

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1491

RIN 0578-AA37

Farm and Ranch Lands Protection Program

AGENCY: Commodity Credit Corporation, Department of Agriculture (USDA).

ACTION: Proposed rule.

SUMMARY: This proposed rule sets forth the policies implementing the farmland protection program. The Farm Security and Rural Investment Act of 2002 repealed the Farmland Protection Program (FPP), established by the Federal Agriculture Improvement and Reform Act of 1996, and authorized a new farmland protection program. The new program will be called the Farm and Ranch Lands Protection Program (FRPP) to both distinguish it from the repealed program and to better describe the types of land the program seeks to protect. Under the FRPP, the Secretary of Agriculture, acting through the Natural Resources Conservation Service (NRCS), is authorized, on behalf of the Commodity Credit Corporation (CCC) and under its authorities, to purchase conservation easements for the purpose of protecting topsoil by limiting nonagricultural uses of the land. As set forth in this proposed rulemaking, NRCS proposes to continue to administer FRPP using the same request for application (RFA) process to announce funding availability that it has used since authorization of the Farmland Protection Program in 1996. NRCS seeks comments from the public on this proposed rule.

DATES: Written comments must be received on or before December 30, 2002.

ADDRESSES: All comments concerning this proposed rule should be submitted to Denise Coleman, Farmland Protection and Community Planning Staff, Natural Resources Conservation Service, PO Box

2890, Washington, DC 20013-2890. Attention: FRPP Comments. FAX: (202) 720-0745. The Proposed Rule can also be accessed and comments submitted via Internet to denise.coleman@usda.gov Attention: FRPP Comments. Users can access the Natural Resources Conservation Service (NRCS) homepage at: <http://www.nrcs.usda.gov>.

FOR FURTHER INFORMATION CONTACT: Denise Coleman, Farmland Protection Program Manager, Natural Resources Conservation Service; phone: (202) 720-9476; fax: (202) 720-0745; e-mail: denise.coleman@usda.gov.

SUPPLEMENTARY INFORMATION:

Background Related to the Farm and Ranch Lands Protection Program

Urban sprawl continues to threaten the Nation's farm and ranch land. Social and economic changes over the past three decades have influenced the rate at which land is converted to nonagricultural uses. Population growth, demographic changes, large lot development, expansion of transportation systems, and economic prosperity have contributed to increased agricultural land conversion rates. Increased population, growing affluence, expanded transportation, and cultural factors of "bigger means better," has accelerated the depopulation of the urban centers and has resulted in the conversion of farmland. Between 1960 and 1990, metropolitan-area population grew by 50 percent while the acreage of developed land increased 100 percent. About 45 percent of new construction between the years of 1994 and 1997 occurred in rural areas, with nearly 80 percent being land bordering urban areas. Overall, this translates to over 2.8 million acres being converted per year, with 2 million devoted to housing (USDA, 2000).

According to the USDA National Resources Inventory (NRI), urban and built-up areas increased from 65.3 million acres in 1992 to 79 million acres in 1997, equaling an area approximately the size of Ohio. Perhaps more important than the overall rate of land conversion is the location and type of land subject to this change in land use. On average, prime and important farmlands are being converted at a rate two to four times that of other lands. Based on NRI urban and built-up data for the 1980s, 46 percent of the land

converted to urban and built-up uses comes from cropland and pasture, while 38 and 14 percent comes from forest land and range land, respectively. Much of the land being lost is prime, unique, or important farmland located near cities. Moreover, an end to farm and forest land conversion is not in sight. The National Home Builders Association forecasts an expansion of 1.3 to 1.5 million new homes per year through 2010 (USDA, 2000).

As a result of these land use changes, there is growing national interest in the protection of farm and ranch land. Once developed, productive farmland's rich topsoil is effectively lost forever, placing future food security for the Nation at risk. Furthermore, land use devoted to agriculture provides an important contribution to environmental quality, history, and scenic beauty.

Overview of the Farm and Ranch Lands Protection Program

The FRPP is a voluntary program that helps farmers and ranchers keep their land in agriculture. The program provides matching funds to State, Tribal, local governments, and non-governmental organizations with existing farmland protection programs to purchase conservation easements. Funds from FRPP cannot be used to restore historical or archaeological resources nor can funds be used to share in the cost of conservation practices.

