

**PART 1439—EMERGENCY LIVESTOCK ASSISTANCE**

## ■ 11. Remove part 1439.

Signed in Washington, DC, June 25, 2009.

**Carolyn B. Cooksie,**

*Acting Administrator, Farm Service Agency, and Acting Executive Vice President, Commodity Credit Corporation.*

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**DEPARTMENT OF AGRICULTURE****Commodity Credit Corporation****7 CFR Part 1491**

**RIN 0578-AA46**

**Farm and Ranch Lands Protection Program**

**AGENCY:** Natural Resources Conservation Service (NRCS) and the Commodity Credit Corporation (CCC), United States Department of Agriculture (USDA).

**ACTION:** Interim final rule; correction with reopening of public comment period.

**SUMMARY:** The Natural Resources Conservation Service (NRCS) published in the **Federal Register** of January 16, 2009, an interim final rule with request for comment amending the program regulations for the Farm and Ranch Lands Protection Program (FRPP) to incorporate programmatic changes authorized by the Food, Conservation, and Energy Act of 2008 (2008 Act). The public comment period closed March 17, 2009.

The January 16, 2009, interim final rule identified the contingent right of enforcement as an acquisition of a real property right. This correction to the January 16, 2009, interim final rule clarifies that the right of enforcement is a condition placed upon the award of financial assistance and, therefore, does not constitute an acquisition. NRCS is also using the opportunity presented by this rulemaking to ask for public input on key programmatic implementation questions. Finally, this document reopens the public comment period for the January 16, 2009, interim final rule, as amended, upon publication until August 3, 2009.

**DATES:** *Effective Date:* The rule is effective July 2, 2009.

*Comment date:* Submit comments on or before August 3, 2009. The comment period for the FRPP interim final rule published on January 16, 2009 (74 FR 2317), as changed by this rulemaking, is

reopened. Comments must be received on or before August 3, 2009.

**ADDRESSES:** You may send comments (identified by Docket Number NRCS-IFR-08013) using any of the following methods:

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

- *Mail:* John Glover, Acting Director, Easements Programs Division, Department of Agriculture, Natural Resources Conservation Service, Farm and Ranch Lands Protection Program Comments, Post Office Box 2890, Washington, DC 20013.

- *Fax:* (202) 720-9689.

- *Hand Delivery:* USDA South Building, 1400 Independence Avenue, SW., Room 6819, Washington, DC 20250, between 9 a.m. and 4 p.m., Monday through Friday, except Federal Holidays. Please ask the guard at the entrance to the South Building to call (202) 720-1854 in order to be escorted into the building.

- This interim final rule may be accessed via the Internet. Users can access the NRCS homepage at <http://www.nrcs.usda.gov/>; select the *Farm Bill* link from the menu; select the *Interim final* link from beneath the *Final and Interim Final Rules Index* title. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA TARGET Center at: (202) 720-2600 (voice and TDD).

**FOR FURTHER INFORMATION CONTACT:** John Glover, Acting Director, Easement Programs Division, Department of Agriculture, Natural Resources Conservation Service, Post Office Box 2890, Washington, DC 20013-2890; *Phone:* (202) 720-1854; *Fax:* (202) 720-9689; or *e-mail:* [FRPP2008@wdc.usda.gov](mailto:FRPP2008@wdc.usda.gov).

**SUPPLEMENTARY INFORMATION:****Regulatory Certifications***Executive Order 12866*

The Office of Management and Budget reviewed the January 16, 2009, interim final rule and determined that it was a significant regulatory action. Pursuant to Executive Order 12866, NRCS conducted a cost-benefit analysis of the potential impacts associated with the interim final rule for FRPP published in the **Federal Register** on January 16, 2009. The provisions of this interim final rule do not alter the analysis that was originally prepared. The administrative record is available for public inspection in the Department of

Agriculture, Natural Resources Conservation Service, Room 5831 South Building, 1400 Independence Avenue, SW., Washington, DC. A copy of the analysis is available upon request from John Glover, Acting Director, Easement Programs Division, Department of Agriculture, Natural Resources Conservation Service, Room 6819-S, Washington, DC 20250-2890 or electronically at: <http://www.nrcs.usda.gov/programs/FRPP/> under the *Program Information* title.

