

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Commodity Credit Corporation

#### 7 CFR Part 1491

RIN 0578-AA46

#### Farm and Ranch Lands Protection Program

**AGENCY:** Commodity Credit Corporation, Natural Resources Conservation Service, United States Department of Agriculture.

**ACTION:** Final rule with request for public comments.

**SUMMARY:** This final rule amends the Natural Resources Conservation Service (NRCS) regulations for implementation of the Farm and Ranch Lands Protection Program (FRPP). This action is necessary to address the comments received on the interim final rule as published and to publish changes to the entity certification requirements. This document provides a 30 day public comment period on the entity certification requirements.

**DATES:** *Effective Date:* The rule is effective January 24, 2011.

*Comment Date:* Submit comments on § 1491.4(d) through (f) on or before February 23, 2011.

**ADDRESSES:** Address all comments regarding § 1491.4(d) through (f) using any of the following methods:

*Mail:* Mark Rose, Farm and Ranch Lands Protection Program Manager, Easement Programs Division, Department of Agriculture, Natural Resources Conservation Service, Post Office Box 2890, Washington, DC 20013; *Fax:* (202) 720-9689; *e-mail:* [mark.rose@wdc.usda.gov](mailto:mark.rose@wdc.usda.gov).

*Hand delivery:* Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6819 South Building, 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.

#### FOR FURTHER INFORMATION CONTACT:

Mark Rose, Program Manager, Farm and Ranch Lands Protection Program, Easement Programs Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6819 South Building, Washington, DC 20250; Telephone: (202) 720-9476; Fax: (202) 720-9689; or E-mail: [mark.rose@wdc.usda.gov](mailto:mark.rose@wdc.usda.gov).

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

#### SUPPLEMENTARY INFORMATION:

##### Regulatory Certifications

###### *Executive Order 12866*

Pursuant to Executive Order 12866, this final rule with request for comment has been determined to be a significant regulatory action. The administrative record is available for public inspection at the Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6819 South Building, Washington, DC. In accordance with Executive Order 12866, NRCS conducted an economic analysis of the potential impacts associated with this program. A summary of the economic analysis can be found at the end of the regulatory certifications of the preamble, and a copy of the analysis is available upon request from Mark Rose, Program Manager, Farm and Ranch Lands Protection Program, Easement Programs Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6819 South Building, Washington, DC 20250.

##### *Regulatory Flexibility Act*

The Regulatory Flexibility Act is not applicable to this final rule because 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.

##### *Environmental Analysis*

In compliance with the National Environmental Policy Act, a Programmatic Environmental Assessment (EA) was prepared in association with the interim final rule. The analysis determined there will not be a significant impact to the human environment and as a result, an Environmental Impact Statement was not required to be prepared (40 CFR 1508.13). For this final rule, the agency has determined that there are no new circumstances or significant new information that has a bearing on environmental effects which warrant supplementing the previous EA and Finding of No Significant Impact (FONSI). The proposed changes identified in this final rule are considered minor changes that should be implemented for the program. The majority of these changes are administrative or technical changes to the regulation.

Copies of the EA and FONSI may be obtained from Matt Harrington, National Environmental Coordinator, Ecological Sciences Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6151 South Building, Washington, DC 20250. The EA and FONSI are also available at [http://www.nrcs.usda.gov/programs/Env\\_Assess/](http://www.nrcs.usda.gov/programs/Env_Assess/).

##### *Civil Rights Impact Analysis*

NRCS has determined through a Civil Rights Impact Analysis that this final rule discloses no disproportionately adverse impacts for minorities, women, or persons with disabilities. The historical participation data presented in the analysis indicates that producers who are members of the protected groups have participated in NRCS conservation programs at parity with other producers. By extrapolating from historical participation data, NRCS has reasonably concluded that NRCS programs, including FRPP, will continue to be administered in a non-discriminatory manner. Outreach and communication strategies are in place to ensure that all producers will be provided the same information to allow them to make informed compliance decisions regarding the use of their lands that will affect their participation in the Department of Agriculture (USDA) programs. FRPP applies to all

persons equally regardless of their race, color, national origin, gender, sex, or disability status. Therefore, this final rule will not result in adverse civil rights implications for women, minorities, and persons with disabilities.

Copies of the Civil Rights Impact Analysis are available from Mark Rose, Program Manager, Farm and Ranch Lands Protection Program, Easement Programs Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6819 South Building, Washington, DC 20250, or electronically at <http://www.nrcs.usda.gov/programs/FRPP>.

#### *Paperwork Reduction Act*

Section 2904 of the Food, Conservation, and Energy Act of 2008 (2008 Act) requires that the implementation of programs authorized under Title II of the Act be made without regard to the Paperwork Reduction Act of 1995 (Title 44 U.S.C. 3501 *et seq.*). Therefore, NRCS is not reporting recordkeeping or estimated paperwork burden associated with this 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 requires government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. To better accommodate public access, NRCS has developed an online application and information system for public use.

#### *Executive Order 12988*

This 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 11 and 614 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), USDA classified this rule as non-major. Therefore, a risk analysis was not conducted.

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

NRCS assessed the effects of this final rule on State, local, and Tribal governments, and the public. This action does not compel the expenditure of \$100 million or more in any one year (adjusted by inflation) 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 of 1995 is not required.

#### *Executive Order 13132*

This final rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. USDA has determined that this final rule conforms with the Federalism principles set forth in the Executive Order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities on the various levels of government. Therefore, USDA concludes that this final rule does not have Federalism implications.

#### *Executive Order 13175*

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. NRCS has assessed the impact of this final rule on Indian Tribal governments and concluded that this final rule will not negatively affect Indian Tribal governments or their communities. The rule neither imposes substantial direct compliance costs on Tribal governments nor preempts Tribal law. However, NRCS plans to undertake a series of at least six regional Tribal consultation sessions before January 15, 2011, on the impact of NRCS conservation programs and services on Tribal governments and their members to establish a baseline of consultation for future actions. Reports from these sessions will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. NRCS will respond in a timely and meaningful manner to all Tribal governments' requests for consultation.

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

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 forgo the Small Business Regulatory Enforcement Fairness Act of 1996 usual 60-day 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 of the 2008 Act in effect as soon as possible. Accordingly, this rule is effective January 24, 2011.

#### *Section 2708 of the 2008 Act*

Section 2708, Compliance and Performance, added a paragraph to section 1244(g) of the Food Security Act of 1985 (1985 Act) entitled, Administrative Requirements for Conservation Programs, which states the following:

“(g) Compliance and performance.— For each conservation program under Subtitle D, the Secretary will develop procedures—

- (1) To monitor compliance with program requirements;
- (2) To measure program performance;
- (3) To demonstrate whether long-term conservation benefits of the program are being achieved;
- (4) To track participation by crop and livestock type; and
- (5) To coordinate activities described in this subsection with the national conservation program authorized under section 5 of the Soil and Water Resources Conservation Act of 1977 (16 U.S.C. 2004).”

This new provision presents in one place the accountability requirements placed on the agency as it implements conservation programs and reports on program results. The requirements apply to all programs under Subtitle D, including the Wetlands Reserve Program, the Conservation Security Program, the Conservation Stewardship Program, the FRPP, the Grassland Reserve Program, the Environmental Quality Incentives Program (EQIP) (including the Agricultural Water Enhancement Program), the Wildlife Habitat Incentive Program, and the Chesapeake Bay Watershed initiative. These requirements are not directly incorporated into these regulations, which set out requirements for program participants. However, certain provisions within these regulations relate to elements of section 1244(g) of the 1985 Act and the agency's accountability responsibilities regarding program performance. The existing procedures described below relate to meeting the requirements of section 1244(g) of the 1985 Act and agency expectations for improving its ability to report on each program's performance and achievement of long-term conservation benefits. Also included is reference to the sections of these regulations that apply to program

participants and that relate to the agency accountability requirements as outlined in section 1244(g) of the 1985 Act.

*Monitor compliance with program requirements.* NRCS has established application procedures to ensure that participants meet eligibility requirements and follow-up procedures to ensure that participants are complying with the terms and conditions of their contractual arrangement with the government, and that the installed conservation measures are operating as intended. These and related program compliance evaluation policies are set forth in agency guidance (Conservation Programs Manual 440 Part 512 and Conservation Programs Manual 440 Part 508) (<http://directives.sc.egov.usda.gov/>). The program requirements applicable to FRPP participants that relate to compliance are set forth in these regulations in § 1491.4 Program requirements, § 1491.20 Cooperative agreements, and § 1491.22 Conservation easement deeds. These sections make clear the general program eligibility requirements, obligations related to easements, and requirements for operating and maintaining FRPP-funded activities.

*Measure program performance.* Pursuant to the requirements of the Government Performance and Results Act of 1993 (Pub. L. 103–62, Sec. 1116) and guidance provided by the Office of Management and Budget (OMB) Circular A–11, NRCS has established performance measures for its conservation programs. Program-funded conservation activity is captured through automated field-level business tools and the information is made publicly available at <http://ias.sc.egov.usda.gov/PRSHOME/>. Program performance also is reported annually to Congress and the public through the annual performance budget, annual accomplishments report, and the USDA Performance Accountability Report. Related performance measurement and reporting policies are set forth in agency guidance (GM 340\_401 and GM 340\_403) (<http://directives.sc.egov.usda.gov/>).

The conservation actions undertaken by participating entities are the basis for measuring program performance—specific actions are tracked and reported annually, while the effects of those actions relate to whether the long-term benefits of the program are being achieved. The program requirements applicable to participants that relate to undertaking conservation actions are set forth in these regulations in § 1491.20 Cooperative agreements and § 1470.22

Conservation easement deeds. These sections make clear participating entity obligations for acquiring easements and conservation stewardship activities, which in aggregate result in the program performance that is reflected in agency performance reports.

Demonstrating the long-term natural resource benefits achieved through conservation programs is subject to the availability of needed data, the capacity and capability of modeling approaches, and the external influences that affect actual natural resource conditions. While NRCS captures many measures of output data, such as acres of conservation practices, it is still in the process of developing methods to quantify the contribution of those outputs to environmental outcomes.

NRCS currently uses a mix of approaches to evaluate whether long-term conservation benefits are being achieved through its programs. Since 1982, NRCS has reported on certain natural resource status and trends through the National Resources Inventory (NRI), which provides statistically reliable, nationally consistent land cover/use and related natural resource data. However, lacking has been a connection between these data and specific conservation programs.<sup>1</sup> In the future, the interagency Conservation Effects Assessment Project (CEAP), which has been underway since 2003, will provide nationally consistent estimates of environmental effects resulting from conservation practices and systems applied. CEAP results will be used in conjunction with performance data gathered through agency field-level business tools to help produce estimates of environmental effects accomplished through agency programs, such as the Conservation Stewardship Program. In 2006, a Blue Ribbon panel evaluation of CEAP<sup>2</sup> strongly endorsed the project's purpose, but concluded "CEAP must change direction" to achieve its purposes. In response, CEAP has focused on priorities identified by the panel and clarified that its purpose is to quantify the effects of conservation practices applied on the landscape. Information regarding CEAP, including reviews and current status is available at (<http://www.nrcs.usda.gov/technical/>

<sup>1</sup> The exception to this is the Conservation Reserve Program (CRP); since 1987 the NRI has reported acreage enrolled in CRP.

<sup>2</sup> Soil and Water Conservation Society. 2006. Final report from the Blue Ribbon Panel Conducting an External Review of the U.S. Department of Agriculture Conservation Effects Assessment Project. Ankeny, IA: Soil and Water Conservation Society. This review is available at <http://www.nrcs.usda.gov/technical/NRI/ceap/>.

*NRI/ceap/*. Since 2004 and the initial establishment of long-term performance measures by program, NRCS has been estimating and reporting progress toward long-term program goals. Natural resource inventory and assessment and performance measurement and reporting policies are set forth in agency guidance (GM 290\_400; GM 340\_401; and GM 340\_403) (<http://directives.sc.egov.usda.gov/>).

Demonstrating the long-term conservation benefits of conservation programs is an agency responsibility. Through CEAP, NRCS is in the process of evaluating how these long-term benefits can be achieved through the conservation easements acquired through FRPP and conservation practices and systems applied by participants under each of its programs. The FRPP program requirements applicable to participants that relate to producing long-term conservation benefits are located in § 1491.20 Cooperative agreements and § 1491.22 Conservation easement deed. These requirements and related program management procedures supporting program implementation are set forth in agency guidance (Conservation Programs Manual 440 Part 512 and Conservation Programs Manual 440 Part 508).