Under the FRPP, NRCS proposes to continue to administer the program using the public notice process, as it has since the Farmland Protection Program was authorized in 1996. Through the public notice process, NRCS will solicit applications from federally recognized Indian Tribes, States, units of local government, and non-governmental organizations to cooperate in the acquisition of conservation easements on farms and ranches for the purpose of protecting topsoil from conversion to nonagricultural use. Although NRCS has authority to acquire other interests in land, the RFA will seek to fund the acquisition of conservation easements.

To participate, entities with existing agricultural land protection programs submit to the local NRCS State Office applications requesting FRPP funds to purchase conservation easements that restrict the conversion of farm and ranch land to nonagricultural uses. Entities eligible to participate in the FRPP include:

- Any agency of any State or local government or federally recognized Indian Tribe (including a farmland protection board or land resource council established under State law); or
 - Any organization that:
 - Is organized principally for one or more of the following conservation purposes: the preservation of land for recreation, open space, historically important land areas and structures, and natural wildlife habitat;
 - Is operated exclusively for charitable, religious, or educational purpose, with no part of its net earnings paid to any private shareholder or individual and no substantial part of its activities influencing legislation or intervening in any political campaign for or against a public office candidate; or
 - Normally receives more than one-third of its support in each taxable year from any combination of gifts, grants, contributions, or membership fees, and normally receives not more than one-third of its support in each tax year from the sum of gross investment income.

To be eligible for FRPP, the land proposed for a conservation easement must:

- Contain prime, unique, or other productive soil as defined by the Farmland Protection Policy Act of 1981, as amended (7 U.S.C. 4201 *et seq.*); or
- Contain historical or archaeological resources; and
- Be subject to a pending offer from an eligible entity; and
- Be privately owned.

Aside from demonstrating land and entity eligibility, entities wishing to receive FRPP funds must also demonstrate:

- A commitment to long-term conservation of agricultural lands;
- A capability to acquire, manage, and enforce easements;
- Staff capacity that will be dedicated to monitoring and easement stewardship; and
- The availability of funds to acquire and manage conservation easements.

Selection will be based on national criteria as determined by the NRCS Chief, set forth in the RFA, and additional State criteria as determined by the appropriate State Conservationist. Examples of national criteria may include:

- Acreage of prime, unique, and important farm and ranch land to be protected;
- Total acres of land to be protected with the requested award;
- Acreage of prime, unique, and important farm and ranch land identified in the National Resources Inventory as converted to nonagricultural uses;

- Total acres needing protection;
- Number or acreage of historic and archaeological resources to be protected on farm or ranch lands;
 - Anticipated average FRPP cost per acre;
 - Rate of land conversion (*e.g.*, local land-use conversion rates);
 - Degree of leveraging guaranteed by eligible entities;
 - History of eligible entity's commitment to conservation planning and conservation practice implementation;
 - Eligible entity's history of acquiring, managing, holding, and enforcing conservation easements. This could include annual farmland protection expenditures, monetary donations received, accomplishments, and staffing levels;
 - A description of the eligible entity's farmland protection strategy and how the FRPP application submitted by the entity corresponds to the entity's strategic plan; and
 - Eligible entity's total estimated acres of unfunded conservation easements on prime, unique, and important farm and ranch land.

Examples of State criteria developed by the State Conservationist may include:

- Proximity of the parcel to other protected clusters;
- Proximity of the parcel to other agricultural operations and infrastructure;
- Parcel size;
- Type of land use;
- Maximum FRPP cost expended per acre;
- Environmental, cultural, and social benefits;
- Degree of leveraging by the entity; and
- Other criteria as determined by the State Conservationist.

Criteria used to evaluate applications will be available to the public through the NRCS State Conservationist. Pending offers must be for acquiring an easement in perpetuity except where State law prohibits a permanent easement. Once an entity is selected for funding, NRCS, on the behalf of CCC, enters into a cooperative agreement with the entity, thereby obligating money for the easement acquisition. The selected entity works with the landowner; processes the easement acquisition; holds, manages, and enforces the easement. Landowners retain all rights to use the property for agriculture. A Federal contingent right interest in the property must be included in each easement deed for the protection of the Federal investment. In addition, all lands enrolled in FRPP must have a

conservation plan developed based on the NRCS Field Office Technical Guide (FOTG) specifications and highly erodible and wetland conservation provisions, in accordance with 7 CFR part 12.

