

data is normally maintained within agency financial systems. The commenter stated that agencies may be able to report on this data in the aggregate, but generally cannot do so on a course or per capita basis since many training and financial systems are not integrated. Agencies are free to determine which of their systems (HR, training, LMS, or financial) the data comes from to meet the data requirements. As long as the data is accurate, agencies can determine how to aggregate the responses in the report as required.

The same commenter suggested that agencies do not capture per diem cost separately from overall travel costs and observed that, generally, all travel costs are recorded as a collective total. Although per diem costs are a separate item in Table 3–I, OPM is mainly interested in the final cost of the travel for training completed by the employee and paid for by the Federal Government.

There were also concerns regarding the granularity of the data to be reported and the general value of that level of detail to OPM. One individual noted that reporting training information by training type, total contact hours, and total cost would appear to be more useful as an aggregate and would significantly lessen the administrative burden on agencies in collecting and managing this data. OPM is requesting the aggregate of the completed training events total cost only. Even though the required reporting process specifies the cost information needed, it is not an all-inclusive list nor is it at the lowest granular level of reporting cost. OPM's objective is to establish a level that is consistent for agencies

Governmentwide. It is important that OPM require only the level of granularity that OMB, Congress and GAO have requested without having to go back out to the agencies to request more information on a regular basis.

One commenter stated that the requirement to begin reporting data as of April 1, 2005, is a burden for some components due to the complexity required to go back in time to attach additional data to historical information. OPM has not required that agencies capture historical training data. Agencies should start reporting data as of December 31, 2006. The April 1, 2005 date was originally set for the pilot to begin where agencies would have had the opportunity to report data and test the system to determine what errors in their reports need to be corrected and to be ready to submit accurate data by the effective date of the final regulation.

A commenter suggested that some components have no current LMS or

electronic mechanism for collecting and submitting the requested data. Thus, the individual hoped that a reasonable amount of time will be allowed to collect and submit these data. OPM is aware there are agencies that do not have a LMS system; however, agencies can meet these standards and requirements by using an e-Training Initiative approved e-Learning solution. OPM has also changed the date when agencies must begin reporting training data to December 31, 2006, and has added a provision (c) under section 410.701, which allows agencies to request an extension based on their plan to meet the reporting requirement at a later date.

#### **E.O. 12866, Regulatory Review**

This rule has been reviewed by the Office of Management and Budget as a significant regulatory action in accordance with Executive Order 12866.

#### **Regulatory Flexibility Act**

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

#### **List of Subjects in 5 CFR Part 410**

Education, Government employees.  
Office of Personnel Management.  
**Linda M. Springer,**  
*Director.*

■ Accordingly, OPM is amending part 410 of 5 CFR as follows:

#### **PART 410—TRAINING**

■ 1. The authority citation for part 410 continues to read as follows:

**Authority:** 5 U.S.C. 4101, *et seq.*; E.O. 11348, 3 CFR, 1967 Comp., p. 275.

#### **Subpart C—Establishing and Implementing Training Programs**

##### **§ 410.311 [Removed]**

■ 2. Remove § 410.311.

#### **Subpart D—Paying for Training Expenses**

##### **§ 410.406 [Removed]**

■ 3. Remove § 410.406.

#### **Subpart G—Reporting**

■ 4. In subpart G, revise the subpart title to read as set forth above:

■ 5. Revise § 410.701 to read as follows:

##### **§ 410.701 Reporting.**

(a) Each agency shall maintain records of training plans, expenditures, and activities in such form and manner as necessary to submit the recorded data to

the Office of Personnel Management (OPM) through the OPM Governmentwide Electronic Data Collection System.

(b) Beginning December 31, 2006, each agency shall report the training data for its employees' training and development at such times and in such form as required for the OPM Governmentwide Electronic Data Collection System, which is explained in the *Guide to Personnel Recordkeeping* and the *Guide to Human Resources Reporting*.

(c) Agencies may request an extension for the timeframe in which they will begin reporting the data under paragraph (b) of this section. OPM may grant an extension based on an approved agency plan to meet the reporting requirements. No extension will be granted for a timeframe beyond December 31, 2007.

(d) Each agency shall establish a Schedule of Records for information required to be maintained by this chapter in accordance with regulations promulgated by the National Archives and Records Administration (NARA).

[FR Doc. 06–4589 Filed 5–16–06; 8:45 am]

BILLING CODE 6325–39–P

## **DEPARTMENT OF AGRICULTURE**

### **Natural Resources Conservation Service**

#### **7 CFR Part 625**

#### **Healthy Forests Reserve Program**

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

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** Title V of the Healthy Forests Restoration Act of 2003 (Act) (Pub. L. 108–148) authorizes the establishment of the Healthy Forests Reserve Program (HFRP). The purpose of this program is to assist landowners in restoring and enhancing forest ecosystems to: Promote the recovery of threatened and endangered species; improve biodiversity; and enhance carbon sequestration. This interim final rule sets forth how NRCS will implement HFRP to meet the statutory objectives of the program.

**DATES:** This rule is effective May 17, 2006. Comments must be received by August 15, 2006.

**ADDRESSES:** Send comments by mail to Robin Heard, Acting Director, Easement

Program Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013-2890; or by e-mail: [Rules@usda.gov](mailto:Rules@usda.gov); attn: Healthy Forests Reserve Program. This rule may also be accessed via Internet through the NRCS homepage at <http://www.nrcs.usda.gov/programs/HFRP>. The rule may also be reviewed and comments may be submitted via the Federal Government's centralized rulemaking Web site at <http://www.regulations.gov>. All comments, including the name and address of each commenter, will become a matter of public record, and may be viewed during normal business hours by contacting NRCS at the address above.

**FOR FURTHER INFORMATION CONTACT:**

Robin Heard, Director, Easement Programs Division, NRCS, P.O. Box 2890, Washington, DC 20013-2890; telephone: (202) 720-1854; fax: (202) 720-4265; e-mail:

[Robin.heard@usda.gov](mailto:Robin.heard@usda.gov), Attention: Healthy Forests Reserve Program.

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

**SUPPLEMENTARY INFORMATION:**

**Background**

America's forests provide multiple benefits and resources for our society including, timber, wilderness, minerals, recreation and wildlife. In addition, a healthy forest ecosystem provides critical habitat for wildlife, sustains biodiversity, protects watersheds, sequesters carbon, and helps purify the air. However, some forest ecosystems have had their ecological functions reduced from a number of factors such as fragmentation, loss of periodic fires, or invasive species. This habitat loss has been severe enough in some circumstances to cause dramatic population decline such as in the case of the ivory-billed woodpecker. Many forests need active management to restore health and function to sustain biodiversity and habitat for species that have suffered significant population decline. Active management of forest ecosystems can also increase carbon sequestration and improve air quality.

There are many forest ecosystems on private lands provide that habitats 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 HFRP to provide financial support to landowners to undertake projects that restore and enhance forest ecosystems to help

promote the recovery of listed species, improve biodiversity, and to enhance carbon sequestration.

The Secretary of Agriculture has delegated authority to implement HFRP to the Chief of NRCS (Chief). In addition, technical support associated with forest management practices may also be provided by the Forest Service. Section 501 of the Act provides that the program will be carried out in coordination with the Secretary of the Interior and the Secretary of Commerce. NRCS will work closely with the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to further the species recovery objectives of the HFRP and to help make available to HFRP program 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).

**Discussion of the Program**

HFRP is a voluntary program to assist landowners in restoring, enhancing, and protecting forestland. The Chief provides national leadership for the implementation of the program. At the state level, the NRCS State Conservationist determines how best to deliver the program and implement national policies in an efficient manner based on the national priorities identified in each sign-up announcement.

NRCS evaluated whether the HFRP could be administered by partnering with third parties to acquire easements, similar to the Farm and Ranch Lands Protection Program, 16 U.S.C. 3838h and 3838i, and concluded that the Act does not provide authority to do so. Thus, the United States Department of Agriculture will hold title to HFRP easements.