#### *Coordination of Actions Authorized Under the Soil and Water Resources Conservation Act*

The 2008 Act reauthorized and expanded on a number of elements of the Soil and Water Resources Conservation Act (RCA) related to evaluating program performance and conservation benefits. Specifically, the 2008 Act added a provision stating:

"Appraisal and inventory of resources, assessment and inventory of conservation needs, evaluation of the effects of conservation practices, and analyses of alternative approaches to existing conservation programs are basic to effective soil, water, and related natural resources conservation."

The program, performance, and natural resource and effects data described previously will serve as a foundation for the next RCA, which will also identify and fill, to the extent possible, data and information gaps. Policy and procedures related to the RCA are set forth in agency guidance (GM 290\_400 and GM 130\_402) (<http://directives.sc.egov.usda.gov/>).

The coordination of the previously described components with the RCA is an agency responsibility and is not reflected in these regulations. However, it is likely that results from the RCA process will result in modifications to

the program and performance data collected, to the systems used to acquire data and information, and potentially to the program itself. As the Secretary proceeds to implement RCA in accordance with the statute, the approaches and processes developed will improve existing program performance measurement and outcome reporting capability and provide the foundation for improved implementation of the program performance requirements of section 1244(g) of the 1985 Act.

#### *Economic Analysis—Executive Summary*

The FRPP is an important tool available to farmers, ranchers, and their communities to preserve the agricultural landscape. The local community is a key driver in farmland<sup>3</sup> protection efforts and is a major beneficiary, as well as incurring much of the cost. Because farmland retention efforts are driven by local decisionmakers and involve site-specific impacts that affect a host of intangible values (scenic views, environmental amenities, *etc.*), performing a traditional nationwide final benefit-cost analysis with a national scope is difficult. Despite limitations, a benefit-cost analysis offers a means to identify the main costs and describe the benefits, albeit in qualitative terms, and explore policy and program alternatives.

The main expenditure is funding for the purchase of development rights (PDR). The economic costs of farmland protection programs include the foregone economic activities fostered by development that would have taken place in the absence of FRPP and any resulting secondary effects such as the reduced tax base. FRPP is only one source of funds to offset the initial acquisition costs of PDRs for these individuals and communities. The cumulative (1996–2010) contributions on 3,489 enrolled parcels consisting of 808,515 acres includes: FRPP share—\$787,444,975; entity share—\$1,088,313,653; landowner donations—\$347,253,305; and combined value—\$2,223,011,933. The foregone economic activities need to be compared with the incremental benefits of protecting farmland, which are largely intangible, such as environmental goods and services from the land and non-market valued amenities brought about by NRCS funding. Non-market valued amenities include the public's desire for open spaces and scenic views. Also, the

distributional effects of retaining an active agricultural sector in the local communities must be acknowledged.

The FRPP Final Benefit-Cost Analysis is posted at <http://www.nrcs.usda.gov/programs/farmland/2008/benefitcostanalysis.html>. Only qualitative descriptions of the possible social benefits of farmland protection are presented in the main text of this analysis. These potential benefits are more fully described in Appendix A. Appendix B presents a method, that when refined, can potentially be used to quantitatively assess the effects of FRPP. A rigorous treatment of these benefits is not possible at this time due to a number of reasons, including the limitations in the willingness-to-pay methodology and uncertainties about extent, locations, and patterns of future development pressure.

The 2008 Act reauthorized the FRPP through FY 2012 and increased program funding. Mandatory changes were made to the program purpose, role of the United States Government, enrollment process, eligible land, and cost-sharing requirements for entities. In addition, the 2008 Act provided discretion for the agency in interpreting aspects of the mandatory provisions and other discretionary elements. The major policy scenarios analyzed in this benefit-cost analysis include:

1. Increased Funding—Authorized funding increases from \$97 million in FY 2008 to \$200 million in FY 2012.
2. Land Eligibility—Compensate landowners for more forest land acreage and ensure that enrolled forest land contributes to natural resource benefits.
3. Certification Process—Establish a certification process and deliver increased flexibilities for certified entities.
4. Simplifying Participation—Establish a simple process for entities to select an appraisal method and use their own terms and conditions in easement deeds, as approved by the Secretary.
5. Impervious Surface Restrictions—Establish clear guidelines for entities to consult for impervious surface restrictions.
6. Non-Federal Contributions—Establish a process to accept contributions of non-Federal funds.
7. Program Performance—Establish procedures to monitor and report on program performance.

Overall, FRPP assistance to local farmland protection programs is important from the distributional effects perspective. The FRPP attempts to assist these local decisionmakers in their efforts to protect farmland. The presence of active farmland retention programs could be interpreted as empirical

evidence that local decisionmakers anticipate positive net benefits from protecting farmland, such as preventing undesirable changes to the landscape and adverse impacts on the natural environment that can result from development locally. From a national perspective, the assessment of benefits and costs is incomplete due to lack of information in existing literature. The assessment of benefits involves amenities that are indirectly traded in markets (*e.g.*, scenic view). The assessment of costs involves forecasting the level of economic activities that would have taken place in the absence of FRPP. The potential effects on benefits and costs for most of the areas of policy discretion covered in this analysis consequently are addressed qualitatively.

#### *Summary of Interim Final Rule Changes*

On January 16, 2009, NRCS published in the **Federal Register** an interim final rule at 74 FR 2809 with a 60-day public comment period that ended on March 17, 2009.

Section 2401 of the 2008 Act amended sections 1238H and 1238I of the 1985 Act to reauthorize and make significant amendments to FRPP. To implement these amendments, the interim final rule made the following changes to the FRPP regulation at 7 CFR part 1491:

#### Subpart A—General Provisions

- Administration—Clarified that a landowner's eligibility must be determined, as well as the land eligibility and the eligibility of the entity that receives the cost-share assistance to purchase the easement.
- Definitions—Modified several definitions of the previous rule. For instance, the definition of agriculture uses was amended to use more current and correct terminology and to broaden the definition to reflect the new statutory program purposes.
- Program Requirements
  - Incorporated the statutory requirement that NRCS provide funding for conservation easements or other interests in land versus acquiring a Federal interest in land, thereby shifting the program focus from purchasing conservation easements to facilitating the purchase of conservation easements by eligible entities.
  - Added that in States that limit the term of the easement, the term of the easement must be the maximum allowed by State law.
  - Set forth the requirements for a new certification process that an entity must meet in order to become a certified

<sup>3</sup> Farmland refers to agricultural land used in crop and livestock production, *i.e.*, cropland, ranch land, and pasture.

entity, as well as the process for review and revocation of certification.

- Added a new statutory eligibility land category, “to further a State or local policy consistent with the purposes of the program.”

- Established that farms with at least 10 acres in forest cover or 10 percent in forest cover required the development of a forest management plan. Farms that were less than 100 acres in size with less than 10 acres of forest were not required to have a forest management plan developed to be eligible.

- Clarified that lands currently under ownership by an entity whose purpose is to protect agricultural uses and related conservation values were not eligible for the program, as lands owned by these entities were already protected.

- Described the onsite and offsite conditions that were not compatible with the program’s purposes.

- Clarified that a landowner may submit an application on land on which the mineral estate is owned by someone other than the landowner, but that USDA reserved the right to determine the impacts of third party rights upon a potential easement and to deny funding where the purposes of the program could not be achieved.

- Defined the industry-approved appraisal methods specified in the 2008 Act as the Uniform Standards of Professional Appraisal Practices or the Uniform Appraisal Standards for Federal Land Acquisition.

- **Application Procedures**—Established a new application process for the program. This new process established that the entity must submit an application to the State Conservationist in the State where the parcel(s) is located, and that the Chief determined whether an eligible entity qualified as a certified entity. Further, the interim final rule established that FRPP would be implemented using a continuous sign-up process, consistent with other NRCS conservation programs. The process allowed certified and non-certified eligible entities to compete under the same application and ranking process in order to simplify the application process and allowed parcels to obtain funding on equal resource-based terms, regardless of the status of the entity.

- **Ranking Considerations and Proposal Selection**—Established a new ranking process whereby NRCS evaluated the eligibility of both the landowner and the land prior to the scoring and ranking of the parcel for funding, because payment eligibility requirements for Adjusted Gross Income (AGI) 7 CFR part 1400 and land eligibility requirements for Highly

Erodible Land and Wetland Conservation provisions at 7 CFR part 12 are a threshold requirement for program participation. In addition, parcels became ranked according to both national and State criteria. National ranking criteria were changed to reflect site (parcel) specific criteria rather than entity performance criteria, and language was added to clarify that the national requirements were mandatory for inclusion in the State ranking.

#### Subpart B—Cooperative Agreements and Conservation Easement Deeds

- **Cooperative Agreements**—Revised cooperative agreement requirements to reflect changes necessitated by the 2008 Act, including the change that FRPP funds are used to assist eligible entities with the purchase of rights in land rather than to purchase these rights directly by the United States. The interim final rule also incorporated the new requirement that the terms of agreements be a minimum of 5 years for certified entities and 3 years for other eligible entities.

- **Substituting Parcels**—Incorporated 2008 Act authorization to allow a cooperating entity to substitute pending offers within their cooperative agreement.

- **Funding**—Reflected the 2008 Act’s change to the minimum entity cost-share, an amount not less than 25 percent of the acquisition purchase price.

- **Conservation Easement Deeds**
  - **Deed Form**—Incorporated changes made by the 2008 Act that allow eligible entities to use their own easement deeds submitted to and approved by NRCS in advance.

- **Contingent Right of Enforcement**—Incorporated the 2008 Act requirement that the eligible entity include a contingent right of enforcement for the Secretary in the terms of the conservation easement deed. The purpose of this right is to ensure that the easement is enforced and that the Federal investment is protected. NRCS, in the interim final rule, interpreted the contingent right of enforcement to mean a vested real property right, providing the Secretary, on behalf of the United States, the right to enforce the terms of the easement for the duration of the easement.

- **Approval of Conservation Plan**—Eliminated the requirement that conservation districts approve the conservation plan, as this was not always consistent with local practice.

- **Impervious Surfaces**—Retained the impervious surface limit of 2 percent, but increased the impervious surface

waiver to up to 10 percent from the prior policy of 6 percent.

#### Subpart C—General Administration

- **Violations and Remedies**—Clarified that any cost recoveries levied by NRCS would be directed to the cooperating entity, not the specific landowner.

- **Appeals**—Replaced the term cooperating entity with eligible entity to refer to FRPP participants. This change ensured that all FRPP participants had the same rights of appeal. The interim final rule also clarified that only administrative actions were appealable, and once the easement was recorded, enforcement actions taken by NRCS were not subject to review under administrative appeal regulations. This change was consistent with appeal regulations at 7 CFR part 614 and 7 CFR part 11, as well as Federal real property law.

#### *Summary of Amendment to the Interim Final Rule*

On July 2, 2009, NRCS published a correction to the interim final rule at 74 FR 31578 and opened the public comment period an additional 30 days. The correction made the following adjustments:

- **Contingent Right of Enforcement**—Clarified that the contingent right of enforcement established by the 2008 Act, and defined by the interim final rule as a Federal acquisition of a real property right, was instead a condition placed upon the award of financial assistance, and though a real property right, did not constitute an acquisition subject to Federal acquisition requirements.

- **Lands Owned by State or Local Government**—Incorporated additional flexibility into the definition of landowner such that it did not preclude the ability of NRCS to help facilitate the placement of a conservation easement or other interest in land on properties in circumstances where an eligible entity purchased fee title to land temporarily and then re-conveyed those lands to a private landowner, such as purchasing farmland in foreclosure to prevent it from being sold at a sheriff’s sale for non-agricultural development.

- **Requests for Public Input**—Sought public feedback as to whether FRPP could be utilized to further the Nation’s efforts with regard to encouraging renewable energy production, promoting energy conservation, mitigating the effects of climate change, facilitating climate change adaptation, or reducing net carbon emissions.

### Registration and Reporting Requirements of the Federal Funding and Transparency Act of 2006

OMB recently published two regulations, 2 CFR part 25 and 2 CFR part 170, to assist agencies and recipients of Federal financial assistance comply with the Federal Funding Accountability and Transparency Act of 2006 (FFATA) (Pub. L. 109–282, as amended). Both regulations have implementation requirements beginning October 1, 2010.