The Federal share for any easement acquisition is limited to a maximum of 50 percent of the appraised fair market value of the conservation easement. As part of its share of the cost of purchasing a conservation easement an eligible entity may include a charitable donation by the landowner of not more than 25 percent of the appraised fair market value of the conservation easement. Where the easement purchase price is less than the appraised fair market value, an entity may choose to provide 50 percent of the purchase price of the conservation easement. If the 50 percent of the purchase price option is chosen, the NRCS share will not exceed the entity's contribution.

Regulatory Certifications

Executive Order 12866

This proposed rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. The Office of Management and Budget (OMB) has been determined that this proposed rule is not a significant rule making action. Therefore, no benefit cost assessment of potential impacts is necessary.

Regulatory Flexibility Act

Pursuant to 5 U.S.C 605(c) of the Regulatory Flexibility Act, it has been determined that 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 implements the Farm and Ranch Lands Protection Program, which involves the voluntary acquisition of interests in property by NRCS in partnership with State, local, and Tribal governments and nonprofit entities.

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 annual effect on the economy of \$100,000,000 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.

Environmental Analysis

A draft Environmental Assessment (EA) has been prepared to assist NRCS in determining whether this proposed rule would have a significant impact on the quality of the human environment such that an Environmental Impact Statement (EIS) should be prepared. Based on the results of the draft EA, NRCS proposes issuing a finding of no significant impact (FONSI) before a final rule is published. Copies of the draft EA and FONSI may be obtained from Denise Coleman, Farmland Protection and Community Planning Staff, Natural Resources Conservation Service, PO Box 2890, Washington, DC 20013–2890. The FRPP draft EA and FONSI will also be available at the following Internet address: http://www.nrcs.usda.gov/programs/Env_Assess/FPP/FPP.html.

Written comments on the draft EA and FONSI should be sent to Denise Coleman, Farmland Protection and Community Planning Staff, Natural Resources Conservation Service, PO Box 2890, Washington, DC 20013–2890.

Paperwork Reduction Act

Section 2702 of the Farm Security and Rural Investment Act of 2002 provides that the promulgation of this proposed rule is carried out without regard to Chapter 35 of Title 44, United States Code (commonly known as the Paperwork Reduction Act).

Executive Order 12988, Civil Justice Reform

This proposed rule has been reviewed in accordance with Executive Order 12988. NRCS has not identified any State or local laws or regulations that are in conflict with this regulation or that would impede full implementation of this rule. Nevertheless, in the event that such a conflict were to be identified, the proposed rule would preempt the State or local laws or regulations found to be in conflict. The provisions of this proposed rule are not retroactive. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR part 614 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 the rule conforms to the federalism principles set forth in the Executive Order; would not impose any compliance cost 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.

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 has assessed the effects of this rulemaking action of State, local, and Tribal governments, and the public. This action does not compel the expenditure of \$100,000,000 or more by any State, local, or Tribal government, or anyone in the private sector; therefore, a statement under section 202 of the Act is not required.

List of Subjects in 7 CFR Part 1491

Administrative practice and procedure, Agriculture, Soil conservation.

For the reasons stated in the preamble, the Commodity Credit Corporation proposes to amend Chapter XIV by adding a new part 1491 as set forth below:

PART 1491—FARM AND RANCH LANDS PROTECTION PROGRAM**Subpart A—General Provisions**

Sec.

- 1491.1 Applicability.
- 1491.2 Administration.
- 1491.3 Definitions.
- 1491.4 Program requirements.
- 1491.5 Application procedures.
- 1491.6 Ranking considerations and proposal selection.
- 1491.7 Funding priorities.

Subpart B—Cooperative Agreements and Conservation Easement Deeds

- 1491.20 Cooperative agreements.
- 1491.21 Funding.
- 1491.22 Conservation easement deeds.
- 1491.23 Easement modifications.

Subpart C—General Administration

- 1491.30 Violations and remedies.
- 1491.31 Appeals.
- 1491.32 Scheme or device.

Authority: 16 U.S.C. 3831h, 3831i.

Subpart A—General Provisions**§ 1491.1 Applicability.**

(a) The regulations in this part set forth policies, procedures, and requirements for program implementation of the Farm and Ranch Lands Protection Program as administered by the Natural Resources Conservation Service (NRCS). FRPP cooperative agreements and easements signed on or after the effective date of the final regulation will be administered according to 7 CFR part 1491.

(b) The NRCS Chief may implement FRPP 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.

§ 1491.2 Administration.

