

Douglas  
Edmunds  
Faulk  
Grant  
Gregory  
Haakon  
Hamlin  
Hand  
Hanson  
Hughes  
Hutchinson  
Hyde  
Jerauld  
Jones  
Kingsbury  
Lake  
Lincoln  
Lyman  
McCook  
McPherson  
Marshall  
Mellette  
Miner  
Moody  
Potter  
Roberts  
Sanborn  
Spink  
Stanley  
Sully  
Todd  
Tripp  
Turner  
Walworth  
Washabaugh  
Yankton  
Ziebach  
Iowa:  
Dickinson  
Emmet  
Lyon  
Osceola  
Minnesota:  
Jackson  
Lincoln  
Lyon  
Murray  
Nobles  
Pipestone  
Rock  
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**VIRGINIA**

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*Richmond*

Survey Area

Virginia (cities):  
Colonial Heights  
Hopewell  
Petersburg  
Richmond

Virginia (counties):  
Charles City  
Chesterfield  
Dinwiddie  
Goochland  
Hanover  
Henrico  
New Kent  
Powhatan  
Prince George

Area of Application. Survey Area Plus

Virginia (cities):  
Charlottesville

Emporia  
Virginia (counties):  
Albemarle  
Amelia  
Brunswick  
Buckingham  
Caroline  
Charlotte  
Cumberland  
Essex  
Fluvanna  
Greensville  
King and Queen  
King William  
Lancaster  
Louisa  
Lunenburg  
Mecklenburg  
Middlesex  
Northumberland  
Nottoway  
Orange  
Prince Edward  
Richmond  
Sussex  
Westmoreland  
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**WISCONSIN**

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*Milwaukee*

Survey Area

Wisconsin:  
Milwaukee  
Ozaukee  
Washington  
Waukesha

Area of Application. Survey Area Plus

Wisconsin:  
Brown  
Calumet  
Door  
Fond du Lac  
Kewaunee  
Manitowoc  
Outagamie  
Racine  
Sheboygan  
Walworth  
Winnebago

[FR Doc. E9-528 Filed 1-13-09; 8:45 am]

**BILLING CODE 6325-39-P**

**DEPARTMENT OF AGRICULTURE**

**Natural Resources Conservation Service**

**7 CFR Part 625**

**RIN 0578-AA52**

**Healthy Forests Reserve Program**

**AGENCY:** Natural Resources Conservation Service (NRCS), United States Department of Agriculture (USDA).

**ACTION:** Proposed rule; request for comment.

**SUMMARY:** On May 17, 2006, NRCS published an interim final rule for the Healthy Forests Reserve Program (HFRP) and received 11 comment letters. NRCS proposes to amend this rule to incorporate changes associated with enactment of the Food, Conservation, and Energy Act of 2008 (the 2008 Act). The 2008 Act authorizes \$9,750,000 for each of the fiscal years 2009 through 2012 to carry out the program. As a result of the 2008 Act, NRCS will allow land enrollment through permanent easements, or easements for a maximum duration allowed under state law and continue to allow enrollment through 10-year cost-share agreements; and allow enrollment of land owned by tribes or members of tribes in 30-year contracts or 10-year cost-share agreements, or any combination of both. Forty percent of program expenditures in any fiscal year will be used for restoration cost-share agreement enrollment and 60 percent of program expenditures in any fiscal year will be for easement enrollment.

In addition to changes associated with the 2008 Act, NRCS is addressing comments received on the interim final rule and proposing additional changes that improve program implementation based on the experience gained from the HFRP implementation under the interim final rule.

**DATES:** Comments must be received on or before February 13, 2009. Comments will be made available to the public or posted publicly in their entirety.

**ADDRESSES:** You may send comments using any of the following methods:

*Government-wide rulemaking Web site:* Go to <http://www.regulations.gov> and follow the instructions for sending comments electronically.

*NRCS Web site:* Go to <http://www.nrcs.usda.gov> and follow the instructions for sending comments electronically.

*Mail:* Easements Programs Division, Natural Resources Conservation Service, Healthy Forests Reserve Program Comments, P.O. 2890, Room 6819-S, Washington, DC 20013.

*Fax:* 1-202-720-4265

*Hand Delivery:* Room 6819-S of the USDA South Office Building, 1400 Independence Avenue, SW., Washington, DC 20250, between 9 a.m. and 4 p.m., Monday through Friday, except Federal Holidays. Please ask the guard at the entrance to the South Office Building to call 202-720-4527 in order to be escorted into the building.

This proposed rule may be accessed via Internet. Users can access the NRCS homepage at <http://www.nrcs.usda.gov/>; select *Farm Bill*

link from the menu; select the *Proposed Rule* link from beneath the *Rules Index* title. Persons with disabilities who require alternative means for communication (Braille, large print, audiotope, etc.) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

**FOR FURTHER INFORMATION CONTACT:** Robin Heard, Director, Easement Programs Division, NRCS, P.O. Box 2890, Washington, DC 20013-2890; Phone: (202) 720-1854; Fax: (202) 720-4265; or e-mail: [HFRP@wdc.usda.gov](mailto:HFRP@wdc.usda.gov).

**SUPPLEMENTARY INFORMATION:**

**Regulatory Certifications**

*Executive Order 12866*

The Office of Management and Budget (OMB) determined that this proposed rule is not a significant regulatory action, and a benefit cost assessment has not been undertaken.

*Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994*

Pursuant to section 304 of the Federal Crop Insurance Reform Act of 1994 (Pub. L. 103-354), USDA classified this rule as non-major. Therefore, a risk analysis was not conducted.

*Regulatory Flexibility Act*

Pursuant to 5 U.S.C. 605(c) of the Regulatory Flexibility Act, this proposed rule will not have a significant economic impact on a substantial number of small entities as defined by that Act. Therefore, a regulatory flexibility analysis is not required for this proposed rule. This proposed rule would amend the HFRP, which involves the voluntary acquisition of interests in property by NRCS.

*Small Business Regulatory Enforcement Fairness Act of 1996*

This proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This proposed rule will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based companies to compete in domestic and export markets.

The 30-day comment period associated with this rulemaking will provide the public the opportunity to comment on the changes to this regulation. To ensure that NRCS has the regulatory framework in place to implement the Food, Conservation, and Energy Act of 2008 (the 2008 Act),

Public Law 110-246, for a fiscal year 2009 sign-up, NRCS has determined that a 30 day comment period is necessary.

*Environmental Analysis*

The proposed rule for the Healthy Forests Reserve Program amends the current regulation to include congressionally required statutory changes to the program as a result of the Food, Conservation, and Energy Act of 2008 (the 2008 Act), Public Law 110-246. The 2008 Act changes the enrollment options for acreage owned by Indian tribes. In addition to using 10-year cost-share agreements, Indian Tribes may now enroll lands under a 30-year contracts option. The 2008 Act also allows the Natural Resources Conservation Service (NRCS) to acquire permanent easements, and establish limitations on the use of funds for cost-share agreements and easements. The proposed rule also amends the regulation in response to comments received by the Agency as a result of a public comment period in 2006; these changes would include language to clarify the Landowner Protections and Safe Harbor Agreements provisions. In addition, the proposed rule makes a number of minor changes to clarify the regulations for the public; such changes include clarifying the enrollment process, providing clear guidance on methods of determination of compensation, providing guidance on the Agency's treatment of ecosystem service credits, and clarifying language on Agency appeals.

After review of the previous Environmental Assessment (EA) prepared in April 2006, it has been determined that the proposed changes are minor and do not present significant new circumstances or new information relative to environmental issues from those analyzed in the 2006 EA. Accordingly, NRCS has determined and reaffirms that the previous EA and Finding of No Significant Impact (FONSI) have sufficiently analyzed the program's potential environmental impacts and are inclusive of the proposed rule. Copies of the EA and FONSI impact may be obtained from the National Environmental Coordinator, Natural Resources Conservation Service, Ecological Sciences Division, 1400 Independence Ave., SW., Washington, DC 20250; the Healthy Forests Reserve Program Manager, Easements Programs Division, NRCS, P.O. Box 2890, Room 6813-S, Washington, DC 20013; or electronically on the Internet through the NRCS homepage, at <http://www.nrcs.usda.gov/programs/HFRP/ProgInfo/Index.html>

*Paperwork Reduction Act*

The forms that will be utilized to implement this regulation have previously been approved for use and OMB assigned the control number 0578-0013. NRCS estimates that HFRP results in the following changes to the current package:

- Type of Request:* New Information Collection Package/form/etc.
- Increase of 26,020 respondents
  - Increase of 23,926.3 responses
  - Increase Burden Hours by 27,768.12 hours
  - Increase in the average time to execute a form in the collection: 0.229 hours or 14.03 minutes.

*Government Paperwork Elimination Act*

NRCS is committed to compliance with the Government Paperwork Elimination Act and the Freedom to E-File Act, which require government agencies in general, and NRCS in particular, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

*Civil Rights Impact Analysis*

USDA has determined through a Civil Rights Impact Analysis that the issuance of this rule would disclose no disproportionately adverse impacts for minorities, women, or persons with disabilities. Copies of the Civil Rights Impact Analysis are available, and may be obtained from the Director, Easement Programs Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013-2890, or electronically at <http://www.nrcs.usda.gov/programs/HFRP>.

*Civil Justice Reform*

This proposed rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. The rule is not retroactive and preempts State and local laws to the extent that such laws are inconsistent with this rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR Parts 614 and 11 must be exhausted.

*Executive Order 13132, Federalism*

This proposed rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. NRCS has determined that this proposed rule conforms with the Federalism principles set forth in the Executive Order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal Government and

the States, or on the distribution of power and responsibilities on the various levels of government. Therefore, NRCS concludes that this proposed rule does not have Federalism implications. Moreover, § 625.5 of this proposed rule shows sensitivity to Federalism concerns by providing an option for the responsible official (State Conservationist) to obtain input from other agencies in proposal development.

#### *Unfunded Mandates Reform Act of 1995*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), NRCS assessed the effects of this proposed rule on State, local, and Tribal governments, and the public. This proposed rule does not compel the expenditure of \$100 million or more by any State, local, Tribal governments, or anyone in the private sector; therefore, a statement under section 202 of the Unfunded Mandates Reform Act is not required.

#### *Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

NRCS has assessed the impact of this proposed rule on Indian tribes and concluded that this proposed rule will not have a substantial direct effect on one or more Indian tribes. Given the legal complexity of acquiring easements on acreage owned by Indian Tribes, the 2008 Act added an enrollment option, in addition to the 10-year cost-share agreement option, of offering 30-year contracts. This change encourages Indian Tribal participation in the program. The proposed rule at § 625.12, will outline the procedures for enrolling land in the program through the 30-year contract option. The rule will neither impose compliance costs on Tribal governments, nor preempt Tribal law.

#### **Discussion of Program**

America's forests provide a wide range of environmental, economic, and social benefits including timber, wilderness, minerals, recreation opportunities, and fish and wildlife habitat. In addition, a healthy forest ecosystem provides habitat for endangered and threatened species, sustains biodiversity, protects watersheds, sequesters carbon, and helps purify the air. However, some forest ecosystems have had their ecological functions diminished by a number of factors, including fragmentation, reduction in periodic fires, lack of proper management, or invasive species. Habitat loss has been severe enough in some circumstances to cause dramatic population declines such as in the case of the ivory-billed

woodpecker. As a result of the pressures on forest ecosystems, many forests need active management and protection from development in order to sustain biodiversity and restore habitat for species that have suffered significant population declines. Active management and protection of forest ecosystems can also increase carbon sequestration and improve air quality.

Many forest ecosystems are located on private lands and provide habitat for species that have been listed as endangered or threatened under Section 4 of the Endangered Species Act (ESA), 16 U.S.C. 1533, (listed species). Congress enacted the Healthy Forests Reserve Program (HFRP), Title V of the Healthy Forest Restoration Act of 2003 (Pub. L. 108–148, 16 U.S.C. 6571–6578, to provide financial assistance to private landowners to undertake projects that restore and enhance forest ecosystems to help promote the recovery of threatened and endangered species, improve biodiversity, and enhance carbon sequestration.