The regulations at 2 CFR part 25 require, with some exceptions, recipients of Federal financial assistance to apply for and receive a Dun and Bradstreet Universal Numbering Systems (DUNS) number and register in the Central Contractor Registry (CCR). The regulations at 2 CFR part 170 establish new requirements for Federal financial assistance applicants, recipients, and sub recipients. The regulation provides standard wording that each agency must include in its awarding of financial assistance that requires recipients to report information about first-tier sub awards and executive compensation under those awards.

NRCS has determined that 2 CFR part 25 and 2 CFR part 170 apply to certain awards of financial assistance provided under FRPP. Therefore, NRCS has incorporated, by reference, these registration and reporting requirements at § 1491.20 and will include the requisite provisions as part of the FRPP contract.

#### Responses to Comments and Changes to Regulation

NRCS received approximately 624 comments on the interim final rule and its amendment. This section of the preamble discusses all of the relevant comments, except for those that expressed agreement with provisions of the interim final rule. NRCS has organized the discussion alphabetically by topic.

#### Applicability

*Comments:* NRCS received seven comments recommending NRCS eliminate application of Department of Justice title standards for projects that remain under 2007–2008 cooperative agreements. Projects funded in FY 2009, and thereafter, are not subject to review under the Department of Justice title standards.

*Response:* FRPP, as authorized by the Farm Security and Rural Investment Act of 2002 (2002 Act), Public Law 107–171, required the Secretary to acquire a conservation easement or other interest in land. Parcels funded under FY 2007–

2008 cooperative agreements are subject to the 2002 Act requirements. Since NRCS acquires a co-grantee interest in the conservation easements funded in FY 2007–2008, the transactions are subject to Federal real property acquisition requirements, including the Department of Justice title standards. NRCS does not have the authority to waive these title standards. Parcels funded in FY 2009 and hereafter are authorized by the 2008 Act, and are financial assistance transactions not subject to Federal real property acquisition requirements; therefore, no changes were made to the final rule.

#### Certification

*Comments:* NRCS received 64 comments regarding the references in § 1491.4 to certified entities. These comments urged NRCS to develop a robust certification program for certified entities. NRCS received 27 comments recommending that NRCS rewrite the rule to develop a certification program that, for certified entities, would minimize title reviews in particular.

*Response:* NRCS agrees that a more robust certification process will improve FRPP implementation. The criteria for certification outlined in the 2008 Act are nearly identical to the criteria for eligibility that existed in FRPP policy prior to 2008 Act enactment, with the exception of closing efficiency. Therefore, the interim final rule mirrored the 2008 Act by identifying very few differences between the agreements with certified entities and agreements with other eligible entities.

The 2008 Act transformed FRPP from a Federal real property acquisition program to a program where NRCS provides financial assistance for the purchase of a conservation easement by an eligible entity. Consistent with this shift in program purpose, NRCS has made further changes in this final rule to the certification criteria and process outlined in § 1491.4 to minimize the need for NRCS oversight of individual easement transactions. NRCS still obtains certain safeguards in relation to an entity's easement acquisition, real property such as review of template deeds and the incorporation of a right of enforcement; however, the actual easement acquisition process is the responsibility of partners. The certification procedures set forth in the interim final rule did not address this shift fully.

NRCS believes that the revisions to § 1491.4 provide a more comprehensive certification program that will better implement the 2008 Act's shift in program purpose and help NRCS focus on other aspects of program

implementation to better protect the long-term viability of higher quality and more vulnerable agricultural lands. Upon review and consideration of the respondents' comments, NRCS has adopted criteria to improve identification of eligible entities that have the capability to manage FRPP lands. Additionally, a more comprehensive certification program gives NRCS greater administrative flexibility in implementing the FRPP program.

In particular, NRCS reviews criteria during the certification process, including an entity's acquisition, management, and enforcement standards and processes to ascertain whether the entity exhibits sufficient capability and experience to manage FRPP financial assistance prudently. NRCS has determined that the certification criteria in the interim final rule unnecessarily limit the ability to identify eligible entities that have the resources and experience to assume the flexibility afforded by certification status. Therefore, a primary qualification for certification status is that an eligible entity must hold and manage a minimum of 25 easements. NRCS derived this number from the total acres owned and under easement by land trusts, the total number of land trusts, and the average size FRPP easement. Land trust figures are taken from the Land Trust Alliance 2005 National Land Trust Census Report.

Additionally, for an eligible entity to qualify for certification, it must hold and manage a minimum of five FRPP conservation easements and have acquired these easements using industry-approved appraisals, title clearance reviews, and deed reviews for each transaction. This minimum number of FRPP easements will demonstrate the entity has experience with FRPP cooperative agreements and FRPP easement acquisition process. Entities may request in writing a waiver of the 25-easement requirement from the Chief. The certification of an entity does not extend to eligible entities funded through the certified entity if the eligible entity is not held to the same standards as the certified entity, and the certified entity is not identified as a co-grantee in the conservation easement deed. If an eligible entity does not meet the certification criteria, NRCS will not certify the eligible entity and will review each transaction's procedures, including the appraisal, deed, and title to ensure that the Federal investment is protected.

As to the greater administrative flexibility provided by certification, NRCS will not require NRCS' appraisal

review, title review, and conservation easement deed review in advance of easement acquisition since a certified entity demonstrates, during the certification process, that it has credible processes of its own that ensure its conservation easements will meet FRPP purposes. Therefore, a certified entity will be authorized to close on individual easement transactions without prior NRCS review and approval of the particular deed, title, or appraisal. If any of these certification criteria are not met, NRCS may still certify the entity, albeit with conditions, such as a requirement that the entity adjust those aspects of its program, e.g., particular deed provisions that are needed to ensure that the acquired conservation easements meet FRPP purposes and are enforceable over the long term.

Regardless of the certification status of an entity, NRCS will conduct quality review checks upon a percentage of transactions, and if any aspect of a transaction fails, NRCS will provide the entity with time to rectify the errors, a minimum of 180 days. If a certified entity fails to do so, the State Conservationist will send, by certified mail, return receipt requested, written notice of proposed decertification of the certified entity's certification status or eligibility. The certified entity may contest the Notice of Proposed Decertification in writing to the State Conservationist within 20 calendar days of receipt of the notice of proposed decertification. If the State Conservationist decides to decertify, the entity will be given written notice of the determination which will set forth the reasons for decertification, the period of decertification, and the scope of decertification. If the State Conservationist decides not to decertify the entity, the entity will be given written notice of that determination. The decertification determination will be based on the administrative record which will be comprised of the Notice of Proposed Decertification and supporting documents, any documents pertaining to the entity's lack of compliance with the certification criteria, and if submitted, the entity's written response and supporting documentation. The Easement Programs Division will maintain a national list of certified and de-certified entities that each NRCS State office will check prior to entering into a cooperative agreement. The period of decertification may not exceed 3 years, and the entity may reapply for certification after the period of decertification has expired. NRCS will recertify an entity that meets

the requirements as outlined under § 1491.4(d).

NRCS added a new paragraph (e) to § 1491.4 to provide additional clarification to the certification process and redesignated paragraphs (e), (f), (g), and (h) as (f), (g), (h), and (i). A new paragraph (j) is added to provide policy on substituting parcels.

This new approach to certification was not identified in the interim final rule and instead, is based upon comments received from various respondents to the interim final rule. Since the public has not had the opportunity to comment upon this new approach, NRCS will receive public comment on the certification and decertification approach set forth in this rulemaking. NRCS is not soliciting comments on any other aspect of this FRPP final rulemaking since NRCS has already solicited and received public comments on these matters as identified herein.

*Comments:* NRCS received four comments suggesting a change to § 1491.4(d)(5) of the interim final rule to clarify that a dedicated fund be a necessary requirement for certified entities that are nongovernmental organizations. The fund is in place for enforcement purposes, and the certified entities that are required to have a dedicated fund must have a sufficient annual budget designation for annual monitoring and administrative functions for conservation easement management purposes.

*Response:* NRCS concurs with the recommendation made by the respondents. The definition of dedicated fund was modified to clarify that a dedicated fund is required for certified entities that are nongovernmental organizations. The purpose of the dedicated fund is to provide a long-term source of funds for management and monitoring of easements acquired and held by nongovernmental organizations. Dedicated funds are not necessary for certified entities which are State and local units of government, because such entities typically have taxing authority for the long-term operation and management of easement programs. In contrast, nongovernmental organizations typically rely on private funding to support their operations and management of easements, thus a dedicated fund ensures a long-term source of funds for such activities. The specific amounts required in the dedicated fund are clarified in policy. The current requirements for the capitalization of the endowment funds are \$50,000 for legal defense and \$10,000 per easement for management

and monitoring. NRCS will adjust the amount required for the dedicated fund based on NRCS' experience, feedback from the nongovernmental organizations, and standards for such accounts within the farmland protection community.

*Comments:* NRCS received 33 comments recommending that NRCS conduct only spot checks of appraisals rather than a review of every appraisal.

*Response:* NRCS will conduct appraisal reviews differently depending upon whether an eligible entity has been certified or not. As described earlier in this preamble, NRCS will only spot check a percentage of a certified entity's transactions. Additionally, the spot checks of a certified entity's appraisals will be to ensure the certified entity followed its appraisal procedures properly, including any adjustments to those procedures required by NRCS as part of certification.

However, for other eligible entities, NRCS will still require more extensive appraisal reviews, including technical and administrative reviews, to ensure that the appraisal meets the detailed NRCS standards and specifications required under the cooperative agreement. Appraisal reviews document the validity of the expenditure of funds. For appraisals submitted by eligible entities that are not certified, agency policy requires a technical review of the first appraisal report that is done by a particular appraiser each year. NRCS will conduct technical review on a minimum of 10 percent of appraisals submitted for approval in each State each year. NRCS standards require sufficient detail to allow for its review of an appraiser's work and to ensure that the less experienced eligible entities are appropriately following procedures.

#### Conservation Easement Deeds

*Comments:* NRCS received 44 comments recommending that NRCS not require conservation easement deed templates used by eligible entities to be submitted to National Headquarters, nor require review and approval of each transaction's deed in advance of use. Five respondents recommended that NRCS continue to review conservation easement deeds.

*Response:* Section 1238I(g)(4) of the 1985 Act authorizes an eligible entity to use its own terms and conditions in conservation easements and other interests in land as approved by the Secretary as long as the terms and conditions "(A) are consistent with the purposes of the program; (B) permit effective enforcement of the conservation purposes of such

easements or other interests; and (C) include a limit on the impervious surfaces to be allowed that is consistent with the agricultural activities to be conducted.” As described above, NRCS agrees that once a template easement deed form has been reviewed and approved, certified entities do not need to seek prior NRCS review and approval of the conservation deed for each transaction. However, for eligible entities that are not certified, NRCS will continue to require that the eligible entity submit to NRCS the deed, title, and appraisal for review prior to closing to ensure that such documents meet NRCS specifications. No changes were made to the final rule.

*Comments:* NRCS received one comment requesting NRCS be aware that State statutes often specify the deed requirements for eligible entities.

*Response:* NRCS recognizes that State statutes require particular provisions, and NRCS will work with eligible entities to address any conflicts between State statutes and FRPP program requirements. However, NRCS must ensure that deed terms are consistent with FRPP purposes as described above. No changes were made to the final rule.

*Comments:* NRCS received one comment asserting that the Federal Government has no authority to enforce a prohibition on future State or local condemnation. The respondent maintains that the Federal Government’s contingent right of enforcement is merely a mechanism to ensure terms and conditions of FRPP easements are honored. The respondent asserted that FRPP purposes can be guaranteed by other means such as requiring a proportionate share of condemnation proceeds be paid to the Federal Government. The respondent contends that the interim final rule’s current condemnation prohibition is causing many States to forego participation in FRPP.

*Response:* Under the 2008 Act, Congress required that a right of enforcement for the Secretary be included in FRPP funded deeds. This right of enforcement is held by the Secretary and runs with the land. As such, it is a vested interest in real property. Under well-established constitutional principles, State and local governments do not have the authority to condemn a Federal interest in land.

*Comments:* NRCS received one comment recommending that NRCS’ conservation plans identify conservation values.

*Response:* NRCS agrees with the respondent. NRCS’ conservation plans already identify conservation values.

