

Proposed Rules

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

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

7 CFR Part 624

Emergency Watershed Protection Program

AGENCY: Natural Resources Conservation Service.

ACTION: Notice of proposed rulemaking with request for comments.

SUMMARY: The Natural Resources Conservation Service (NRCS) proposes several changes to the implementation of the Emergency Watershed Protection (EWP) Program to improve the effectiveness of its response to natural disasters. These changes to the existing program regulations include the following:

- Modifying the cost-share rate for program assistance;
- Clarifying that EWP assistance is not available for Federal lands except in situations where safeguards are followed to avoid inappropriate augmentation of appropriations;
- Allowing a greater Federal share in areas that qualify as limited resource areas; and
- Describing the parameters under which the agency will purchase floodplain easements as a means to limit flood damages and reduce future Federal obligations.

DATES: Comments on this proposed rulemaking must be received by January 20, 2004 to be considered in the development of the final rule.

ADDRESSES: All comments concerning this proposed rule should be addressed to Director, Watersheds and Wetlands Division, Natural Resources Conservation Service, USDA, P.O. Box 2890, Washington, DC 20013-2890; or fax to (202) 720-2143. This rule may also be accessed, and comments submitted, electronically. Users can access the NRCS Watersheds and Wetlands Division Homepage at <http://www.nrcs.usda.gov/>. Comments may

also be submitted via e-mail to victor.cole@usda.gov. All electronic comments must be submitted as Word or Word Perfect file. Files that cannot be accessed or files that contain special characters or any form of encryption that cannot be accessed will not be accepted or considered.

FOR FURTHER INFORMATION CONTACT: Victor Cole, (202) 690-4575, Watersheds and Wetlands Division, Natural Resources Conservation Service, or for information regarding floodplain easements, contact Martha Joseph (202) 720-7157, Watersheds and Wetlands Division, Natural Resources Conservation Service.

SUPPLEMENTARY INFORMATION:

Background

The Secretary of Agriculture cooperates with other Federal, State, and local agencies in the recovery from natural disasters such as hurricanes, tornadoes, fires, drought, and floods through implementation of the EWP Program (authorized by Section 216 of The Flood Control Act of 1950, Public Law 81-516, 33 U.S.C. 701b-1; Section 403 of the Agricultural Credit Act of 1978, Public Law 95-334, as amended by Section 382, of the Federal Agriculture Improvement and Reform Act of 1996, Public Law 104-127, 16 U.S.C. 2203). EWP, through local sponsors, provides emergency measures for run-off retardation and erosion control to areas where a sudden impairment of a watershed threatens life or property. The Secretary of Agriculture has delegated authority for administration of EWP to the Chief of NRCS.

Executive Order 12866

The Office of Management and Budget has determined that this proposed rule is a "significant action" for the purposes of Executive Order 12866. Pursuant to § 6(a)(3) of Executive Order 12866, NRCS has conducted an economic analysis of the potential impacts associated with this proposed rule. The economic analysis concluded that NRCS is conducting the EWP program in a manner that provides significant benefits related to costs. A copy of this cost-benefit analysis is available upon request from the address listed above.

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Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this rule since it does not contain a major proposal requiring preparation of a regulatory analysis. These proposed regulations will not have a significant economic impact on a substantial number of small entities.

Environmental Evaluation

This proposed draft rule is supported by a Programmatic Environmental Impact Statement (PEIS) that was made available in draft form for public review on December 16, 1999 (64 FR 70212). NRCS will consider both the comments received on the draft PEIS and this rule in formulation of the final regulation. Copies of the draft PEIS may be obtained from the Watersheds and Wetlands Division, Natural Resources Conservation Service, USDA, P.O. Box 2890, Washington, DC 20013-2890.

GPEA Statement

NRCS is committed to compliance with the GPEA, which requires Government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Paperwork Reduction Act

This draft final rule does not change the reporting or record-keeping burden previously required.

Executive Order 13132

This draft rule complies with Executive Order 13132 "Federalism." In pursuing the revision of this rule, NRCS prepared a PEIS in accordance with the National Environmental Policy Act (NEPA) guidelines. Preparation of the PEIS included an extensive "scoping process," which included six public meetings held in different regions of the country; contact with State agencies, primarily the emergency management and fish and wildlife divisions; and publication of the draft PEIS in the **Federal Register**. Concerns in response to the publication of the draft PEIS primarily centered on compliance with historic preservation requirements of individual States. In particular, it was recommended that NRCS coordinate all activities with the respective State historic preservation officer. Much praise was received for the program

from government officials at all levels and the public. Through the NEPA process, consultation is done on a routine basis. NRCS established policies that require “pre-disaster planning” be carried out with all affected State and Federal agencies to ensure everyone understands what NRCS will do in the event of a disaster.

Executive Order 12998

This draft rule has been reviewed in accordance with Executive Order 12998. The provisions of this rule are not retroactive. Furthermore, the provisions of this draft rule pre-empt State and local laws to the extent that such laws are inconsistent with this proposed rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR parts 614 and 11 must be exhausted.

Unfunded Mandates Reform Act of 1995

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, NRCS assessed the effects of this rulemaking action on State, local, and tribal governments, and the public. This action does not compel the expenditure of \$100 million or more by any State, local, or tribal government, or the private sector; therefore, a statement under Section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

Discussion of the Proposed Changes to 7 CFR Part 624

Overview

The Emergency Watershed Protection (EWP) Program helps remove threats to life and property that remain in the nation’s watersheds in the aftermath of natural disasters such as floods, hurricanes, tornadoes, and wildfires. The EWP Program is administered by the U.S. Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS), which provides technical and financial assistance to local sponsoring authorities to preserve life and property threatened by disaster for runoff retardation and soil-erosion prevention. Funding is typically provided through Congressional emergency supplemental appropriations. Threats that the EWP Program addresses are termed watershed impairments. These include, but are not limited to, debris-clogged stream channels, undermined and unstable streambanks, jeopardized water control structures and public infrastructure, wind-borne debris removal, and damaged upland sites

stripped of protective vegetation by fire or drought. If these watershed impairments are not addressed, they would pose a serious threat of injury, loss of life, or devastating property damage should a subsequent event occur.