*Enrollment Options:* There are three enrollment options for program participants and projects will be enrolled in the approximate proportion of landowner interest expressed in a particular enrollment method. NRCS may enroll land in HFRP through 10-year restoration cost-share agreements; 30-year easements; or 99-year easements. NRCS may offer an easement with duration longer than 30 years and less than 99 years if a different duration is the maximum allowed under state law. The program has a statutory enrollment cap of two million acres. See, 16 U.S.C. 6572.

NRCS will only accept applications for enrollment during announced sign-up periods. The sign-up announcement will identify the national requirements for the particular sign-up, including the geographic extent. NRCS will select

applications for enrollment based on ranking and selection criteria developed for the particular forest ecosystem, following the national guidelines outlined in the sign-up notice. With both HFRP easements and 10-year cost-share agreements, participants will have the opportunity to utilize common management practices and activities to restore, enhance, and protect forest ecosystems.

As required by Section 503 of the Act, 16 U.S.C. 6573 all participants will enter into a restoration plan for the enrolled area (HFRP restoration plan) for the length of their agreement or easement. The HFRP restoration plan includes conservation treatments, such as the conservation practices and measures necessary to the restoration and management of the enrolled area. Where NRCS will provide financial assistance for this conservation treatment, NRCS will enter into a restoration agreement and the HFRP restoration plan will serve as the basis for the agreement. Therefore, participants may receive financial assistance for restoration management practices identified in the restoration plan through enrollment under the 10-year cost-share agreement option or in conjunction with enrollment through either the 30-year or 99-year easement option. If desired by the participant, the HFRP restoration plan can also serve as the basis for obtaining safe harbor or similar assurances, which shall be made available to the landowner through NRCS in coordination with FWS and NMFS.

*Landowner Protections (safe harbor or similar assurances):* Because many listed species occur primarily or exclusively on privately owned property, NRCS believes it is critical to involve the private sector in the conservation and recovery of these species. Many property owners, however, are concerned about land use restrictions, particularly in relation to the prohibition on take of listed species under section 9 of the ESA, which may occur if listed species colonize their property or increase in numbers as a result of their land management. Thus, these landowners may avoid or limit land and water management practices and activities that could enhance and maintain a specific habitat. Additionally, habitat adjustments may cause an improvement in habitat for one species and a decline in habitat for another.

Section 506 of the Act, 16 U.S.C. 6576, requires that the Secretary of Agriculture to make available "safe harbor or similar assurances and protection" ("Landowner Protections")

to program participants with land enrolled in the HFRP and whose conservation activities result in a net conservation benefit for listed species, candidate species, or other species of concern. Landowner Protections are explained further below.

Section 503 of the Act requires that land enrolled in the program be subject to a restoration plan and that the restoration plan require such practices as are necessary to restore and enhance habitat for listed species. Consistent with the section 502 eligibility provisions, the restoration plan actions for lands enrolled in the HFRP will be designed to restore, enhance, or otherwise increase the likelihood of recovery of listed species or candidates for listing, State-listed species, or special concern species. Because program participants must have an HFRP restoration plan, program participants' activities that comply with the terms of the 10-year cost-share agreement, easement and/or HFRP restoration plan are assumed to result in a net conservation benefit that contributes to the recovery of listed species, candidate or other species. In addition, if the means to obtaining Landowner Protections requires the program participant to take additional conservation or protection measures besides those contained in his or her 10-year cost-share agreement or easement, such measures shall be considered part of an HFRP restoration plan for these purposes. In exchange, program participants will be able to obtain safe harbor or similar assurances (Landowner Protections) under ESA section 7(b)(4) or section 7(a)(1), 16 U.S.C. 1536(b)(4), 1539(a)(1).

There are two ways that NRCS plans to help its program participants obtain Landowner Protections, and these protections are very similar under either approach:

(1) NRCS may extend to a HFRP program participant incidental take authorization received by NRCS through biological opinions issued by FWS or NMFS pursuant to section 7(b)(4) of the ESA. Such an incidental take authorization will be obtained by NRCS through consultation with FWS or NMFS under section 7(a)(2) of the ESA. Under this approach, the program participant will be covered by the authorization to NRCS to "take" (as defined in the ESA) listed species in the course of conducting management activities and other compliance with the terms of a 10-year cost-share agreement, or a 30-year or 99-year easement, and associated restoration plan. This may, if the landowner so desires, include authorization for incidental take

associated with returning to baseline resource conditions at the end of the applicable period. Thus, the landowner would not be in violation of ESA section 9 take prohibitions.

(A) With regard to modifications of a restoration plan that contains provisions for a net conservation benefit, NRCS will work with program participants who request modifications to a restoration plan, provided the requested modifications do not adversely affect the forest ecosystem for which the easement or agreement was established or the basis on which the section 7 incidental take authorization was issued, and a net conservation benefit is still likely to be achieved.

(B) In the event where a landowner enrolled in HFRP through a 10-year cost share agreement does not carry out the terms and conditions of the restoration agreement, NRCS has the discretion to terminate the 10-year cost share agreement and associated HFRP restoration plan. Such termination may also require the Services to terminate Landowner Protections. NRCS does not have authority to terminate HFRP easements. In easement circumstances, where a change of conditions requires the Services to terminate a Landowner Protection, NRCS will work to address the changed conditions in the HFRP restoration plan in coordination with the landowner.

(2) NRCS will provide technical assistance to the HFRP program participant to enter into a Safe Harbor Agreement (SHA) with FWS or NMFS under section 10 of the ESA, 16 U.S.C. 1539. ESA Section 10 Safe Harbor Agreements are voluntary arrangements between either FWS or NMFS and cooperating landowners where landowners agree to adopt practices and measures, or refrain from certain activities, that are reasonably likely to result in a net conservation benefit that contributes to the recovery of listed species. In many cases the FWS or NMFS enter into a programmatic SHA with a non-Federal entity (e.g., a State Fish and Wildlife Agency or a local government), who holds the permit and assurances and extends them to landowners who chose to participate in the SHA. SHA requirements are described in the Safe Harbor Policy adopted by FWS and NMFS (64 FR 32717) and, in the case of FWS, regulations at 50 CFR 17.22(c) and 17.32(c). In exchange for their commitment to undertake conservation measures, the landowner receives an enhancement of survival permit under section 10 of the ESA authorizing incidental take that may occur, both as a result of management activities and as

a result of the return to baseline conditions, of the listed species covered by the SHA. Thus the landowner would not be in violation of ESA section 9 prohibitions on take. In addition to the authorization for incidental take provided through the enhancement of survival permit, under an SHA the landowner also receives assurances that:

(A) Provided the SHA is being properly implemented, FWS or NMFS may not require additional or different management activities be undertaken by the permittee without the consent of the permittee; and

(B) The FWS must, with the consent of the permittee, pursue all appropriate options to avoid revoking an enhancement of survival permit.

Whether or not a program participant seeks the assistance of NRCS to obtain the Landowner Protections through either of the approaches described above, NRCS has its own ESA Section 7(a)(1) and Section 7(a)(2) responsibilities. Under ESA Section 7(a)(1), NRCS utilizes its authorities to further the purposes of ESA by carrying out programs for the conservation of endangered and threatened species; this program is an example of NRCS utilizing its authorities to further the purposes of ESA. Consistent with ESA Section 7(a)(2), NRCS will consult with the appropriate Service to ensure that its activities are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat of such species. Pursuant to consultation under ESA Section 7(a)(2), the Service issues a biological opinion and an incidental take statement to the NRCS as the action agency. The incidental take statement identifies those terms and conditions to which the NRCS, as the action agency, must adhere in order to avoid incurring liability that would be associated with unauthorized take of listed species under section 9 of the ESA. Typically, the action consulted upon includes measures that designed to avoid or minimize incidental take, and the terms and conditions simply specify that these agreed upon measures must be implemented.