*Comments:* NRCS received several comments related to NRCS’ identification of various activities as agricultural uses or non-agricultural uses. NRCS received three comments recommending that NRCS allow on-farm energy production in conservation easement deeds. NRCS also received three comments that argued that the restriction on subdividing a parcel under a FRPP conservation easement deed contradicts State regulations or statutes, and has no basis in the 2008 Act. Two comments identified that the more restrictive conservation easement deed requirements spelled out in the interim final rule and the new cooperative agreement template, threaten Maine farmers in a number of ways including failure to address on-farm energy production and use. Seven respondents argued that limitations on signage and snowmobiles threaten Maine farmers. One respondent asserted that the requirement to forego future rights to residential development contradicts Maryland’s regulations or statutes, and has no basis in the 2008 Act. Three comments recommended allowing farms enrolled in FRPP to host non-farm rural enterprises.

*Response:* NRCS identifies agricultural and non-agricultural uses pursuant to its responsibilities under FRPP. In particular, the purpose of FRPP as stated in the 2008 Act is to “protect the agricultural use and related conservation values of eligible land by limiting non-agricultural uses of that land.” Additionally, the identification of agricultural and non-agricultural uses is relevant in regard to the terms and conditions of the cooperative agreement. Section 1238I(g)(1) of the 1985 Act requires NRCS to stipulate in the cooperative agreement the terms and conditions under which cost-share assistance is provided, and section 1238I(g)(4) of the 1985 Act authorizes NRCS to review the terms of an eligible entity’s conservation easement to ensure the terms and conditions are consistent with FRPP. Activities that are related to agricultural production or directly support the agricultural operations are agricultural uses of the land. Other activities, though they commonly may occur on agricultural lands, are not agricultural uses, and thus, NRCS may require eligible entities to incorporate limitations into the terms of approved conservation easement deeds.

For example, the on-farm production of energy presents a combination of agricultural and non-agricultural uses, and NRCS must find a balance between those uses. Where the energy produced on a farm is for on-farm usage, NRCS considers such activity an agricultural

use. However, the same farmers who wish to protect their farms from development are often the same landowners who care about meeting the Nation’s future energy needs. While the on-farm production of energy for off-farm use is not an agricultural use, NRCS believes that a complete prohibition of such uses is not required by statute. Thus, NRCS will work with eligible entities to develop appropriate limitations in the deed terms that focus on the impact that such activities have upon the particular easement area’s agricultural viability, such as proposed siting and density restrictions, rather than strictly prohibiting such uses.

The more complex activities to address in conservation easement deeds are those that, when exercised by a farmer’s family and its guests, should be authorized, but when exercised on a commercial scale, may represent a conversion to non-agricultural use. However, if the activity does not interfere with the agriculture use, like snowmobiling, it may be considered a permitted activity. Other activities, such as the development of all terrain or off-road vehicle recreation, significantly impacts the resource and represents conversion of a farm to non-agricultural use, and thus, should be prohibited. NRCS recognizes that a balance must be struck between authorized, prohibited, and restricted activities within the terms of a conservation easement deed to ensure protection of the agricultural viability of the land while allowing flexibility for reasonable use of the land into the future. NRCS will continue to work with eligible entities to develop the appropriate balance.

*Comments:* NRCS received 11 comments recommending that NRCS eliminate the NRCS reserved right.

*Response:* Section 1238I(f)(2) of the 1985 Act requires that a “contingent right of enforcement” be included 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 contingent right of enforcement is required by statute, protects the Federal investment, and cannot be eliminated by NRCS.

*Comments:* NRCS received three comments stating that NRCS should not allow cooperating entities to run FRPP.

*Response:* While NRCS works closely with cooperating entities, NRCS will not abdicate its responsibility to maintain quality assurance oversight over the transactions funded through FRPP. NRCS requires cooperating entities to meet eligibility requirements, and requires that each transaction funded also meets NRCS eligibility and priority



requirements. For example, rather than simply adopting the ranking criteria of the cooperating entity, NRCS reviews and ranks the transactions it funds using NRCS national and State criteria. No changes were made to the final rule.

*Comments:* NRCS received one comment recommending that NRCS not involve local conservation districts in approving the conservation plan.

*Response:* Section 1491.22(e) of the interim final rule makes clear that local conservation districts are not involved in approving conservation plans. While district staff is often involved in the development of the conservation plan, the conservation plan is ultimately developed by NRCS, in consultation with the landowner, and implemented according to the NRCS Field Office Technical Guide (FOTG).

*Comments:* NRCS received one comment recommending that under § 1491.22(g) of the interim final rule, the conservation easement review conducted by NRCS prior to easement closing should be limited to a determination that the conservation easement deed conforms to the conservation easement form contained in the executed cooperative agreement.

*Response:* The acceptance referenced in § 1491.22(g) of the interim final rule pertains to the land, not to the terms of the conservation easement deed. However, all of the terms contained in the conservation easement deed are not necessarily contained in the conservation easement form in the cooperative agreement. For example, the deed template does not identify the grantors and the capacity in which they are conveying the land. During its reviews, NRCS has identified many situations where the draft deed for a particular transaction did not correctly identify the grantors or the land area to be encumbered.

*Comments:* NRCS received four comments that the general indemnification requirement of § 1491.22(j) of the interim final rule contradicts State regulations or statutes and has no basis in the 2008 Act. The respondents argue that NRCS should allow entities to modify the indemnification language of conservation easement deeds.

*Response:* NRCS recognizes the limitations that public entities have in regards to entering into indemnification agreements. NRCS, working with the Office of the General Counsel, modifies its indemnification language for public entities to comply with State laws while ensuring adequate protection to the United States. Although the 2008 Act does not specifically mention addressing potential liability issues, it is

common practice for conservation easement holders to include such clauses. Moreover, as part of the NRCS duty to protect the public interest, it is good administrative practice to include such clauses.

*Comments:* NRCS received one comment recommending that language be added requiring NRCS to review and approve any amendments to easement deeds.

*Response:* NRCS agrees with this recommendation. The language in § 1491.22(k) of the interim final rule has been modified to require that NRCS must review and approve any material amendments to conservation easement deeds.

#### Conservation Easement Deeds—Impervious Surfaces

*Comments:* NRCS received 63 comments concerning impervious surfaces in § 1491.22(i). The comments assert that, despite congressional intent and statutory direction, NRCS continues to impose a standard of no more than 2 percent impervious surfaces on FRPP easement areas. The respondents asserted that NRCS should not set a numerical limit, but instead allow eligible entities to use their own terms and conditions that are consistent with the agricultural activities to be conducted. NRCS also received 20 comments supporting an impervious surface limitation, and several respondents recommended that the impervious surface limit be scaled to the size of the easement so that smaller easements would be authorized to have a larger percentage in impervious surface. These respondents also recommended that State Conservationists have flexibility to approve a local entity's waiver processes for impervious surfaces if the processes are applied on a parcel-by-parcel basis.

*Response:* The purpose of the impervious surface standard is to limit the conversion of productive agriculture lands to non-agricultural use within the easement area. An impervious surface represents an irretrievable commitment of resources to a particular use, and thus, has an impact upon the long-term viability and adaptability of the agricultural operation. NRCS does not intend to limit the expansion, for example, of a confined animal or permanent greenhouse operation. However, NRCS will not permit the impervious surface of these operations to exceed the maximum allowed under § 1491.22(i) in the FRPP rule. Existing NRCS policy permits State Conservationists to waive the 2 percent impervious surface limitation on a

parcel-by-parcel basis up to a maximum of 10 percent. In addition, NRCS has revised policy to allow eligible entities to develop and submit their own impervious surface waiver process to the State Conservationist for review and consideration. The process must be approved by the State Conservationist and applied by the eligible entity on a parcel-by-parcel basis.

#### Cooperative Agreements

*Comments:* NRCS received three comments on the topic of amendments to cooperative agreements. The respondents recommended that multi-year cooperative agreements be revised to reflect any changes between the final rule and the interim final rule.

*Response:* Cooperative agreements may be modified subject to the mutual agreement of NRCS and the cooperating entity. The final rule does not require any substantive changes to the cooperative agreements made prior to the final rule.

*Comments:* NRCS received one comment that recommended the agency provide for the ability to make property substitutions as part of FRPP.

*Response:* Section 1491.20(a)(5) of the interim final rule already provides for the ability to make parcel substitutions upon mutual agreement of the parties. No changes were made to the final rule.

*Comments:* NRCS received one comment regarding the manner in which the New Jersey farmland preservation program purchases easements and its interface with FRPP. The respondent expressed concern that FRPP policy requiring the disbursement of the entire payment during the life of the cooperative agreement could prevent New Jersey counties and townships from using FRPP funding. In particular, New Jersey farmland preservation programs often purchase conservation easements with proceeds from general obligation debt, paying in installments over an extended period of time. However, cooperative agreements are for a maximum of 5 years. Further, the respondent requested clarification as to whether NRCS would consider certain debt obligations incurred by the cooperating entity to the benefit of the landowner as constituting a cash contribution rather than an installment payment.

*Response:* Section 1238I(c) of the 1985 Act describes the financial assistance provided from NRCS to eligible entities as cost-share assistance. Section 1238I(c) also requires that the Federal share for purchasing a conservation easement or other interest in eligible land will not exceed 50 percent of the appraised fair market

value. The requirement that an entity must provide at least 25 percent of the purchase price of the acquisition is also a statutory requirement. The situation suggested by the respondent would violate the statutory requirements for the program by requiring NRCS or the landowner to cover the statutorily required cost-share expenses for the entity. NRCS, by statute, may only provide funding for the costs of the easement purchase and not the associated administrative costs such as title insurance, surveys, appraisals, easement monitoring, and other related administrative fees and transaction costs incurred by the entity. Additionally, funds for FRPP appropriated to NRCS by Congress must be expended within 5 years from the fiscal year of obligation. Obligated funds not expended within the 5-year period will no longer be available for payment after the fifth year of obligation. In response to the respondent's comment regarding whether NRCS would allow the entity's obligation to count as a cash contribution from the landowner, this is not permitted for the same statutory reasons mentioned earlier. The statute requires the entity to provide at least 25 percent of the purchase price of the easement or other interest in property. The purchase price is defined as the appraised fair market value of the easement minus the landowner donation. The eligible entity must contribute its statutorily required share to purchase the easement, and debt obligations do not count towards satisfying an eligible entity's required share of the purchase price of an easement.

#### Definitions

*Comments:* NRCS received two comments requesting that the FRPP final rule provide a definition for the phrase, land that furthers a State or local policy consistent with the purposes of the program and gives the State Conservationist, with input from the State Technical Committee and FRPP partner organizations, the ability to decide what lands might further a State or local policy consistent with the program.

*Response:* Given the potential range and variety of State or local policies that may exist, NRCS does not believe that a definition "that furthers a State or local policy consistent with the purposes of the program" would provide much meaning. Additionally, FRPP purposes are identified by statute. The final rule has not been modified to include this definition. The 2008 Act included an additional category of eligible land which was "land, the

protection of which will further a State or local policy consistent with the purposes of the program." The purpose of FRPP is to protect the agricultural use and related conservation values of eligible land by limiting non-agricultural uses of that land. NRCS will allow State Conservationists to determine which State and local policies are consistent with the stated purposes of FRPP for this category of eligible land.

#### Agricultural Use

*Comments:* NRCS received 11 comments recommending that NRCS accept any State's definition of agriculture as contained in State or local farmland protection legislature, regulation, and ordinance.

*Response:* The definition of agricultural use in the interim final rule, in substantial part, is the same as the definition of agricultural use used in the 2003 FRPP final rule published at 68 FR 26461, May 16, 2003. FRPP defers to State definitions, but cannot allow uses that decrease the agricultural productivity of the soil such as sod-farming or balled and burlap nursery stock production. Some States include in their definition of agriculture use activities that may decrease the agricultural productivity of the soil. No changes were made to the final rule.

#### Forest Land

*Comments:* NRCS received three comments requesting that NRCS change the first sentence in the definition of forest land to "Forest land means a land cover or use category that is at least 10 percent stocked by non-invasive woody species of any size." The respondents argue that NRCS should redefine the term forest land to be consistent with the definition cited by the USDA Forest Service Forestry Inventory and Analysis Program, and should be limited to nonindustrial private forest land (NIPF) to ensure a focus on family farmers who own forests.

*Response:* With regard to the respondents' first comment, NRCS adopted the definition of forest land that is used throughout the NRI. NRCS will use this definition of forest land to ensure consistency with other NRCS programs and to ensure the quality and consistency of NRCS data. With regard to the respondents' last comment pertaining to ensuring a "focus on family farmers who own forests," Farm Bill programs are available to all private landowners that meet the AGI limitation of \$1 million per year. Several Farm Bill programs, such as EQIP and the Conservation Stewardship Program, limit forest land eligibility to NIPF.