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

(b) NRCS shall:

(1) Provide overall program management and implementation leadership for FRPP;

(2) Develop, maintain, and ensure that policies, guidelines, and procedures are carried out to meet program goals and objectives;

(3) Ensure that the FRPP share of the cost of an easement or other deed restrictions in eligible land shall not exceed 50 percent of the appraised fair market value of the conservation easement;

(4) Determine land and entity eligibility;

(5) Make funding decisions and determine allocations of program funds;

(6) Coordinate with the Office of the General Counsel (OGC) to ensure the legal sufficiency of the cooperative agreement and the easement deed or other legal instrument;

(7) Sign and monitor cooperative agreements for the CCC with the selected entity;

(8) Monitor and ensure conservation plan compliance with highly erodible land and wetland provisions in accordance with 7 CFR part 12; and

(9) Provide leadership for establishing, implementing, and overseeing administrative processes for easements, easement payments, and administrative and financial performance reporting.

(c) NRCS may enter into cooperative agreements with eligible entities to assist NRCS with implementation of this Part.

§ 1491.3 Definitions.

The following definitions may be applicable to this part:

Agricultural uses are defined by State law. (If the agency finds that a State definition of agriculture is so broad that an included use could lead to the degradation of soils, NRCS reserves the right to impose greater deed restrictions on property than allowable under a State definition of agriculture in order to protect topsoil.)

Chief means the Chief of NRCS, USDA.

Commodity Credit Corporation (CCC) is a Government-owned and operated entity that was created to stabilize, support, and protect farm income and

prices. CCC is managed by a Board of Directors, subject to the general supervision and direction of the Secretary of Agriculture, who is an ex-officio director and chairperson of the Board. CCC provides the funding for FRPP, and NRCS administers the FRPP on its behalf.

Conservation Easement means a voluntary, legally recorded restriction, in the form of a deed, on the use of property, in order to protect resources such as agricultural lands, historic structures, open space, and wildlife habitat.

Conservation Plan means the document that—

- Applies to highly erodible cropland;
- Describes the conservation system applicable to the highly erodible cropland and describes the decisions of the person with respect to location, land use, tillage systems, and conservation treatment measures and schedules;
- Is approved by the local soil conservation district in consultation with the local committees established under Section 8 (b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 5909h(b)(5)) and the Secretary, or by the Secretary.

Contingent right is an interest in land held by the United States, which the United States may exercise under specific circumstances in order to enforce the terms of the conservation easement or hold title to the easement.

Eligible entities means federally recognized Indian Tribes, States, units of local government, and certain non-governmental organizations (see definition below), which have a farmland protection program that purchases agricultural conservation easements for the purpose of protecting topsoil by limiting conversion to non-agricultural uses of the land. Additionally, to be eligible for FRPP, the entity must have pending offers (see definition below), for the acquiring conservation easements for the purpose of protecting agricultural land from conversion to nonagricultural uses.

Eligible land is privately owned land on a farm or ranch that has prime, unique, statewide, or locally important soil, or contains historical or archaeological resources, and is subject to a pending offer by an eligible entity. Eligible land includes cropland, rangeland, grassland, and pasture land, as well as forest land that is an incidental part of an agricultural operation. Other incidental land that would not otherwise be eligible, but when considered as part of a pending offer, may be considered eligible, if inclusion of such land would

significantly augment protection of the associated farm or ranch land.

Fair market value of the conservation easement is ascertained through standard real property appraisal methods. Fair market value is the amount in cash, for which in all probability the property would have sold on the effective date of the appraisal, after a reasonable exposure of time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer. Neither the seller nor the buyer act under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal.

Field Office Technical Guide (FOTG) is the official document for NRCS guidelines, criteria, and standards for planning and applying conservation treatments and conservation management systems. The FOTG contains detailed information on the conservation of soil, water, air, plant, and animal resources applicable to the local area for which it is prepared.

Historical and archaeological resources must be:

- Listed in the National Register of Historic Places (established under the National Historic Preservation Act (NHPA), 16 U.S.C. 470, *et seq.*), or
- Formally determined eligible for listing in the National Register of Historic Places (by the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) and the Keeper of the National Register in accordance with Section 106 of the NHPA), or
- Formally listed in the State or Tribal Register of Historic Places of the SHPO (designated under section 101 (b)(1)(B) of the NHPA) or the THPO (designated under section 101(d)(1)(C) of the NHPA).

