

# Rules and Regulations

Federal Register

Vol. 71, No. 144

Thursday, July 27, 2006

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF AGRICULTURE

### Commodity Credit Corporation

#### 7 CFR Part 1491

RIN 0578-AA37

#### Farm and Ranch Lands Protection Program

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

**ACTION:** Interim Final Rule with request for comments.

**SUMMARY:** On behalf of the Commodity Credit Corporation (CCC), the Natural Resources Conservation Service (NRCS), hereafter referred to as the Agency, is amending the Interim Final Rule implementing the Farm and Ranch Lands Protection Program (FRPP) at 7 CFR part 1491 to clarify certain program policies and legal requirements. Specifically, the Agency is addressing policy and legal requirements in eight areas: Fair market value definition; program eligibility as to forest lands; the nature of the real property rights the United States is acquiring and how it will exercise those rights; compliance with Department of Justice (DOJ) Title Standards; exercising United States' rights; the implementation of Federal appraisal requirements required by the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970; impervious surface limitations on the easement area; and indemnification requirements. NRCS requests comments on this amendment. Cooperative agreements signed on or after the publication of this Interim Final Rule will be administered.

This rule is being published as an Interim Final Rule, with request for comments under the authority of section 2702 of the Farm Security and Rural Investment Act of 2002, Pub. L. 107-17, which allows the promulgation of an Interim Final Rule effective upon

publication. The Agency made a determination that publishing this Interim Final Rule is appropriate and necessary given the fact that this rule is making program changes to address and clarify existing Federal law and policy requirements.

**DATES:** This rule is effective on July 27, 2006. Comments must be received by September 25, 2006.

**ADDRESSES:** This Interim Final Rule can be accessed via the Internet at: <http://www.nrcs.usda.gov/programs/frpp>. Send comments by mail to the Easement Program Division, NRCS, 1400 Independence Avenue, SW., Room 6819-S, Washington, DC 20250-1400, or fax comments to (202) 720-9689.

**FOR FURTHER INFORMATION CONTACT:** Robert Glennon, Farm and Ranch Lands Protection Program Manager, NRCS, 1400 Independence Avenue, SW., Room 6819-S, Washington, DC 20250-1400; telephone: (202) 720-9476; e-mail: [Robert.Glennon@wdc.usda.gov](mailto:Robert.Glennon@wdc.usda.gov). Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at: (202) 720-2600 (voice and TDD).

#### SUPPLEMENTARY INFORMATION:

##### Background

The Farm Security and Rural Investment Act of 2002, Pub. L. 107-171, repealed the Farmland Protection Program (FPP), established by the Federal Agriculture Improvement and Reform Act of 1996, and authorized a new FPP. NRCS named the new program FRPP to both distinguish it from the repealed program and to better describe the types of land the program seeks to protect. Under FRPP, the Secretary of Agriculture, acting through NRCS, is authorized, on behalf of the CCC and under its authorities, to purchase conservation easements or other interests in land for the purpose of protecting topsoil by limiting nonagricultural uses of the land. NRCS purchases conservation easements by partnering with eligible entities (partners) that have pending offers for the acquisition of conservation easements. NRCS memorializes this partnership relationship and obligates funding through the use of FRPP cooperative agreements. As explained in the preamble to the final FRPP rule, FRPP is a real property acquisition

program, not a financial assistance or grants program.

NRCS, on behalf of CCC, published final regulations for FRPP on May 16, 2003 (68 FR 26461), which are codified at 7 CFR part 1491. Since that time, several issues have arisen as to the implementation of FRPP. Some of these issues, such as the degree to which impervious surfaces are allowed on FRPP easements and how much forest land is eligible for enrollment into FRPP, were clarified through internal policy and set forth in the Agency program manual. However, because of the public's interest in these matters, the Agency has decided to amend the final FRPP rule to address these policies and request the public's comments. In addition, questions have arisen as to the nature of the property rights the United States is purchasing when it funds FRPP easements and whether the DOJ Title Standards and Federal appraisal requirements are applicable to FRPP acquisitions. The Agency is taking the opportunity presented by the publishing of this amendment to clarify these matters as well.