*Regulatory Flexibility Act*

The Regulatory Flexibility Act is not applicable to this interim final rule because the Commodity Credit Corporation (CCC) 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.

*Environmental Analysis*

A programmatic environmental assessment has been prepared in association with the interim final rulemaking published on January 16, 2009. The provisions of this interim final rule do not alter the assessment that was originally prepared. The analysis has determined that there will not be a significant impact to the human environment, and as a result, an Environmental Impact Statement is not required to be prepared (40 CFR Part 1508.13). The comment period for the Environmental (EA) Analysis and Finding of No Significant Impact (FONSI) is reopened and hereby extended to August 3, 2009. A copy of the EA and FONSI may be obtained from the following Web site: [http://www.nrcs.usda.gov/programs/Env\\_Assess/](http://www.nrcs.usda.gov/programs/Env_Assess/). A hard copy may also be requested from the following address and contact: Matt Harrington, National Environmental Coordinator, Natural Resources Conservation Service, Ecological Sciences Division, 1400 Independence Ave., SW., Washington DC 20250. Comments from the public should be specific and reference that comments provided are on the EA and FONSI. Public comment may be submitted by any of the following means: (1) E-mail comments to [NEPA2008@wdc.usda.gov](mailto:NEPA2008@wdc.usda.gov), (2) e-mail to e-gov Web site [www.regulations.gov](http://www.regulations.gov), or (3) written comments to: Matt Harrington, National Environmental Coordinator, Ecological Sciences Division, Natural Resources Conservation Service, 1400 Independence Ave., SW., Washington DC 20250.

### *Civil Rights Impact Analysis*

NRCS has determined through a Civil Rights Impact Analysis that the issuance of the interim final rule published on January 16, 2009, disclosed no disproportionately adverse impacts for minorities, women, or persons with disabilities. The provisions of this interim final rule do not alter the analysis that was originally prepared. Copies of the Civil Rights Impact Analysis are available, and may be obtained from John Glover, Acting Director, Easement Programs Division, Natural Resources Conservation Service, Post Office Box 2890, Washington, DC 20013-2890, or electronically at <http://www.nrcs.usda.gov/programs/FRPP>.

### *Paperwork Reduction Act*

Section 2904 of the 2008 Act requires that the implementation of this provision be carried out without regard to the Paperwork Reduction Act, Chapter 35 of title 44, U.S.C. Therefore, NRCS is not reporting recordkeeping or estimated paperwork burden associated with this interim final rule.

### *Government Paperwork Elimination Act*

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

### *Executive Order 12988*

This interim final rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. The provisions of this interim final rule are not retroactive and preempt State and local laws to the extent that such laws are inconsistent with this interim final rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR parts 11, 614, and 780 must be exhausted.

### *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), NRCS classified this rule as non-major. Therefore, a risk analysis was not conducted.

### *Unfunded Mandates Reform Act of 1995*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), USDA assessed the effects of this interim final rule on State, local, and tribal governments, and the public.

This rule does not compel the expenditure of \$100 million or more by any State, local, or tribal governments or anyone in the private sector; therefore, a statement under Section 202 of the Unfunded Mandates Reform Act is not required.

### *Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)*

The January 16, 2009, interim final rule was 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 an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete in domestic and export markets. The provisions of this interim final rule do not alter the original determination under SBREFA. However, Section 2904(c) of the 2008 Act requires that the Secretary use the authority in Section 808(2) of Title 5, U.S.C., which allows an agency to forego SBREFA's usual Congressional Review delay of the effective date of a regulation if the agency finds that there is a good cause to do so. NRCS hereby determines that it has good cause to do so in order to meet the Congressional intent to have the conservation programs authorized or amended by Title II in effect as soon as possible. Accordingly, this rule is effective upon filing for public inspection by the Office of the Federal Register.