Land Evaluation and Site Assessment System (LESA) is the Federal land evaluation system used to rank land, based on soil potential for agriculture, as well as social and economic factors, such as location, access to market, and adjacent land use. (For additional information see the Farmland Protection Policy Act Rule (7 CFR part 658).

Landowner means a person, persons, estate, corporation, or other business or nonprofit entity having fee title ownership of farm or ranch land.

Natural Resources Conservation Service is an agency of the U.S. Department of Agriculture.

Non-governmental organization, is defined as any organization that:

- Is organized for, and at all times since the formation of the organization,

has been operated principally for one or more of the conservation purposes specified in clause (i), (ii), (iii), or (iv) of section 170(h)(4)(A) of the Internal Revenue code of 1986;

- Is an organization described in section 501(c)(3) of that code that is exempt from taxation under 501(a) of that code;
- Is described in section 509(a)(2) of that code; or
- Is described in section 509(a)(3) of that code and is controlled by an organization described in section 509(a)(2) of that code.

Other interests in land include any right in real property recognized by State law, including fee title. FRPP funds will only be used to purchase other interests in land with prior approval from the Chief.

Other productive soils are soils that are contained on farm or ranch land that is identified as farmland of statewide or local importance and is used for the production of food, feed, fiber, forage, or oilseed crops. The appropriate State or local government agency determines statewide or locally important farmland with concurrence from the State Conservationist. Generally, these farmlands produce high yields of crops when treated and managed according to acceptable farming methods. In some states and localities, farmlands of statewide and local importance may include tracts of land that have been designated for agriculture by State law or local ordinance. 7 CFR part 657, sets forth the process for designating soils as statewide or locally important.

Pending offer is a written bid, contract, or option extended to a landowner by an eligible entity to acquire a conservation easement before the legal title to these rights has been conveyed for the purpose of limiting non-agricultural uses of the land.

Prime and unique farmland are defined separately, as follows:

- Prime farmland is land that has the best combination of physical and chemical characteristics for producing food, feed, fiber, forage, oilseed, and other agricultural crops with minimum inputs of fuel, fertilizer, pesticides, and labor, without intolerable soil erosion, as determined by the Secretary.

Unique farmland is land other than prime farmland that is used for the production of specific high-value food and fiber crops, as determined by the Secretary. It has the special combination of soil quality, location, growing season, and moisture supply needed to economically produce sustained high quality or high yields of specific crops when treated and managed according to acceptable farming methods. Examples

of such crops include citrus, tree nuts, olives, cranberries, fruits, and vegetables. Additional information on the definition of prime, unique, or other productive soil can be found in 7 CFR part 657 and 7 CFR part 658.

Secretary is the Secretary of the U. S. Department of Agriculture.

State Technical Committee means a committee established by the Secretary of the U.S. Department of Agriculture in a State pursuant to 16 U.S.C. 3861 and 7 CFR part 610, subpart C.

State Conservationist means the NRCS employee authorized to direct and supervise NRCS activities in a State, the Caribbean Area (Puerto Rico and the Virgin Islands), or the Pacific Basin Area (Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands).

§ 1491.4 Program requirements.

(a) Under the FRPP, the Secretary, on behalf of CCC, shall purchase conservation easements, in partnership with eligible entities, from landowners who voluntarily wish to protect their farm and ranch lands from conversion to nonagricultural uses. Eligible entities submit applications to NRCS State Offices to partner with NRCS to acquire conservation easements on farm and ranch land. NRCS enters into cooperative agreements with selected entities and provides funds for up to 50 percent of the appraised market value for the easement purchase. In return, the entity agrees to acquire, hold, manage, and enforce the easement. A Federal contingent right interest in the property must be included in each easement deed for the protection of the Federal investment.

(b) The term of all easements will be in perpetuity unless prohibited by State law.

(c) To be eligible to receive FRPP funding, an entity must meet the definition of "eligible entity" as listed in the "Definitions" section of this proposed rule. In addition, eligible entities wishing to receive FRPP funds must also demonstrate:

- (1) A commitment to long-term conservation of agricultural lands;
- (2) A capability to acquire, manage, and enforce easements;
- (3) Sufficient number of staff that will be dedicated to monitoring and easement stewardship; and
- (4) The availability of funds.

(d) Eligible land must meet the definition of "eligible land" as provided herein. In addition:

- (1) Entire farms or ranches may be enrolled in FRPP.
- (2) Farms must contain at least 50 percent of prime, unique, statewide, or

locally important soil, unless otherwise determined by the State Conservationist, or contain historical or archaeological resources.