#### Discussion of Changes

Below NRCS discusses each of the amendments to 7 CFR part 1491 by subject area.

##### Subpart A—General Provisions

##### Definition of Fair Market Value

NRCS is amending § 1491.3 to change the definition of fair market value to the value of the landowner's whole property before the easement, and the value of the landowner's whole property after the easement. The current definition compares the value of the whole property before the easement and the remainder property after the easement. The current definition does not consider the difference in value between the property being protected by the easement and the remainder of the land that is not protected when it is owned by the same individual who owns the protected land. Although the easement may lower the value of the land being protected by preventing development for certain uses, the easement may increase the value of adjacent land. The demand for land adjacent to protected land may increase resulting in an increase to the value of the adjacent land in response to the increased demand.

Consequently, comparing the value of the whole property before and after the easement is recorded is the only way to assess its fair market value.

#### Eligibility of Forest Lands

NRCS amends § 1491.4 to expand the scope of forest land which is eligible for enrollment under FRPP as forest lands incidental to the farm operation. The FRPP authorizing legislation defines eligible land as “cropland, rangeland, grassland, pasture land, and forest land that is incidental part of the agricultural operation.” In June 2002, NRCS instituted a policy to ensure that FRPP would not compete with the Forest Legacy Program. The 2002 policy set out in the NRCS Conservation Programs Manual, Part 519 defined “incidental forest land” as any land less than 50 percent of the total easement area.

This policy unintentionally created an impediment to enrolling land in the Eastern States where forested acreage is an integral and important supplemental part of the farming operation. In the East, streams occur throughout cropland, and wet, stony, and rocky soils are randomly interspersed with prime farmland. Forest land in the East is also typically interspersed with cropland because of its location adjacent to those streams, and the fact that it has not been cleared in order to maintain water quality. In addition, forests on wet, stony, or rocky soil have not been cleared because they were not practical to farm. In these areas of the Nation, the incidental forest land policy has resulted in landowners subdividing tracts or deforesting acres offered for the program or “carving out” portions of the property that will not meet the definition of incidental forest land. For these reasons, NRCS revisited this policy to provide NRCS State Conservationists the flexibility to enroll lands containing more than 50 percent forest land under certain circumstances.

Specifically, NRCS is establishing a national limitation that not more than two-thirds of the easement acreage may be occupied by forested acreage, including sugarbush and pulpwood. NRCS' new policy permits NRCS to pay for forest land up to the same acreage amount as the nonforested, agricultural soils acreage, provided all other FRPP eligibility criteria are met and that such forest land is supplemental to the agricultural operation. NRCS has included in this Interim Final Rule a new subparagraph to paragraph 1491.4(d) incorporating this policy. Regarding management of forested acres, it is the Agency's practice to work with its FRPP partners to address the management of these forested acres.

NRCS has also added a new definition in section 1491.3 for “forest land” in this Interim Final Rule. This definition will assist with the determination of the extent of acreage for which NRCS will contribute funding. Consistent with other NRCS conservation programs, “forest land” means a land cover/use category that is at least 10 percent stocked by single-stemmed woody species of any size that will be at least 4 meters (13 feet) tall at maturity. Also included in this definition is land that is bearing evidence of natural regeneration of tree cover (cutover forest or abandoned farmland) that is not currently developed for nonforest 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. The minimum area for classification as forest land is 1 acre, and the area must be at least 100 feet wide. Exceptions may be made by the Chief for land primarily managed through a low-input system for food, fiber, or other agricultural products.

#### Real Property Interest of the United States

Over the past several years, questions have arisen regarding certain legal aspects of FRPP's administration. The Agency addresses these matters and, where applicable, amends the FRPP regulation.