NRCS is initiating proposed rulemaking to codify existing EWP program implementation and institute programmatic changes that allow the repair of enduring conservation practices, limit repeated site repairs, allow additional easement purchases, address environmental justice issues, and limits treatments on Federal lands. To implement the proposed action, NRCS would incorporate changes in program administration and in project execution dealing with traditional watershed impairments. It would expand the program by providing for floodplain sediment deposition removal, and repair damaged structural conservation practices to the list of watershed impairments EWP currently addresses. Additionally, the proposed changes include allowing for up to 90 percent cost-share for limited resource areas, limit repair to twice in a ten year period, eliminate the single beneficiary requirement, funds will not be used on Federal lands, purchase of easements on non-agricultural lands, and establish one easement category.

The purpose and need for the NRCS proposed action are to provide administrative transparency that ensures that the public is fully informed of program operations. Program delivery improvements are designed to enable NRCS field and State office personnel to provide EWP assistance more effectively and efficiently. NRCS believes that these improvements would more fully, equitably, and consistently meet the needs of people requiring emergency assistance. Program improvements are designed to address environmental, economic, and social concerns and values.

Proposed changes were identified, discussed, and refined in an ongoing comprehensive program review that NRCS initiated. The process included extensive opportunities for public participation and identified substantive ways to improve the environmental, economic, social, and technical soundness of Program activities. NRCS is now initiating the proposed rulemaking needed to implement the changes to the codified EWP regulations. The National EWP Manual (policy), and Handbook (procedures) will also need to be revised to reflect the changes that NRCS has already instituted, and those that will be adopted if the policies proposed in this

rulemaking are adopted in a final rule after the opportunity for public comment.

Section-by-Section Discussion of Proposed Rule Provisions

Section 624.1 Purpose. This proposed section would modify the existing section to clarify the purpose of the EWP Program.

Section 624.2 Objective. This proposed section would modify the existing section to state that NRCS assists sponsors in the implementation of “emergency recovery measures.”

Section 624.3 Scope. This proposed section would revise the existing section and combine subparagraphs (a) and (b) in the current regulation.

Section 624.4 Definitions. The proposed section would rename the current section and would modify the section to provide definitions for the EWP program. The ability to provide assistance on Forest Service lands as identified in the existing § 624.4 is being eliminated from the rule to avoid inappropriate augmentation of appropriations for Forest Service restoration activities. Assistance on National Forest System lands or other Federal lands can be provided in situations where appropriate safeguards are followed to avoid such augmentation.

Section 624.5 Coordination. This proposed section would include a discussion of NRCS coordination in both presidentially declared and State conservationist-declared disasters.

Section 624.6 Program administration. This proposed section now describes the NRCS administration of the EWP Program, eligibility, and sponsor responsibilities.

Section 624.6(b)(1) Exigency. This proposed paragraph has been modified to clarify exigency situations. NRCS has encountered various cases where the term “exigency” (previously found in § 624.5(a)(1)(iv)) is applied too liberally and implemented for purposes for which it was not intended.

Interpretations of the terms “exigency” and “non-exigency” (previously found in § 624.5(a)(1)(B)) vary widely within NRCS. In some cases, an “exigency” allowed certain contracting procedures to be waived inappropriately; in others, “exigency” was used to fund projects inappropriately; and in still others, “exigency” is used inappropriately to qualify for a U.S. Army Corps of Engineers (USACE) nationwide general permit.

NRCS did not intend these interpretations when the two categories (exigency and non-exigency) were established. Rather, the original intent

was to allow NRCS to respond quickly to only those situations that needed immediate attention and that could be addressed within 30 days. Current regulations tie cost-sharing to this designation, although NRCS has not applied the higher cost-sharing rate originally set for exigencies for the past 7 years. Instead, NRCS has applied a single cost-share rate of 75 percent to exigent and non-exigent situations. However, NRCS recognizes there may be unique situations that require a waiver from this cost-sharing rate. We had added *Section 624.11 Waivers* which allows the NRCS Deputy Chief for Programs to waive any provision of these regulations to the extent allowed by law. Examples may include allowing up to 100 percent cost-sharing with limited resource areas or communities, or situations involving environmental justice.

Under the proposed action, the term exigency would be clarified and the term non-exigency would be eliminated since all eligible sites would be considered watershed emergencies and the purpose of the current and proposed exigency classification is to expedite EWP recovery measures where an immediate threat exists. NRCS believes this clarification would result in more uniform delivery of the EWP Program. Clarification of exigency and removal of the term non-exigency would ensure consistent interpretation, and the change should not affect program funding.

Recognizing that certain situations require immediate attention, this proposed section would modify the current regulation to add language that clarifies "exigency" situations that require immediate attention. Exigency situations typically exhibit an extremely high potential for loss of life or significant property damage unless immediate action is taken.

Occasionally, a site affected by a natural disaster demands immediate action to minimize potential threats of life and/or property, including when another event may occur shortly thereafter. Two examples of such a situation are (1) debris jamming into a bridge or culvert, causing water to back up and possibly endanger nearby buildings or the bridge and associated road; and (2) a streambank undercutting a building that, if not stabilized immediately, could result in the loss of the building.

This proposed clarification to the regulations still ensures immediate action when no reasonable alternative is available. The NRCS State conservationist would be authorized to carry out the needed recovery work to

alleviate the exigency situation immediately when:

- A damage survey report is completed
- Procurement authority is secured
- EWP funds are available
- A sponsor is selected and local funds are available
- Necessary land rights have been acquired

The clarification proposed by this section would limit the number of situations where immediate action is taken to those that are of an extremely critical nature, which was the intent of the existing regulations. The proposed changes would save time by focusing on actions requiring immediate attention during emergency recovery efforts and allowing NRCS state offices to be more responsive to local needs.