In its administration of HFRP, NRCS is proposing to enter into programmatic consultation with FWS or NMFS on a forest ecosystem basis, or other appropriate geographic scale, to encompass NRCS activities under HFRP within that area. Pursuant to the consultation, if the appropriate Service issues NRCS a biological opinion and an Incidental Take Statement authorizing NRCS activities under HFRP to occur under certain terms and conditions,

HFRP program participants automatically would be covered by this authorization for incidental take by virtue of their commitment to implement the restoration plan associated with their HFRP easement or 10-year cost share agreement. Courts have held that a party which is neither a federal agency nor an applicant for a permit or license can take members of a listed species without violating the ESA if the action in question was contemplated by an incidental take statement issued to a federal agency under Section 7(a)(2) of the ESA. See, *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996) Thus, HFRP program participants can obtain protection from ESA liability by adhering to the terms and conditions of the Incidental Take Statement issued by the appropriate Service to NRCS for that particular forest ecosystem. HFRP program participants also have the option of entering into a Safe Harbor Agreement with FWS or NMFS to receive similar protections.

The HFRP and associated Landowner Protections will benefit listed species while giving private landowners protection from potential restrictions of section 9 of the ESA by authorizing the take of listed species that may occur during restoration actions, ongoing operations, or returning to baseline conditions at the end of the 10-year cost-share agreement or a 30- or 99-year easement. These Landowner Protections operate with lands enrolled in the HFRP and are valid for as long as the participant is complying with the terms under which the Landowner Protections were given.

**Land Eligibility:** Consistent with section 502(b) of the Act, 16 U.S.C. 6572(b), NRCS identifies in 625.4 that it will consider land eligible if it is privately owned land, including Indian trust land, the enrollment of which will restore, enhance, or otherwise measurably increase the likelihood of recovery of listed species, candidates for such listing, State-listed species, or species identified by the Chief for special funding consideration. Privately-owned land does not include land owned by the federal, state, or local government. NRCS will work with FWS and/or NMFS in identifying particular forest ecosystems that meet these eligibility criteria.

In enrolling such land, NRCS will give additional consideration to enrolling land that improves biological diversity and increases carbon sequestration. NRCS will only enroll land offered voluntarily by the landowner.

Lands in addition to the above described eligible lands may also be

enrolled if NRCS determines enrollment of such land is necessary for the efficient administration of an easement or restoration cost-share agreement.

**Enrollment Priority:** As provided in Section 502(g) of the Act, 16 U.S.C. 6572(g), NRCS will give priority to the enrollment of land capable of supporting the forest ecosystem conditions that will provide the greatest conservation benefit primarily to species listed under the ESA and secondarily to other species that are candidates for such listing, State-listed species, or species identified by the Chief for special funding consideration. NRCS will not enroll otherwise eligible lands if it determines that the current land use has modified site conditions to such an extent that the re-establishment of the desired forest ecosystem conditions is impracticable or infeasible. NRCS will also emphasize program implementation to restore the Nation's forest land for the improvement of biological diversity and the sequestration of carbon.

NRCS will consider the cost-effectiveness of each 10-year cost-share agreement or easement, and associated HFRP restoration plan, so as to maximize the Federal investment. However, NRCS will not utilize a strict environmental benefits index, but will evaluate the enrollment of particular land parcels based upon their site conditions, the feasibility to restore the desired forest cover, proximity to other parcels with the desired forest cover, contribution of resources by partnering organizations, and other resource and cost factors. NRCS seeks public input regarding how best to maximize the federal investment as required by statute.

NRCS may place enrollment priority upon certain regional forest ecosystems, such as the longleaf pine forest ecosystem of the Southeast, riparian forest ecosystems of California and the Southwest, mesic hardwood forest ecosystems of the Appalachian region, coastal coniferous forests of New England, and temperate rainforests of the Pacific Northwest. Each of these forest ecosystems have listed endangered and threatened species that could benefit from more active forest management practices and measures. NRCS will identify through a sign-up notice process the geographic scope and ranking priorities for that particular sign-up.

NRCS considered several methods of ranking the applications, including a state-by-state ranking, a national ranking, or a combination of the two methods. Under the combination method, NRCS, with the input of the

applicable State Conservationists, will develop a ranking process for applications received within that forest ecosystem. States would initially screen applications based on criteria contained in the sign-up announcement and the more locally-derived specific criteria. NRCS seeks public input about the manner in which NRCS should select particular projects for funding. In carrying out the HFRP, NRCS may consult with non-industrial private forest landowners, other Federal agencies, State fish and wildlife agencies, State forestry agencies, State environmental quality agencies, and non-profit conservation agencies.

#### **Provisions That Apply to Both Easements and 10-Year Restoration Cost-Share Agreements**

As required by section 503 of the Act, 16 U.S.C. 6573, lands enrolled in HFRP shall be subject to a restoration plan for the period of time the land is covered by either a 10-year cost share agreement or easement that requires such restoration practices as necessary to restore and enhance habitat for listed species under ESA and animal and plant species before the species reach such endangered or threatened status, such as candidate, State-listed species, and special concern species as identified by the Chief. NRCS will work closely with FWS and NMFS to identify those practices and measures that will be included as the conservation treatment within the HFRP restoration plan. NRCS believes that the close collaboration with FWS and NMFS will aid in the coordination of the implementation of the program and in establishing program policies. However, no determination by FWS, NMFS, the Forest Service, federal or state agency, conservation district, or other organization will compel the NRCS to take any action which the NRCS determines will not serve the purposes of the program established by this part.

Both HFRP easements and 10-year cost-share agreements will require that the land is managed to maintain the vitality of the forest ecosystem as described in the HFRP restoration plan. The HFRP restoration plan will take into account management practices and measures necessary for further species recovery objectives of the HFRP and may serve as the basis for program participants to obtain Landowner Protections as described above.

Section 503 of the Act, 16 U.S.C. 6573, requires that NRCS and the landowner will jointly develop the HFRP restoration plan, in coordination with the Secretary of the Interior. Similar to the Grassland Reserve

Program and the Wetland Reserve Program (which are other conservation programs administered by NRCS), the "restoration agreement" will be the legal instrument used to incorporate the HFRP restoration plans into both the 10-year cost-share agreements and easements and will provide cost-share assistance for implementing measures that will restore and enhance habitat for listed species or candidate, state-listed or species of special concern. NRCS has determined that program implementation is greatly enhanced in this way if it has the flexibility to utilize the same type of legal instrument, in this case the restoration agreement, for providing financial assistance for restoration implementation activities to program participants.

Section 506(b) directs that if Landowner Protections require the taking of measures that are in addition to the measures covered by the applicable HFRP restoration plan, the cost of the additional measures, including the cost of any permit, are considered part of the HFRP restoration plan for purposes of financial assistance. As such, any additional measures that might be required so that the HFRP participant can qualify for Landowner Protections would be eligible for cost-share assistance under section 504 of the Act, 16 U.S.C. 6579.

NRCS will work with the program participant and the Services to ensure that these measures are designed to restore and enhance habitat so as to provide a net conservation benefit for listed species, candidate species, State-listed species, and special concern species. These measures would be site-specific and would be addressed as management activities in the HFRP restoration plan. Failure by the program participant to perform the activities required by the HFRP restoration plan and/or any measures required can result in violation of the easement or 10-year cost-share agreement, and in the loss of Landowner Protections.

A major program participation requirement contained in § 625.11 and § 625.12 of the interim final rule is the inclusion of a right under an easement or 10-year cost-share agreement for NRCS to determine if a landowner's specific use of the enrolled area may be permitted as compatible with the purposes for which the land was enrolled into HFRP. Under the terms of an easement, the landowner would retain fee title to the land and such uses that are compatible with maintaining the conservation benefits for priority species. Such uses may include hunting, fishing, hiking, camping, bird watching, and other undeveloped recreational

activities. Under the terms of a 10-year cost-share agreement, NRCS will include provisions within the agreement document that identify those activities determined compatible with the short-term duration of enrollment. For a use to be considered compatible, the Chief or designee would determine that the use is consistent with the purposes of HFRP: (1) Promoting the recovery of listed species, (2) improving biodiversity, and (3) enhancing carbon sequestration. NRCS seeks comment about the compatible use process for HFRP.