The Secretary of Agriculture has delegated authority to implement HFRP to the NRCS Chief (Chief). In addition, technical support associated with forest management practices may also be provided by the U.S. Forest Service. Section 501 of Title V of the Healthy Forests Restoration Act of 2003 (Pub. L. 108–148) provides that the program will be carried out in coordination with the Secretary of the Interior and the Secretary of Commerce. NRCS works closely with the FWS and the NMFS to further the species recovery objectives of the HFRP and to help make available to HFRP participants safe harbor or similar assurances and protection under ESA section 7(b)(4) or Section 10(a)(1), 16 U.S.C. 1536(b)(4), 1539(a)(1).

#### **Proposed Changes to the Regulations Based on the Prior Comment Period**

NRCS published an interim final rule that established the regulations captioned “Healthy Forests Reserve Program” in the **Federal Register** on May 17, 2006 (71 FR 28547). The Agency provided a 90-day comment period that ended on August 15, 2006. NRCS received comments from 11 commenters who raised a number of issues. This section discusses all of the relevant comments except for those that expressed agreement with provisions of the interim final rule. Based on the reasons set forth in the interim final rule and this document, NRCS proposes the changes discussed below.

#### *Purpose and Eligibility*

The statutory provisions at 16 U.S.C. 6571 state that the purpose of HFRP is

to restore and enhance forest ecosystems in order to: (1) Promote the recovery of threatened and endangered species, (2) improve biodiversity, and (3) enhance carbon sequestration. Under 16 U.S.C. 6572(b), to be eligible for enrollment, land must be:

(1) Private land the enrollment of which will restore, enhance, or otherwise measurably increase the likelihood of recovery of a species listed as endangered or threatened under 16 U.S.C. 1533 and

(2) private land the enrollment of which will restore, enhance, or otherwise measurably improve the well-being of species that—

(a) are not listed as endangered or threatened under 16 U.S.C. 1533; but

(b) are candidates for such listing, State-listed species, or special concern species.

The authorizing statute further provides at 16 U.S.C. 6572(c) that the Secretary of Agriculture shall give additional consideration to enrollment of eligible land that will improve biological diversity and increase carbon sequestration.

One Federal agency commenter questioned whether land had to meet both criteria in order to be eligible. While the language of 16 U.S.C. 6572(b) uses “and” between both criteria, it has been determined that both categories of land are individually eligible. The interpretation that eligible land must meet both criteria is overly restrictive and is likely to occur rarely. The NRCS interpretation is intended to avoid negatively impacting its ability to achieve the program purposes. This is clarified in 7 CFR 625.4.

One commenter asserted that eligibility for the HFRP should be limited to non-industrial private forest lands. No changes were made to the regulations based on this comment because the Agency does not see any basis in the statute for limiting enrollment to non-industrial private forest lands. As noted above, 16 U.S.C. 6572 provides that any private land (including industrial private forest land) that meets the specified conditions is eligible.

Commenters asserted that HFRP places too much emphasis on protecting endangered species and too little emphasis on protecting the forest ecosystem. To help change the emphasis, commenters asserted that professional foresters should be heavily involved in ranking proposed sites for the HFRP. No changes were made to the regulations based on this comment. The emphasis on endangered species reflects the purpose of the program detailed in the statute: to promote the recovery of

threatened and endangered species, to improve biodiversity, and to enhance carbon sequestration. See 16 U.S.C. 6571 and 6572.

Two commenters questioned why clear-cutting was singled out as incompatible with HFRP and asserted that HFRP should allow for clear-cutting when it would enhance the long-term forest and wildlife health. No changes were made to the regulations based on these comments. It appears that the commenters referred to an example concerning clear-cutting in the preamble of the interim final rule, which indicated that clear-cutting may not be a compatible use for enrollment under the HFRP if the purpose was to achieve economic gain at the expense of the forest ecosystem or essential fish and wildlife habitat (71 FR 28551). The discussion was just an example and was not intended to cover all circumstances. Clear-cutting may be allowed under HFRP if such activity were designed to help accomplish the purposes of the program.

A number of commenters made reference to non-forest lands as part of a forest ecosystem. No changes were made to the regulations because non-forest land is eligible to be included if it is part of an eligible forest ecosystem.

Two commenters asserted that “forest ecosystems” eligible for HFRP should not be limited to lands with trees on them, but should include rangelands and other lands that are integral parts of a forest ecosystem and vital to the habitat of species or the enhancement of biodiversity and carbon sequestration. No changes were made to the regulations based on these comments. “Rangelands and other lands” described by the commenter are not prohibited from inclusion in HFRP. The statutory provisions at 16 U.S.C. 6572, state that to be eligible for enrollment, land must be:

(1) Private land the enrollment of which will restore, enhance, or otherwise measurably increase the likelihood of recovery of a species listed as endangered or threatened under 16 U.S.C. 1533 and

(2) private land the enrollment of which will restore, enhance, or otherwise measurably improve the well-being of species that—

(a) Are not listed as endangered or threatened under 16 U.S.C. 1533; but

(b) are candidates for such listing, State-listed species, or special concern species.

With respect to the statutory eligibility for enrollment of private land which would restore, enhance, or otherwise measurably improve the well-being of State-listed species, one

commenter asserted that for States that do not have State lists, enrollment eligibility should include lands that provide habitat for G1–G2 species recognized by NatureServe and requests made by applicants. No changes were made to the regulations based on this comment. As noted above, the statutory provisions allow for eligibility for enrollment of private land the enrollment of which would restore, enhance, or otherwise measurably improve the well-being of “special concern species.” This provides a basis for enrolling lands in those States that do not have State lists.

One commenter asserted that the interim final rule should be changed by adding a definition of “forestland.” This comment appears to have been made to help clarify land eligibility. No changes were made to the regulations based on this comment. As noted above, private land that meets the eligibility criteria specified above is eligible for HFRP; the statute does not include a term “forestland”.

One commenter asserted that rangelands and other lands that are integral parts of a forest ecosystem and vital to the habitat of species or the enhancement of biodiversity and carbon sequestration, should be eligible for inclusion in the HFRP to the extent that areas covered by trees might be eligible. One commenter asserted that riparian corridors that would protect aquatic species, such as salmon, should be eligible land for HFRP. NRCS did not make any changes to the regulations based on these comments. HFRP does not limit eligible lands to a particular type of private lands. Except as described in § 625.4(d), any type of private land may be eligible for inclusion in HFRP.

One commenter asserted that NRCS should remove the requirement that eligible property must have access from a public road. No changes were made to the regulations based on this comment. Although the 2006 interim final rule preamble indicated that there must be access to the property from a public road (71 FR 28551 and 28553), the interim final rule text at § 625.11(b)(1) provides merely that the easement shall grant the United States a right of access to the easement area. The Agency affirms the regulatory language that direct access from a public road is not required, if access to the easement area is conveyed to the United States through an acceptable right-of-way easement.

#### *Priority for Enrollment*

The statutory provisions at 16 U.S.C. 6572 set forth priority criteria for enrollment in HFRP. Subsection (f)

provides the following regarding enrollment priority:

(1) Species—The Secretary of Agriculture shall give priority to the enrollment of land that provides the greatest conservation benefit to—

(a) Primarily, species listed as endangered or threatened under 16 U.S.C. 1533; and

(b) Secondly, species that—

(i) Are not listed as endangered or threatened under 16 U.S.C. 1533; but

(ii) Are candidates for such listing, State-listed species, or special concern species.

(2) Cost-effectiveness—The Secretary of Agriculture shall also consider the cost-effectiveness of each agreement or easement, and associated restoration plans, so as to maximize the environmental benefits per dollar expended.

One commenter asserted that the HFRP should place emphasis on pollinator-related enhancements. Another commenter suggested that the HFRP should change the emphasis for enrollment under the HFRP from “promoting” the recovery of listed species, “improving” biodiversity, and “enhancing” carbon sequestration to “does not detract from” the recovery of listed species, “does not detract from biodiversity,” and “does not detract from” carbon sequestration. No changes were made to the regulations based on these comments. The Agency does not have statutory authority to change the emphasis of the HFRP as requested by commenters. However, issues regarding the forest ecosystem and pollinator-related enhancements would be considered for purposes of eligibility as set forth above.

One commenter recommended inclusion of the hardwoods of the Mississippi River and its tributaries and the mesic hardwood forests of the Appalachian region (including the Cumberland plateau) as a regional forest ecosystem to be included as HFRP focus areas. No changes were made to the regulations based on this comment. Under the provisions of 16 U.S.C. 6572(f), any eligible lands, including those described by the commenter, may be considered if they meet the requirements for enrollment priority.

One commenter asserted that eligible non-profit conservation organizations should receive higher priority in application selection. No changes were made to the regulations based on this comment. As noted above, 16 U.S.C. 6572(f) sets forth the criteria for enrollment priority, and no statutory authority exists to give priority to non-profit conservation organizations eligible for participation in HFRP.

One commenter suggested that affected State Conservationists develop a uniform set of ranking criteria for a particular regional enrollment. No changes were made to the regulations based on this comment because the statute does not give NRCS the discretion to use priorities other than those set forth in 16 U.S.C. 6572. The required ranking considerations are found in the interim final rule at § 625.6. As a matter of policy, the NRCS State Conservationists will ensure that local conditions are considered in applying the ranking criteria.

#### *Term of Enrollment*

Statutory provisions at 16 U.S.C. 6572(e)(1) provide that land may be enrolled in the HFRP in accordance with:

- A 10-year cost-share agreement,
- A 30-year easement, or
- A permanent easement; or an easement for the maximum duration allowed under State law.

Under the provisions of 16 U.S.C. 6572(e)(3), the statute allows acreage owned by Indian Tribes to be enrolled into the program through the use of 30-year contracts or 10-year cost-share agreements or a combination of the two.

Two commenters asserted that NRCS should not adopt informal quotas for the three enrollment types. The original HFRP statutory language required that “the extent to which each enrollment method is used shall be based on the approximate proportion of owner interest expressed in that method in comparison to the other methods.” No changes were made to the regulations based on these comments. However, the 2008 Act included language specifying that 40 percent of program expenditures in any FY be for restoration cost-share agreement enrollment and 60 percent of program expenditures in any FY be for easement enrollment. The 2008 Act allows re-allocation if funds are not obligated by April 1st of the FY in which the funds were made available.

One commenter asserted that HFRP should allow a continuous enrollment process. Although NRCS recognizes that continuous enrollment may be more convenient for some landowners, no changes were made to the regulation based on this comment. Given the limited funding for HFRP, continuous enrollment would increase the administrative costs of implementing the program without providing additional beneficial effects.

#### *Restoration Plans*

The interim final rule provided that as a condition of HFRP participation, a landowner must agree to the

implementation of a HFRP restoration plan. The purpose of the restoration plan is to restore, protect, enhance, maintain, and manage the habitat conditions necessary to increase the likelihood of recovery of listed species under the ESA, or measurably improve the well-being of species that are not listed but are candidates for such listing, State-listed species, or species identified by the Chief for special consideration for funding.

One commenter asserted that the HFRP should allow existing plans prepared for other forestry and conservation programs to be used to satisfy the requirement for a HFRP restoration plan. No changes were made to the regulations based on this comment because no other plans prepared for other forestry and conservation programs meet the criteria for participation in the HFRP. Further, 16 U.S.C. 6573 requires that the HFRP restoration plan be developed “jointly, by the landowner and the Secretary of Agriculture, in coordination with the Secretary of the Interior.”

One commenter asserted that the HFRP should compensate applicants for the use of consulting services for preparing applications. No changes were made to the regulations based on this comment. Under the provisions of 16 U.S.C. 6575, NRCS is responsible for providing, including obtaining from third parties, any needed assistance in preparing the HFRP restoration plan.