Section 624.6(b)(2) Limitations. NRCS is proposing to add this new paragraph to describe the number of times an impacted location may be eligible for EWP assistance. This proposed paragraph also contains limitations found in the current regulations at § 624.7. Repeat disasters may strike an area and require EWP recovery assistance frequently at one location. Under this proposed rulemaking, NRCS would limit repairs under EWP to twice within a 10-year period for the same cause (*i.e.*, flooding) at the same site. If a site already has been restored twice with EWP assistance and less than 10 years has elapsed between the disaster that triggered the first repair and the disaster triggering a third repair, the only option available under EWP would be purchasing a floodplain easement on the damaged site. Under this proposed regulation, The Department of Agriculture (USDA) would review the prospective site to ascertain the frequency of EWP recovery assistance at the location.

For example, if a structure was protected from destruction twice using EWP assistance for two separate events, regardless of the practice used or the location of the protection efforts, EWP funds would not be available for a third protection effort within the 10-year period for the same cause. However, for repairs of dikes, levees, berms, and similar structures, because these structures can run contiguously for miles, a specific location on a structure is considered one EWP site to determine whether future impacts to this site on the structure are eligible for EWP funds. Thus, repairs can be made repetitively so long as the same location is not repetitively repaired more than twice within 10 years.

EWP focuses upon disaster recovery efforts while other USDA programs, as

well as programs administered by other Federal and State agencies, are available to plan and implement protective practices to solve recurring problems. This proposed EWP Program change would encourage individuals and project sponsors to seek more appropriate programs to solve existing long-term and recurring resource problems.

NRCS believes the impacts of limiting the number of times EWP funds can be used to repair the same site will be minimal, but the change is necessary to avoid those cases where funds may be used for repetitive repairs.

Section 624.6(b)(2)(iv). This proposed paragraph would clarify that NRCS can only provide EWP assistance on Federal lands in situations where safeguards are followed to avoid inappropriate augmentation of appropriations.

Section 624.6(b)(3). This proposed paragraph describes those sites that will be eligible for EWP where structural/enduring/long-life conservation practices exist. This proposed change to the regulations currently found in § 624.7(d) would provide for a blanket policy exception first established by the NRCS Chief in 1996 for NRCS-assisted flood control structures. The EWP Program regulations currently prohibit providing assistance for these projects unless the NRCS Chief grants an exception. In 1996, the Chief granted a blanket exception to this requirement, and assistance has been provided as needed. This proposal section would allow repair of NRCS-assisted structural practices, such as dams and channels, constructed under the Small Watershed Protection and Flood Control Program (authorized by the Watershed Protection and Flood Prevention Act of 1954, Public Law 83-566, 16 U.S.C. 1001-1008), Flood Prevention Program (authorized by the Flood Control Act of 1944, Public Law 78-534), Resource Conservation and Development Program, and the Pilot Watershed Program.

When a disaster strikes, NRCS-assisted flood control structures may be damaged beyond the level that would normally be expected to be repaired under routine operation and maintenance activities and may be beyond the sponsor's ability to make necessary repairs. For example, when an auxiliary spillway is damaged, extensive repairs may be required to prevent catastrophic failure that could result in loss of life or property and to provide an opportunity for the dam to function properly in the future.

Under the proposed action, existing structural/enduring/long-life conservation practices that are damaged

during disaster events would be eligible for EWP Program technical and cost-share assistance. This provision would allow repair of conservation practices that may include grassed waterways, terraces, embankment ponds, diversions, and water conservation systems. Nonstructural and/or management practices such as conservation tillage would not be eligible. Additionally, natural disaster recovery practices where assistance is provided under the Emergency Conservation Program (ECP) administered by the Farm Service Agency would not be eligible for EWP assistance. EWP differs significantly from ECP because a sponsor is required for EWP recovery work, and unlike ECP, EWP recovery assistance does not provide financial assistance directly to individuals. NRCS is interested in receiving comments related to this proposed expansion of the eligibility of EWP assistance to allow repair of conservation practices.

Under this proposed paragraph, NRCS could provide EWP assistance toward upgrading damaged or undersized practices for structural/enduring/long-life conservation practices when technology advances or construction techniques warrant. All structural/enduring/long-life conservation practices for which the sponsor is required to obtain a permit issued by a Federal, State, or local entity shall be designed and installed to meet the permit requirements or NRCS standards, whichever is greater.

The benefits obtained by adopting this proposal include:

- Allowing repair work that would address conservation needs that may not be covered by other programs;
- Helping to ensure that practices will be repaired and remain functional rather than being abandoned and becoming a hazard;
- Allowing the EWP Program to assist more landowners so that a greater number of people will benefit from natural resource protection;
- Providing rapid treatment of natural resources by the EWP Program that might prevent further damage on and off site; and
- Encouraging needed repairs by sponsors by providing assistance through the EWP Program.

Section 624.6(c). This proposed provision would expand the areas now covered under the EWP Program. Currently, EWP Program work is normally confined to watercourses and areas immediately adjacent, except in case of drought or fire where work may be carried out on critical areas in upland portions of a watershed. However,

agricultural productivity, public health and safety, and the environment are often threatened in the aftermath of disasters that occur outside these limits. NRCS proposes that the availability of EWP Program assistance expand to include practices needed on all privately owned lands. This provision of the proposed regulation would expand the EWP Program to include areas away from streams and would allow the removal of sediment and other debris from agricultural land (croplands, orchards, vineyards, and pastures) and windblown debris, particularly in areas considered environmentally sensitive. Environmentally sensitive areas may include lands especially vulnerable to damage from the products of erosion, points of groundwater re-charge, habitat of endangered or threatened species, or cultural resource sites. This provision of the proposed regulation also provides for EWP assistance for drought recovery activities.