To be determined compatible, the type, method, timing, duration, and extent of a use must be an integral and positive part of the overall HFRP restoration plan for the easement or 10-year cost-share agreement. For example, in an easement area that is a restored forest ecosystem, a salvage cut to remove diseased or damaged trees may be appropriate. A selective harvest of over-story trees which opens up the canopy to provide for under-story vegetative diversity may also be compatible in specific cases. A clear cutting approach to timber harvest, however, for the purpose of achieving economic gain at the expense of the forest ecosystem or essential wildlife habitat would not be compatible.

Once an easement or 10-year cost-share agreement has been signed, a program participant can request modifications to the HFRP restoration plan that do not adversely affect the forest ecosystem for which the easement or 10-year cost-share agreement was established or the basis on which Landowner Protections were issued. However, as determined by NRCS, in coordination with FWS or NMFS, the modification must result in equal or greater species conservation.

Section 504 of the Act, 16 U.S.C. 6574, provides for cost-share assistance for the adoption of approved practices on land enrolled through both the easement and 10-year cost-share agreement options. However, the Act limits the rate of cost-share assistance depending upon the duration of the enrollment. For 99-year easements, NRCS will reimburse a program participant an amount not less than 75 percent nor more than 100 percent of the cost of approved practices. For 30-year easements, NRCS will reimburse a program participant an amount not more than 75 percent of the cost of approved practices. For 10-year cost-share agreements, NRCS will reimburse a program participant an amount not more than 50 percent of approved practices.

*Easements:* Section 625.4 of the interim final rule provides that for participation in an easement option, the applicant must be the owner of the eligible land. To grant an easement to the United States, the landowner must possess clear title to the land or be able to provide subordination agreements from third parties with interest in the land. Additionally, there must be access to the property from a public road. The landowner must comply with the terms of the easement and associated restoration agreement, if one is required.

NRCS intends to acquire easements under HFRP utilizing a standard conservation easement deed similar to the deed used by the Grasslands Reserve Program (GRP). The standard conservation easement, termed a negative restrictive easement, is an interest in land where the holder of the easement has the right to require the owner of the burdened land (i.e., the easement area) to do or not to do specified things with respect to that land. Under a negative restrictive easement, the drafter of the easement deed anticipates the possible uses of the property that might interfere with forest resources and specifically prohibits them in the easement document. Negative restrictive easements tend to work well in programs where the landowner will continue to conduct various activities on the property and only a few activities need to be prohibited to meet program purposes. NRCS also considered utilizing a reserved interest easement deed similar to the deed used for the Wetlands Reserve Program (WRP). Under a reserved interest deed, the purchaser acquires all rights in the property not reserved to the landowner. Thus, reserve interest deeds identify to the landowner the rights s/he is keeping in the property and thus knows which activities are permitted and which are prohibited. Activities that do not interfere with protecting forest resources purposes would be identified in the deed as reserved to the landowner. Reserved interest easements tend to work very well in programs where habitat protection is a primary purpose and the landowner is not expected to perform many activities on the property. NRCS seeks public comment regarding which deed form should be used in the administration of HFRP.

Easement payments are based on appraisals that derive value from the method commonly referred to as the before-and-after appraisal method. Under this appraisal method, the amount paid for the easement is the fair market value of the easement which is determined by a before-and-after

appraisal method done by a certified land appraiser. A certified land appraiser appraises the fair market value of the land before an HFRP easement is acquired and subtracts from this amount what the fair market value of the land would be after an HFRP easement is acquired. This difference in value represents the value of the HFRP easement and will form the basis of compensation paid to an HFRP program participant. For easements longer than 30 years and not more than 99 years, NRCS will offer to pay the landowner not less than 75 percent, nor more than 100 percent, of the value of the easement for the time period the land is subject to the easement, as determined by a before-and-after appraisal. In the case of a 30-year easement, NRCS will offer to pay the landowner an amount equal to not more than 75 percent of the value of the easement for the time period the land is subject to the easement, as determined by a before-and-after appraisal.

Easement payments may be provided in one lump sum payment at the time of closing or participants may elect to receive installment payments. Participants who elect to receive installment payments can receive no more than 10 annual payments of equal or unequal amount, as agreed to by NRCS and the landowner.

In addition to compensation for the conveyance of an easement, a landowner may receive cost-share assistance towards the establishment or maintenance of practices and measures that restore and enhance habitat for listed species, candidate species, State-listed species, and other species of special concern. These practices and measures must be approved by the Chief or his designee, to be eligible for cost-share assistance under HFRP.

NRCS will provide cost-share assistance to program participants for practices and measures, including those necessary to obtain Landowner Protections, which are incorporated into an HFRP restoration plan. The extent of cost-share assistance will be up to the maximum allowed by law, based on the NRCS State average cost list, and subject to the availability of funds. The Act provides an option for NRCS to base cost-share assistance upon either actual costs or an average cost list developed by NRCS. See 16 U.S.C. 6574. NRCS determined to use the average cost list consistent with its cost-share programs. NRCS believes the average cost approach is more cost-efficient when considering the administrative costs associated with utilizing the actual cost approach in terms of the additional documentation that needs to be

submitted by the program participant and processed by NRCS. NRCS welcomes public comment regarding the use of average or actual costs when it provides cost-share assistance under HFRP.

Lastly, section 504(d) of the Act, 16 U.S.C. 6574(d), provides that NRCS may accept and use contributions of non-federal funds to make payments.

*10-Year Restoration Cost-Share Agreements:* Instead of applying for entry into HFRP through one of the easement options, section 502(f) of the Act, 16 U.S.C. 6572(f), allows landowners, including other people who have general control of property for the agreement period, to apply for enrollment into HFRP through 10-year cost-share agreements. HFRP 10-year cost-share agreements do not involve a transfer of real property rights like under the easement enrollment options. Applicants who do not have fee title ownership of the enrolled area need to provide evidence of control of the property for the length of the agreement. If cost-share payments are to be divided between the landowner and other participants or multiple landowners, the 10-year cost-share agreement will need to be signed by all parties, indicating their respective share of the payments. As required by section 504(c) of the Act, 16 U.S.C. 6574(c), cost-share payment amounts under the 10-year cost-share agreement option will not exceed 50 percent of the average cost of approved practices and measures. Payments will be paid upon completion of a practice, a measure, or identifiable component of a practice.

Cost-shared practices and measures shall be maintained by the participant for the life of the practice or measure. The life of the practice or measure is determined by the NRCS State Conservationist, and shall be consistent with other NRCS conservation programs. All practices and measures will be implemented in accordance with the NRCS requirements.

Persons who enroll land initially through a 10-year cost-share agreement may subsequently enroll the land through an easement, providing the application ranks high enough to be funded, all other eligibility criteria are met, and funds are available to acquire an easement. The easement application will be considered a new offer that will be evaluated with all other new offers. This policy allows NRCS to obtain longer term protection on lands considered valuable for enrollment.

## Summary of Provisions and Request for Comment

NRCS welcomes comments on all aspects of this interim final rule. The following describes the specific requirements in each section of the regulation. Activities conducted by NRCS would be performed by representatives of NRCS or third party providers hired by NRCS as identified in 7 CFR part 652. Section 505(b) of the Act, 16 U.S.C. 6575(b), authorizes NRCS to request the services of, and enter into cooperative agreements with, individuals or entities identified as technical service providers pursuant to section 1242 of the Food Security Act of 1985, as amended, 16 U.S.C. 3842.

### Section 625.1 Purpose and Scope

This section describes the general purpose and scope of HFRP. The purpose of HFRP is to assist landowners, on a voluntary basis, in restoring, enhancing, and protecting forest ecosystems on private lands through 10-year cost-share agreements and easements. The objectives of HFRP are to promote the recovery of listed species, maintain and improve plant and animal biodiversity, and enhance carbon sequestration.

The Chief 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, the Commonwealth of the Northern Mariana Islands, and the Trust Territories of the Pacific Islands. The Chief may determine to offer the program nationwide, in particular regional forest ecosystems, or in particular States, depending upon the extent of funding available, the identification of eligible forest ecosystems, and other considerations.