With respect to reviewing and approving restoration plans, three commenters suggested that NRCS use the word “confer” instead of “consult with” based on the assertion that “consult with” could be misinterpreted to have a more formal meaning than intended. The interim final rule defined “consultation” or “consult with” to mean “to talk things over for the purpose of providing information; to offer an opinion for consideration; and/or to meet for discussion or to confer, while reserving final decision-making authority with NRCS.” Accordingly, “consultation” or “consult with” does not refer to a formal process. To avoid confusion, the Agency has eliminated the terms “consultation” and “consult with” and, instead, without a change in meaning, is using the term “confer” as suggested by the commenters.

#### *Cost-Share Payments*

Two commenters asserted that NRCS should use actual costs, including maximum caps, rather than average costs for determining cost-share assistance reimbursement rates as allowed under 16 U.S.C. 6574. They assert that the average may be far lower

than the actual costs and thereby make full program implementation less likely in those places if landowners are not repaid for their full expenses. No changes were made to the regulation based on these comments. Calculating actual costs would require extensive reviews of each applicant’s situation, including review of every relevant receipt. This would significantly increase the administrative workload and reduce the financial assistance available to HFRP participants. Average costs as determined on a regional basis will be used to ensure that the average costs are close to actual costs in that area.

#### *Easements*

One commenter asserted that the HFRP should provide for permanent easements. NRCS did not make any changes to the regulations based on this comment. The statute sets forth the methods through which land can be enrolled into the program. The 2008 Act amended the statutory language to allow for the enrollment of permanent easements. This change is discussed along with other statutory changes in a separate section which follows.

The Agency proposed to use a standard conservation easement deed, termed a negative restricted deed. The Agency specifically requested comments on whether the standard conservation easement deed or the reserved interest deed should be used in HFRP (71 FR 28551). The standard conservation easement deed, termed a negative restricted easement deed, represents an interest in land where the holder of the easement has the right to require the owner of the encumbered land (i.e., the easement area) to take, or not take, specific actions with respect to that land. On the other hand, the reserved interest deed acquires all rights in the property not specifically reserved to the landowner. In response, NRCS received two comments, asserting that the HFRP should use the standard conservation easement deed for HFRP. No changes were made to the regulations based on these comments because the Agency has been using the standard conservation easement deed in HFRP and will continue to do so. Standard conservation easement deeds work best on working lands in programs such as HFRP where the landowner will continue to conduct various activities on the easement area and few activities need to be prohibited in order to meet program purposes.

#### *Cooperation and Technical Assistance*

Under the provisions of 16 U.S.C. 6572, NRCS is to carry out the HFRP in

coordination with the FWS and the NMFS. The provisions of § 625.13(c), which concern the HFRP restoration plan development, state that NRCS, in coordination with FWS, will determine the conservation practices and measures for the restoration plan.

One commenter asserted that the reference to coordination with FWS should also include cooperation with NMFS. The language of 16 U.S.C. 6573 says that NRCS, the landowner, and FWS will develop the HFRP restoration plan. However, given that 16 U.S.C. 6572 states that NRCS is to carry out HFRP in coordination with FWS and NMFS, NRCS is changing the regulation text to refer to coordination with both FWS and NMFS as appropriate, in light of the species or habitat involved, in developing the HFRP conservation plan.

#### *Landowner Protections and Safe Harbor Agreements*

The 2006 interim final rule (71 FR 28557), included a definition of Landowner Protections as part of § 625.2 and the preamble described those protections and how program participants obtain them (71 FR 28548–28550). Landowner Protections were defined in the interim final rule as “protections and assurances made available to HFRP participants whose voluntary conservation activities result in a net conservation benefit for listed, candidate, or other species. Landowner Protections made available by the Secretary of Agriculture to HFRP participants may be provided under section 7(b)(4) or section 10(a)(1) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1536(b)(4), 1539(a)(1)). These Landowner Protections may be provided by NRCS in conjunction with meeting its responsibilities under section 7 of the ESA, or by FWS or NMFS through section 10 of the ESA. These Landowner Protections include a permit providing coverage for incidental take of species listed under the ESA. Landowner Protections also include assurances related to potential modifications of HFRP restoration plans and assurances related to the potential (unlikely) termination of Landowner Protections and any 10-year cost share agreement.”

Commenters asserted that NRCS should establish specific provisions in agreements or in the regulations regarding how NRCS will cooperate with FWS and NMFS concerning the preparation of restoration plans and other activities under the HFRP. NRCS should include how it will cooperate with FWS and NMFS to make Landowner Protections available to participating landowners.

Under the statutory provisions at 16 U.S.C. 6573, NRCS is responsible for preparing restoration plans. NRCS develops the restoration plans jointly with the program participant in coordination with the FWS or NMFS, as appropriate. Further, NRCS will work with FWS and NMFS to establish memorandums of understanding to enhance the coordination process. In response to the commenters' request for more procedural details, NRCS clarified the definition of Landowner Protections in § 625.2 and added a new section in the regulations at § 625.13(d) to indicate how NRCS will help program participants obtain Landowner Protections.

NRCS has also added a definition for Candidate Conservation Agreement with Assurances (CCAA) and clarified the definitions of Landowner Protections and Safe Harbor Agreement (SHA) in § 625.2 of this rule to more fully describe the two types of Landowner Protections. These Landowner Protections are conditioned on to the HFRP restoration plan and associated cost-share agreement or easement being properly implemented. There is no requirement that HFRP participants obtain any Landowner Protections. Generally, the three elements of Landowner Protections are: (1) Authorization for the take of endangered or threatened species when conducting management activities under a HFRP restoration plan and when returning to the baseline conditions at the end of the cost-share agreement or easement period (whichever is longer), (2) assurance that the landowner will not be required to undertake additional or different management activities without the consent of the landowner, and (3) limitations on the possibility of termination of a HFRP restoration plan that is being properly implemented by the landowner.

The definition of Landowner Protections in the interim final rule (and text in the preamble), included a description of two approaches that the Secretary of Agriculture may use to make Landowner Protections available to HFRP participants. Based on the suggestions from commenters and to help ensure clarity, NRCS clarified the description in the definition in section § 625.2 and added § 625.13(d) to specify the two ways that NRCS can make Landowner Protections available to HFRP participants upon request. The first approach involves NRCS and the HFRP participant, and does not require direct involvement by FWS or NMFS with the participant. Under this approach, NRCS will extend to participants the incidental take

authorization received by NRCS from FWS or NMFS through biological opinions issued as part of the interagency consultation process under section 7(a)(2) of the ESA.

Under the second approach for Landowner Protections, NRCS will provide technical assistance to help participants design and use their HFRP restoration plan for the dual purposes of qualifying for HFRP financial assistance and as a basis for entering into a SHA or CCAA with FWS or NMFS under section 10(a)(1)A of the ESA. SHAs are voluntary arrangements between either the FWS or NMFS and cooperating participants who agree to adopt practices and measures, or refrain from certain activities, in order to achieve net conservation benefits, i.e., a contribution to the recovery of listed species. A CCAA is a voluntary agreement between FWS or NMFS and cooperating landowners, who voluntarily agree to manage their lands or waters to remove threats to species at risk of becoming threatened or endangered, receive assurances that their conservation efforts will not result in future regulatory obligations in excess of those they agree to at the time they enter into the Agreement. CCAAs are intended to help conserve proposed and candidate species, and species likely to become candidates, by giving private, non-Federal landowners incentives to implement conservation measures for declining species. The primary incentive for a CCAA is an assurance that no further additional land, water, or resource use restrictions would be imposed should the species later become listed under the ESA. There is no requirement that HFRP participants enter into a SHA or a CCAA. All SHAs are subject to the SHA policy jointly adopted by FWS and NMFS (Announcement of Final Policy, 64 FR 32717, June 17, 1999), and SHAs with the FWS also are subject to regulations at 50 CFR Part 17, and specifically 50 CFR 17.22(c) for endangered species or 17.32(c) for threatened species. All CCAAs are subject to the CCAA policy jointly adopted by FWS and NMFS (Announcement of Final Policy, 64 FR 32726, June 17, 1999), and CCAAs with the FWS are also subject to regulations at 50 CFR Part 17, and specifically 50 CFR 17.22(d) for endangered species or 17.32(d) for threatened species.

The provisions of 16 U.S.C. 6575 require that the Secretary of Agriculture offer landowners with technical assistance to assist the landowners “in complying” with the terms of restoration plans (as included in agreements or easements) under the

HFRP. One commenter requested that NRCS indicate how this will be carried out. No changes were made to the regulation based on this comment because NRCS works with the landowner when developing the restoration plan. As part of the planning process, NRCS ensures that the landowner understands the plan requirements. The existing regulations at § 625.16 provide guidance as to how NRCS would work with those found to have deficiencies or committed violations.

#### *Electric Transmission Facilities*

One commenter asserted that the HFRP should not be implemented in a way that would be contrary to the use of electric transmission facilities. The commenter stated:

- NRCS should consider electronic transmission facilities to be compatible with HFRP and allow such facilities to be located on lands covered by NRCS easements without the need to modify each individual easement.
- NRCS should provide public notice of and the opportunity for comments on all pending NRCS projects, including easements in the HFRP.
- NRCS should have an up-to-date system at the regional level for obtaining information about existing and planned easements rather than an annual system so that utilities could easily identify where the easements may be located.
- After a utility has filed a formal application for construction of facilities, NRCS should stay any further action on proposed easements within the identified utility routes until final action is taken on the application by State and Federal agencies.

No changes were made to the regulations based on these comments. The Agency understands the importance of electric transmission facilities that provide electricity to homes and businesses across America. However, NRCS is purchasing conservation easements for the protection of certain conservation values: promoting the recovery of threatened and endangered species, improving biodiversity, and enhancing carbon sequestration. The protection of those conservation values will dictate the terms of any conservation easement deed. Most conservation easement deeds limit the development of structures and utilities. Whether an electric transmission facility would be allowed on an easement property is determined on a case-by-case basis and depends on whether the electronic transmission facilities would be compatible with the purposes of HFRP and the easement at issue. Regarding the comment about public

notice and comment, NRCS is not required by law to provide public notice and an opportunity to comment on easements under HFRP. The last two comments are related to potential conflicts between the placement of an easement and the placement of utilities. NRCS policy requires that State Conservationists take into account utilities that are being planned for installation when making project funding decisions and seek to avoid conflicts with infrastructure projects when feasible.

#### *Termination of Landowner Protection*

The preamble of the 2006 interim final rule states that “In easement circumstances, where a change of conditions requires the FWS and the NMFS to terminate a Landowner Protection, NRCS will work to address the changed conditions in the HFRP restoration plan in coordination with the landowner” (71 FR 28549). One commenter questioned whether this referred to landowner non-compliance or changed environmental or ecological conditions. NRCS will work to address the changed conditions in coordination with the landowner regardless of the cause of the change. As provided for in this proposed rule in the clarified definition of Landowner Protections in § 625.2 and the associated provision at § 625.13(d), provided that the contract holder has acted in good faith and without the intent to violate the terms of the HFRP restoration plan, all appropriate options will be pursued with the participant to avoid termination in the case of landowner non-compliance or changed conditions. If the participant has entered into a SHA or CCAA with FWS or NMFS (the Services) based on a HFRP restoration plan, NRCS will work with the participant and the Services to seek appropriate means of avoiding revocation of a permit issued under section 10(a)(1) of the ESA by FWS or NMFS to implement the SHA or CCAA. However, in the event of a termination, any requested assurances from NRCS will be voided and the landowner will be responsible to FWS or NMFS for any violations of the ESA, as clarified in this proposed rule at § 625.13(d). The SHA policy regarding revocation of a permit issued in association with a SHA is: “The Services are prepared as a last resort to revoke a permit implementing a Safe Harbor Agreement where continuation of the permitted activity would be likely to result in jeopardy to a species covered by the permit. Prior to taking such a step, however, the Services would first have to exercise all possible means to remedy such a

situation.” (Fish and Wildlife Service and National Fisheries Marine Service, Safe Harbor Agreements and Candidate Conservation Agreements with Assurances, Final Rule and Notices, 64 FR 32724). Regulations pertaining to SHA permits issued by FWS have a similar provision (50 CFR 17.22(c)(7) and 17.32(c)(7)) for endangered and threatened wildlife.