FRPP does not limit land eligibility to NIPF. Limiting eligibility to NIPF could limit the ability of the program to protect contiguous sections of agricultural lands where land conversion pressures are higher.

#### Forest Land of Statewide Importance

*Comments:* NRCS received one comment requesting that the final rule add a definition for forest land of statewide importance that includes priority forested areas or regions of the State that have been identified by the State forester and informed through statewide assessments and strategies pursuant to sections 8001 and 8002 of the 2008 Act.

*Response:* NRCS agrees with the recommendation of the respondent and has added a definition to the final rule. Forest land of statewide importance means forest land that the State Conservationist, in consultation with the State Technical Committee, identifies as having ecological or economic significance within the State, and may include forested areas or regions of the State that have been identified through statewide assessments and strategies conducted pursuant to State or Federal law.

#### Forest Management Plan

*Comments:* NRCS received three comments recommending that NRCS recognize and accept forest plans as specified in section five of the Cooperative Forestry Assistance Act of 1978, 16 U.S.C. 2103c, or other forest plans developed and approved solely by a State forester. The respondents also suggested redefining the term forest management plan to include forest stewardship plans as specified by the Cooperative Forestry Assistance Act, and forest management plans developed under a third-party audited forest certification system, such as the American Tree Farm System.

*Response:* The definition of forest management plan, as currently written, permits the use of the various plans described by the respondents. No changes were made to the final rule.

#### Impervious Surface

*Comments:* NRCS received two comments requesting a definition for impervious surface.

*Response:* NRCS agrees with the respondents that a definition for impervious surface as used in the context of FRPP is necessary. The rule has been modified to provide such definition. NRCS would like to clarify that the following activities are not considered impervious surfaces for the purposes of FRPP: Roads and parking

lots with soil or gravel surfaces, conservation practices identified in the FOTG and in a conservation plan for the subject farm or ranch, and temporary greenhouses that cover the soil surface for less than 6 months.

#### Landowner

*Comments:* NRCS received 13 comments requesting that NRCS allow organizations that qualify as eligible entities under FRPP to also be eligible as landowners and permitted to apply for cost-share assistance under FRPP. NRCS also received one comment recommending that NRCS provide for an exemption from the definition of landowner such that a nongovernmental organization would have the ability to purchase an FRPP property in order to keep it from being developed while the funds to protect it were being secured.

*Response:* Lands currently under ownership by an entity whose purpose is to protect agricultural uses and related conservation values, such as a nongovernmental organization, are already protected without funding from FRPP. Therefore, an eligible entity normally cannot qualify as a landowner. However, the July 2, 2009, correction to the interim final rule incorporated additional flexibility into the definition of landowner at § 1491.3 to allow NRCS to facilitate the placement of a conservation easement or other interest in land on properties in limited circumstances where an eligible entity purchases fee title to land temporarily, and then re-conveys those lands to a private landowner. In order for this flexibility to apply, the parcel must be transferred back to private ownership before or at closing on the easement. No further changes were made to the final rule.

#### Parcel

*Comments:* NRCS received one comment requesting the agency define the term parcel because the agency uses the term interchangeably when it refers to farms and ranches.

*Response:* NRCS agrees with the respondent's comment. The final rule has been modified to define the term parcel. Parcel means a farm or ranch submitted for consideration for funding under this part.

#### Public Access

*Comments:* NRCS received one comment requesting that NRCS define the phrase public access.

*Response:* The State and local ranking criteria are determined by the State Conservationist, with advice from the State Technical Committee. The State Technical Committee provides

information, analysis, and recommendations to the State Conservationist on implementation of conservation programs under Title XII of the 1985 Act. The interim final rule identified that eligible entities may receive additional ranking points under the State ranking criteria if the landowner is willing to allow public access for recreational purposes. NRCS has removed this as a potential ranking criterion. NRCS is cognizant of the potential biohazards that public access presents to an active agricultural operation, and thus, will not use public access as a ranking factor for FRPP assistance.

#### Right of Enforcement (Original Interim Final Rule Definition)

*Comments:* NRCS received 32 comments asserting that the agency's position that the contingent right of enforcement is a vested real property right is inconsistent with the intent of Congress.

*Response:* NRCS addressed the respondents' comments in its July 2, 2009, correction to the interim final rule published at 74 FR 31578. The correction to the interim final rule at § 1491.3 defines the contingent right of enforcement as a vested right set forth in the conservation easement deed. However, as explained below, the contingent right of enforcement is a condition of providing assistance and is not an acquisition subject to the Department of Justice title standards.

#### Right of Enforcement (Correction to the Interim Final Rule § 1491.22(d))

*Comments:* NRCS received two comments critical of NRCS' contingent right of enforcement. The respondents argued that USDA's insistence on maintaining the right to enforce the FRPP conservation easement in perpetuity regardless of State and local future needs is causing many States to forego participation in FRPP. NRCS also received eight comments that applauded the change in language made by the correction to the interim final rule regarding the contingent right of enforcement and the elimination of Department of Justice title standard requirements.

*Response:* Section 1238I(f)(2) of the 1985 Act explicitly requires that a contingent right of enforcement be included in the terms of each FRPP conservation easement deed. As the correction to the interim final rule explained, as a *term* of the conservation easement, the contingent right of enforcement is a vested real property right which provides the Chief, on behalf of the United States, the ability

to sue to ensure the protection of the conservation values identified in the conservation easement deed. Because the enforcement right is required by statute, NRCS has no authority to remove it. Moreover, the very purpose of the right is to protect the public investment in conservation and to prevent the possibility of future divestment that the first commenter discusses.

*Comments:* NRCS received one comment that recommended NRCS allow cooperating entities to consider acquisition costs as part of the purchase price.

*Response:* FRPP cost-share is limited to the cost of purchasing the easement and is defined in the statute in reference to the fair market value of the easement. There is no authority for NRCS to provide cost-share assistance for the other costs associated with conservation easement acquisition.

*Comments:* NRCS received one comment that requested NRCS inform cooperating entities of the acquisition costs for which they are responsible.

*Response:* Acquisition costs have always been the responsibility of the cooperating entity and encompass the standard direct acquisition costs and due diligence responsibilities of purchasers of conservation easements. Additional information on typical standards and practices of easement acquisition and management may be found on the Land Trust Alliance Web site at <http://www.landtrustalliance.org>. No changes were made to the final rule.

#### Program Requirements

*Comments:* NRCS received one comment requesting clarification about how program funds will be available to eligible entities to partner with NRCS to acquire forest land. The respondent requested clarification as to whether eligible entities must consult with the State Forester to determine what constitutes characteristics of viability, as mentioned in the 2008 Act, and the extent to which forest land may satisfy that determination, as well as to determine the extent and type of buffer necessary and the appropriate measures to maintain adequate buffer capacity.

*Response:* The focus of the program is the protection of working farms and ranches. The inclusion of forest land as an allowable land use facilitates the enrollment of farms and ranches with a high percentage of forest land. NRCS is interested in assisting landowners in managing forest lands, and is relying on the forest management plan to guide landowners. While the State Forester is a valuable source of information and guidance, the FRPP rule does not

require an eligible entity to consult with the State Forester to determine the characteristics of viability. The buffers mentioned in the 2008 Act and the final rule are buffers to protect the farm from development, not necessarily to function as a water quality buffer.

*Comments:* NRCS received three comments that FRPP should be redesigned to be a grant program similar to block grants where Federal agencies focus on the results and facilitate local management of the program.

*Response:* The statute describes the program as a cost-share program. The original House legislation proposed a grant program; however, Congress did not adopt that provision of the legislation in the Conference Report. In the Conference Report, Congress designed FRPP as a program to provide financial assistance through a cooperative agreement to facilitate the purchase of conservation easements by eligible entities. As defined in the Federal Grants and Cooperative Agreement Act, 31 U.S.C. 6304 *et seq.*, cooperative agreements are different from grants because, among other things, there is a higher level of Federal involvement. This is consistent with the FRPP statutory requirements which require significant involvement of the Secretary, including setting cooperative agreement requirements, certification, conservation planning, and enforcement.

*Comments:* NRCS received two comments asserting that the requirement that eligible entities have pending offers to purchase conservation easements or other interests in eligible land before applying for FRPP funds is arbitrary and burdensome.

*Response:* Section 1238H of the 1985 Act defines eligible land as "land on a farm or ranch that is subject to a pending offer for purchase from an eligible entity." Therefore, the pending offer is required to meet land eligibility criteria. Additionally, securing a pending offer ensures that the landowner is serious about selling an easement. No changes were made to the final rule.

*Comments:* NRCS received one request that the term facilitate be added to the purpose of the program.

*Response:* NRCS agrees with the respondent. However, the term facilitate was added to the language of § 1491.4(a) of the interim final rule; therefore, no change is required to address this comment. NRCS believes that the language of § 1491.4(a) affirms NRCS has shifted the focus of the program from purchasing conservation easements to facilitating the purchase of conservation easements by eligible

entities. Also, adding the term facilitate identifies that NRCS will promote farm and ranch land protection, not that it will decrease the accountability required of cooperating entities.

*Comments:* NRCS received 17 comments expressing concern about removal of the specific reference to topsoil protection as a primary program purpose.

*Response:* Section 2401 of the 2008 Act revised the program purpose of FRPP so that the language no longer includes protection of topsoil. The purpose of the 2002 Act was "protecting agricultural use and related conservation uses." NRCS is not authorized to change the purpose of the program. Even so, the protection of topsoil remains one of FRPP purposes as is made clear by the criteria for eligible land—"prime, unique, or productive soil."

*Comments:* NRCS received one comment suggesting consideration of optional term easements consistent with State program requirements, where available.

*Response:* Section 1491.4(b) of the interim final rule already provided for the maximum term allowed by State law. Optional term easements are often for less than the maximum term allowed by State law, and NRCS believes that the FRPP Federal investment is best served by permanent or the longest-term easement that is available. Therefore, NRCS did not adopt the recommendation of the respondent.

*Comments:* NRCS received one comment recommending that NRCS allow entities to be qualified as eligible without being associated with a parcel.

*Response:* Entities can be considered qualified to apply for FRPP financial assistance without having any parcels being considered for financial assistance. Because the entity's eligibility may vary over time as funding and staff wax and wane, an entity will have to be qualified at least annually unless they are an entity associated with a cooperative agreement with a term of 3 or 5 years.

*Comments:* NRCS received 10 comments recommending that the final rule provide a more qualitative standard for eligible land that is consistent with existing State and local program requirements. The respondents argued that land eligibility tied to a percentage of the farm in certain soil types is inappropriate.

*Response:* Congress established the criteria for eligible land in the 2008 Act. Section 1491.4(c) further clarifies program eligibility criteria. A criterion for land eligibility in the 2008 Act is prime, unique, and other productive

soils. NRCS has national standards for prime, unique, and important farmland soil that have been developed in cooperation with Land Grant Universities in each State. The national target for prime, unique, and important farmland soil in FRPP, set by the White House Office of Management and Budget, is 65 percent of the total acres enrolled in FRPP. No changes were made to the final rule.

*Comments:* NRCS received one comment asserting that there is no clear rationale as to why an easement cannot contain more than two-thirds forest land. The respondent urges flexibility in this figure to allow for greater acreages if the forest meets the viability test as identified in the 2008 Act, and that there is no statutory restriction on amount of the forest land that can be enrolled.

*Response:* The limitation of two-thirds forest land is to avoid conflicts with the Forest Legacy Program as requested by the USDA Forest Service. No changes were made to the final rule.

*Comments:* NRCS received 75 comments asserting that the requirement for forest management plans is burdensome. The respondents requested that NRCS eliminate this requirement, or at least make the threshold 50 acres. NRCS also received one comment stating that the forest management plan requirement was perfect.

*Response:* The 2008 Act requires that forest land enrolled in FRPP contributes to the economic viability of the farm or serves as a buffer from development. A management plan is a minimal requirement to prove land eligibility and will be the primary means by which economic viability will be determined. In response to comments on the interim final rule, the final rule increased the amount of acreage enrolled in FRPP requiring a forest management plan to 40 contiguous acres, or 20 percent of the easement area from 10 contiguous acres or 10 percent of the easement area. Forest land that contributes to the economic viability of the farm may include parcels of forest with viability for timber harvest, hunting, or other recreational uses for which a fee may be charged. Section 1491.4(g)(2) of the final rule has been modified by adding "or serves as a buffer to protect an agricultural operation from development" to allow the Chief to identify other means for which the contribution of FRPP to the economic viability can be demonstrated.