### Section 625.2 Definitions

This section sets forth the definition of terms that are utilized throughout the regulation. Many of these definitions are not unique to HFRP. However, several terms included in this section have not been previously defined or they have meanings different than how these terms are understood under other conservation programs.

For example, NRCS is including a definition for "conservation treatment" that specifies that the practices, measures, and activities encompassed by a conservation treatment must meet HFRP purposes. NRCS expects that the actions needed to restore or enhance habitat for listed species may require the implementation of work more than the adoption of conservation practices

currently identified in NRCS Field Office Technical Guides. In particular, the enrolled land will require a comprehensive system of restoration and management actions to meet HFRP purposes. For example, the terms and conditions of an Incidental Take Statement may require certain actions that are not NRCS conservation practices. Since there may be measures and activities that are known to improve habitat conditions and/or provide the basis for Landowner Protections, NRCS believes that the term conservation treatment describes the contents of an HFRP restoration plan more completely. Therefore, such practices, measures, and activities that improve habitat conditions for listed species or other species of concern are identified collectively as eligible for financial assistance as necessary conservation treatment.

In addition, the term "consultation" or "consult with" under these regulations would mean to talk things over for the purpose of providing information, to offer an opinion for consideration, or to meet for discussion or to confer. The Act calls for the Secretary of Agriculture to "consult with" a wide range of groups, individuals, and agencies. Groups the Secretary may consult with include non-industrial private forest landowners, other Federal agencies, State fish and wildlife agencies, State forestry agencies, other State conservation agencies, and non-profit conservation organizations. See 16 U.S.C. 6567. The term under HFRP does not have the same meaning as that same or similar term is understood to have under the ESA.

Section 502 of the Act, 16 U.S.C. 6572, also specifies that the implementation of HFRP will be in "coordination" with FWS and NMFS. NRCS proposes in this regulation to distinguish "coordination" from ESA "consultation." While NRCS will enter into ESA consultation with the Services where appropriate under section 7(a) of the ESA, the term "coordination" means something different for HFRP purposes. NRCS has defined "coordination" as NRCS taking the lead in making all decisions associated with implementing the program, involving FWS and NMFS, and utilizing information provided by these agencies in HFRP implementation.

NRCS is the leading agency in conservation planning in the Federal Government, and HFRP will utilize this technical capability of the Agency. As part of any easement or 10-year cost-share agreement, NRCS will develop a conservation plan that includes the schedule for implementation for

conservation practices and measures and other conservation treatment that will be implemented to restore, enhance, and protect forest ecosystems enrolled in HFRP. NRCS has named the required conservation plan the "HFRP restoration plan."

NRCS has included the term "Landowner Protections" in the HFRP interim final rule. Such protections may include those associated with: (1) Incidental take authorization issued to NRCS pursuant to an Incidental Take Statement under section 7(b)(4) of the ESA, which automatically conveys to HFRP participants, and (2) similar protections associated with Safe Harbor Agreements under section 10(a)(1) of the ESA, as described in the SHA regulations issued by the FWS at 50 CFR 17.22 and 17.32, and the Safe Harbor policy issued by FWS and NMFS. Under either approach, Landowner Protections will most likely allow HFRP participants to provide beneficial habitat that may attract listed species to their property, or increase the number of individuals of listed species already present, while not violating the ESA if the program participant chooses to return the enrolled area to baseline conditions upon expiration of the term of the HFRP easement or restoration cost-share agreement.

#### *Section 625.3 Administration*

This section describes how the HFRP will be administered under the general supervision and direction of the Chief. The Chief delegates certain responsibilities to the NRCS State Conservationists.

NRCS will coordinate with FWS and NMFS in the implementation of the program and in establishing program policies. The NRCS may also consult with the nonindustrial private forest landowners, 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. However, this rule specifies that no determination by any of these entities will compel the NRCS to take any action which the NRCS determines will not serve the purposes of HFRP.

#### *Section 625.4 Program Requirements*

This section sets forth the requirements that program participants must meet to enroll lands into the HFRP. NRCS sets forth the basic requirements in paragraph (a) of this section. In general, NRCS will purchase conservation easements or enter into 10-year cost-share agreements with eligible

landowners who voluntarily enroll in the program. To participate in HFRP, a landowner will agree to the implementation of a HFRP restoration plan.

If a program participant must take management measures that are in addition to the measures covered by the applicable HFRP restoration plan in order to obtain Landowner Protections, the cost of additional measures, as well as the cost of any permit, if incorporated into the HFRP restoration plan, are considered eligible for financial assistance as part of the HFRP restoration plan.

Paragraph (b) specifies the eligibility requirements of program participants. In particular, this interim final rule requires that a program participant be a landowner. However, a landowner includes those persons who have control of the land for the term of the program enrollment period.

To grant an easement, a landowner must possess clear title to the land or be able to provide subordination agreements from third parties with interest in the land. The landowner must also provide NRCS access to the easement area from a public road.

Paragraph (c) of this section defines the type of land that will be eligible for enrollment. Land is eligible if it is private land, including tribal land. The land must, subsequent to enrollment, restore, enhance, or otherwise measurably increase the likelihood of recovery of a listed species or other species of concern such as state-listed species or candidates for federal listing. Among the land types eligible for enrollment, NRCS may enroll other lands adjacent that would contribute significantly to the conservation benefit of the ecosystem or improve the practical administration of the program.

Paragraph (d) of this section describes lands that NRCS will not enroll into HFRP. These ineligible lands include lands owned by a governmental entity, lands already subject to an easement or deed restriction that provides for the protection of wildlife habitat, or lands where implementation of forest restoration practices would be futile due to on-site or off-site conditions. These on-site or off-site conditions could result from the presence of hazardous waste, incompatible land use patterns, or other factors that prove either impracticable or costly to address.

#### *Section 625.5 Application Procedures*

This section provides the sign-up notice and application procedures for a person to express their wish to enroll land into HFRP. Interested applicants can file an application pursuant to a

sign-up notice with their local USDA Service Center.

Paragraph (c) provides that the applicant, by filing an application, will allow an NRCS representative to come onto their property to determine whether the land is eligible and a priority for enrollment. NRCS will notify the applicant when the agency intends to visit the property, and the applicant, of course, is entitled to accompany the NRCS representative on any such visits.

Paragraph (d) provides the flexibility for an applicant to improve their ranking score by voluntarily accepting a lesser payment amount than that being offered by NRCS.

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

The State Conservationist will develop a ranking process. As required by section 502(g) of the Act, 16 U.S.C. 6572(g), NRCS will give priority to the enrollment of land that provides the greatest conservation benefit primarily to listed species under the ESA and secondarily to other species that are candidates for such listing, State-listed species, or species identified by the Chief for special funding considerations. NRCS will consider the cost-effectiveness of each 10-year cost-share agreement and easement so as to maximize the federal investment.

#### *Section 625.7 Enrollment of Easements*

This section of the interim final rule describes the process for enrolling easements into the program. NRCS will consider land enrolled into HFRP if an applicant responds to an NRCS offer of tentative acceptance with a notice of intent to continue. The applicant's notice of intent to continue will authorize NRCS to proceed with easement acquisition activities, including appraisal, survey, title clearance, and other matters. Prior to NRCS and the landowner executing the easement on the land, NRCS may withdraw its offer of enrollment because of title clearance issues, hazardous waste issues, lack of availability of funds, or other matters related to whether the enrollment of the particular parcel of land will meet program requirements.

#### *Section 625.8 Compensation for Easements*

This section of the interim final rule describes the level of compensation that will be provided to HFRP program participants for the enrollment of up to a 99-year easement, a 30-year easement, and a restoration cost-share agreement. As described earlier in this preamble,

the compensation rates for easements will be based upon before-and-after appraisals and the duration of the easement.

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

This section of the interim final rule describes the terms and conditions of the 10-year cost-share agreement. In particular, a 10-year cost-share agreement will incorporate the provisions of the HFRP restoration plan, be for a period of 10 years, specify the requirements for operation and maintenance of applied practices and measures, and specify the extent to which NRCS will provide cost-share assistance for the adoption or implementation of the approved conservation treatment. This section also describes the limited circumstances under which a 10-year cost-share agreement can be terminated.