#### **Proposed Changes Resulting From Passage of the Food, Conservation, and Energy Act of 2008**

NRCS proposes to amend the current regulation to include statutory changes included in Section 8205 of the 2008 Act (Pub. L. 110–246) as follows:

- Section 8205 amended the methods of enrollment by replacing the 99-year enrollment method with enrollment of permanent easements or the maximum duration allowed by state law. NRCS proposes to amend § 625.8(b), § 625.10(e)(1) and § 625.11(a) by removing reference to 99 year easements and inserting in its place the words “permanent easement”.
- Section 8205 also expanded the enrollment methods to include the use of 30-year contracts or 10-year cost share agreements, or any combination of both, for acreage owned by Indian tribes. The statement of managers (Conference Report H.R. 110–627 for HR 2419, pages 202 and 203, May 13, 2008) provided additional clarification of Congressional intent by stating that “the Managers intend that Tribal land enrolled in the program should be land held in private ownership by a tribe or an individual Tribal member. Tribal lands held in trust or reserved by the U.S. government or restricted fee lands should not be enrolled in the program regardless of ownership.” NRCS proposes to add the definition of “acreage owned by Indian Tribes” in § 625.3 to read as follows: “acreage owned by Indian Tribes means private lands to which the title is held by individual Indians and Indian tribes, including Alaska Native Corporations. This term does not include land held in trust by the United States or lands the title to which is held subject to Federal restrictions against alienation.”
- NRCS also proposes to amend the following sections to incorporate reference to 30-year contracts: § 625.1(a); § 625.2; § 625.3 in the definition of “restoration agreement;” § 625.4(a); § 625.5(b); § 625.8(b)(2); § 625.8(d); § 625.15(b)(5); § 625.16(b); and § 625.20(b); NRCS proposes to add the term “contract” in reference to 30-year contracts in § 625.6(a)(7); § 625.7(a) and (b); § 625.14; § 625.17; and § 625.16(a)(3); and NRCS proposes to

add a new § 625.12, 30-year contracts, to include the provisions related to this new enrollment method. Consistent with the statutory requirement, NRCS must treat 30-year contracts like easements to the extent possible. In particular, statutory language in 16 U.S.C. 6572 requires that the value of a 30-year contract for Tribal lands shall be equivalent to the value of a 30-year easement. Although there are limitations to handling 30-year contracts like 30-year easements because of the fundamental differences between contract law and real property law related to easements, NRCS has structured 30-year contract requirements in § 625.12 to be as comparable as possible to the easements requirements in § 625.11.

Section 8205 of the 2008 Act establishes requirements regarding the use of funds for cost-share agreements and easements. Specifically, this section directs that of the total amount of funds expended under the program for a fiscal year to acquire easements and enter into cost-share agreements, not more than 40 percent shall be used for 10-year cost-share agreements and not more than 60 percent shall be used for easements. Funds not obligated by April 1st of the fiscal year may be used to carryout either enrollment method. Cost-share agreements and easements under the Tribal lands option do not count toward the 60/40 calculation. NRCS proposes to incorporate this statutory requirement in § 625.4(a).

#### Other Proposed Minor Changes for Clarification or Improved Program Administration

NRCS proposes to make other changes to clarify the regulations for the public; such changes include clarifying the enrollment process, providing clear language about determining easement, contract, and agreement compensation, providing guidance on the Agency's treatment of ecosystem service credits, and clarifying language on Agency appeals. The proposed changes include:

##### Section 625.1 Purpose and Scope

Section 625.1(b)(1) identifies one objective of the program as being to "Promote the recovery of endangered and threatened species under the ESA." NRCS proposes to amend § 625.1(b)(1) to clarify that ESA is an abbreviation for the Endangered Species Act.

##### Section 625.2 Definitions

In addition to the definition of "Acreage owned by Indian Tribes," which NRCS proposes to add as a result of statutory changes described in the previous section, NRCS proposes to add

definitions for "Candidate Conservation Agreement with Assurances," "Conservation practice" and "Forest ecosystem".

NRCS proposes to add a definition for the term "Candidate Conservation Agreement with Assurances" to ensure the public has clear understanding of the Landowner Protections provided through HFRP. NRCS proposes the definition to read as follows: "Candidate Conservation Agreement with Assurances (CCAA) means a voluntary arrangement between FWS or NMFS, and cooperating non-Federal landowners under the authority of Section 10(a)(1) of the Endangered Species Act of 1973 (the Act), 16 U.S.C. 1539(a)(1). Under the CCAA and an associated enhancement of survival permit, the non-Federal landowner implements actions that are consistent with the conditions of the permit. Candidate Conservation Agreements with Assurances with FWS are also subject to regulations at 50 CFR 17.22(d) for endangered species or 50 CFR 17.32(d) for threatened species, or applicable subsequent regulations."

NRCS proposes to add the term "Conservation practice" to replace the definition of "practice." The definition of "conservation practice" describes a broader array of activities than the definition of the term "practice." NRCS proposes to incorporate the following language as the definition of "conservation practice." "Conservation practice means one or more conservation improvements and activities, including structural practices, land management practices, vegetative practices, forest management, and other improvements that benefit the eligible land and optimize environmental benefits, planned and applied according to NRCS standards and specifications."

The purpose of HFRP is to restore and enhance forest ecosystems. NRCS proposes to add the term "forest ecosystem" to clarify the program's purpose.

NRCS proposes amendments to other definitions as follows:

The definition of "Activity" is removed because statutory authority is only provided for "Practices" and "Measures."

The definition of "Biodiversity" is changed to clarify that "biodiversity" is the shortened term for biological diversity.

The definition of "Contract" is changed to be consistent with other programs administered by NRCS. NRCS proposes amending the definition to read as follows:

"Contract/agreement means the legal document that specifies the obligations

and rights of any applicant who has been accepted to participate in the program. A contract/agreement is a binding agreement for the transfer of assistance from USDA to the participant for conducting the prescribed program implementation actions."

The term "30-year contract" is added to incorporate the 30-year contract option.

The Agency is removing the definition of "Indian Trust Lands," "Practice," and "Consultation or consult." The definition of "Indian Trust Lands" is removed and replaced by the definition of "Acreage owned by Indian Tribes" to be consistent with the statutory language. The definition of "Practice" is removed and replaced with the more specific term "Conservation practice." The definition of "Consultation or consult" is removed and revised to change the term to confer for the reasons described in the public comment section above.

The definition of "landowner" is revised to remove the term "remaindermen" as a category of ownership. NRCS proposes removing this term because it unnecessarily complicates the definition.

The definition of "Landowner Protections" is changed as a result of the public comments received. The explanation for this proposal is provided under "Proposed changes based on public comment."

The definition of "Liquidated damages" is amended to read: "Liquidated damages" is defined as "a sum of money stipulated in the HFRP restoration agreement that the participant agrees to pay NRCS if the participant fails to adequately complete the terms of the restoration agreement. The sum represents an estimate of the expenses incurred by NRCS to service the restoration agreement, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy." This is consistent with how the term is defined in other programs administered by NRCS.

The definition of "Participant" is amended to incorporate non-substantive changes to make the definition consistent with the definition of "Participant" in other conservation programs and to address the addition of the 30-year contract option provided in the 2008 Act for Tribal lands. Specifically, a "Participant" is an applicant who is party to a 10-year cost share agreement, 30-year contract, or an option agreement to purchase an easement. The Agency is also taking the opportunity to note in this regulation, consistent with the appeal regulations at

7 CFR Part 614 and Federal real property law, that once a conservation easement is conveyed, the landowner is no longer a “Participant” for easement enforcement and management matters and, therefore, may not file an administrative appeal on those matters.

The definition of “Private land” is changed to read: “Private land means land that is not owned by a governmental entity, and includes land meeting the definition of “acreage owned by Indian Tribes.” This proposed change ensures the public recognizes that the term “Private land,” as used in this regulation, includes acreage owned by Indian Tribes. The previous definition included the term “Indian Trust Lands.”

The definition of “Safe harbor agreement” is changed as described in the public comment section above.

The definition of “State Conservationist” is changed to clarify that the former State Conservationist of Hawaii position has become the director of the Pacific Islands.

#### *Section 625.4 Program Requirements*

NRCS proposes to revise § 625.4(a) to incorporate the statutory limitation on the use of funds for cost-share agreements and easements. As described in the statutory change section above, Section 8205 of the 2008 Act requires an allocation of no more than 40 percent of program expenditures toward enrollment of restoration cost-share agreements and no more than 60 percent of program expenditures toward enrollment of easements. Any contracts on acreage owned by Indian Tribes are not included in this calculation. The 2008 Act allows the Secretary to use any funds that are not obligated by April 1st of the fiscal year to be used for either agreements or easements during that fiscal year. Any funds not obligated by April 1 or later will be re-distributed to projects with agreements or easements ready to obligate funding. NRCS proposes to manage this process at the national level to ensure that the allocation of funds meets the statutory requirements.

NRCS proposes to amend § 625.4(b) to clarify that an individual or entity can enroll in HFRP by replacing the term “person” with the words “individual or entity.” The current language refers to a “person.” This term is inaccurate due to participation of entities and Indian tribes.

NRCS proposes, for clarity purposes, to change § 625.4(d) to clarify that any land not eligible under the categories listed in § 625.4(c) is ineligible land. Section 625.4(c) identifies eligible land.

#### *Section 625.5 Application Procedures*

NRCS proposes revising § 625.5(a) to clarify the sign-up process. Specifically, the State Conservationists will develop proposals for the State to receive funds and may seek input from other agencies in doing so. The State Conservationists will submit proposals to the Chief for funding consideration. The Chief will evaluate and select proposals for funding and provide the State Conservationist with a funding allocation. Upon a State’s selection for funding, the State Conservationists will issue a public sign-up notice to obtain applications from eligible landowners. The State Conservationists may consult with organizations or units of government with appropriate technical expertise in developing ranking criteria to be used in selecting applications best suited to achieving the project purpose. The applications will be ranked based on these criteria. The highest ranking applications are funded by the State Conservationists. Due to the limited funding provided for this program, continuous enrollment would likely increase the administrative burden of implementing the program. This sign-up process will ensure that the limited HFRP funding will be used for the best projects nationally, and help maximize the expected benefits related to habitat restoration and protection that address the recovery of endangered species, improvement in biodiversity, and enhanced carbon sequestration. In short, national competition will result in the optimal use of funds.

NRCS proposes to amend § 625.5(d) to clarify that any voluntary reduction in compensation must not be below the lowest rate allowed by the statute.

#### *Section 625.6 Establishing Priority for Enrollment in HFRP*

NRCS proposes to amend § 625.6(a) to reflect the change in the definition of biological diversity discussed above at § 625.2

#### *Section 625.7 Enrollment of Easements, Contracts, and Agreements*

NRCS proposes to amend § 625.7 to reflect a change in the NRCS business process that is designed to reduce the potential for de-obligating funds. NRCS has experienced difficulty in other easement programs where funds are obligated to projects whose enrollment is subsequently terminated due to irresolvable title issues and hazardous materials concerns. NRCS will no longer use commitment accounting, but will use the option agreement to purchase as the point of obligation. Also, additional evaluation that was formerly performed

after the signing of the option agreement to purchase will now be performed prior to the obligation.

Section 625.7(a) is changed to clarify that the obligation of HFRP funds occurs when the landowner signs the option agreement to purchase, cost-share agreement, or 30-year contract. This policy helps ensure that HFRP funds are used to the greatest extent possible by reducing the potential for de-obligation.

Section 625.7(c) is changed to clarify the point at which land is considered enrolled into the program to be consistent with other easement programs administered by NRCS.

Section 625.7(d) is amended to clarify the conditions and procedures for withdrawing an offer after the land is considered enrolled in the program.