*Comments:* NRCS received eight comments asserting that NRCS should not require hazardous materials records search and site reviews.

*Response:* NRCS does not require the eligible entity to do hazardous materials records search. However, the hazardous materials records search, site review, and landowner interview are basic due diligence requirements that are recommended for any purchaser of real property. NRCS may conduct its own hazardous materials records search, site review, and landowner interview to ensure public funds are not being used to acquire an interest in contaminated sites.

*Comments:* NRCS received one comment that the term suitability may need to be replaced with unsuitable for this sentence to make sense.

*Response:* NRCS agrees with the respondent. Section 1491.4(f)(8) has been modified to reflect the commenter's suggestion.

*Comments:* NRCS received one comment supporting the provision in § 1491.4(f)(9) that eligible land "may be land on which gas, oil, earth, or other mineral rights exploration has been leased or is owned by someone other than the applicant and may be offered for participation in the program."

*Response:* NRCS appreciates the respondent's support for the provision. NRCS will assess the potential impact that the third party rights, such as severed or leased mineral rights, may have upon achieving the program purposes. NRCS reserves the right to deny funding for any application where existing encumbrances will have an adverse impact upon the ability to protect the agricultural viability of the land, and such encumbrances are not able to be resolved during the title clearance process.

*Comments:* NRCS received one comment that requested NRCS not allow large entities to dictate the terms of the program.

*Response:* NRCS uses a ranking process as described in § 1491.6 of the final rule to ensure all cooperating entities are treated equally. The process ranks the parcels to be selected for funding, not the entity. The entity must meet the eligibility criteria as described in § 1491. NRCS will not abdicate its responsibility to ensure that FRPP is administered in a manner that protects Federal investment in farmland protection.

#### Ranking Considerations and Proposal Selection, § 1491.6 of the Interim Final Rule

*Comments:* NRCS received one comment recommending that NRCS delete the suggested State criteria involving succession plans.

*Response:* The State criteria are suggestions only. They are not

requirements. USDA encourages succession planning for farmers and ranchers; therefore, no changes were made to the final rule.

*Comments:* NRCS received one comment recommending deletion of the suggested State criteria involving access for recreation.

*Response:* As discussed above, NRCS removed the reference to priority for allowing public access to acknowledge the biohazard concerns of agricultural operations.

*Comments:* NRCS received 80 comments asserting that delineating specific national criteria in the rule that are not called for by statute may conflict with established State and local criteria. The respondents argue that certified entities should be allowed to use their own ranking and proposal selection process, and that NRCS should identify broad categories, but not specific criteria, in order to facilitate comparison between applications from certified and non-certified entities.

*Response:* NRCS believes that it is the ranking aspect of FRPP that provides the greatest assurance that FRPP purposes are being met, and national criteria are vital to the ranking process. Certification alone does not ensure that the parcels selected will best meet FRPP purposes. The national ranking factors in the 2003 FRPP final rule only provided weight to the cooperating entities with the longest tenure and the largest budgets and staff. No weight was given to the quality of the parcels. The national ranking factors in the 2009 interim final rule removed the bias in favor of established cooperating entities with large budgets and staff, and placed greater emphasis on the quality of the parcels. Parcels submitted by all eligible entities are treated equally once the eligible entities have met the eligibility criteria. In every State except two, parcels are submitted by certified and non-certified eligible entities. There must be a selection process that is common to both certified and non-certified entities. NRCS State offices may score and weigh the national ranking factors to reflect the State's needs and add ranking factors that reflect State or local priorities. NRCS accepts applications on a continuous basis. The announcement of the application ranking date is changed from 60 days to 30 days before ranking to allow State offices to select eligible parcels and obligate funds faster. The reduced time will also allow States to announce multiple ranking dates.

#### Violations and Remedies

*Comments:* NRCS received one comment that asserted that if NRCS

finds that a grantor has violated the easement, then NRCS should pursue cost recovery directly from the grantor without obligation from the grantee. The respondent believes that NRCS should only pursue legal action against the grantee if NRCS feels the grantee is violating its obligations.

*Response:* Section 1491.30(c) of the interim final rule states that the landowner will be liable for any costs. NRCS has identified that it will only seek to enforce an easement if the grantee has failed to do so; therefore, no changes were made to the final rule.

#### Miscellaneous

*Comments:* NRCS received one request that NRCS use eligible entity in place of cooperating entity.

*Response:* NRCS agrees with the respondent. The change is required for clarity and has been made in the final rule.

*Comments:* NRCS received one request that NRCS use eligible entity in place of grantee.

*Response:* NRCS agrees with the respondent. The change is required for clarity and has been made in this final rule where applicable. However, there are certain situations where grantee is the appropriate term, and NRCS retained its use in those circumstances.

*Comments:* NRCS received one request that the agency not use eligible entity to address an entity before it is determined to be eligible.

*Response:* NRCS agrees with the respondent. The change is required for clarity and has been made in the final rule.

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

Administrative practice and procedure, Agriculture, Soil conservation.

For the reasons stated above, the CCC revises part 1491 of Title 7 of the CFR to read as follows:

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

#### Subpart A—General Provisions

##### Sec.

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

#### Subpart B—Cooperative Agreements and Conservation Easement Deeds

- 1491.20 Cooperative agreements.
- 1491.21 Funding.
- 1491.22 Conservation easement deeds.

**Subpart C—General Administration**

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

Authority: 16 U.S.C. 3838h–3838i.

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

(a) The regulations in this part set forth requirements, policies, and procedures for implementation of the Farm and Ranch Lands Protection Program (FRPP) as administered by the Natural Resources Conservation Service (NRCS). FRPP cooperative agreements will be administered under the regulations in effect at the time the cooperative agreement is signed.

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

**§ 1491.2 Administration.**

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

(b) NRCS will—

- (1) Provide overall program management and implementation leadership for FRPP;
- (2) Develop, maintain, and ensure that policies, guidelines, and procedures are carried out to meet program goals and objectives;
- (3) Ensure that the FRPP share of the cost of an easement or other deed restrictions in eligible land will not exceed 50 percent of the appraised fair market value of the conservation easement;
- (4) Determine eligibility of the land, landowner, State government, local government, Indian Tribe, or nongovernmental organization;
- (5) Ensure a conservation plan is developed in accordance with 7 CFR part 12;
- (6) Make funding decisions and determine allocations of program funds;
- (7) Coordinate with the Office of the General Counsel to ensure the legal sufficiency of the cooperative agreement and the easement deed or other legal instrument;
- (8) Sign and monitor cooperative agreements for the Commodity Credit Corporation (CCC) with the selected eligible entity;
- (9) Monitor and ensure conservation plan compliance with highly erodible land and wetland provisions in accordance with 7 CFR part 12; and
- (10) Provide leadership for establishing, implementing, and

overseeing administrative processes for easements, easement payments, and administrative and financial performance reporting.

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

**§ 1491.3 Definitions.**

The following definitions will apply to this part, and all documents issued in accordance with this part, unless specified otherwise:

*Agricultural uses* are defined by the State's FRPP or equivalent, or where no program exists. Agricultural uses should be defined by the State agricultural use tax assessment program. However, if NRCS finds that a State definition of agriculture is so broad that an included use could lead to the degradation of soils and agriculture productivity, NRCS reserves the right to impose greater deed restrictions on the property than allowable under that State definition of agriculture in order to protect agricultural use and related conservation values.

*Certified entity* means an eligible entity that NRCS has determined to meet the requirements of § 1491.4(d) of this part.

*Chief* means the Chief of NRCS or designee.

*Commodity Credit Corporation* is a government-owned and operated entity that was created to stabilize, support, and protect farm income and prices. The CCC is managed by a Board of Directors, subject to the general supervision and direction of the Secretary of Agriculture, who is an ex-officio director and chairperson of the Board. The CCC provides the funding for FRPP, and NRCS administers FRPP on its behalf.

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

*Conservation plan* is the document that—

- (1) Applies to highly erodible cropland;
- (2) Describes the conservation system applicable to the highly erodible cropland and describes the decisions of the person with respect to location, land use, tillage systems, and conservation treatment measures and schedules;
- (3) Is developed by NRCS in consultation with the landowner through the local soil conservation district, in consultation with the local committees, established under section 8(b)(5) of the Soil Conservation and

Domestic Allotment Act (16 U.S.C. 5909h(b)(5)) and the Secretary, or by the Secretary.

*Cooperative agreement* means the document that specifies the obligations and rights of NRCS and eligible entities participating in the program.

*Dedicated fund* means an account held by a nongovernmental organization which is sufficiently capitalized for the purpose of covering expenses associated with the management, monitoring, and enforcement of conservation easements and where such account cannot be used for other purposes.

*Eligible entity* means Indian Tribe, State government, local government, or a nongovernmental organization which has a farmland protection program that purchases agricultural conservation easements for the purpose of protecting agriculture use and related conservation values by limiting conversion to non-agricultural uses of the land.

*Eligible land* means privately owned land on a farm or ranch that NRCS has determined to meet the requirements of § 1491.4(f) of this part.

*Fair market value* means the value of a conservation easement as ascertained through standard real property appraisal methods, as established in § 1491.4(g).

*Farm and ranch land of local importance* means farm or ranch land used to produce food, feed, fiber, forage, bio-fuels, and oilseed crops that are not identified as having national or statewide importance. Where appropriate, these lands are to be identified by the local agency or agencies concerned. Farmlands of local importance may include tracts of land that have been designated for agriculture by local ordinance.

*Farm and ranch land of statewide importance* means, in addition to prime and unique farmland, land that is of statewide importance for the production of food, feed, fiber, forage, bio-fuels, and oil seed crops. Criteria for defining and delineating this land are to be determined by the appropriate State agency or agencies. Generally, additional farmlands of statewide importance include those that are nearly prime farmland and that economically produce high yields of crops when treated and managed according to acceptable farming methods. Some may produce as high a yield as prime farmlands if conditions are favorable. In some States, additional farmlands of statewide importance may include tracts of land that have been designated for agriculture by State law in accordance with 7 CFR part 657.

*Farm or ranch succession plan* means a general plan to address the continuation of some type of

agricultural business on the conserved land. The farm or ranch succession plan may include specific intra-family succession agreements or strategies to address business asset transfer planning to create opportunities for beginning farmers or ranchers.

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

*Forest land* means a land cover or use category that is at least 10 percent stocked by single-stemmed woody species of any size that will be at least 13 feet tall at maturity. Also included is land bearing evidence of natural regeneration of tree cover (cutover forest or abandoned farmland) that is not currently developed for non-forest use. Ten percent stocked, when viewed from a vertical direction, equates to an aerial canopy cover of leaves and branches of 25 percent or greater.

*Forest land of statewide importance* means forest land that the State Conservationist, in consultation with the State Technical Committee, identifies as having ecological or economic significance within the State, and may include forested areas or regions of the State that have been identified through statewide assessments and strategies conducted pursuant to State or Federal law.

*Forest management plan* means a site-specific plan that is prepared by a professional resource manager, in consultation with the participant, and is approved by the State Conservationist. Forest management plans may include a forest stewardship plan, as specified in section 5 of the Cooperative Forestry Assistance Act of 1978 (16 U.S.C. 2103a), another practice plan approved by the State Forester, or another plan determined appropriate by the State Conservationist. The plan complies with applicable Federal, State, Tribal, and local laws, regulations, and permit requirements.

*Historical and archaeological resources* mean resources that are:

(1) Listed in the National Register of Historic Places (established under the National Historic Preservation Act (NHPA), 16 U.S.C. 470, *et seq.*);

(2) Formally determined eligible for listing in the National Register of Historic Places (by the State Historic Preservation Officer (SHPO) or Tribal

Historic Preservation Officer (THPO) and the Keeper of the National Register in accordance with section 106 of the NHPA);

(3) Formally listed in the State or Tribal Register of Historic Places of the SHPO (designated under section 101(b)(1)(B) of the NHPA) or the THPO (designated under section 101(d)(1)(C) of the NHPA); or

(4) Included in the SHPO or THPO inventory with written justification as to why it meets National Register of Historic Places criteria.

*Imminent harm* means easement violations or threatened violations that, as determined by the Chief, would likely cause immediate and significant degradation to the conservation values; for example, those violations that would adversely impact agriculture use, productivity, and related conservation values or result in the erosion of topsoil beyond acceptable levels as established by NRCS.