### *Executive Order 13132*

E.O. 13132 requires NRCS to develop a process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." E.O. 13132 defines the term "Policies that have federalism implications" to include regulations that have "substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government." Under E.O. 13132, NRCS may not issue a regulation that has federalism implication, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or NRCS consults with State and local officials early in the process of developing the proposed regulation. NRCS shows sensitivity to

federalism concerns by requiring the State Conservationist to meet with and provide opportunities for involvement of State and local governments through the State Technical Committee. The interim final rule published on January 16, 2009, will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government as specified in E.O. 13132. The provisions of this interim final rule do not alter this determination. Thus, the Executive Order does not apply to this rule.

### *Executive Order 13175*

This interim final rule has been reviewed in accordance with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. NRCS has assessed the impact of this interim final rule on Indian Tribal Governments and has concluded that this rule will not negatively affect communities of Indian Tribal Governments. The rule will neither impose substantial direct compliance costs on Indian Tribal Governments, nor preempt tribal law.

## **Discussion of Program**

### *Background*

This document is effective on the date published in the **Federal Register**. The FRPP is a voluntary program to help farmers and ranchers preserve their agricultural land. FRPP provides matching funds to State, tribal, and local governments, and nongovernmental organizations with farmland protection programs to purchase conservation easements.

### *Contingent Right of Enforcement*

The 2008 Act made several program changes to FRPP. Significantly, the 2008 Act modified the nature of FRPP from a program where NRCS purchases conservation easements or other interest in land directly to a program where NRCS facilitates and provides matching funds to other entities to purchase conservation easements. The 2008 Act also required NRCS to "require the inclusion of a contingent right of enforcement for the Secretary in the terms of a conservation easement or other interest in eligible land that is purchased using cost share assistance provided under the program."

The January 16, 2009, FRPP interim final rule incorporated the changes to the program made by the 2008 Act. Additionally, NRCS identified the contingent right of enforcement as a

Federal acquisition of a real property right.

In the preamble of the January 16, 2009, interim final rule, NRCS explained that it had consulted with the Office of the General Counsel and had determined that the contingent right of enforcement, given the requirement for the contingent right of enforcement to be a term of the deed, was intended to be a right that runs with the land for the duration of the easement and, as such, NRCS was acquiring a Federal real property right. NRCS concluded that it could not “accomplish the intent of the managers as reflected in the legislative history regarding the effect of ‘contingent right of enforcement’ and give meaning to the plain statutory language of FRPP. This is because when an interest is to run with the land, it constitutes a real property right.”

The programmatic significance of identifying the contingent right of enforcement as an acquisition of a real property right is that FRPP transactions would remain subject to Federal acquisition title review requirements under 40 U.S.C. 3111 and the Department of Justice (DOJ) title standards.

Despite the sound reasoning provided in the preamble, NRCS believes that it should reconsider its original interpretation because the continued adherence of Federal procedures for land acquisitions to FRPP transactions is counter to the express and implied Congressional intent gleaned from the FRPP statutory changes, the Manager’s Report, and the associated legislative history. Therefore, NRCS has examined whether additional analysis of the statutory language could reconcile the difference with legislative intent.

#### *The 2008 Act Statutory Changes*

The 2008 Act amendments to FRPP changed the nature of FRPP from a Federal conservation easement acquisition program to a financial assistance program implemented through cooperative agreements. (The 2008 Act made similar changes to the Grassland Reserve Program by establishing a financial assistance option under that statute.) FRPP originally provided that: “The Secretary shall establish and carry out a farmland protection program under which the Secretary shall purchase conservation easements or other interests in eligible land.” The 2008 Act specifically removes the Secretary’s authority to purchase easements “or other interests in eligible land” and substitutes language that the Secretary “shall *facilitate and provide funding* for the purchase of conservation easements or

other interests in eligible land.” [Emphasis supplied].

Thus, unlike other Federal conservation easement programs, FRPP no longer provides for the direct acquisition of conservation easement or other interest in land by a Federal entity. More particularly, the 2008 Act amended Section 1238I(c) to specify that: “The Secretary shall provide cost-share assistance to eligible entities for purchasing a conservation easement or other interest in eligible land.” The 2008 Act also added Section 1238I(g) that provides that the Secretary “shall enter into agreements with eligible entities to stipulate the terms and conditions under which the eligible entity is permitted to use cost-share assistance” provided under FRPP.