#### *Section 625.8 Compensation for Easements and 30-Year Contracts*

NRCS proposes to amend § 625.8(c) to clarify the Agency’s existing authority to accept and use non-Federal contributions.

NRCS proposes to amend § 625.8(d) to identify that payments for 30-year contracts will be treated the same as 30-year easement payments. The statutory language in 16 U.S.C. 6572 instructs that the value of a 30-year contract shall be equivalent to the value of a 30-year easement.

Additionally, the following information about the appraisal methodology will be used for the valuation of HFRP offers: For permanent easements (or easements for the maximum duration allowed under State law), the HFRP statute states that the Secretary of Agriculture shall pay the landowner not less than 75 percent, nor more than 100 percent of (as determined by the Secretary) the fair market value of the land enrolled unencumbered by the easement, less the fair market value of such land encumbered by the easement. The term “encumbered” refers to the period of time when the easement becomes effective. The appraisal process established by NRCS is aimed at determining the difference between the value of the enrolled land prior to and after easement encumbrance.

When acquiring real property, Federal agencies generally follow the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs (“the Uniform Relocation Act”) found in regulations at Part 24 of Title 49 of the Code of Federal Regulations. Section 24.103 of that title establishes that “appraisals are to be prepared according to these requirements, which are

intended to be consistent with the Uniform Standards of Professional Appraisal Practice (USPAP). The Agency may have appraisal requirements that supplement these requirements, including, to the extent appropriate, the Uniform Appraisal Standards for Federal Land Acquisition (UASFLA).” [Yellow Book] The Yellow Book requires that compensation be based upon the impact that the easement encumbrance will have on the value of the “larger parcel,” which is all land owned by the landowner that may be impacted by the easement, as determined by the appraiser.

The HFRP language for permanent and maximum duration easements requires that compensation be based on the impact to value of only the land enrolled and encumbered by the easement. Thus, the Yellow Book requirement of appraising the larger parcel conflicts with the HFRP statutory requirement related to determining easement value for permanent easements, or those of the maximum duration required by state law. Therefore, the Agency proposes to use Uniform Standards for Professional Appraisal Practice (USPAP) for those easements, which is consistent with 49CFR24. Even though the HFRP statute states the approach for valuing permanent and 30-year easements in slightly different language, there is no actual distinction since both result in basing value on the enrolled land encumbered by the easement. Correspondingly, the Agency is maintaining consistency in the approach to determining easement compensation values for 30-year and permanent easements.

NRCS proposes to add language in § 625.8(h) that clarifies USDA policy regarding environmental credits such as carbon, water quality, biodiversity, or wetlands preservation, on land enrolled in HFRP. USDA considers these credits the property of the farmer, the landowner, or the person who applied the conservation practices on the land, regardless of the Federal funds invested.

#### *Section 625.9 10-Year Restoration Cost-Share Agreements*

NRCS proposes to amend § 625.9 (a) to reflect a change in section numbering caused by the addition of the 30-year contract section. Amendments to this section reflect the change from the term “practice” to “conservation practice.”

NRCS proposes to amend § 625.9 (d) to clarify the meaning of the sentence and to clarify that termination of the restoration cost-share agreement can occur when the terms of § 625.9(d) 1, 2, or 3 are met.

#### *Section 625.10 Cost-Share Payments*

NRCS proposes to amend § 625.10(b) to clarify the addition of the term “candidate species,” as well as listed species, through a Candidate Conservation Agreement with Assurances.

Section 625.10(c) and § 625.10(g) and (h) are amended to reflect the change in the definition from “practice” to the more specific term “conservation practice” as discussed above at § 625.2. Section 625.10(e) is also amended for the same reason and to clarify that the conservation practice would need to meet NRCS standards and specifications.

#### *Section 625.11 Easement Participation Requirements*

NRCS proposes to amend § 625.11(a) to clarify the sentence to include not only listed species but to allow for other types of management that support forest ecosystem functions and values, such as activities to protect candidate species.

#### *Section 625.12 30-Year Contracts*

A new section is added to incorporate the statutory provision for 30-year contracts for acreage owned by Indian Tribes. The section describes enrollment and minimum requirements of the contract. Terms of the 30-year contract are kept as consistent as possible with terms of a 30-year easement, considering the differences in the legal instruments.

#### *Section 625.13 The HFRP Restoration Plan Development and Landowner Protections*

NRCS proposes to amend § 625.13(a), § 625.13(c) and § 625.13(d) to reflect the changes discussed above as a result of public comments. Section 625.13(a), was amended to replace the term “consult” with “confer.” In § 625.13(c) “The National Marine Fisheries Service” was added as an agency that would assist in determining eligible practices. Section 625.13(d) was amended to clarify Landowner Protections.

#### *Section 625.14 Modification of the HFRP Restoration Plan*

NRCS proposes to amend § 625.14 to make non-substantive changes to the sentence structure.

#### *Section 625.15 Transfer of Land*

NRCS proposes the following changes: Amend § 625.15(a) to clarify that this section refers to offers voided prior to enrollment in the program. This section would also be amended to clarify that this section applies to easements, agreements, and contracts.

In addition, amend § 625.15(b) to clarify that this section refers to actions following transfer of land. These changes clarify that cost-share payments can be transferred to the new owner upon presentation of an assignment of rights. Landowner Protections can be transferred to the new landowner, and if a SHA or CCAA is involved, the landowners need to coordinate with FWS or NMFS to transfer the agreement and assurances to the new landowner.

#### *Section 625.16 Violations and Remedies*

NRCS proposes to make the following amendments to this section: Amend § 625.16 (a) to clarify that extensions to correct violations beyond 30 days, under this section, should be made based on the State Conservationists determination of how much time is necessary to correct the violation.

Section 625.16(b) is amended to clarify that extensions to correct violations beyond 30 days should be based on the State Conservationists determination of how much time is necessary to correct the violation. NRCS is also removing the last sentence of paragraph (b)(3), all of paragraph (b)(4), and paragraph (b)(6). The last sentence of (b)(3) is removed because it is administratively burdensome to continue to monitor and enforce the operation and maintenance of practices for which the Agency no longer has a contract. Due to limited resources and funding, the Agency has determined that to administer the program more effectively after an agreement is terminated, that the Agency will recover the appropriate amount and will not continue to monitor the installed practices or measures. Paragraph (b)(4) is removed because it has been incorporated into (b)(3). Paragraph (b)(6) is removed because the Agency has determined that it is not in the interests of the program to allow participants to unilaterally terminate a contract without penalty or repayment, even when participants are in compliance with all conditions. The Agency is interested in ensuring practices are continued for the original duration of the contract and maintaining a high level of environmental benefits.

#### *Section 625.18 Assignments*

The text of Section § 625.18 is not amended. The only change to this section is the section heading which has been changed to reflect the insertion of the 30-year contract section above at § 625.12.

### Section 625.19 Appeals

NRCS proposes to amend § 625.19(b) to clarify that appeals procedures apply to administrative actions and not for other purposes such as enforcement actions.

Section 625.19(d) is added to further clarify that enforcement actions taken by NRCS are not subject to review under administrative appeal regulations. This language is consistent with the appeal regulations at 7 CFR Part 614 and Federal real property law.

### Specific Request for Public Comment

The Agency is particularly interested in receiving public input regarding the following topics: (1) The definition of acreage owned by Indian Tribes and the accompanying requirements for 30-year contracts at § 625.12; (2) the language regarding ownership of ecosystem services credits; and (3) the language regarding the establishment of easement compensation rates.

### List of Subjects in 7 CFR Part 625

Administrative practice and procedure, Agriculture, Soil conservation, Forestry.

### Text of Rule Amendments

For the reasons stated in the preamble, the Natural Resources Conservation Service proposes to revise 7 CFR part 625 to read as follows:

## PART 625—HEALTHY FORESTS RESERVE PROGRAM

Sec.

- 625.1 Purpose and scope.
- 625.2 Definitions.
- 625.3 Administration.
- 625.4 Program requirements.
- 625.5 Application procedures.
- 625.6 Establishing priority for enrollment in HFRP.
- 625.7 Enrollment of easements, contracts, and agreements.
- 625.8 Compensation for easements and 30-year contracts.
- 625.9 10-year restoration cost-share agreements.
- 625.10 Cost-share payments.
- 625.11 Easement participation requirements.
- 625.12 30-year contracts.
- 625.13 The HFRP restoration plan development and landowner protections.
- 625.14 Modification of the HFRP restoration plan.
- 625.15 Transfer of land.
- 625.16 Violations and remedies.
- 625.17 Payments not subject to claims.
- 625.18 Assignments.
- 625.19 Appeals.
- 625.20 Scheme and device.

**Authority:** 16 U.S.C. 6571–6578.

### § 625.1 Purpose and scope.

(a) The purpose of the Healthy Forests Reserve Program (HFRP) is to assist landowners, on a voluntary basis, in restoring and enhancing forest ecosystems on private lands through easements, 30-year contracts, and 10-year cost-share agreements.

(b) The objectives of HFRP are to:

(1) Promote the recovery of endangered and threatened species under the Endangered Species Act (ESA);

(2) Improve plant and animal biodiversity; and

(3) Enhance carbon sequestration.

(c) The regulations in this part set forth the policies, procedures, and requirements for the HFRP as administered by the Natural Resources Conservation Service (NRCS) for program implementation and processing applications for enrollment.

(d) The Chief of NRCS may implement HFRP in any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.

### § 625.2 Definitions

The following additions shall be applicable to this part:

*30-year Contract* means a contract that is limited to acreage held in private ownership by Indian Tribes or individual tribal members. The 30-year contract is not eligible for use on tribal lands held in trust or subject to Federal restrictions against alienation.

*Acreage Owned by Indian Tribes* means private lands to which the title is held by individual Indians and Indian tribes, including Alaska Native Corporations. This term does not include land held in trust by the United States or lands where the fee title contains restraints against alienation.

*Biodiversity (Biological Diversity)* means the variety and variability among living organisms and the ecological complexes in which they live.

*Candidate Conservation Agreement with Assurances (CCAA)* means a voluntary arrangement between U.S. FWS or NMFS, and cooperating non-Federal landowners under the authority of Section 10(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. 1539(a)(1). Under the CCAA and an associated enhancement of survival permit, the non-Federal landowner implements actions that are consistent with the conditions of the permit. Candidate Conservation Agreements with Assurances with FWS are also subject to regulations at 50 CFR 17.22(d)

for endangered species or 50 CFR 17.32(d) for threatened species, or applicable subsequent regulations.

*Carbon sequestration* means the long term storage of carbon in soil (as soil organic matter) or in plant material (such as in trees).

*Chief* means the Chief of the NRCS, United States Department of Agriculture (USDA), or designee.

*Confer* means to discuss for the purpose of providing information; to offer an opinion for consideration; or to meet for discussion, while reserving final decision-making authority with NRCS.

*Conservation practice* means one or more conservation improvements and activities, including structural practices, land management practices, vegetative practices, forest management, and other improvements that benefit the eligible land and optimize environmental benefits, planned and applied according to NRCS standards and specifications.”

*Conservation treatment* means any and all conservation practices, measures, activities, and works of improvement that have the purpose of alleviating resource concerns, solving or reducing the severity of natural resource use problems, or taking advantage of resource opportunities, including the restoration, enhancement, maintenance, or management of habitat conditions for HFRP purposes.

*Contract or agreement* means the legal document that specifies the obligations and rights of any applicant who has been accepted to participate in the program. A contract or agreement is a binding agreement for the transfer of assistance, including financial or technical assistance, from USDA to the participant for conducting the prescribed program implementation actions.

*Coordination* means to obtain input and involvement from others while reserving final decision-making authority with NRCS.

*Cost-share agreement* means a legal document that specifies the rights and obligations of any participant accepted into the program. A HFRP cost-share agreement is a binding agreement for the transfer of assistance from USDA to the participant to share in the costs of applying conservation. A cost-share agreement under HFRP has a duration of 10-years.