(3) Eligible lands are farm and ranch lands that must be subject to a pending offer, as defined in the "Definitions" section of this proposed rule, for purchase of a conservation easement.

(4) Eligible land must be privately owned. NRCS will not enroll land in FRPP that is owned in fee title by an agency of the United States or State or local government, or land that is already subject to an easement or deed restriction that limits the conversion of the land to nonagricultural use, unless otherwise determined by the Secretary.

(5) Eligible land must be owned by landowners who certify that they do not exceed the adjusted gross income limitation eligibility requirements set forth in Section 1604 of the Farm Security and Rural Investment Act of 2002.

(e) Prior to FRPP fund disbursement, all parcels must have an appraisal. Appraisals shall be completed and signed by a State-certified or licensed appraiser and shall contain a disclosure statement by the appraiser. The appraisal shall conform to either the Uniform Standards of Professional Appraisal Practices or the Uniform Appraisal Standards for Federal Land Acquisitions; or, with NRCS National Office approval, be valued using an alternative real estate evaluation system used by the State government in expending State funds. Where an alternative real estate evaluation system is used, parcels will be given equal priority as those having current appraisals.

(f) At the discretion of the Chief, a standard easement will be required as a condition for program participation.

(g) The landowner shall be responsible for complying with the Highly Erodible Land and Wetland Conservation provisions of the Food Security Act of 1985, as amended, and 7 CFR part 12.

§ 1491.5 Application procedures.

(a) When funds are available, NRCS publishes a Request for Applications in the **Federal Register** or, at the discretion of the Chief, uses another process to solicit applications from eligible entities to cooperate in the acquisition of conservation easements on farms and ranches. Information required in the application will be set forth in the Request for Applications.

(b) To participate, an eligible entity submits an application to NRCS for the acquisition of conservation easements on eligible farm or ranch land, on which

the entity already has pending offers. An entity's application contains a request to fund one or more parcels. All applications must be submitted to the appropriate NRCS State Conservationist by the specified date, as indicated in the Request for Applications.

§ 1491.6 Ranking considerations and proposal selection.

(a) Once the NRCS State Conservationist has assessed entity eligibility and land eligibility, the State Conservationist shall use National and State criteria to evaluate the land and rank parcels, contained within the entity's application. Entities and parcels will be selected for participation based on the entities' responses to the Request for Applications. Selection will be based on national ranking criteria set forth by the Chief in the Request for Applications and state criteria as determined by the State Conservationist, with advice from the State Technical Committee.

(1) Examples of national criteria may include:

- (i) Acreage of prime, unique, and important farm and ranch land to be protected;
- (ii) Total acres of land to be protected with the requested award;
- (iii) Acreage of prime, unique, and important farm and ranch land identified in the National Resources Inventory as converted to nonagricultural uses;
- (iv) Total acres needing protection;
- (v) Number or acreage of historic and archaeological resources to be protected on farm or ranch lands;
- (vi) Anticipated average FRPP cost per acre;
- (vii) Rate of land conversion (*e.g.*, local land use conversion rates);
- (viii) Degree of leveraging guaranteed by eligible entities;
- (ix) History of eligible entity's commitment to conservation planning and conservation practice implementation;
- (x) Eligible entity's history of acquiring, managing, holding, and enforcing conservation easements. This could include annual farmland protection expenditures, monetary donations received, accomplishments, and staffing levels;
- (xi) A description of the eligible entity's farmland protection strategy and how the FRPP application submitted by the entity corresponds to the entity's strategic plan; and
- (xii) Eligible entity's estimated acres of unfunded conservation easements on prime, unique, and important farm and ranch land.

(2) Examples of State or local criteria determined by the State Conservationist include:

- (i) Proximity of parcel to other protected clusters;
- (ii) Proximity of parcel to other agricultural operations and infrastructure;
- (iii) Parcel size;
- (iv) Type of land use;
- (v) Maximum FRPP cost expended per acre;
- (vi) Degree of leveraging by the entity;
- (b) State ranking criteria will be developed on a State-by-State basis.

Prior to proposal submission, interested entities should contact the State Conservationist located in their State for a full listing of applicable National and State ranking criteria.

(c) The NRCS State Conservationist may seek advice from the State Technical Committee (established pursuant to 16 U.S.C. 3861) in evaluating the merits of the applications.

§ 1491.7 Funding priorities.