Deposits of large quantities of sediments and other debris on floodplains usually occurs from major flooding. Such materials are usually coarse and infertile, and frequently destroy or smother plants and impair normal agricultural use. This is a normal occurrence in the dynamics of floodplain systems, but it can jeopardize the productivity of agricultural lands. Under this proposed regulation, NRCS would consider alternative practices to address the type of damage such as:

- Removing and disposing the sediment and other debris
- Incorporating the sediment into the underlying soil
- Offering to purchase a floodplain easement (see § 624.10)

Whether these sites qualify for EWP assistance and the most effective alternative treatment depends upon many factors: Size of the particles, depth of material deposited, lateral extent of the deposit, land use and soil type of the underlying material, and value of the land to the entire agricultural operation. Floodplain easements (see § 624.10) can provide disaster relief where there is too much debris to incorporate or haul off-site, or otherwise dispose.

Most debris that is deposited on upland areas is carried from winds of hurricanes or tornadoes. Such debris may cover portions of several watersheds and normally consists of downed trees, utility poles, and fence posts; livestock and poultry carcasses; or building materials, such as insulation, shingles, metal roofing, metal siding, and similar non-biodegradable materials. Similarly, ice storms may result in debris deposition

and cause the death of livestock and poultry. Debris removal will typically be associated with the removal of debris from upstream of bridges and culverts, or in upland areas where buildup of debris in a waterway will cause flooding of homes and other structures.

The practice components adopted to address upland debris deposition could include, but not be limited to:

- Creating access when needed to move trucks and heavy equipment to a debris site
- Using chain saws, other power tools, winches, and other machinery and heavy equipment to gather and process the debris for onsite disposal or removal
- Disposing of debris in accordance with local rules and regulations on-site by burial, chipping, or burning
- Loading on trucks for removal and disposal off-site in approved sites or landfills based upon the composition of the material
- Obtaining special technical assistance and personnel to handle hazardous materials such as asbestos, petroleum products, propane, or other compressed gas containers, or other potentially hazardous or toxic compounds or materials
- Grading, shaping, and revegetating, by seeding or planting, any portion of the area affected by the debris removal operation

Drought recovery practices are generally temporary in nature and are intended to reduce the consequences of a drought. EWP assistance typically includes providing temporary water for livestock to reduce the use of drought impacted water sources, or prescribed grazing and/or purchasing and transporting hay, which allows rangeland to recover more rapidly. Planting vegetation may be used to reduce soil erosion. EWP assistance will not be used during drought situations to install permanent practices or structures, including water wells, irrigation systems, or purchase of portable equipment (*i.e.*, water pumps). EWP practices during drought situations will not be conducted at the expense of another natural resource, such as pumping or releasing water from a water body to an extent that is environmentally detrimental.

Section 624.6(d) Documentation. This proposed paragraph would rename the existing section 624.6(d). The information found in this paragraph clarifies the language found in the existing regulation at § 624.6(b).

Section 624.6(e) Implementation. This proposed paragraph would rename the existing section 624.7(e) and would

contain language previously found in the existing regulation at § 624.6(c).

Section 624.7 Cost share assistance. This proposed section would rename the existing section and establish a cost-share rate of up to 75 percent for implementation of EWP measures and up to 90 percent for limited-resource areas.

Under current EWP program regulations at § 624.5(c)(1)(ii) and § 624.5(C)(2)(i), impairments determined to be non-exigencies receive up to 80 percent Federal funding, and exigencies receive up to 100 percent Federal funding. The proposal to eliminate the exigency and non-exigency categories would also eliminate the differential cost-share rate. A single category of emergency would allow for a single cost-share rate. In addition, NRCS would reduce the general cost-share ceiling to align it with the 75 percent rate used in related Federal programs. However, some increase in the Federal cost-share rate may be warranted for sponsors within limited-resource areas. Without such assistance, NRCS believes that the needs of such areas will not be met if only 75 percent cost-share rate is available. Therefore, NRCS proposes in section 624.7(b) to allow sponsors of limited-resource areas to be eligible to receive up to 90 percent Federal funding.

The proposed definition of a limited-resource area (see proposed definition in 624.4(d)) is a county where average housing values are less than 75 percent of the State average, per capita income is less than 75 percent of the national per capita income, and unemployment during the preceding 3 years is twice the available U.S. average. All three criteria would have to be met to qualify. NRCS would use the most recent U.S. census and unemployment data to make this determination. Local data may be used for small communities.

If a natural disaster strikes a limited-resource community in a non-designated limited-resource area, the NRCS State conservationist would have the authority to document the limited-resource status using State census data for the three factors mentioned above and approve the 90 percent cost-share rate for that community. In no case would this procedure be used for a unit smaller than a “community,” as defined in proposed section 624.4(d).

Section 624.8(b). This proposed paragraph would clarify and replace language previously found in the current regulation § 624.10.

Section 624.8(c)(3) Funding Priorities. This proposed paragraph is being added to provide guidelines for establishing funding priorities to allow the most

effective and efficient use of limited EWP funding. When a State conservationist declares a local disaster, he or she would typically follow these proposed priorities to determine the order in which sites would be recovered. In some cases, the State conservationist may deviate from the list of priorities due to the damage situation (e.g., a building may not be in immediate jeopardy but giving its repair a higher priority may avoid adverse impacts to a cultural resource) or based upon the sponsor's priorities and ability to undertake the project. NRCS priorities are listed in the following table.

NRCS PRIORITY ORDER OF EWP FUNDING

Priority	Damage situation
1	Exigency.
2	Sites where there is a serious, but not immediate, threat to human life.
3	Sites where property, structures, utilities, or other important infrastructure components are threatened.
4	Sites with federally protected resources, including: Sites inhabited by federally listed threatened and endangered (T&E) species or containing the species designated critical habitat where the individuals of the species or the critical habitat would be in jeopardy without the EWP practice; Sites that contain or are in proximity to cultural sites listed on the National Register of Historic Places where the listed resource would be jeopardized if the EWP practice were not installed; Sites where prime farmland supporting high value crops is threatened; Sites containing wetlands that would be damaged or destroyed without the EWP practice; and Sites that have a major effect on water quality.
5	Sites containing unique habitat— supporting State-listed T&E species or species of concern, recreation, or State- identified sensitive habitats other than wetlands.
6	Other lands not listed above.