*Cost-share payment* means the payment made by NRCS to a program participant or vendor to achieve the restoration, enhancement, and protection goals of enrolled land in accordance with the HFRP restoration plan.

*Easement* means a conservation easement, which is an interest in land defined and delineated in a deed whereby the landowner conveys certain rights, title, and interests in a property to the United States for the purpose of protecting the forest ecosystem and the conservation values of the property.

*Easement area* means the land encumbered by an easement.

*Easement payment* means the consideration paid to a landowner for an easement conveyed to the United States under the HFRP.

*Fish and Wildlife Service (FWS)* is an agency of the United States Department of the Interior.

*Forest ecosystem* means a dynamic set of living organisms, including plants, animals and microorganisms interacting among themselves and with the environment in which they live. A forest ecosystem is characterized by a predominance of trees, and by the fauna, flora, and ecological cycles (energy, water, carbon, and nutrients)

*Forest Service* is an agency of the USDA.

*HFRP restoration plan* means the document that identifies the conservation treatments that are scheduled for application to land enrolled in HFRP in accordance with NRCS standards and specifications.

*Indian Tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688, 43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Landowner* means an individual or entity having legal ownership of land, including those who may be buying land under a purchase agreement. The term "landowner" may also include all forms of collective ownership including joint tenants, tenants in common, and life tenants.

*Landowner Protections* means protections and assurances made available by NRCS to HFRP participants when requested and whose voluntary conservation activities result in a net conservation benefit for listed, candidate, or other species, and meet other requirements of the program. These Landowner Protections are subject to an HFRP restoration plan and associated cost-share agreement, 30-year contract, or easement being properly implemented. Landowner Protections made available by the Secretary of Agriculture to HFRP participants may

include an incidental take authorization received by NRCS from FWS or NMFS or may be provided by a Safe Harbor Agreement or Candidate Conservation Agreement with Assurances directly between the HFRP participant and FWS or NMFS as appropriate.

*Liquidated Damages* means a sum of money stipulated in the HFRP restoration agreement that the participant agrees to pay NRCS if the participant fails to adequately complete the terms of the restoration agreement. The sum represents an estimate of the expenses incurred by NRCS to service the restoration agreement, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

*Maintenance* means work performed to keep the applied conservation practice functioning for the intended purpose during its life span. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its original condition if one or more components fail.

*Measure* means one or more specific actions that is not a conservation practice, but has the effect of alleviating problems or improving the treatment of the resources.

*National Marine Fisheries Service (NMFS)* is an agency of the United States Department of Commerce.

*Natural Resources Conservation Service (NRCS)* is an agency of the USDA, which has the responsibility for administering HFRP.

*Participant* means a person or entity who is a party to a 10-year cost share agreement, 30-year contract, or an option agreement to purchase an easement.

*Private land* means land that is not owned by a governmental entity, and includes land that meets the definition of "acreage owned by Indian Tribes."

*Restoration* means implementing any conservation practice (vegetative, management, or structural) or measure that improves forest ecosystem values and functions (native and natural plant communities).

*Restoration agreement* means a cost-share agreement between the program participant and NRCS to restore, enhance, and protect the functions and values of a forest ecosystem for the purposes of HFRP under either an easement, 30-year contract, or a 10-year cost-share agreement enrollment option.

*Safe Harbor Agreement* means a voluntary arrangement between FWS or NMFS, and cooperating non-Federal landowners under the authority of Section 10(a)(1) of the Endangered

Species Act of 1973 (the Act), 16 U.S.C. 1539(a)(1). Under the Safe Harbor Agreement and an associated enhancement of survival permit, the private property owner implements actions that are consistent with the conditions of the permit. Safe Harbor Agreements with FWS are also subject to regulations at 50 CFR 17.22(c) for endangered species or 50 CFR 17.32 (c) for threatened species, or applicable subsequent regulations.

*Sign-up notice* means the public notification document that NRCS provides to describe the particular requirements for a specific HFRP sign-up.

*State Conservationist* means the NRCS employee authorized to implement HFRP and direct and supervise NRCS activities in a State, the Caribbean Area, or the Pacific Island Area.

*Technical service provider* means an individual, private-sector entity, or public agency certified by NRCS to provide technical services to program participants in lieu of or on behalf of NRCS.

#### § 625.3 Administration.

(a) The regulations in this part will be administered under the general supervision and direction of the Chief.

(b) The Chief may modify or waive a provision of this part if the Chief determines that the application of such provision to a particular limited situation is inappropriate and inconsistent with the goals of the program. This authority cannot be further delegated. The Chief may not modify or waive any provision of this part which is required by applicable law.

(c) No delegation in this part to lower organizational levels shall preclude the Chief from determining any issue arising under this part or from reversing or modifying any determination arising from this part.

(d) The State Conservationist will develop the rates of compensation for an easement and 30-year contract, a priority ranking process, and any related technical matters.

(e) The NRCS shall coordinate with FWS and NMFS in the implementation of the program and in establishing program policies. In carrying out this program, NRCS may confer with private forest landowners, including Indian tribes, the Forest Service and other Federal agencies, State fish and wildlife agencies, State forestry agencies, State environmental quality agencies, other State conservation agencies; and nonprofit conservation organizations. No determination by FWS, NMFS, the

Forest Service, any Federal or State agency, conservation district, or other organization shall compel the NRCS to take any action which the NRCS determines will not serve the purposes of the program established by this part.

#### § 625.4 Program requirements.

(a) General. Under the HFRP, NRCS will purchase conservation easements from, or enter into 30-year contracts or 10-year cost-share agreements with eligible landowners who voluntarily cooperate in the restoration and protection of forestlands and associated lands. To participate in HFRP, a landowner will agree to the implementation of a HFRP restoration plan, the effect of which is to restore, protect, enhance, maintain, and manage the habitat conditions necessary to increase the likelihood of recovery of listed species under the ESA, or measurably improve the well-being of species that are not listed as endangered or threatened under the ESA but are candidates for such listing, State-listed species, or species identified by the Chief for special consideration for funding. NRCS may provide cost-share assistance for the activities that promote the restoration, protection, enhancement, maintenance, and management of forest ecosystem functions and values. Specific restoration, protection, enhancement, maintenance, and management activities may be undertaken by the landowner or other NRCS designee.

(1) Of the total amount of funds expended under the program for a fiscal year to acquire easements and enter into 10-year cost-share agreements, not more than 40 percent shall be used for cost-share agreements and not more than 60 percent shall be used for easements.

(2) The Chief may use any funds that are not obligated by April 1st of the fiscal year for which the funds are made available to carry out a different method of enrollment during that fiscal year.

(b) Landowner eligibility. To be eligible to enroll an easement in the HFRP, an individual or entity must:

(1) Be the landowner of eligible land for which enrollment is sought; and

(2) Agree to provide such information to NRCS as the agency deems necessary or desirable to assist in its determination of eligibility for program benefits and for other program implementation purposes.

(c) Eligible land.

(1) The NRCS, in coordination with FWS or NMFS, shall determine whether land is eligible for enrollment and whether, once found eligible, the lands may be included in the program based on the likelihood of successful

restoration, enhancement, and protection of forest ecosystem functions and values when considering the cost of acquiring the easement, 30-year contract, or 10-year cost share agreement, and the restoration, protection, enhancement, maintenance, and management costs.

(2) Land shall be considered eligible for enrollment in the HFRP only if the NRCS determines that:

(i) Such private land is capable of supporting habitat for a selected species listed under Section 4 of the ESA; or

(ii) Such private land is capable of supporting habitat for a selected species not listed under Section 4 of the ESA but is candidate for such listing, or the selected species is State-listed species, or is a species identified by the Chief for special consideration for funding.

(3) NRCS may also enroll land adjacent to eligible land if the enrollment of such adjacent land would contribute significantly to the practical administration of the easement area, but not more than it determines is necessary for such contribution.

(4) To be enrolled in the program, eligible land must be configured in a size and with boundaries that allow for the efficient management of the area for easement purposes and otherwise promote and enhance program objectives.

(5) In the case of acreage owned by an Indian Tribe, the NRCS may enroll acreage into the HFRP which is privately owned by either the Tribe or an individual.

(d) Ineligible land. The following land is not eligible for enrollment in the HFRP:

(1) Lands owned by the United States, States, or units of local government;

(2) Land subject to an easement or deed restriction that already provides for the protection of fish and wildlife habitat or which would interfere with HFRP purposes, as determined by NRCS; and

(3) Lands that would not be eligible for HFRP under paragraphs (c) (1) through (c) (5).

#### § 625.5 Application procedures.

(a) Sign-up process. As funds are available, the Chief will solicit project proposals from the State Conservationist. The State Conservationist may consult with other agencies at the State, Federal, and local levels to develop proposals. The State Conservationist will submit the proposal(s) to the Chief for funding selection. Upon selection for funding, the State Conservationist will issue a public sign-up notice which will announce and explain the rationale for

decisions based on the following information:

(1) The geographic scope of the sign-up;

(2) Any additional program eligibility criteria that are not specifically listed in this part;

(3) Any additional requirements that participants must include in their HFRP applications that are not specifically identified in this part;

(4) Information on the priority order of enrollment for funding;

(5) An estimate of the total funds NRCS expects to obligate during a given sign-up; and

(6) The schedule for the sign-up process, including the deadline(s) for applying.

(b) Application for participation. To apply for enrollment through an easement, 30-year contract, or 10-year cost-share agreement, a landowner must submit an application for participation in the HFRP during an announced period for such sign-up.

(c) Preliminary agency actions. By filing an application for participation, the applicant consents to an NRCS representative entering upon the land for purposes of determining land eligibility, and for other activities that are necessary or desirable for the NRCS to make offers of enrollment. The applicant is entitled to accompany an NRCS representative on any site visits.

(d) Voluntary reduction in compensation. In order to enhance the probability of enrollment in HFRP, an applicant may voluntarily offer to accept a lesser payment amount than is being offered by NRCS. Such offer and subsequent payments may not be less than those rates set forth in 625.8 and 625.10 of this part.

#### § 625.6 Establishing priority for enrollment in HFRP.

(a) Ranking considerations. Based on the specific criteria set forth in a sign-up announcement and the applications for participation, NRCS, in coordination with FWS and NMFS, may consider the following factors to rank properties:

(1) Estimated conservation benefit to habitat required by threatened or endangered species listed under Section 4 of the ESA;

(2) Estimated conservation benefit to habitat required by species not listed as endangered or threatened under Section 4 of the ESA but that are candidates for such listing, State-listed species, or species identified by the Chief for special consideration for funding;

(3) Estimated improvement of biodiversity, if enrolled;

(4) Potential for increased capability of carbon sequestration, if enrolled;

(5) Availability of contribution of non-federal funds;

(6) Significance of forest ecosystem functions and values;

(7) Estimated cost-effectiveness of the particular restoration cost-share agreement, contract, or easement, and associated HFRP restoration plan; and

(8) Other factors identified in an HFRP sign-up notice.

(b) The NRCS may place higher priority on certain forest ecosystems based regions of the State or multi-State area where restoration of forestland may better achieve NRCS programmatic and sign-up goals and objectives.

(c) Notwithstanding any limitation of this part, NRCS may enroll eligible lands at any time in order to encompass project areas subject to multiple land ownership or otherwise to achieve program objectives. Similarly, NRCS may, at any time, exclude otherwise eligible lands if the participation of the adjacent landowners is essential to the successful restoration of the forest ecosystem and those adjacent landowners are unwilling to participate.

(d) If available funds are insufficient to accept the highest ranked application, and the applicant is not interested in reducing the acres offered to match available funding, NRCS may select a lower ranked application that can be fully funded. In cases where HFRP funds are not sufficient to cover the costs of an application selected for funding, the applicant may lower the cost of the application by changing the duration of the easement or agreement or reducing the acreage offered, unless these changes result in a reduction of the application ranking score below that of the score of the next available application on the ranking list.