*Impervious surface* means surfaces that are covered by asphalt, concrete, roofs, or any other surface that does not allow water to percolate into the soil.

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

*Land Evaluation and Site Assessment System* means the land evaluation system approved by the State Conservationist used to rank land for farm and ranch land protection purposes, based on soil potential for agriculture, as well as social and economic factors, such as location, access to markets, and adjacent land use. For additional information *see* the Farmland Protection Policy Act regulation at 7 CFR part 658.

*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 nongovernmental organizations that qualify as eligible entities are not eligible as landowners, unless otherwise determined by the Chief.

*Natural Resources Conservation Service* means an agency of the Department of Agriculture.

*Nongovernmental organization* means any organization that:

(1) Is organized for, and at all times since, the formation of the organization, and has been operated principally for one or more of the conservation purposes specified in clause (i), (ii), (iii), or (iv) of section 170(h)(4)(A) of the Internal Revenue Code of 1986;

(2) Is an organization described in section 501(c)(3) of that Code that is exempt from taxation under 501(a) of that Code; and

(3) Is described—

(i) In section 509(a)(1) and (2) of that Code, or

(ii) Is described in section 509(a)(3) of that Code and is controlled by an organization described in section 509(a)(2) of that Code.

*Other interests in land* include any right in real property other than easements that are recognized by State law. FRPP funds will only be used to purchase other interests in land with prior approval from the Chief.

*Other productive soils* means farm and ranch land soils, in addition to prime farmland soils, that include unique farmland and farm and ranch land of statewide and local importance.

*Parcel* means a farm or ranch submitted for consideration for funding under this part.

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

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

*Purchase price* means the appraised fair market value of the easement minus the landowner donation.

*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.

*Secretary* means the Secretary of the United States Department of Agriculture.

*State Conservationist* means the NRCS employee authorized to direct and supervise NRCS activities in a State, the Caribbean Area (Puerto Rico and the

Virgin Islands), or the Pacific Islands Area (Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands).

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

*Unique farmland* means land other than prime farmland that is used for the production of specific high-value food and fiber crops, as determined by the Secretary. It has the special combination of soil quality, location, growing season, and moisture supply needed to economically produce sustained high quality or high yields of specific crops when treated and managed according to acceptable farming methods. Examples of such crops include citrus, tree nuts, olives, cranberries, fruits, and vegetables. Additional information on the definition of prime, unique, or other productive soil can be found in 7 CFR part 657 and 7 CFR part 658.

#### § 1491.4 Program requirements.

(a) Under FRPP, the Chief, on behalf of the CCC, will facilitate and provide funding for the purchase of conservation easements or other interests in eligible land that is subject to a pending offer from an eligible entity for the purpose of protecting the agricultural use and related conservation values of the land by limiting non-agricultural uses of the land. Eligible entities submit applications to NRCS State offices to partner with NRCS to acquire conservation easements on farm and ranch land. NRCS enters into cooperative agreements with selected entities and provides funds for up to 50 percent of the fair market value of the easement. In return, the eligible entity agrees to acquire, hold, manage, and enforce the easement. A Federal right of enforcement must also be included in each FRPP funded easement deed for the protection of the Federal investment.

(b) The term of all easements or other interests in land will 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.

(c) To be eligible to receive FRPP funding, an Indian Tribe, State, unit of local government, or a nongovernmental organization must meet the definition of eligible entity as listed in § 1491.3. In addition, eligible entities interested in receiving FRPP funds must demonstrate:

(1) A commitment to long-term conservation of agricultural lands;

(2) A capability to acquire, manage, and enforce easements;

(3) Sufficient number of staff dedicated to monitoring and easement stewardship; and

(4) The availability of funds.

(d) To be eligible as a certified entity, an Indian Tribe, State, unit of local government, or a nongovernmental organization must be qualified to be an eligible entity and must submit a written request for certification to the Chief at the same time the entity is requesting FRPP cost-share assistance. In order to be certified, an eligible entity must:

(1) Meet the requirements identified in paragraph (c) of this section;

(2) Use or agree to use for FRPP funded acquisitions, the Uniform Standards for Professional Appraisal Practice or the Uniform Appraisal Standards for Federal Land Acquisitions in conducting appraisals;

(3) Hold, manage, and monitor a minimum of 25 agricultural land conservation easements, unless the entity requests and receives a waiver of this requirement from the Chief;

(4) Hold, manage, and monitor a minimum of five FRPP or Farmland Protection Program conservation easements;

(5) Have the demonstrated ability to complete acquisition of easements in a timely fashion;

(6) Have the capacity to enforce the provisions of easement deeds;

(7) For nongovernmental organizations, possess a dedicated fund for the purposes of easement management, monitoring, and enforcement where such fund is sufficiently capitalized in accordance with NRCS standards. The dedicated fund must be dedicated to the purposes of managing, monitoring, and enforcing each easement held by the eligible entity;

(8) Be willing to adjust procedures to ensure that the conservation easements acquired meet FRPP purposes and are enforceable; and

(9) Have a plan for administering easements enrolled under this part, as determined by the Chief.

(e) Once NRCS determines that an eligible entity qualifies as a certified entity:

(1) NRCS will enter into a cooperative agreement with the certified entity through which NRCS may obligate funding for up to 5 years. New parcels or prior-year unfunded parcels submitted for funding by certified entities must compete for funding each year. Selected parcels and funding will be added to the existing cooperative agreement using an amendment to the cooperative agreement. Funding expiration dates for the added parcels

will be in the amendment to the cooperative agreement;

(2) NRCS will accept applications from certified entities continuously throughout the fiscal year;

(3) Certified entities may elect to close easements without NRCS approving the conservation easement deeds, titles, or appraisals before closing;

(4) Certified entities will prepare the conservation easement deeds, titles, and appraisals according to NRCS requirements as identified in the cooperative agreement;

(5) NRCS will conduct quality assurance reviews of a percentage of the conservation easement transactions submitted by the certified entity for payment. The review will include whether the deed, title review, or appraisals were conducted in accordance with the requirements set forth by NRCS in its certification of the eligible entity or in the cooperative agreement entered into with the certified entity; and

(6) If a certified entity closes on the easement without a pre-closing NRCS review, and the conservation easement deed, title, or appraisal fails the NRCS quality assurance review, NRCS will provide the certified entity an opportunity to correct the errors. If the certified entity fails to correct the errors to NRCS satisfaction, NRCS may consider decertification of the entity in accordance with paragraph (f) of this section.

(f) *Review and decertification of the certified entity.* (1) The Chief will conduct a review of the certified entity a minimum of once every 3 years to ensure that the certified entities are meeting the certification criteria established in § 1491.4(d).

(2) If the Chief finds that the certified entity no longer meets the criteria in § 1491.4(d), the Chief will:

(i) Allow the certified entity a specified period of time, at a minimum 180 days, in which to take such actions as may be necessary to correct the identified deficiencies, and

(ii) If the State Conservationist has determined the certified entity does not meet the criteria established in § 1491.4(d) after the 180 days, the State Conservationist will send, by certified mail, return receipt requested, written notice of proposed decertification of the entity's certification status or eligibility for future FRPP funding. This notice will contain what actions have not been completed to retain certification status, what actions the entity must take to request certification status, the status of funds in the cooperative agreement, and the eligibility of the entity to apply for future FRPP funds. The entity may



contest the Notice of Decertification in writing to the State Conservationist within 20 calendar days of receipt of the notice of proposed decertification.

(3) The period of decertification may not exceed 3 years in duration, with duration of decertification based upon the seriousness of the facts; and

(4) The entity may be recertified upon application to NRCS, after the decertification period has expired, and when the entity has met the requirements as outlined under § 1491.4(d).

(g) Eligible land:

(1) Must be privately owned land on a farm or ranch and contain at least 50 percent prime, unique, statewide, or locally important farmland, unless otherwise determined by the State Conservationist; contain historical or archaeological resources; furthers a State or local policy consistent with the purposes of the program; and is subject to a pending offer by an eligible entity;

(2) Must be cropland, rangeland, grassland, pastureland, or forest land that contributes to the economic viability of an agricultural operation or serves as a buffer to protect an agricultural operation from development;

(3) May include land that is incidental to the cropland, rangeland, grassland, pastureland, or forest land if the incidental land is determined by the Secretary to be necessary for the efficient administration of a conservation easement;

(4) May include parts of or entire farms or ranches;

(5) Must not include forest land of greater than two-thirds of the easement area. Land with contiguous forest that exceeds the greater of 40 acres or 20 percent of the easement area will have a forest management plan before closing, unless the Chief has reviewed and approved an alternative means by which the forest land's contribution to the economic viability of the land has been demonstrated;

(6) NRCS will 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 a nongovernmental organization 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 non-agricultural use;

(7) Must be owned by landowners who certify that they do not exceed the adjusted gross income limitation

eligibility requirements set forth in part 1400 of this title;

(8) Must possess suitable onsite and offsite conditions which will allow the easement to be effective in achieving the purposes of the program. Unsuitable conditions may include, but are not limited to, hazardous substances on or in the vicinity of the parcel, land use surrounding the parcel that is not compatible with agriculture, and highway or utility corridors that are planned to pass through or immediately adjacent to the parcel; and

(9) May be land on which gas, oil, earth, or other mineral rights exploration has been leased or is owned by someone other than the applicant and may be offered for participation in the program. However, if an applicant submits an offer for an easement project, the Department of Agriculture (USDA) will assess the potential impact that the third party rights may have upon achieving the program purposes. USDA reserves the right to deny funding for any application where there are exceptions to clear title on any property.

(h) Prior to closing, the value of the conservation easement must be appraised. Appraisals must be completed and signed by a State-certified general appraiser and must contain a disclosure statement by the appraiser. The appraisal must conform to the Uniform Standards of Professional Appraisal Practices or the Uniform Appraisal Standards for Federal Land Acquisitions, as selected by the eligible entity. State Conservationists will provide the guidelines through which NRCS will review appraisals for quality assurance purposes. Entities must provide a copy of the appraisal to NRCS.

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

(j) The entity may substitute acres within a pending offer. Substituted acres must not decrease the value of the offered easement or the value of the parcel in meeting program purposes. With the State Conservationist's approval, a cooperating entity may substitute pending offers within their cooperative agreement. The landowner and parcel must meet eligibility criteria as described in § 1491.4(e). The State Conservationist may require re-ranking of substituted acres and substituted parcels.

#### § 1491.5 Application procedures.

(a) An Indian Tribe, State, unit of local government, or a nongovernmental

organization will submit an application to the State Conservationist in the State where parcels are located.

(b) The State Conservationist will determine whether the Indian Tribe, State, unit of local government, or a nongovernmental organization is eligible to participate in FRPP based on the criteria set forth in § 1491.4(c).

(c) The Chief will determine whether an eligible entity is a certified entity based on the criteria set forth in § 1491.4(d), information provided by the application, and data in the national FRPP database.

(d) The State Conservationist will notify each Indian Tribe, State, unit of local government, or a nongovernmental organization if it has been determined eligible, certified, or ineligible.

(e) Eligible entities with cooperative agreements entered into after the effective date of this part will not have to resubmit an annual application for the duration of the cooperative agreement. Entities may reapply for eligibility when their cooperative agreements expire.

(f) Throughout the fiscal year, eligible entities may submit to the appropriate State Conservationist applications for parcels, in that State, with supporting information to be scored, ranked, and considered for funding.

(g) At the end of each fiscal year, the lists of pending, unfunded parcels will be cancelled unless the eligible entity requests that specific parcels be considered for funding in the next fiscal year. Entities must submit a new list of parcels each fiscal year in order to be considered for funding unless they request that parcels from the previous fiscal year be considered.

#### § 1491.6 Ranking considerations and proposal selection.

(a) Before the State Conservationist can score and rank the parcels for funding, the eligibility of the landowner and the land must be assessed.

(b) The State Conservationist will use national and State criteria to score and rank parcels. The national ranking criteria will be established by the Chief, and the State criteria will be determined by the State Conservationist, with advice from the State Technical Committee. The national criteria will comprise at least half of the ranking system score.

(c) At least 30 days before the ranking of parcels, the State Conservationist will announce the date on which ranking of parcels will occur. A State Conservationist may announce more than one date of ranking in a fiscal year.

(d) All parcels submitted throughout the fiscal year will be scored. All parcels

will be ranked together in accordance with the national and State ranking criteria before parcels are selected for funding.