Therefore, the impact of the 2008 Act amendments was to change the nature of FRPP from a Federal real estate acquisition program to a program that facilitates and provides financial assistance to non-Federal entities for their conservation easement acquisition efforts.

Accordingly, NRCS has reassessed the FRPP provision related to the “contingent right of enforcement” within the overall statutory framework for the program. In analyzing a statutory text, NRCS’ interpretation provided in this amendment is guided:

“by the basic principle that a statute should be read as a harmonious whole, with its separate parts being interpreted within their broader statutory context in a manner that furthers statutory purpose. The various canons of interpretation and presumptions as to substantive results are usually subordinated to interpretations that further a clearly expressed congressional purpose.” (CRS Report for Congress: “Statutory Interpretation: General Principles and Recent Trends,” Updated August 31, 2008.)

Section 1238I(f)(2) provides that: “(2) Contingent Right of Enforcement—The Secretary shall require the inclusion of a contingent right of enforcement for the Secretary in the terms of a conservation easement or other interest in eligible land that is purchased using cost-share assistance provided under the program.” While the text of this provision indicates that the contingent right of enforcement is to be a term of a conservation easement or other interest in land, the text requires “the inclusion” of a contingent right of enforcement, rather than “the acquisition” of such right. Additionally, the text specifies that the term “purchased” is used in relationship to the conservation easement or other interest in land purchased by the non-Federal entity using FRPP cost-share assistance. The text does not state that

NRCS is making payment for the purchase of the contingent right of enforcement. NRCS believes that the terms chosen, when viewed in the context of the overall framework of the program, indicate that the contingent right of enforcement is not a Federal acquisition of a real property right intended to trigger Federal procedures such as the DOJ Title standards.

Section 3111(a) under Title 40 of the U.S.C., approval of sufficiency of title prior to acquisition, provides:

(a) Approval of Attorney General Required—Public money may not be expended to purchase land or any interest in land unless the Attorney General gives prior written approval of the sufficiency of the title to the land for the purpose for which the Federal Government is acquiring the property.

Federal title requirements under Title 40 U.S.C. 3111 are only triggered when the Federal Government expends public money to acquire an interest in land. As discussed above, the cost-share assistance provided under FRPP is not being expended to purchase the contingent right of enforcement. Rather, the cost-share assistance is provided to assist a non-Federal entity to purchase a conservation easement or other interest in land.

While the right of enforcement, as a term of a conservation easement, is a real property right, the conservation easement is acquired by the non-Federal entity from the landowner, and the non-Federal entity includes the right of enforcement as a conservation easement term in order to meet the conditions placed upon the grant of Federal funding. Therefore, the inclusion of the right of enforcement is not an acquisition, and the Federal real property acquisition requirements do not apply.

This statutory interpretation is consistent with the legislative history supporting the provision and meets the plain intent of the statute to provide the Federal protection of the FRPP funded conservation easements. In particular, the Joint Explanatory Statement, prepared concurrently with the legislation, stated that, “The managers do not intend this right to be considered to be an acquisition of real property, but in the event an easement cannot be enforced by the eligible entity that the Federal Government shall ensure the easement remains in force.”

NRCS has concluded that the inclusion of the contingent right of enforcement in a conservation easement or other interest of land purchased by a non-Federal entity using FRPP funds does not constitute a Federal acquisition of real property. However, the inclusion

of the contingent right of enforcement in the conservation easement deed is a vested property right which provides the NRCS Chief, on behalf of the United States, the ability to sue to ensure the protection of the farmland protection and related conservation values identified in the conservation easement deed. NRCS is amending the January 16, 2009 interim final rule to clarify this interpretation of the nature of the contingent right of enforcement.

#### *Lands Owned by State or Local Government*

In the preamble to the FRPP interim final rule, NRCS explained that it was revising the definition for the term "landowner" to clarify that State and local governments, and non-governmental organizations are not considered eligible landowners. There are limited circumstances where an eligible entity, in order to prevent farmland in foreclosure from being sold at a sheriff's sale for non-agricultural development, purchases fee title to land temporarily, and then re-conveys those lands to a private landowner. NRCS does not wish to preclude the ability of NRCS to help facilitate the placement of a conservation easement or other interest in land on such properties. NRCS is therefore incorporating into the FRPP interim final rule additional flexibility to address these types of limited circumstances.