#### **§ 625.7 Enrollment of easements, contracts, and agreements.**

(a) Offers of enrollment. Based on the priority ranking, NRCS will notify an affected landowner of tentative acceptance into the program. This notice of tentative acceptance into the program does not bind NRCS or the United States to enroll the proposed project in HFRP, nor does it bind the landowner to convey an easement, or to contract, or agree to HFRP activities. The letter notifies the landowner that NRCS intends to continue the enrollment process on their land unless otherwise notified by the landowner.

(b) Acceptance of offer of enrollment. An option agreement to purchase or a restoration cost-share agreement or contract will be presented by NRCS to the landowner, which will describe the easement, agreement, or contract area; the easement, agreement, or contract

terms and conditions; and other terms and conditions for participation that may be required by NRCS.

(c) Effect of the acceptance of the offer (enrollment). After the option agreement to purchase or restoration cost-share agreement or contract is executed by NRCS and the landowner, the land will be considered enrolled in the HFRP. For easements, NRCS will proceed with various easement acquisition activities, which may include conducting a survey of the easement area, securing necessary subordination agreements, procuring title insurance, and conducting other activities necessary to record the easement or implement the HFRP, as appropriate for the enrollment option being considered. For restoration cost-share agreements and contracts the landowner will proceed to implement the restoration plan with technical assistance and cost-share from NRCS.

(d) Withdrawal of offers. Prior to execution of an option agreement to purchase, a restoration cost-share agreement, and/or contract between the United States and the landowner, NRCS may withdraw the land from enrollment at any time due to lack of availability of funds, inability to clear title, or other reasons. An option to purchase shall be void, and the offer withdrawn, if not executed by the landowner within the time specified.

#### **§ 625.8 Compensation for easements and 30-year contracts.**

(a) Determination of easement payment rates.

(1) NRCS shall offer to pay not less than 75 percent nor more than 100 percent of the fair market value of the enrolled land during the period the land is subject to the easement less the fair market value of the land encumbered by the easement for permanent easements or easements for the maximum duration allowed under State law.

(2) NRCS shall offer to pay not more than 75 percent of the fair market value of the enrolled land less the fair market value of the land encumbered by the easement for 30-year easements or 30-year contracts.

(b) Acceptance and use of contributions. NRCS may accept and use contributions of non-federal funds to make payments under this section.

(c) Acceptance of offered easement or 30-year contract compensation.

(1) NRCS will not acquire any easement or 30-year contract unless the landowner accepts the amount of the payment that is offered by NRCS. The payment may or may not equal the fair market value of the interests and rights to be conveyed by the landowner under the easement or 30-year contract. By

voluntarily participating in the program, a landowner waives any claim to additional compensation based on fair market value.

(2) Payments may be made in a single payment or no more than 10 annual payments of equal or unequal size, as agreed to between NRCS and the landowner.

(d) If a landowner believes they may be eligible for a bargain sale tax deduction that is the difference between the fair market value of the easement conveyed to the United States and the easement payment made to the landowner, it is the landowner's responsibility to discuss those matters with the Internal Revenue Service. NRCS disclaims any representations concerning the tax implications of any easement or cost-share transaction.

(e) Per acre payments. If easement payments are calculated on a per acre basis, adjustment to stated easement payment will be made based on final determination of acreage.

(f) Environmental Services Credits for Conservation Improvements. USDA recognizes that environmental benefits will be achieved by implementing conservation practices, measures, and activities funded through HFRP, and that environmental credits may be gained as a result of implementing activities compatible with the purposes of an HFRP easement, contract, or restoration agreement. NRCS asserts no direct or indirect interest on these credits. However, NRCS retains the authority to ensure the requirements of an HFRP easement, contract, cost-share agreement, or restoration plan are met consistent with §§ 625.9 through 625.13 of this part. Where activities required under an environmental credit agreement may affect land covered under an HFRP easement, restoration cost-share agreement, or contract, an amendment to the restoration agreement or contract, or a compatible use approval under an easement, may be required and participants are highly encouraged to request a compatibility assessment from NRCS prior to entering into such environmental credit agreements.

#### **§ 625.9 10-year restoration cost-share agreements**

(a) The restoration plan developed under § 625.13 forms the basis for the 10-year cost-share agreement and its terms are incorporated therein.

(b) A 10-year cost-share agreement will:

(1) Incorporate all portions of a restoration plan;

(2) Be for a period of 10 years;

(3) Include all provisions as required by law or statute;

(4) Specify the requirements for operation and maintenance of applied conservation practices;

(5) Include any participant reporting and recordkeeping requirements to determine compliance with the agreement and HFRP;

(6) Be signed by the participant;

(7) Identify the amount and extent of cost-share assistance that NRCS will provide for the adoption or implementation of the approved conservation treatment identified in the restoration plan; and

(8) Include any other provision determined necessary or appropriate by the NRCS representative.

(c) Once the participant and NRCS have signed a 10-year cost-share agreement, the land shall be considered enrolled in HFRP.

(d) The State Conservationist may, by mutual agreement with the parties to the 10-year cost-share agreement, consent to the termination of the restoration agreement where:

(1) The parties to the 10-year cost-share agreement are unable to comply with the terms of the restoration agreement as the result of conditions beyond their control;

(2) Compliance with the terms of the 10-year cost-share agreement would cause a severe hardship on the parties to the agreement; or

(3) Termination of the 10-year cost-share agreement would, as determined by the State Conservationist, be in the public interest.

(e) If a 10-year cost-share agreement is terminated in accordance with the provisions of this section, the State Conservationist may allow the participants to retain any cost-share payments received under the 10-year cost-share agreement in a proportion appropriate to the effort the participant has made to comply with the restoration agreement, or, in cases of hardship, where forces beyond the participant's control prevented compliance with the agreement.

#### **§ 625.10 Cost-share payments.**

(a) NRCS may share the cost with landowners of restoring land enrolled in HFRP as provided in the HFRP restoration plan. The HFRP restoration plan may include periodic manipulation to maximize fish and wildlife habitat and preserve forest ecosystem functions and values over time and measures that are needed to provide the Landowner Protections under section 7(b)(4) or section 10(a)(1) of the ESA, including the cost of any permit.

(b) Landowner Protections may be made available to landowners enrolled

in the HFRP who agree, for a specified period, to restore, protect, enhance, maintain, and manage the habitat conditions on their land in a manner that is reasonably expected to result in a net conservation benefit that contributes to the recovery of listed species under the ESA, candidate, or other species covered by this regulation. These protections operate with lands enrolled in the HFRP and are valid for as long as the landowner is in compliance with the terms and conditions of such assurances, any associated permit, the easement, contract, or the restoration agreement.

(c) If the Landowner Protections, or any associated permit, require the adoption of a conservation practice or measure in addition to the conservation practices and measures identified in the applicable HFRP restoration plan, NRCS and the landowner will incorporate the conservation practice or measure into the HFRP restoration plan as an item eligible for cost-share assistance.

(d) Failure to perform planned management activities can result in violation of the easement, 10-year cost-share agreement, or the agreement under which Landowner Protections have been provided. NRCS will work with landowners to plan appropriate management activities.

(e) The amount and terms and conditions of the cost-share assistance shall be subject to the following restrictions on the costs of establishing or installing NRCS approved conservation practices or implementing measures specified in the HFRP restoration plan:

(1) On enrolled land subject to a permanent easement or an easement for the maximum duration allowed under State law, NRCS shall offer to pay not less than 75 percent nor more than 100 percent of the average cost; and

(2) On enrolled land subject to a 30-year easement or 30 year contract, NRCS shall offer to pay not more than 75 percent of the average cost.

(f) On enrolled land subject to a 10-year cost-share agreement without an associated easement, NRCS shall offer to pay not more than 50 percent of the average costs.

(g) Cost-share payments may be made only upon a determination by NRCS that an eligible conservation practice or measure, or an identifiable component of the conservation practice has been established in compliance with appropriate standards and specifications. Identified conservation practices and measures may be implemented by the landowner or other designee.

(h) Cost-share payments may be made for the establishment and installation of additional eligible conservation practices and measures, or the maintenance or replacement of an eligible conservation practice or measure, but only if NRCS determines the conservation practice or measure is needed to meet the objectives of HFRP, and the failure of the original conservation practices or measures was due to reasons beyond the control of the landowner.

#### **§ 625.11 Easement participation requirements.**

(a) To enroll land in HFRP through a permanent easement, an easement for the maximum duration allowed under State law, or 30-year enrollment option, a landowner shall grant an easement to the United States. The easement deed shall require that the easement area be maintained in accordance with HFRP goals and objectives for the duration of the term of the easement, including the restoration, protection, enhancement, maintenance, and management of habitat and forest ecosystem functions and values.

(b) For the duration of its term, the easement shall require, at a minimum, that the landowner, and the landowner's heirs, successors and assignees, shall cooperate in the restoration, protection, enhancement, maintenance, and management of the land in accordance with the easement and with the terms of the HFRP restoration plan. In addition, the easement shall grant to the United States, through the NRCS:

(1) A right of access to the easement area;

(2) The right to permit compatible uses by the landowner of the easement area, which may include such activities as hunting and fishing, managed timber harvest, or periodic haying or grazing, if such use is consistent with the long-term protection and enhancement of the purposes for which the easement was established;

(3) The right to determine compatible uses on the easement area and specify the amount, method, timing, intensity, and duration of the compatible use;

(4) The rights, title, and interest to the easement area as specified in the conservation easement deed; and

(5) The right to perform restoration, protection, enhancement, maintenance, and management activities on the easement area.

(c) The landowner shall convey title to the easement which is acceptable to the NRCS. The landowner shall warrant that the easement granted to the United States is superior to the rights of all others, except for exceptions to the title

which are deemed acceptable by the NRCS.

(d) The landowner shall:

- (1) Comply with the terms of the easement;
- (2) Comply with all terms and conditions of any associated agreement or contract;
- (3) Agree to the long-term restoration, protection, enhancement, maintenance, and management of the easement in accordance with the terms of the easement and related agreements;
- (4) Have the option to enter into an agreement with governmental or private organizations to assist in carrying out any landowner responsibilities on the easement area; and
- (5) Agree that each person who is subject to the easement shall be jointly and severally responsible for compliance with the easement and the provisions of this part and for any refunds or payment adjustment that may be required for violation of any terms or conditions of the easement or the provisions of this part.

#### **§ 625.12 30-year contracts.**

(a) To enroll land in HFRP through the 30-year contract option, a landowner shall sign a 30-year contract with NRCS. The contract shall require that the contract area be maintained in accordance with HFRP goals and objectives for the duration of the term of the contract, including the restoration, protection, enhancement, maintenance, and management of habitat and forest ecosystem functions and values.

(b) For the duration of its term, the 30-year contract shall require, at a minimum, that the landowner, and the landowner's assignees, shall cooperate in the restoration, protection, enhancement, maintenance, and management of the land in accordance with the contract and with the terms of the HFRP restoration plan. In addition, the contract shall grant to the United States, through the NRCS:

- (1) A right of access to the contract area;
- (2) The right to allow such activities by the landowner as hunting and fishing, managed timber harvest, or periodic haying or grazing, if such use is consistent with the long-term protection and enhancement of the purposes for which the contract was established;
- (3) The right to specify the amount, method, timing, intensity, and duration of the activities listed in paragraph (b)(2) of this section, as incorporated into the terms of the contract; and
- (4) The right to perform restoration, protection, enhancement, maintenance,

and management activities on the contract area.

(c) The landowner shall:

- (1) Comply with the terms of the contract;
- (2) Comply with all terms and conditions of any associated agreement or contract;
- (3) Agree to the long-term restoration, protection, enhancement, maintenance, and management of the contract area in accordance with the terms of the contract and related agreements.
- (d) A 30-year contract will:
  - (1) Be signed by the participant;
  - (2) Identify the amount and extent of cost-share assistance that NRCS will provide for the adoption or implementation of the approved conservation treatment identified in the restoration plan; and
  - (3) Include any other provision determined necessary or appropriate by the NRCS representative.
- (e) Once the landowner and NRCS have signed a 30-year contract, the land shall be considered enrolled in HFRP.