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

This section of the interim final rule describes the availability of cost-share assistance for practices and measures identified in the HFRP restoration plan, including cost-share assistance for the implementation of practices and measures related to obtaining Safe Harbor Assurances and related permits. HFRP program participants can receive cost-share assistance for the implementation of approved practices and measures at varying rates, depending upon the duration of the easement or if enrollment is through a restoration cost-share agreement: (1) Up to 100% cost-share assistance for activities implemented on up to a 99-year easement; (2) up to 75% cost-share assistance for activities implemented on a 30-year easement; and (3) up to 50% cost-share assistance for activities implemented on land enrolled through a 10-year cost-share agreement.

Practices or measures eligible for cost-share assistance under HFRP shall be approved by NRCS, in coordination with FWS and NMFS. These practices will include those necessary to restore, enhance, or maintain habitat conditions or otherwise increase the likelihood of recovery of listed species, candidate, and other species identified by the Chief for special funding consideration.

#### *Section 625.11 Easement Participation Requirements*

This section of the interim final rule describes the responsibilities the program participant has by enrolling an easement into HFRP. An easement is an interest in land and is binding, for the duration of its term, upon the

landowner and anyone claiming title, rights, or interests under the landowner. In particular, a program participant must grant an easement to the United States and agree to the restoration of the property in accordance with the goals and objectives of HFRP.

Additionally, the program participant must provide NRCS a right of access to the easement area sufficient for the NRCS to exercise the rights it acquires under the easement. By enrolling an easement into HFRP, a program participant agrees to the use of the easement area for the restoration, protection, enhancement, maintenance, and management of forest ecosystems and recovery of a listed species or other species of concern. NRCS may authorize a landowner subject to an HFRP easement to engage in certain activities if such activities are compatible with the purposes for which the easement was acquired.

#### *Section 625.12 The HFRP Restoration Plan Development*

This section of the interim final rule sets forth the terms and conditions under which NRCS will enter into a HFRP restoration plan. Eligible activities include land management, vegetative, and structural practices and measures in forestland ecosystems that will restore, enhance, or maintain habitat conditions or otherwise increase the likelihood of recovery of listed species, or candidate, state-listed or species of special concern as identified by the Chief. Specific activities eligible for payment will be determined by the NRCS at the State level in coordination with FWS and NMFS.

The HFRP restoration plan will specify the manner in which the enrolled land shall be restored, protected, enhanced, maintained, and managed for forest ecosystems and recovery of listed species and other species selected by the Chief for special funding consideration.

#### *Section 625.13 Modification of the HFRP Restoration Plan*

This section of the interim final rule provides how the HFRP restoration plan may be modified.

#### *Section 625.14 Transfer of Land*

This section of the interim final rule provides how applications will be handled if the original applicant transfers the land that is encompassed by the application before the closing of the easement. In general, any transfer of the property prior to the landowner acceptance into the program will void the offer of enrollment. However, 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 or cost-share agreement terms and conditions.

NRCS will hold the new landowner responsible for assuring completion of all measures and practices required by the restoration plan. NRCS will make cost-share payments to the new landowner upon presentation of an assignment of rights or other evidence that title had passed. However, NRCS does not bear any responsibility for any full payments or partial distributions of funds between the original landowner and the landowner's successor.

#### *Sections 625.15 Through 625.19*

These sections of the interim final rule are common provisions in NRCS easement and cost-share programs. They include how NRCS will handle violations and recovery of costs, including the ability to recover under a liquidated damages provision in 10-year cost-share agreements.

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

A person participating in the HFRP may obtain a review of any administrative determination concerning eligibility for participation utilizing the administrative appeal procedures under 7 CFR part 614 for non-Title XII programs. 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 part 614. Additionally, any appraisals, market analysis, or supporting documentation that may be used by the NRCS in determining property value are considered confidential information, and NRCS will only disclose such information as determined at the sole discretion of the NRCS in accordance with applicable law.

If NRCS determines that a person has employed a scheme or device to defeat the purposes of HFRP, 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.

#### **Regulatory Certifications**

##### *Executive Order 12866*

The Office of Management and Budget (OMB) determined that this interim final rule is not significant and it was not reviewed by the Office of

Management and Budget under Executive Order 12866.

##### *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*

The Regulatory Flexibility Act is not applicable to this interim final rule because the Natural Resources Conservation Service (NRCS) is not required by 5 U.S.C. 553, or by any other provision of law, to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

##### *Small Business Regulatory Enforcement Fairness Act of 1996*

This interim final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This interim final rule will not result in 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.

Section 553(b)(B) of Title 5 of the United States Code exempts rules from notice and comment procedures if such rules would be "impracticable, unnecessary, or contrary to the public interest." NRCS hereby finds that there is "good cause" to proceed with interim final rule making because this rulemaking is to implement a pilot program effort of \$2.5 million that Congress has authorized for FY 2006. The \$2.5 million will be able to purchase only approximately 15 easements encompassing an estimated 3000 acres, and thus the scope of the rule is quite small compared to other NRCS program efforts where NRCS purchases over 1000 conservation easement encompassing over 150,000 acres annually. Additionally, many of the interim rule's provisions relate to acquisition of conservation easements and are based upon standard acquisition provisions utilized under other NRCS conservation easement programs. NRCS will base the final rule upon the experience gained from the pilot program effort and the public comments it receives pursuant to this rulemaking. Therefore, the 90-day comment period associated with this rulemaking will provide the public the opportunity to comment prior to NRCS implementing

HFRP on a more regional or national scale. To ensure that NRCS has the regulatory framework in place for a pilot program effort for an FY 2006 sign-up, NRCS has determined that it is in the public interest for this interim rule to be in effect upon its publication in the **Federal Register**.

##### *Environmental Analysis*

An Environmental Assessment (EA) has been prepared to assist in determining whether this interim final 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 EA, NRCS has issued a Finding of No Significant Impact (FONSI). Copies of the EA and FONSI may be obtained from Diane Gelburd, Director, Ecological Sciences Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013-2890. The HFRP EA and FONSI will also be available at the following Internet address: [http://www.nrcs.usda.gov/programs/Env\\_Assess/HFRP/HFRP.html](http://www.nrcs.usda.gov/programs/Env_Assess/HFRP/HFRP.html). Written comments on the EA and FONSI should be sent to Diane Gelburd, Director, Ecological Sciences Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013-2890, or submit them via the Internet to [diane.gelburd@usda.gov](mailto:diane.gelburd@usda.gov).

##### *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:

- 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/14.03 minutes

##### *Government Paperwork Elimination Act*

NRCS is committed to compliance with the Government Paperwork Elimination Act (GPEA) 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.

##### *Executive Order 12988, Civil Justice Reform*

This interim final 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 interim final 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 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 million or more by any State, local, or Tribal government, or anyone in the private sector; therefore, a statement under section 202 of the Unfunded Mandates Reform Act is not required.

#### **List of Subjects in 7 CFR Part 625**

Administrative practice and procedure, Agriculture, Soil conservation.

■ For the reason stated in the preamble, NRCS is adding a new part 625 in Chapter VI of 7 CFR 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.
625.8	Compensation for easements.
625.9	10-year restoration cost-share agreements.
625.10	Cost-share payments.
625.11	Easement participation requirements.
625.12	The HFRP restoration plan development.
625.13	Modification of the HFRP restoration plan.
625.14	Transfer of land.

625.15	Violations and remedies.
625.16	Payments not subject to claims.
625.17	Assignments.
625.18	Appeals.
625.19	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, enhancing, and protecting forestland resources on private lands through easements and 10-year cost-share agreements.

(b) The objectives of HFRP are to:

- (1) Promote the recovery of endangered and threatened species under the 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 definitions shall be applicable to this part:

*Activity* means an action other than a conservation practice that is included as a part of a restoration agreement; such as a measure, incremental movement on a conservation index or scale, or a pilot or assessment.