Currently, in a presidentially declared disaster, NRCS coordinates with the Federal Emergency Management Agency (or the State agency with emergency recovery responsibilities). NRCS would continue to do so after the implementation of this proposed change

and follow the priorities set by those agencies.

Section 624.9 Time limits. This proposed section has been renamed, and it would simplify time limits associated with the obligation of funds and certain limits for completion of work. NRCS proposes a single time frame (220 days after the date when the funds are committed to the State conservationist by the national office) to complete the work.

Section 624.10 Floodplain easement. This proposed section is being added to address administration of EWP floodplain easements.

Section 382 of the Federal Agriculture Improvement and Reform Act of 1996, Public Law 104-127, amended the EWP authority to provide for the purchase floodplain easements as an emergency measure. Since 1996, NRCS has purchased floodplain easements on agricultural lands that qualify for EWP assistance. Floodplain easements restore, protect, maintain, and enhance the functions of wetlands and riparian areas; conserve natural values including fish and wildlife habitat, water quality, flood water retention, ground water recharge, and open space; and safeguard lives and property from floods, drought, and the products of erosion.

NRCS may purchase EWP easements on any floodplain lands that have been impaired within a 12-month period or that have a history of repeated flooding (i.e., flooded at least two times during the past 10 years). Since offers into the program may exceed funding, NRCS maintains a list of easement offers that meet basic eligibility criteria at the time of application, and these offers continue to be eligible pending availability of funding.

Under the floodplain easement option, a landowner offers to sell to NRCS a permanent easement that provides NRCS with the full rights to restore and enhance the floodplain's functions and values. In exchange, a landowner receives an easement payment in an amount calculated as the least of one of the three following values:

- (i) A geographic rate established by the NRCS State conservationist;
- (ii) a value based on a market appraisal analysis for agricultural uses or assessment for agricultural land; or
- (iii) the landowner's offer, if one has been made.

NRCS may pay up to 100 percent of the restoration costs of the easement. Restoration efforts include both structural and non-structural practices. To the extent practicable, NRCS may actively restore the natural features and characteristics of the floodplain through

re-creating the topographic diversity, increasing the duration of inundation and saturation, and providing for the re-establishment of native vegetation. The landowner is provided the opportunity to participate in the restoration efforts.

Landowners retain several rights to the property, including the right of quiet enjoyment, the right to control public access, and the right to undeveloped recreational use such as hunting and fishing. At any time, a landowner may obtain authorization from NRCS to engage in other activities if NRCS determines it will be compatible with the protection and enhancement of the easement's floodplain functions and values. These compatible uses may include managed timber harvest, periodic haying, or grazing. NRCS determines the amount, method, timing, intensity, and duration of any compatible use that might be authorized. While a landowner can realize economic returns from an activity allowed for on the easement area, a landowner will not be assured of any specific level or frequency of such use, and the authorization does not vest any right of any kind to the landowner. Cropping would not be authorized as a compatible use, and haying or grazing would not be authorized as a compatible use on lands that are being returned to woody vegetation.

While NRCS currently only purchases floodplain easements on agricultural lands, NRCS is proposing purchasing floodplain easements on non-agricultural lands. NRCS plans to expand the availability of floodplain easements to low population density, non-agricultural lands. Structures within the floodplain easement may be demolished or relocated outside the 100-year floodplain, whichever costs less.

This element of the proposed rule would tend to increase program costs in the short-term, but reduce costs to the Federal government in the long-term, as people and structures in non-agricultural areas are relocated out of the floodplain. In addition, as more acreage is returned to open space, the floodplain would function in a more natural state with increased long-term public benefits.

Section 624.11 Waivers. This section is being proposed to provide NRCS with the opportunity to waive those provisions of the proposed rule that are not prohibited by the law. Situations may arise that could be addressed through the EWP Program but proposed provisions in this proposed regulation may restrict or not allow NRCS to provide EWP assistance. This section is being proposed to avoid these situations

and to allow NRCS to provide assistance for disaster recovery.

List of Subjects in 7 CFR Part 624

Disaster assistance, Floodplain easement, Flooding, Imminent threat, Natural disaster, and Watershed impairment.

Accordingly, for the reasons stated in the preamble, it is proposed that Title 7 of the Code of Federal Regulations be amended by revising Part 624 to read as follows:

PART 624—EMERGENCY WATERSHED PROTECTION

Sec.

- 624.1 Purpose.
- 624.2 Objective.
- 624.3 Scope.
- 624.4 Definitions.
- 624.5 Coordination.
- 624.6 Program administration.
- 624.7 Cost-sharing.
- 624.8 Assistance.
- 624.9 Time limits.
- 624.10 Floodplain easements.
- 624.11 Waivers.

Authority: Sec. 216, Pub. L. 81–516, 33 U.S.C. 701b–1; Sec. 403, Pub. L. 95–334, as amended, 16 U.S.C. 2203; 5 U.S.C. 301.

§ 624.1 Purpose.

The Natural Resources Conservation Service (NRCS) is responsible for administering the Emergency Watershed Protection (EWP) Program. This part sets forth the requirements and procedures for Federal assistance, administered by NRCS, under Section 216, Public Law 81–516, 33 U.S.C. 701b–1; and Section 403 of the Agricultural Credit Act of 1978, Public Law 95–334, as amended by Section 382, of the Federal Agriculture Improvement and Reform Act of 1996, Public Law 104–127, 16 U.S.C. 2203.

§ 624.2 Objective.