(a) NRCS will only consider funding the acquisition of eligible land in the Program if the agricultural viability of the land can be demonstrated. For example, the land must be of sufficient size and have boundaries that allow for efficient management of the area. The land must also have access to markets for its products and a support infrastructure appropriate for agricultural production.

(b) NRCS may not fund the acquisition of eligible lands if NRCS determines that the protection provided by the FRPP would not be effective because of on-site or off-site conditions.

(c) NRCS will place a higher priority on easements acquired by entities that have extensive experience in managing and enforcing easements.

(d) During the application period, pending offers having appraisals completed and signed by State-certified appraisers within the preceding one year shall receive higher funding priority by the NRCS State Conservationist. Before funding is released for easement acquisition, the cooperating entity must provide NRCS with a copy of the certified appraisal.

(e) NRCS may place a higher priority on lands and locations that help create a large tract of protected area for viable agricultural production and that are under increasing urban development pressure(s).

(f) NRCS may place a higher priority on lands and locations that link to other Federal, Tribal, or State governments or non-governmental organization efforts with complementary farmland

protection objectives (e.g., open space, watershed and wildlife habitat protection).

(g) NRCS may place a higher priority on lands that provide multifunctional benefits including social, economic, and environmental benefits.

(h) A higher priority may be given to certain geographic regions where the enrollment of particular lands may help achieve National, State, and regional goals and objectives, or enhance existing government or private conservation projects.

(i) NRCS may place a higher priority on the national ranking criteria listed herein than State criteria, if the NRCS Chief deems appropriate.

Subpart B—Cooperative Agreements and Conservation Easement Deeds

§ 1491.20 Cooperative agreements.

(a) NRCS, on behalf of CCC, enters into a cooperative agreement with those entities selected for funding awards. Once a proposal is selected by the State Conservationist, the entity must work with the appropriate State Conservationist to finalize and sign the cooperative agreement incorporating all necessary FRPP requirements. The cooperative agreement addresses:

- (1) The interests in land to be acquired, including the form of the easements to be used and terms and conditions;
- (2) The management and enforcement of the rights acquired;
- (3) The role of NRCS;
- (4) The responsibilities of the easement manager on lands acquired with the assistance of FRPP; and
- (5) Other requirements deemed necessary by NRCS to protect the interests of the United States.

(b) The cooperative agreement will also include an attachment listing the parcels accepted by the State Conservationist, landowners' names, addresses, location map(s), and other relevant information. An example of a cooperative agreement may be obtained from the State Conservationist.

§ 1491.21 Funding.

(a) The State Conservationist, in coordination with the cooperating entity, shall determine the NRCS share of the cost of purchasing a conservation easement.

(b) Under the FRPP, NRCS may provide up to 50 percent of the appraised fair market value of the conservation easement. Entities are required to supplement the NRCS share of the cost of the conservation easement.

(c) Landowner donations up to 25 percent of the appraised fair market

value of the conservation easement may be considered part of the entity's matching offer.

(d) The entity must provide, in cash, at least 25 percent of the appraised fair market value of the conservation easement. When providing its share of the cost of the conservation easement, an entity may:

(1) Provide in cash, at least 25 percent of the appraised fair market value of the conservation easement, when accompanied by a landowner donation; or

(2) Provide at least 50 percent of the purchase price, in cash, of the conservation easement. In this situation, the NRCS share cannot exceed the entity's contribution.

(e) FRPP funds may not be used for expenditures such as appraisals, surveys, title insurance, legal fees, costs of easement monitoring, and other related administrative costs incurred by the entity.

(f) If the State Conservationist determines that the purchase of two or more conservation easements are comparable in achieving FRPP goals, the State Conservationist shall not assign a higher priority to any one of these conservation easements based on lesser cost to FRPP.

§ 1491.22 Conservation easement deeds.

(a) Under FRPP, a landowner grants an easement to an eligible entity with which NRCS has entered into an FRPP cooperative agreement. The easement shall require that the easement area be maintained in accordance with FRPP goals and objectives for the term of the easement.

(b) Pending offers by an eligible entity must be for acquiring an easement in perpetuity, except where State law prohibits a permanent easement.

(c) The conveyance document or conservation easement deed used by the eligible entity may be reviewed and approved by the NRCS National Office and Office of the General Counsel (OGC) before being recorded.