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

*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 Natural Resources Conservation Service or the person delegated authority to act on behalf of the Chief.

*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.

*Consultation or “consult with”* means 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.

*Contract* means the document that specifies the obligations and rights of any individual or entity who has been accepted for participation in the program.

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

*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 forestland 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 Service* is an agency of the United States Department of Agriculture.

*HFRP* means the Healthy Forests Reserve Program authorized by Title V of the Healthy Forests Restoration Act of 2003.

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

*Indian trust lands* means real property in which:

(1) The United States holds title as trustee for an Indian or Tribal beneficiary; or

(2) An Indian or Tribal beneficiary holds title and the United States maintains a trust relationship.

*Landowner* means an individual or entity having legal ownership of land, including those who may be buying land under a purchase agreement or who have legal control of the land for the term of the HFRP enrollment period for which enrollment is sought.

Landowner may include all forms of collective ownership including joint tenants, tenants in common, and life tenants and remaindermen in a property.

*Landowner Protections* means 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, and/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.

*Liquidated damages* means a sum of money stipulated in a restoration agreement which the participant agrees to pay NRCS if the participant fails to adequately complete the restoration agreement. The sum represents an estimate of the anticipated or actual harm caused by the failure, 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 United States Department of Agriculture.

*Participant* means an applicant who is a party to a 10-year cost share agreement or an option agreement to purchase.

*Practice* means a specified treatment, such as a structural or land management practice, that is planned and applied according to NRCS standards and specifications.

*Private land* means land that is not owned by a governmental entity, and includes land that is considered Indian trust lands.

*Restoration* means implementing any conservation practice (vegetative, management, or structural) or measure that improves the values and functions of forestland (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 forestland for the purposes of HFRP under either an easement 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, 16 U.S.C. 1536(b)(4), 1539(a)(1). Under the Safe Harbor Agreement and an associated enhancement of survival permit, the non-federal property owner implements actions that will result in a net conservation benefit for species listed under the Act without the risk of further restrictions pursuant to section 9 of the Act, which prohibits take of listed species. The property owner also receives assurances related to modifications of the SHA or termination of the permit. (See "Landowner Protections," above.)

*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 direct and supervise NRCS activities within a specified State, the Pacific Basin, or the Caribbean Area.

*Technical service provider* means an individual, private-sector entity, or public agency certified or approved by NRCS to provide technical services through NRCS or directly to program participants, as defined in 7 CFR part 652.

#### § 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.

(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, 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 consult with nonindustrial private forest landowners, 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 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 Endangered Species Act (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 forestland functions and values. Specific restoration, protection, enhancement, maintenance, and management activities may be undertaken by the landowner or other NRCS designee.

(b) *Landowner eligibility.* To be eligible to enroll an easement in the HFRP, a person 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 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; and

(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 the restored forestland 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.

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

(1) Lands owned by a governmental entity;

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

(3) Lands where implementation of restoration practices would be futile due to on-site or off-site conditions.

#### § 625.5 Application procedures.

(a) *Sign-up process.* NRCS will publish an HFRP sign-up notice with sufficient time for individuals and entities to consider the benefits of participation prior to the opening of the sign-up period. In the public sign-up

notice, the Chief will announce and explain the rationale for decisions for 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 and program agreements 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 under new program agreements 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 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 than is being offered by NRCS.

#### § 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 biological diversity, 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 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, USDA may select a lower ranked application that can be fully funded. Applicants may choose to change the duration of the easement or agreement or reduce acreage amount offered if the application ranking score is not reduced below that of the score of the next available application on the ranking list.

#### § 625.7 Enrollment of easements.

(a) *Offers of enrollment.* Based on the priority ranking, NRCS will notify an affected landowner of tentative acceptance into the program for which the landowner has 15 calendar days to sign a letter of intent to continue.

(b) *Effect of letter of intent to continue (enrollment).* An offer of tentative acceptance into the program does not bind NRCS or the United States to acquire an easement, nor does it bind the landowner to convey an easement or agree to HFRP restoration plan activities. However, receipt of an executed letter of intent to continue will authorize NRCS to proceed with easement acquisition activities and the land will be considered enrolled into HFRP.

(c) *Acceptance of offer of enrollment.* An option agreement to purchase will be presented by NRCS to the landowner, which will describe the easement area; the easement terms and conditions; and other terms and conditions for

participation that may be required by NRCS.

(d) *Effect of the acceptance of the offer.* After the option agreement to purchase is executed by NRCS and the landowner, NRCS will proceed with the remaining activities necessary for NRCS to purchase an easement, 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 restoration plan. If the landowner breaches an option agreement to purchase, NRCS is entitled to recover any costs, including administrative or technical costs, expended in reliance of the option agreement to purchase.

(e) *Withdrawal of offers.* Prior to execution and recordation by the United States and the landowner of the easement, NRCS may withdraw its offer anytime due to availability of funds, inability to clear title, or other reasons. The offer to the landowner shall be void if not executed by the landowner within the time specified.

#### **§ 625.8 Compensation for easements.**

(a) *Establishment of rates.* (1) The State Conservationist may determine the maximum easement payment rates to be applied to specific geographic areas within the State or to individual easement areas.

(2) In order to provide for better uniformity among States, the Regional Assistant Chief and Chief may review and adjust, as appropriate, State or other geographically based easement payment rates.

(b) *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 easements of not more than 99 years.

(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.

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

(d) *Acceptance of offered easement compensation.* (1) NRCS will not acquire any easement unless the landowner accepts the amount of the easement payment which is offered by NRCS. The easement payment may or may not equal the fair market value of the interests and rights to be conveyed

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

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

(e) *Reimbursement of a landowner's expenses.* For completed easement conveyances, NRCS will reimburse landowners for their fair and reasonable expenses, if any, incurred for surveying and related costs, as determined by NRCS. The State Conservationist may establish maximum payments to reimburse landowners for reasonable expenses.

(f) *Tax implications of easement conveyances.* Subject to applicable regulations of the Internal Revenue Service, a landowner may be eligible for a bargain sale tax deduction which is the difference between the fair market value of the easement conveyed to the United States and the easement payment made to the landowner. NRCS disclaims any representations concerning the tax implications of any easement or cost-share transaction.

(g) *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.

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

(a) The restoration plan developed under § 625.12 forms the basis for the 10-year cost-share agreement and is 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 practices;
- (5) Include any participant reporting and recordkeeping requirements to determine compliance with the agreement and HFRP;

(6) Be signed by the participant. When the participant is not the fee title owner, concurrence from the fee title owner is required;

(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 work a severe hardship on the parties to the agreement;

(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 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 Endangered Species Act (ESA). 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, and the restoration agreement.

(c) If the Landowner Protections, or any associated permit, require the adoption of a practice or measure in addition to the practices and measures identified in the applicable HFRP restoration plan, NRCS and the landowner will incorporate the 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 practices or implementing measures specified in the HFRP restoration plan:

(1) On enrolled land subject to an easement of not more than 99 years, NRCS shall offer to pay not less than 75 percent nor more than 100 percent of the average cost;

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

(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 the NRCS that an eligible practice or measure, or an identifiable component of the practice has been established in compliance with appropriate standards and specifications. Identified 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 practices and measures, or the maintenance or replacement of an eligible practice or measure, but only if NRCS determines the practice or measure is needed to meet the objectives of HFRP, and the failure of the original practices or measures was due to reasons beyond the control of the landowner.

(i) A landowner may seek additional cost-share assistance from other public or private organizations as long as the activities funded are in compliance with this part. In no event shall the landowner receive an amount which exceeds 100 percent of the total actual cost of the restoration.

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

(a) To enroll land in HFRP through the 99-year or 30-year enrollment option, a landowner shall grant an easement to the United States. The easement 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 for listed species within a forest ecosystem's 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 assigns, 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 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 which may be required for violation of any terms or conditions of the easement or the provisions of this part.

#### **§ 625.12 The HFRP restoration plan development.**

(a) The development of the HFRP restoration plan shall be made through an NRCS representative, in consultation with the program participant and with coordination of input from the FWS and NMFS, where applicable.