The objective of the EWP Program is to assist sponsors, landowners, and operators in implementing emergency recovery measures for runoff retardation and erosion prevention to relieve imminent hazards to life and property created by a natural disaster that causes a sudden impairment of a watershed.

§ 624.3 Scope.

EWP technical and financial assistance may be made available to a qualified sponsor, or landowners when a floodplain easement is the selected alternative, upon a qualified sponsor or landowner's request when a Federal emergency is declared by the President or when a local emergency is declared by the NRCS State conservationist. This program is designed for emergency

recovery work, including the purchase of floodplain easements. Emergency watershed protection is authorized in the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa.

§ 624.4 Definitions.

(a) **Defensibility** means the extent to which an alternative action is:

- (1) More beneficial than adverse in the extent and intensity of its environmental and economic effects;
- (2) In compliance with Federal, State, and local laws;

(3) Acceptable to affected individuals and communities;

(4) Effective in restoring or protecting the natural resources;

(5) Complete with all necessary components included; and

(6) Efficient in achieving the desired outcome.

(b) **Exigency** means those situations that demand immediate action to avoid potential loss of life or property, including situations where a second event may occur shortly thereafter that could compound the impairment, cause new damages or the potential loss of life if action to remedy the situation is not taken immediately.

(c) **Floodplain easement** means a reserved interest easement, which is an interest in land, defined and delineated in a deed whereby the landowner conveys all rights and interest in the property to the grantee, but the landowner retains those rights, title, and interest in the property which are specifically reserved to the landowner in the easement deed.

(d) **Imminent threat** means a substantial natural occurrence that could cause significant damage to property or threaten human life.

(e) **Limited resource area or community** is defined as a unit of government or a group of people within a bounded geographical area who interact within shared institutions, and who possess a common sense of interdependence and belonging where:

(1) Housing values are less than 75 percent of the State housing value average;

(2) Per capita income is 75 percent or less than the National per capita income; and

(3) Unemployment is at least twice the U.S. average over the past 3 years based upon the annual unemployment figures.

NRCS will use the most recent National census information available when determining (1) and (2) above.

(f) **Natural occurrence** includes, but is not limited to, floods, fires, windstorms,

hurricanes, typhoons, tornadoes, earthquakes, volcanic actions, slides, and drought.

(g) *Project sponsor* means a legal subdivision of a State government or a State agency, other government entities, or any Native American tribe or tribal organization as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b), with a legal interest in or responsibility for the values threatened by a watershed emergency; is capable of obtaining necessary land rights; and is capable of carrying out any operation and maintenance responsibilities that may be required.

(h) *Watershed emergency* means adverse impacts to resources exist when a natural occurrence causes a sudden impairment of a watershed and creates an imminent threat to life or property.

(i) *Watershed impairment* means the situation that exists when the ability of a watershed to carry out its natural functions is reduced to the point where an imminent threat to health, life, or property is created. This impairment can also include sediment and debris deposition in floodplains and upland portions of the watershed.

§ 624.5 Coordination.

(a) If the President declares an area to be a major disaster area, NRCS will provide assistance which will be coordinated through the Federal Emergency Management Agency (FEMA) or its designee.

(b) When an NRCS State conservationist determines that a watershed impairment exists but the President does not declare an area to be a major disaster area, FEMA does not coordinate assistance. In this situation, NRCS will provide assistance, assume the lead, and coordinate work with the State office of emergency preparedness and other Federal, tribal, or local agencies involved with emergency activities, as appropriate.

§ 624.6 Program administration.

(a) *Sponsors.* (1) When the State conservationist declares that a watershed impairment exists, NRCS may, upon request, make assistance available to a sponsor who must be a State or political subdivision thereof, qualified Indian tribe or tribal organization, or unit of local government. Private entities may not receive assistance except through the sponsorship of a governmental entity.

(2) Sponsors must:

(i) Contribute their share of the project costs by providing funds or certain services necessary to undertake the activity. Contributions that may be

applied towards the sponsor's applicable cost-share of construction costs include:

- (A) Cash,
- (B) In-kind services such as labor, equipment, design, surveys, contract administration and construction inspection, and other services as determined by the State conservationist; or
- (C) A combination of cash and in-kind services;
- (ii) Obtain any necessary real property rights, water rights, and regulatory permits; and
- (iii) Agree to provide for any required operation and maintenance of the completed emergency measures.

(3) The sponsor is responsible for 100 percent of the costs associated with meeting the requirements found in paragraphs (a)(2)(ii) and (a)(2)(iii) of this section.

(b) *Eligibility.* NRCS will provide assistance based upon the NRCS State conservationist's determination that the current condition of the land or watershed impairment poses a threat to health, life, or property. This assistance includes EWP practices associated with the removal of public health and safety threats, and restoration of the natural environment after disasters, including acquisition of floodplain easements.

(1) Priority EWP assistance is available to alleviate exigency situations (exigency is defined in § 624.4(b)). Sponsors must complete practices deemed necessary under an exigency situation within 5 days of the site becoming accessible. NRCS may approve assistance for temporary correction practices to relieve an exigency situation until a more acceptable solution can be designed and implemented.

(2) *Limitations.*

(i) In cases where the same type of natural event occurs within a 10-year period and the site has been repaired twice within that period using EWP assistance, then EWP assistance is limited to those sites eligible for the purchase of a floodplain easement as described in § 624.10 of this part.

(ii) EWP assistance shall not be used to perform operation or maintenance such as the periodic work that is necessary to maintain the efficiency and effectiveness of a measure to perform as originally designed and installed.

(iii) EWP assistance shall not be used to repair, rebuild, or maintain private or public transportation facilities, public utilities, or similar facilities.

(iv) EWP assistance shall not be provided on any Federal lands, unless adequate safeguards are followed to avoid inappropriate augmentation of

appropriations for other Federal agencies.

(3) Repair of structural/enduring/long-life conservation practices.