#### *Request for Public Input*

USDA furthers the Nation's ability to increase renewable energy production, conserve energy, mitigate the effects and adapt to climate change, and reduce net carbon and greenhouse gas emissions through various assistance programs. CCC is using this rulemaking opportunity to obtain input from the public on how FRPP can achieve its program purposes and further the Nation's efforts with renewable energy production, energy conservation, mitigating the effects of climate change, facilitating climate change adaptation, or reducing net carbon emissions.

#### **List of Subjects in 7 CFR Part 1491**

Administrative practice and procedure, Agriculture, Soil conservation, Wetlands, and Wetland protection.

■ For the reasons stated in the preamble, the CCC corrects part 1491 of Title 7 of the Code of Federal Regulations as set forth below:

### **PART 1491—FARM AND RANCH LANDS PROTECTION PROGRAM**

■ 1. The authority citation for part 1491 continues to read as follows:

**Authority:** 6 U.S.C. 3837 *et seq.*

■ 2. Section 1491.3 is amended by revising the definition for the terms "landowner" and "right of enforcement" to read as follows:

#### **§ 1491.3 Definitions.**

\* \* \* \* \*

*Landowner* means a person, legal entity, or Indian tribe having legal ownership of land and those who may be buying eligible land under a purchase agreement. The term, "landowner" may include all forms of collective ownership including joint tenants, tenants-in-common, and life tenants. State governments, local governments, and non-governmental organizations that qualify as eligible entities are not eligible as landowners, unless otherwise determined by the Chief.

\* \* \* \* \*

*Right of enforcement* means a vested right set forth in the conservation easement deed, equal in scope to the right of inspection and enforcement granted to the grantee, that the Chief, on behalf of the United States, may exercise under specific circumstances in order to enforce the terms of the conservation easement when not enforced by the holder of the easement.

\* \* \* \* \*

■ 3. Section 1491.4 is amended by revising paragraphs (b) and (f)(6) to read as follows:

#### **§ 1491.4 Program requirements.**

\* \* \* \* \*

(b) The term of all easements or other interests in land shall be in perpetuity unless prohibited by State law. In States that limit the term of the easement or other interest in land, the term of the easement or other interest in land must be the maximum allowed by State law.

\* \* \* \* \*

(f) \* \* \*

(6) Unless otherwise determined by the Chief, NRCS shall not provide FRPP funds for the purchase of an easement or other interest in land on land owned in fee title by an agency of the United States, a State or local government, or by an entity whose purpose is to protect agricultural use and related conservation values, including those listed in the statute under eligible land, or land that is already subject to an easement or deed restriction that limits

the conversion of the land to nonagricultural use;

\* \* \* \* \*

■ 4. Section 1491.22 is amended by adding a new sentence to the end of paragraph (c), and by revising paragraph (d) to read as follows:

#### **§ 1491.22 Conservation easement deeds.**

\* \* \* \* \*

(c) \* \* \* The Chief may exercise the option to promulgate standard minimum conservation deed requirements as a condition for receiving FRPP funds.

(d) The conveyance document must include a "right of enforcement" clause. NRCS shall specify the terms for the "right of enforcement" clause to read as set forth in the FRPP cooperative agreement. This right is a vested property right and cannot be condemned by State or local government.

\* \* \* \* \*

■ 5. Section 1491.30 is amended by revising paragraph (f) to read as follows:

#### **§ 1491.30 Violations and remedies.**

\* \* \* \* \*

(f) In the event NRCS determines it must exercise its rights identified under a conservation easement or other interest in land, NRCS shall provide written notice by certified mail to the grantee at the grantee's last known address. The notice will set forth the nature of the noncompliance by the grantee and a 60-day period to cure. If the grantee fails to cure within the 60-day period, NRCS shall take the action specified under the notice. NRCS reserves the right to decline to provide a period to cure if NRCS determines that imminent harm may result to the conservation values or other interest in land it seeks to protect.

Signed this 26th day of June 2009, in Washington, DC.

**Dave White,**

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

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