(b) The HFRP restoration plan shall specify the manner in which the enrolled land under easement 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 the Chief 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, 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.

#### **§ 625.13 Modification of the HFRP restoration plan.**

Consistent with the easement and applicable law, the State Conservationist may approve modifications to the HFRP restoration plan that do not modify or void provisions of the easement, restoration agreement, or Landowner Protections. NRCS may obtain and receive input from the landowner and coordination from 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, 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 and restoration cost-share agreement and modification to the protections afforded by the safe harbor assurances.

#### § 625.14 Transfer of land.

(a) *Offers voided.* 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 and contract terms and conditions.

(b) *Payments to landowners.* (1) For easements with multiple annual payments, any remaining easement payments will be made to the original landowner unless NRCS receives an assignment of proceeds.

(2) The new landowner shall be held responsible for assuring completion of all measures and practices required by the contract. Eligible cost-share payments shall be made to the new landowner upon presentation of an assignment of rights or other evidence that title had passed.

(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.

#### § 625.15 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 may allow.

(2) Notwithstanding paragraph (a)(1) of this section, the 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 the NRCS when such actions are deemed necessary to protect important listed 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 owing 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) *10-year Cost-Share Agreement Violations.* (1) If the NRCS determines that a participant is in violation of the terms of a 10-year cost-share agreement, or documents incorporated by reference into the 10-year cost-share agreement, NRCS will give the participant a reasonable time, as determined by the State Conservationist, to correct the violation and comply with the terms of the cost-share agreement and attachments thereto. If the violation continues, the State Conservationist may terminate the 10-year cost-share agreement.

(2) Notwithstanding the provisions of paragraph (b)(1) of this section, an agreement 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 cost-share agreement due to breach of contract, the participant will forfeit all rights for future payments under the cost-share agreement, and must refund all or part of the payments received, plus interest, and liquidated damages. The State Conservationist may require only partial refund of the payments received if a previously installed practice or measure can function independently, is not affected by the violation or other practices or measures that would have been installed under the cost-share agreement, and the participant agrees to operate and maintain the installed practice or measure for the life span of the practice or measure.

(4) If NRCS terminates a 10-year cost-share agreement due to breach of contract, or the participant voluntarily terminates the 10-year cost-share agreement before any cost-share payments have been made, the participant will forfeit all rights for further payments under the 10-year cost-share agreement, and must pay such liquidated damages as are prescribed in the restoration agreement. The State Conservationist has the option to waive the liquidated damages, depending upon the circumstances of the case.

(5) When making any 10-year cost-share agreement termination decisions, the State Conservationist may reduce the amount of money owed by the participant by a proportion which reflects the good faith effort of the participant to comply with the cost-share agreement, or the hardships beyond the participant's control that have prevented compliance with the contract including natural disasters or events.

(6) The participant may voluntarily terminate a 10-year cost-share agreement, without penalty or repayment, if the State Conservationist determines that the cost-share agreement terms and conditions have been fully complied with before termination of the cost-share agreement.

#### § 625.16 Payments not subject to claims.

Any cost-share 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.

#### § 625.17 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.

#### § 625.18 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 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 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.

**§ 625.19 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 cost-share practices 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.

Signed in Washington, DC, on May 8, 2006.

**Bruce I. Knight,**

*Chief, Natural Resources Conservation Service.*

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**FEDERAL RESERVE SYSTEM**

**12 CFR Part 201**

[Regulation A]

**Extensions of Credit by Federal Reserve Banks**

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) has adopted final amendments to its Regulation A to reflect the Board's approval of an increase in the primary credit rate at each Federal Reserve Bank. The secondary credit rate at each Reserve Bank automatically increased by formula as a result of the Board's primary credit rate action.

**DATES:** The amendments to part 201 (Regulation A) are effective May 17, 2006. The rate changes for primary and secondary credit were effective on the dates specified in 12 CFR 201.51, as amended.

**FOR FURTHER INFORMATION CONTACT:** Jennifer J. Johnson, Secretary of the

Board (202/452-3259); for users of Telecommunication Devices for the Deaf (TDD) only, contact 202/263-4869.

**SUPPLEMENTARY INFORMATION:** The Federal Reserve Banks make primary and secondary credit available to depository institutions as a backup source of funding on a short-term basis, usually overnight. The primary and secondary credit rates are the interest rates that the twelve Federal Reserve Banks charge for extensions of credit under these programs. In accordance with the Federal Reserve Act, the primary and secondary credit rates are established by the boards of directors of the Federal Reserve Banks, subject to the review and determination of the Board.

The Board approved requests by the Reserve Banks to increase by 25 basis points the primary credit rate in effect at each of the twelve Federal Reserve Banks, thereby increasing from 5.75 percent to 6.00 percent the rate that each Reserve Bank charges for extensions of primary credit. As a result of the Board's action on the primary credit rate, the rate that each Reserve Bank charges for extensions of secondary credit automatically increased from 6.25 percent to 6.50 percent under the secondary credit rate formula. The final amendments to Regulation A reflect these rate changes.

The 25-basis-point increase in the primary credit rate was associated with a similar increase in the target for the Federal funds rate (from 4.75 percent to 5.00 percent) approved by the Federal Open Market Committee (Committee) and announced at the same time. A press release announcing these actions indicated that:

Economic growth has been quite strong so far this year. The Committee sees growth as likely to moderate to a more sustainable pace, partly reflecting a gradual cooling of the housing market and the lagged effects of increases in interest rates and energy prices.

As yet, the run-up in the prices of energy and other commodities appears to have had only a modest effect on core inflation, ongoing productivity gains have helped to hold the growth of unit labor costs in check, and inflation expectations remain contained. Still, possible increases in resource utilization, in combination with the elevated prices of energy and other commodities, have the potential to add to inflation pressures.

The Committee judges that some further policy firming may yet be needed to address inflation risks but emphasizes that the extent and timing of any such firming will depend importantly on the evolution of the economic outlook as implied by incoming information. In any event, the Committee will respond to changes in economic prospects as needed to support the attainment of its objectives.

**Regulatory Flexibility Act Certification**

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Board certifies that the new primary and secondary credit rates will not have a significantly adverse economic impact on a substantial number of small entities because the final rule does not impose any additional requirements on entities affected by the regulation.

**Administrative Procedure Act**

The Board did not follow the provisions of 5 U.S.C. 553(b) relating to notice and public participation in connection with the adoption of these amendments because the Board for good cause determined that delaying implementation of the new primary and secondary credit rates in order to allow notice and public comment would be unnecessary and contrary to the public interest in fostering price stability and sustainable economic growth. For these same reasons, the Board also has not provided 30 days prior notice of the effective date of the rule under section 553(d).

**12 CFR Chapter II**

**List of Subjects in 12 CFR Part 201**

Banks, Banking, Federal Reserve System, Reporting and recordkeeping.

**Authority and Issuance**

■ For the reasons set forth in the preamble, the Board is amending 12 CFR chapter II to read as follows:

**PART 201—EXTENSIONS OF CREDIT BY FEDERAL RESERVE BANKS (REGULATION A)**

■ 1. The authority citation for part 201 continues to read as follows:

**Authority:** 12 U.S.C. 248(i)-(j), 343 *et seq.*, 347a, 347b, 347c, 348 *et seq.*, 357, 374, 374a, and 461.

■ 2. In § 201.51, paragraphs (a) and (b) are revised to read as follows:

**§ 201.51 Interest rates applicable to credit extended by a Federal Reserve Bank.<sup>1</sup>**

(a) *Primary credit.* The interest rates for primary credit provided to depository institutions under § 201.4(a) are:

Federal reserve bank	Rate	Effective
Boston .....	6.00	May 10, 2006.
New York .....	6.00	May 10, 2006.
Philadelphia .....	6.00	May 10, 2006.

<sup>1</sup> The primary, secondary, and seasonal credit rates described in this section apply to both advances and discounts made under the primary, secondary, and seasonal credit programs, respectively.