(i) Sponsors may receive EWP assistance for long-life conservation practices including, but not limited to, grassed waterways, terraces, embankment ponds, diversions, and water conservation systems, except where assistance is provided under the Emergency Conservation Program administered by the Farm Service Agency.

(ii) EWP assistance may be available for the repair of certain structural practices (*i.e.*, dams and channels) originally constructed under Public Law 83–566, Public Law 78–534, Subtitle H of Title XV of the Agriculture and Food Act of 1981 (16 U.S.C. 3451 *et seq.*), commonly known as the Resource Conservation and Development Program, and the Pilot Watershed Program of the Department of Agriculture Appropriation Act of 1954 (Public Law 83–156; 67 Stat. 214). EWP assistance may not be used to perform operation and maintenance activities specified in the agreement for the covered structure project entered into with the eligible local organization responsible for the works of improvement.

(iii) NRCS may authorize EWP assistance for modifying damaged practices when technology advances or construction techniques warrant modifications.

(iv) EWP assistance is not available for repair or rehabilitation of nonstructural management practices such as conservation tillage.

(4) Increased level of protection. In cases other than those described in paragraph (b)(3)(iii) of this section, if the sponsor desires to increase the level of protection that would be provided by the EWP practice, the sponsor shall pay 100 percent of the upgrade or additional work unless the upgrade is the result of permit requirements necessary to implement the recovery.

(c) *Eligible practices.* NRCS will only provide assistance for measures that:

(1) Provide protection from additional flooding or soil erosion;

(2) Reduce threats to life or property from a watershed impairment, including sediment and debris removal in floodplains and uplands;

(3) Restore the hydraulic capacity to the natural environment to the maximum extent practical;

(4) Provide temporary water for livestock to reduce the use of drought impacted water sources, prescribed grazing or purchasing and transporting hay to allow rangeland to recover; and

(5) Are economically and environmentally defensible and technically sound.

(d) *Documentation.* NRCS shall document the economic rationale of proposed practices in appropriate detail before the allocation of emergency funding, including projects under consideration for floodplain easements in § 624.10. Generally, the expected value of the property restored should exceed the cost of emergency measures, including taking into consideration environmental benefits. Documentation shall include, but is not limited to:

(1) Number of locations and extent of damage, including environmental and cultural resources at risk, because of the watershed impairment;

(2) Estimated damages to the values at risk if the threat is imminent but not yet realized;

(3) Events that must occur for any imminent threat to be realized and the estimated probability of their occurrence both individually and collectively;

(4) Estimates of the nature, extent, and costs of the emergency practices to be constructed to recover from an actual threat or relieve an imminent threat;

(5) Thorough description of the beneficial and adverse effects on environmental resources, including fish and wildlife habitat;

(6) Description of water quality and water conservation impacts, as appropriate;

(7) Analysis of effects on downstream water rights; and

(8) Other information deemed appropriate by NRCS to describe adequately the environmental impacts to comply with the National Environmental Policy Act, Endangered Species Act, National Historic Preservation Act, and related requirements.

(e) *Implementation.* When planning emergency recovery practices, NRCS shall place emphasis on measures that are the most economical and are to be accomplished by using the least damaging practical construction techniques and equipment that retain as much of the existing characteristics of the landscape and habitat as possible. Construction of emergency practices may include, but are not limited to, timing of the construction to avoid impacting fish spawning, clearing of right-of-ways, reshaping spoil, debris removal, use of bioengineering techniques, and revegetation of disturbed areas. Mitigation actions needed to offset potential adverse impacts of the EWP practices should be planned for installation before, or concurrent with, the installation of the

EWP practices. In rare occurrences where mitigation cannot be installed concurrently, plans shall require mitigation be accomplished as soon as practical.

(f) NRCS may determine that a measure is not eligible for assistance for any reason, including economic and environmental factors or technical feasibility.

§ 624.7 Cost sharing.

(a) Except as provided in paragraph (b) of this section, the Federal contribution toward the implementation of emergency measures shall not exceed 75 percent of the construction cost of such emergency measures, including work done to offset or mitigate adverse impacts as a result of the emergency measures.

(b) If NRCS determines that an area qualifies as a limited resource area, the Federal contribution toward the implementation of emergency measures shall not exceed 90 percent of the construction cost of such emergency measures.

(c) If a natural disaster strikes a limited resource community in a non-designated limited-resource area, the NRCS State conservationist has the authority to document the limited resource status using census data for the three factors listed in § 624.4(g)(1) through (3) of this part, and approve the 90 percent cost-share rate for that community. In no case would this procedure be used for a unit smaller than a community.

§ 624.8 Assistance.

(a) Sponsors must submit a formal request to the State conservationist for assistance within 60 days of the natural disaster occurrence, or 60 days from the date when access to the sites becomes available. Requests shall include a statement that the sponsors understand their responsibilities and are willing to pay its cost-shared percentage and information pertaining to the natural disaster, including the nature, location, and scope of the problems and the assistance needed.

(b) On receipt of a formal request for EWP assistance, the State conservationist shall immediately investigate the emergency situation to determine whether EWP is applicable. The State conservationist will take into account the funding priorities identified in paragraph (c)(3) of this section. The State conservationist will forward the damage survey report, which provides the information pertaining to proposed EWP practice(s) and indicates the amount of funds necessary to undertake the Federal portion, to the NRCS Chief

or designee. This information will be submitted no later than 60 days from receipt of the formal request from the sponsor. NRCS may not commit funds until notified by the Chief, or his designee, of the availability of funds.

(c) Before the release of financial assistance, NRCS will enter into an agreement with a sponsor that specifies the responsibilities of the sponsor under this part, including any required operation and maintenance responsibilities.

(1) NRCS will only provide funding for work that is necessary to reduce applicable threats.

(2) Efforts must be made to avoid or minimize adverse environmental impacts associated with the implementation of emergency measures, to the extent practicable, giving special attention to protecting cultural resources and fish and wildlife habitat.