(d) Since title to the easement is held by an entity other than the United States, the conveyance document must contain a "contingent right" clause that provides that all rights conveyed by the landowner under the document will become vested in the United States should the eligible entity (i.e., the grantee[s]) abandon or attempt to terminate the conservation easement. In addition, the contingent right also provides, in part, that the Secretary takes title to the easement, if the eligible entity fails to uphold the easement or attempts to transfer the easement

without first securing the consent of the Secretary.

(e) As a condition for participation, a conservation plan will be developed by NRCS in consultation with the landowner and implemented according to the NRCS Field Office Technical Guide and approved by the local conservation district. The conservation plan will be developed and managed in accordance with the Food Security Act of 1985, as amended, 7 CFR part 12 or subsequent regulations, and other requirements as determined by the State Conservationist. To ensure compliance with this conservation plan, the easement will grant to the United States, through NRCS, its successors or assigns, a right of access to the easement area.

(f) The cooperating entity shall acquire, hold, manage and enforce the easement. The cooperating entity may have the option to enter into an agreement with governmental or private organizations to carry out easement stewardship responsibilities if approved by NRCS.

§ 1491.23 Easement modifications.

(a) After an easement has been recorded, no amendments to the easement will be made without prior approval by NRCS.

(b) Easement modifications will be approved only when easement is duly prepared and recorded in conformity with standard real estate practices, including requirements for title approval, subordination of liens, and recordation, and when the amendment is consistent with the purposes of the conservation easement.

Subpart C—General Administration

§ 1491.30 Violations and remedies.

(a) In the event of a violation of the terms of the easement, the entity shall notify the landowner. The landowner may be given reasonable notice and, where appropriate, an opportunity to voluntarily correct the violation in accordance with the terms of the conservation easement.

(b) In the event that the cooperating entity fails to enforce any of the terms of the easement as determined in the sole discretion of the Secretary, the Secretary and his or her successors and assigns shall have the right to enforce the terms of the easement through any and all authorities available under Federal or State law. In the event that the cooperating entity attempts to terminate, transfer, or otherwise divest itself of any rights, title, or interests of the easement or extinguish the easement or without the prior consent of the Secretary and payment of consideration

to the United States, then, at the option of the Secretary, all right, title, and interest in the conservation easement shall become vested in the United States of America.

(c) Notwithstanding paragraph (a) of this section, NRCS reserves the right to enter upon the easement area at any time to remedy deficiencies or easement violations, as it relates to the conservation plan. The entry may be made at the discretion of NRCS when the actions are deemed necessary to protect highly erodible soils and wetland resources. 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 the easement requirements.

(d) 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.

(e) The conservation easement shall include an indemnification clause requiring landowners to indemnify, defend, and hold harmless the United States from any liability resulting from the negligent acts of the landowner.

(f) In instances where an easement is terminated or extinguished, NRCS will collect CCC's share of the conservation easement based on the appraised fair market value at the time the easement is violated or terminated. CCC's share shall be in proportion to its percentage of original investment.

§ 1491.31 Appeals.

(a) A person or cooperating entity participating in FRPP may obtain a review of any administrative determination concerning eligibility for participation utilizing the administrative appeal regulations provided in 7 CFR part 614.

(b) Before a person may seek judicial review of any action taken under this part, the person must exhaust all administrative appeal procedures set forth in paragraph (a) of this section, and for the purposes of judicial review, no decision shall be a final agency action except a decision of the U. S. Department of Agriculture under these provisions.

(c) Any appraisals, market analyses, or supporting documentation that may be used by the NRCS to determine property value are considered confidential information, and shall be disclosed only as determined by the cooperating entity and NRCS in accordance with applicable law.

§ 1491.32 Scheme or device.

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

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

Signed in Washington, DC, on October 16, 2002.

Bruce I. Knight,

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

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM01-12-000]

Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design

October 22, 2002.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of technical conferences.

SUMMARY: On July 31, 2002, the Commission issued a Notice of Proposed Rulemaking (NOPR) in the above-captioned docket, proposing to amend its regulations to remedy undue discrimination through open access transmission service and standard electricity market design. The Commission has scheduled a series of public conferences, to be held in the Commission Meeting Room, to address specific areas of concern about the proposed rule. Persons interested in speaking at the conferences should file requests to speak on or before October 25, 2002.

DATES: Requests to speak are due: October 25, 2002. Conferences will be held on: November 6, 2002, November 19, 2002, and December 3, 2002.

ADDRESSES: Send requests to speak to: Office of the Secretary, Federal Energy