(e) The parcels selected for funding will be listed on the agreements of the entities that submitted the parcels, and the agreements will be signed by the State Conservationist and the eligible entity. Funds for each fiscal year's parcels will be obligated with a new signature each year on an amendment to the agreement. Parcels funded on each fiscal year's amendment will have a separate deadline for closing and requesting reimbursement.

(f) The national ranking criteria are:

(1) Percent of prime, unique, and important farmland in the parcel to be protected;

(2) Percent of cropland, pastureland, grassland, and rangeland in the parcel to be protected;

(3) Ratio of the total acres of land in the parcel to be protected to average farm size in the county according to the most recent USDA Census of Agriculture;

(4) Decrease in the percentage of acreage of farm and ranch land in the county in which the parcel is located between the last two USDA Censuses of Agriculture;

(5) Percent population growth in the county as documented by the United States Census;

(6) Population density (population per square mile) as documented by the most recent United States Census;

(7) Proximity of the parcel to other protected land, such as military installations, land owned in fee title by the United States or an Indian Tribe, State government or local government, or by a nongovernmental organization whose purpose is to protect agricultural use and related conservation values, or land that is already subject to an easement or deed restriction that limits the conversion of the land to non-agricultural use;

(8) Proximity of the parcel to other agricultural operations and infrastructure; and

(9) Other additional criteria as determined by the Chief.

(g) State or local criteria as determined by the State Conservationist, with advice of the State Technical Committee, may include:

(1) The location of a parcel in an area zoned for agricultural use;

(2) The performance of an eligible entity's experience in managing and enforcing easements. Performance must be measured by the closing efficiency or percentage of parcels that have been monitored and the percentage of monitoring results that have been

reported. The number of years of an eligible entity's existence, budget, or staffing level will not be used as a ranking factor;

(3) Multifunctional benefits of farm and ranch land protection including social, economic, historical and archaeological, and environmental benefits;

(4) Geographic regions where the enrollment of particular lands may help achieve national, State, and regional conservation goals and objectives, or enhance existing government or private conservation projects;

(5) Diversity of natural resources to be protected;

(6) Score in the Land Evaluation and Site Assessment system. This score serves as a measure of agricultural viability (access to markets and infrastructure); and

(7) Existence of a farm or ranch succession plan or similar plan established to encourage farm viability for future generations.

(h) State ranking criteria will be developed on a State-by-State basis. The State Conservationist will make available a full listing of applicable national and State ranking criteria.

#### **Subpart B—Cooperative Agreements and Conservation Easement Deeds**

##### **§ 1491.20 Cooperative agreements.**

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

(1) The interests in land to be acquired, including the United States' right of enforcement, as well as the form and other terms and conditions of the easement deed;

(2) The management and enforcement of the rights on lands acquired with FRPP funds;

(3) The responsibilities of NRCS;

(4) The responsibilities of the eligible entity on lands acquired with FRPP funds;

(5) The allowance of parcel substitution upon mutual agreement of the parties; and

(6) Other requirements deemed necessary by NRCS to meet the purposes of this part or protect the interests of the United States.

(b) The term of cooperative agreements will be 5 years for certified entities and 3 years for other eligible entities.

(c) The cooperative agreement will include an attachment listing the parcels accepted by the State Conservationist. This list will include landowners' names and addresses, acreage, the estimated fair market value, the estimated Federal contribution, and other relevant information. The cooperative agreement template will be made available by the State Conservationist.

(d) The cooperative agreement will incorporate the provisions necessary for the eligible entity to comply with applicable registration and reporting requirements of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109-282, as amended) and 2 CFR parts 25 and 170.

##### **§ 1491.21 Funding.**

(a) Subject to the statutory limits, the State Conservationist, in coordination with the eligible entity, will determine the NRCS share of the cost of purchasing a conservation easement or other interest in the land.

(b) NRCS may provide up to 50 percent of the appraised fair market value of the conservation easement consistent with § 1491.4(g). An eligible entity will share in the cost of purchasing a conservation easement in accordance with the limitations of this part.

(c) A landowner may make donations toward the acquisition of the conservation easement.

(d) The eligible entity must provide a minimum of 25 percent of the purchase price of the conservation easement.

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

(f) NRCS will conduct its technical and administrative review of appraisals and its hazardous materials reviews with FRPP funds.

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

(h) Environmental Services Credits:

(1) NRCS asserts no direct or indirect interest in environmental credits that may result from or be associated with an FRPP easement;

(2) NRCS retains the authority to ensure that the requirements for FRPP-funded easements are met and maintained consistent with this part; and

(3) If activities required under an environmental credit agreement may affect land covered under a FRPP easement, landowners are encouraged to request a compatibility assessment from the eligible entity prior to entering into such agreements.

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

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

(b) Pending offers by an eligible entity must be for acquiring an easement in perpetuity, except where State law prohibits a permanent easement. In such cases where State law limits the term of a conservation easement, the easement term will be for the maximum allowed under State law.

(c) The eligible entity may use its own terms and conditions in the conservation easement deed, but the conservation easement deed must be reviewed and approved by National Headquarters in advance of use. Individual conservation easement deeds used by the eligible entity will be submitted to National Headquarters at least 90 days before the planned closing date. Eligible entities with multiple parcels in a cooperative agreement may submit a conservation easement deed template for review and approval. The deed templates must be reviewed and approved by National Headquarters in advance of use. For eligible entities that have not been certified, the NRCS State offices will review prior to closing the conservation easement deeds for individual parcels to ensure that they contain the same language as approved by the national office and that the appropriate site-specific information has been included. NRCS reserves the right to require additional specific language or to remove language in the conservation easement deed to protect the interests of the United States. 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 will 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.

(e) As a condition for participation, a conservation plan will be developed by

NRCS in consultation with the landowner and implemented according to the FOTG. NRCS may work through the local conservation district in the development of the conservation plan. The conservation plan will be developed and managed in accordance with the 1985 Act, 7 CFR part 12 or subsequent regulations, and other requirements as determined by the State Conservationist. To ensure compliance with this conservation plan, the easement will grant to the United States, through NRCS, its successors or assigns, a right of access to the easement area.

(f) The eligible entity will acquire, hold, manage, and enforce the easement. The eligible entity may have the option to enter into an agreement with governmental or private organizations to carry out easement stewardship responsibilities.

(g) NRCS will sign an acceptance of the conservation easement, concurring with the terms of the conservation easement and accepting its interest in the conservation easement deed.

(h) All conservation easement deeds acquired with FRPP funds must be recorded. Proof of recordation will be provided to NRCS by the eligible entity.

(i) Impervious surfaces will not exceed 2 percent of the FRPP easement area, excluding NRCS-approved conservation practices. The State Conservationist may waive the 2 percent impervious surface limitation on a parcel-by-parcel basis, provided that no more than 10 percent of the easement area is covered by impervious surfaces. Before waiving the 2 percent limitation, the State Conservationist must consider, at a minimum, population density, the ratio of open prime other important farmland versus impervious surfaces on the easement area, the impact to water quality concerns in the area, the type of agricultural operation, and parcel size. Eligible entities may submit an impervious surface limitation waiver process to the State Conservationist for review and consideration. The eligible entities must apply approved impervious surface limitation waiver processes on a parcel-by-parcel basis. State Conservationists will not approve blanket waivers of the impervious surface limitation for all parcels administered by the eligible entity without regard for the characteristics of individual parcels. All FRPP easements must include language limiting the amount of impervious surfaces within the easement area.

(j) The conservation easement deed must include an indemnification clause requiring the landowner to indemnify and hold harmless the United States

from any liability arising from or related to the property enrolled in FRPP.

(k) The conservation easement deed must include an amendment clause requiring that any changes to the easement deed after its recordation must be consistent with the purposes of the conservation easement and this part. The conservation easement deed must require that NRCS approve any substantive amendment.

#### **Subpart C—General Administration**

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

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

(b) In the event that the eligible entity fails to enforce any of the terms of the conservation easement as determined by the Chief, the Chief or his or her successors or assigns may exercise the United States' rights to enforce the terms of the conservation easement through any and all authorities available under Federal or State law.

(c) Notwithstanding paragraph (a) of this section, NRCS, upon notification to the landowner, reserves the right to enter upon the easement area at any time to monitor conservation plan implementation or remedy deficiencies or easement violations as it relates to the conservation plan. The entry may be made at the discretion of NRCS when the actions are deemed necessary to protect highly erodible soils and wetland resources. The landowner will be liable for any costs incurred by NRCS as a result of the landowner's negligence or failure to comply with the easement requirements as it relates to conservation plan violations.

(d) The United States will be entitled to recover any and all administrative and legal costs from the participating eligible entity, including attorney's fees or expenses, associated with any enforcement or remedial action as it relates to the enforcement of the FRPP easement.

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

(f) In the event NRCS determines it must exercise its rights identified under a conservation easement or other

interest in land, NRCS will provide written notice by certified mail, return receipt requested, to the eligible entity at the eligible entity's last known address. The notice will set forth the nature of the noncompliance by the eligible entity and a 60-day period to cure. If the eligible entity fails to cure within the 60-day period, NRCS will 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.

#### § 1491.31 Appeals.

(a) A person or eligible entity which has submitted an FRPP proposal and is therefore participating in FRPP, may obtain a review of any administrative determination concerning eligibility for participation utilizing the administrative appeal regulations provided in 7 CFR part 614.

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

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

#### § 1491.32 Scheme or device.

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

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

Signed this 11th day of January, 2011 in Washington, DC.

**Dave White,**

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

[FR Doc. 2011-1212 Filed 1-21-11; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 9 CFR Parts 93, 94, and 95

[Docket No. APHIS-2006-0074]

RIN 0579-AC36

#### Highly Pathogenic Avian Influenza

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Interim rule and request for comments.

**SUMMARY:** We are amending the regulations concerning the importation of animals and animal products to prohibit or restrict the importation of bird and poultry products from regions where any subtype of highly pathogenic avian influenza is considered to exist. We are also adding restrictions concerning importation of live poultry and birds that have been vaccinated for certain types of avian influenza, or that have moved through regions where any subtype of highly pathogenic avian influenza is considered to exist. These restrictions supplement or replace existing restrictions on the importation of live birds and poultry, and bird and poultry products and byproducts from regions where exotic Newcastle disease or highly pathogenic avian influenza subtype H5N1 are considered to exist. They are necessary to prevent the introduction of highly pathogenic avian influenza into the United States.

**DATES:** This interim rule is effective on January 24, 2011. We will consider all comments that we receive on or before March 25, 2011.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2006-0074> to submit or view comments and to view supporting and related materials available electronically.

- *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS-2006-0074, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road, Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2006-0074.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW.,

Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at <http://www.aphis.usda.gov>.

**FOR FURTHER INFORMATION CONTACT:** Dr. Julia Punderson, Senior Staff Veterinarian, National Center for Import and Export, Animal Health Policy and Programs, VS, APHIS, 4700 River Road, Unit 38, Riverdale, MD 20737; (301) 734-4356.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Animal and Plant Health Inspection Service (APHIS) regulations in title 9 of the Code of Federal Regulations (CFR), parts 93, 94, and 95 (referred to below as the regulations), govern the importation into the United States of specified animals and animal products and byproducts to prevent the introduction of various animal diseases, including exotic Newcastle disease (END) and highly pathogenic avian influenza subtype H5N1.

END is a contagious disease of birds and poultry caused by a paramyxovirus. END is one of most infectious diseases of poultry in the world. A death rate of almost 100 percent can occur in unvaccinated poultry flocks. END can also infect and cause death even in vaccinated birds and poultry.

Avian influenza is caused by a orthomyxovirus, the same family that includes viruses that cause human influenza. Worldwide, there are many strains of avian influenza (AI) virus that can cause varying amounts of clinical illness in birds and poultry. AI viruses can infect chickens, turkeys, pheasants, quail, ducks, geese and guinea fowl, as well as a wide variety of other birds. Migratory waterfowl have proved to be a natural reservoir for the less virulent strains of the disease known as low-pathogenicity avian influenza.

Classification of AI viruses is based on both biological and molecular characteristics of the virus. AI viruses are identified by a combination of two groups of surface proteins; the hemagglutinin or H proteins and the neuraminidase or N proteins. AI viruses also are characterized as low pathogenic (LP) or highly pathogenic (HP) by their ability to produce disease or by molecular characteristics. The ability to cause clinical signs may depend on the species of bird infected and may change over time, becoming more or less