(3) Funding priorities. NRCS shall provide EWP assistance based on the following criteria:

(i) Exigency situations;

(ii) Sites where there is a serious, but not immediate threat to human life;

(iii) Sites where buildings, utilities, or other important infrastructure components are threatened;

(iv) Sites with federally protected resources, including, but not limited to:

(A) Sites inhabited by federally listed threatened and endangered species or containing the species designated critical habitat where the individuals of the species or critical habitat would be in jeopardy without the EWP practice;

(B) Sites that contain or are in the proximity to cultural sites listed on the National Register of Historic Places where the listed resource would be jeopardized if the EWP practice were not installed;

(C) Sites where prime farmland supporting high value crops is threatened;

(D) Sites containing wetlands that would be damaged or destroyed without the EWP practice; and,

(E) Sites that have a major affect on water quality.

(v) Sites containing unique habitat, including but not limited to, State-listed threatened and endangered species, fish and wildlife management areas, or State-identified sensitive habitats; and,

(vi) Other lands not listed above.

§ 624.9 Time limits.

Funds must be obligated by the State conservationist and construction completed within 220 calendar days after the date funds are committed to the State conservationist.

§ 624.10 Floodplain easements.

(a) *General.* Notwithstanding any limitations found in this part, NRCS may purchase floodplain easements as an emergency measure. NRCS will only purchase easements from landowners on a voluntary basis.

(b) *Floodplain easements.* (1) Floodplain easements established under this part shall be:

(i) Held by the United States, through the Secretary of Agriculture;

(ii) Administered by NRCS or its designee; and

(iii) Perpetual in duration;

(2) *Eligible land.* NRCS may determine that land is eligible under this section if:

(i) The floodplain lands were damaged by flooding within the last 12 months or have been subject to flood damage at least twice within the previous 10 years; or

(ii) Other lands within the floodplain that would contribute to the restoration of the flood storage and flow, erosion control, or that would improve the practical management of the easement; or,

(iii) Lands that would be inundated or adversely impacted as a result of a dam breach.

(3) *Ineligible land.* NRCS may determine that land is ineligible under this section if:

(i) Implementation of restoration practices would be futile due to on-site or off-site conditions;

(ii) The land is subject to an existing easement or deed restriction that provides sufficient protection or restoration of the floodplain's functions and values; or

(iii) The purchase of an easement would not meet the purposes of this part.

(4) *Compensation for easements.* A landowner will receive the lesser of the three following values as an easement payment:

(i) A geographic rate established by the NRCS State conservationist, if one has been established;

(ii) A value based on a market appraisal analysis for agricultural uses or assessment for agricultural land; or

(iii) The landowner's offer, if one has been made.

(5) NRCS will not acquire any easement unless the landowner accepts the amount of the easement payment that is offered by NRCS. The easement payment may or may not equal the fair market value of the interests and rights to be conveyed by the landowner under the easement. By voluntarily participation in the program, a landowner waives any claim to additional compensation under EWP based on fair market value.

(6) NRCS may provide up to 100 percent of the restoration and enhancement costs of the easement. NRCS may enter into an agreement to ensure that identified practices are implemented. NRCS, the landowner, or other designee may implement identified practices. Restoration and enhancement efforts may include both structural and non-structural practices. An easement acquired under this part shall provide NRCS with the full authority to restore, protect, manage, maintain, and enhance the functions and values of the floodplain.

(7) The landowner shall:

(i) Comply with the terms of the easement;

(ii) Comply with all terms and conditions of any associated agreement; and,

(iii) Convey title to the easement that is acceptable to NRCS and warrant that the easement is superior to the rights of all others, except for exceptions to the title that are deemed acceptable by NRCS.

(8) Structures, including buildings, within the floodplain easement may be demolished and removed, or relocated outside the 100-year floodplain.

(c) *Easement modifications.* (1) After an easement has been recorded, no modification will be made in the easement except by mutual agreement with the Chief and the landowner.

(2) Approved modifications will be made only in an amended easement which is duly prepared and recorded in conformity with standard real estate practices, including requirements for title approval, subordination of liens, and recordation.

(3) The Chief may approve modifications to facilitate the practical administration and management of the easement area or the program so long as the modification will not adversely affect the functions and values for which the easement was acquired.

(4) Modifications must result in equal or greater environmental and economic values to the United States.

(d) *Enforcement.* (1) In the event of a violation of an easement, the violator shall be given reasonable notice and an opportunity to correct the violation within 30 days of the date of the notice, or such additional time as NRCS may allow.

(2) Notwithstanding paragraph (c)(1) of this section, NRCS reserves the right to enter upon the easement area at any time to remedy deficiencies or easement violations. Such entry may be made at the discretion of NRCS when such actions are deemed necessary to protect important floodplain functions and values or other rights of the United

States under the easement. The landowner shall be liable for any costs incurred by the United States as a result of the landowner's negligence or failure to comply with easement or agreement obligations.

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

(4) NRCS shall be entitled to recover any and all administrative and legal costs, including attorney's fees or expenses, associated with any enforcement or remedial action.

(5) On the violation of the terms or conditions of the easement or related agreement, the easement shall remain in force, and NRCS may require the landowner to refund all or part of any payments received by the landowner under this Part, together with interest thereon as determined appropriate by NRCS.

(6) All the general penal statutes relating to crimes and offenses against the United States shall apply in the administration of floodplain easements acquired under this part.

§ 624.11 Waivers.

To the extent allowed by law, the NRCS Deputy Chief for Programs may waive any provision of these regulations.

Signed in Washington, DC on October 29, 2003.

Bruce I. Knight,

Chief, Natural Resources Conservation Service.

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DEPARTMENT OF AGRICULTURE**Grain Inspection, Packers and Stockyards Administration****7 CFR Part 800****RIN 0580-AA80****Fees for Official Inspection and Official Weighing Services**

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Proposed rule.