#### **§ 625.13 The HFRP restoration plan development and landowner protections.**

(a) The development of the HFRP restoration plan shall be made through an NRCS representative, who shall confer with the program participant and with the FWS and NMFS, as appropriate.

(b) The HFRP restoration plan shall specify the manner in which the enrolled land under easement, 30-year contract, or 10-year cost-share agreement shall be restored, protected, enhanced, maintained, and managed to accomplish the goals of the program.

(c) Eligible restoration practices and measures may include land management, vegetative, and structural practices and measures that will restore and enhance habitat conditions for listed species, candidate, State-listed, and other species identified by NRCS for special funding consideration. To the extent practicable, eligible practices and measures will improve biodiversity and increase the sequestration of carbon. NRCS, in coordination with FWS and NMFS, will determine the conservation practices and measures. NRCS will determine payment rates and cost-share percentages within statutory limits that will be available for restoration. A list of eligible practices will be available to the public.

(d) Landowner Protections. An HFRP participant who enrolls land in HFRP and whose conservation treatment results in a net conservation benefit for listed, candidate, or other species. A participant may request such Landowner Protections as follows:

(1) Incidental Take Authorization.

(i) NRCS will extend to participants the incidental take authorization received by NRCS from FWS or NMFS through biological opinions issued as part of the interagency cooperation process under section 7(a)(2) of the ESA;

(ii) NRCS will provide assurances, as a provision of the restoration plan, that when a participant is provided authorization for incidental take of a listed species, NRCS will not require management activities related to that species to be undertaken in addition to or different from those specified in the restoration plan without the participant's consent;

(iii) Provided the landowner has acted in good faith and without intent to violate the terms of the HFRP restoration plan, NRCS will pursue all appropriate options with the participant to avoid termination in the event of the need to terminate an HFRP restoration plan that is being properly implemented; and

(iv) If the 30-year contract or 10-year restoration cost-share agreement is terminated, any requested assurances, including an incidental take authorization under this section, provided by NRCS will be voided. As such, the landowner will be responsible to FWS or NMFS for any violations of the ESA.

(2) SHA or CCAA.

(i) NRCS will provide technical assistance to help participants design and use their HFRP restoration plan for the dual purposes of qualifying for HFRP financial assistance and as a basis for entering into a SHA or CCAA with FWS or NMFS and receiving an associated permit under section 10(a)(1)(a) of the ESA.

(ii) All SHAs and associated permits issued by FWS or NMFS are subject to the Safe Harbor Policy jointly adopted by FWS and NMFS according to the regulations at 64 FR 32717 or applicable subsequently adopted policy, and SHAs with FWS also are subject to regulations at 50 CFR 17.22(c) for endangered species or 50 CFR 17.32(c) for threatened species, or applicable subsequent regulations.

(iii) All CCAAs and associated permits issued by FWS or NMFS are subject to the CCAAs policy jointly adopted by FWS and NMFS according to the regulations at 64 FR 32706 or applicable subsequently adopted policy, and Candidate Conservation Agreements with Assurances with FWS also are subject to regulations at 50 CFR 17.22(d) for endangered species or 50 CFR 17.32(d) for threatened species, or applicable subsequent regulations.

(iv) If the 30-year contract or 10-year restoration cost-share agreement is terminated, the landowner will be responsible to notify and coordinate with FWS and NMFS, as appropriate, for any modifications related to the SHA or CCAA.

**§ 625.14 Modification of the HFRP restoration plan.**

The State Conservationist may approve modifications to the HFRP restoration plan that do not modify or void provisions of the easement, contract, restoration agreement, or Landowner Protections, and are consistent with applicable law. NRCS may obtain and receive input from the landowner and coordinate with FWS and NMFS to determine whether a modification is justified. Any HFRP restoration plan modification must meet HFRP program objectives, and must result in equal or greater wildlife benefits and ecological and economic values to the United States. Modifications to the HFRP restoration plan which are substantial and affect provisions of the easement, contract, restoration cost-share agreement, or Landowner Protections will require agreement from the landowner, FWS or NMFS, as appropriate, and may require execution of an amended easement, contract, and 10-year restoration cost-share agreement and modification to the protections afforded by the safe harbor assurances.

**§ 625.15 Transfer of land.**

(a) Offers voided prior to enrollment. Any transfer of the property prior to the applicant's acceptance into the program shall void the offer of enrollment. At the option of the State Conservationist, an offer can be extended to the new landowner if the new landowner agrees to the same or more restrictive easement, agreement, and contract terms and conditions.

(b) Actions following transfer of land.

(1) For easements or 30-year contracts with multiple annual payments, any remaining payments will be made to the original landowner unless NRCS receives an assignment of proceeds.

(2) Eligible cost-share payments shall be made to the new landowner upon presentation of an assignment of rights or other evidence that title has passed.

(3) Landowner protections shall be available to the new landowner and the new landowner shall be held responsible for assuring completion of all measures and conservation practices required by the contract, deed, and incidental take permit.

(4) If a SHA or CCAA, is involved, the previous and new landowners may

coordinate with FWS or NMFS, as appropriate, to transfer the agreement and associated permits and assurances.

(5) The landowner and NRCS may agree to transfer a 30-year contract. The transferee must be determined by NRCS to be eligible to participate in HFRP and must assume full responsibility under the contract, including operation and maintenance of all conservation practices and measures required by the contract.

(c) Claims to payments. With respect to any and all payments owed to a person, the United States shall bear no responsibility for any full payments or partial distributions of funds between the original landowner and the landowner's successor. In the event of a dispute or claim on the distribution of cost-share payments, NRCS may withhold payments without the accrual of interest pending an agreement or adjudication on the rights to the funds.

**§ 625.16 Violations and remedies.**

(a) Easement Violations.

(1) In the event of a violation of the easement or any associated agreement involving a landowner, the landowner shall be given reasonable notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice, or such additional time as the State Conservationist determines is necessary to correct the violation.

(2) Notwithstanding paragraph (a)(1) of this section, NRCS reserves the right to enter upon the easement area at any time to remedy deficiencies or easement violations. Such entry may be made at the discretion of NRCS when such actions are deemed necessary to protect important listed species, candidate species, and forest ecosystem functions and values or other rights of the United States under the easement. The landowner shall be liable for any costs incurred by the United States as a result of the landowner's negligence or failure to comply with easement or contractual obligations.

(3) In addition to any and all legal and equitable remedies as may be available to the United States under applicable law, NRCS may withhold any easement and cost-share payments owed to landowners at any time there is a material breach of the easement covenants, associated restoration agreement, or any associated contract. Such withheld funds may be used to offset costs incurred by the United States in any remedial actions or retained as damages pursuant to court order or settlement agreement.

(4) The United States shall be entitled to recover any and all administrative and legal costs, including attorney's fees

or expenses, associated with any enforcement or remedial action.

(b) 30-year Contract and 10-year Cost-Share Agreement Violations.

(1) If the NRCS determines that a participant is in violation of the terms of a 30-year contract, or 10-year cost-share agreement, or documents incorporated by reference into the 30-year contract or 10-year cost-share agreement, the landowner shall be given reasonable notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice, or such additional time as the State Conservationist determines is necessary to correct the violation. If the violation continues, the State Conservationist may terminate the 30-year contract or 10-year cost-share agreement.

(2) Notwithstanding the provisions of paragraph (b)(1) of this section, a 10-year cost-share agreement or 30-year contract termination is effective immediately upon a determination by the State Conservationist that the participant has: Submitted false information; filed a false claim; engaged in any act for which a finding of ineligibility for payments is permitted under this part; or taken actions NRCS deems to be sufficiently purposeful or negligent to warrant a termination without delay.

(3) If NRCS terminates a 10-year cost-share agreement or 30-year contract, the participant will forfeit all rights for future payments under the 10-year cost-share agreement or 30-year contract, and must refund all or part of the payments received, plus interest, and liquidated damages.

(4) When making any 30-year contract or 10-year cost-share agreement termination decisions, the State Conservationist may provide equitable relief in accordance with 7 CFR part 635.

**§ 625.17 Payments not subject to claims.**

Any cost-share, contract, or easement payment or portion thereof due any person under this part shall be allowed without regard to any claim or lien in favor of any creditor, except agencies of the United States Government.

**§ 625.18 Assignments.**

Any person entitled to any cash payment under this program may assign the right to receive such cash payments, in whole or in part.

**§ 625.19 Appeals.**

(a) A person participating in the HFRP may obtain a review of any administrative determination concerning eligibility for participation utilizing the administrative appeal

regulations provided in 7 CFR parts 11 and 614.

(b) Before a person may seek judicial review of any administrative action concerning eligibility for program participation under this part, the person must exhaust all administrative appeal procedures set forth in paragraph (a) of this section, and for purposes of judicial review, no decision shall be a final Agency action except a decision of the Chief under these procedures.

(c) Any appraisals, market analysis, or supporting documentation that may be used by NRCS in determining property value are considered confidential information, and shall only be disclosed as determined at the sole discretion of NRCS in accordance with applicable law.

(d) Enforcement actions undertaken by NRCS in furtherance of its federally held property rights are under the jurisdiction of the Federal District Court and are not subject to review under administrative appeal regulations.

#### **§ 625.20 Scheme and device.**

(a) If it is determined by NRCS that a person has employed a scheme or device to defeat the purposes of this part, any part of any program payment otherwise due or paid such person during the applicable period may be withheld or be required to be refunded with interest thereon, as determined appropriate by NRCS.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person of payments for 10-year cost share agreements, contracts, or easements for the purpose of obtaining a payment to which a person would otherwise not be entitled.

(c) A person who succeeds to the responsibilities under this part shall report in writing to NRCS any interest of any kind in enrolled land that is held by a predecessor or any lender. A failure of full disclosure will be considered a scheme or device under this section.

#### **Arlen L. Lancaster,**

*Vice President, Commodity Credit Corporation and Chief, Natural Resources Conservation Service.*

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## **DEPARTMENT OF AGRICULTURE**

### **Agricultural Marketing Service**

#### **7 CFR Part 985**

[Docket Nos. AMS-FV-08-0104; FV09-985-1 PR]

#### **Marketing Order Regulating the Handling of Spearmint Oil Produced in the Far West; Salable Quantities and Allotment Percentages for the 2009-2010 Marketing Year**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This rule would establish the quantity of spearmint oil produced in the Far West, by class that handlers may purchase from, or handle for, producers during the 2009-2010 marketing year, which begins on June 1, 2009. This rule invites comments on the establishment of salable quantities and allotment percentages for Class 1 (Scotch) spearmint oil of 842,171 pounds and 42 percent, respectively, and for Class 3 (Native) spearmint oil of 1,196,109 pounds and 53 percent, respectively. The Spearmint Oil Administrative Committee (Committee), the agency responsible for local administration of the marketing order for spearmint oil produced in the Far West, recommended these limitations for the purpose of avoiding extreme fluctuations in supplies and prices to help maintain stability in the spearmint oil market.

**DATES:** Comments must be received by March 16, 2009.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or Internet: <http://www.regulations.gov>. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

#### **FOR FURTHER INFORMATION CONTACT:**

Susan M. Coleman, Marketing Specialist or Gary D. Olson, Regional Manager, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (503) 326-2724; Fax: (503) 326-7440; or E-mail: [Sue.Coleman@usda.gov](mailto:Sue.Coleman@usda.gov) or [GaryD.Olson@usda.gov](mailto:GaryD.Olson@usda.gov).

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491; Fax: (202) 720-8938, or E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Order No. 985 (7 CFR Part 985), as amended, regulating the handling of spearmint oil produced in the Far West (Washington, Idaho, Oregon, and designated parts of Nevada and Utah), hereinafter referred to as the "order." This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, salable quantities and allotment percentages may be established for classes of spearmint oil produced in the Far West. This proposed rule would establish the quantity of spearmint oil produced in the Far West, by class, which may be purchased from or handled for producers by handlers during the 2009-2010 marketing year, which begins on June 1, 2009. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the