Historically, the United States has acquired a “contingent right” in FRPP-funded easements which allows the Secretary, at his or her discretion, to enforce or take title to the conservation easement should the Secretary determine that the partner is not enforcing the easement or is attempting to divest itself of the easement without prior approval of and payment of consideration to the Secretary. Under FRPP, the Secretary of Agriculture is authorized “to purchase conservation easements or other interests in eligible land that is subject to a pending offer from an eligible entity,” which means that the Secretary is to purchase a presently vested real property right. To avoid any confusion, NRCS is clarifying the nature of the rights acquired under FRPP so there can be no question that these rights are presently vested, insurable real property rights. The Agency is doing this by re-characterizing its “contingent right,” as well as requiring that the United States is identified as a grantee in FRPP funded deeds. Both changes are discussed below.

This rulemaking amends the FRPP final regulation to change the terminology from “contingent right” to “rights.” The property rights provision

required in FRPP easements will read substantially as follows:

Under this Conservation Easement, the same rights have been granted to the United States that have been granted to the grantee/partner. However, the Secretary of the United States Department of Agriculture (the Secretary), on behalf of the United States, will only exercise these rights under the following circumstances: In the event that the grantee/partner fails to enforce any of the terms of this Conservation Easement, as determined in the sole discretion of the Secretary, the Secretary and his or her successors or assigns may exercise the United States' rights to enforce the terms of this Conservation Easement through any and all authorities available under Federal or State law. In the event that the grantee/partner attempts to terminate, transfer, or otherwise divest itself of any rights, title, or interests in this Conservation Easement without the prior consent of the Secretary and, if applicable, payment of consideration to the United States, then, at the option of the Secretary, all right, title, and interest in this Conservation Easement shall become vested solely in the United States of America.

This “rights” provision is similar to the old “contingent right” clause. The Agency is making this change to clarify that the United States is a grantee under the terms of the deed consistent with both the statutory authority for FRPP and the DOJ Title Standards. In order to effectuate this change, this amendment changes the text at §§ 1491.4(a), 1491.22(d), and 1491.30(b) of the FRPP rule to insert the requirement that the rights of the United States as a grantee are to be included in all FRPP-funded easements.

An additional reason for adding the United States as a grantee is to ensure that the United States appears in the chain of title. Grantee status facilitates enforcement of these Federal rights vis a vis subsequent landowners, and also has the beneficial effect of preventing condemnation of the easements by local authorities because State and local governments cannot condemn Federal property.

These changes do not alter the fundamental relationship NRCS has had with its FRPP partners or their primary stewardship responsibilities for FRPP funded easements. The clarifications noted above are just that—clarifications so that there is no ambiguity as to the rights the United States is acquiring. The Department anticipates and intends that its relationship with its partners will remain the same as it was prior to the publication of this rule. The Department continues to see its role as a backstop to ensure the viability of FRPP easements with primary stewardship and management of the easements squarely in the hands of the

partner. Finally, NRCS is considering the use of a conservation easement template addendum under the authority of paragraph 1491.4(f) that incorporates the co-grantee status of the United States and other FRPP policies regarding particular uses of the easement area, including the extent of the easement area that can have an impervious surface (see discussion below). NRCS believes the use of a template addendum may minimize the extent that NRCS will need to require modification to cooperating entities' standard deed provisions to conform to FRPP policies. NRCS solicits comments on this proposal.

### Title Review

This section discusses Federal policy regarding title review for Federal acquisition of real property. No amendments to the rule are necessary to implement this requirement because it is simply a statement of existing Federal law and policy. Requirements at 40 U.S.C. 3111 state:

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

This law codifies prudent business practices by fostering uniformity and requiring the adequacy of title acquired by the various departments and agencies of the Federal Government. DOJ promulgated the Title Standards to implement 40 U.S.C. 3111. The Attorney General has delegated the authority to approve title to the USDA. The Office of the General Counsel (OGC) reviews title for legal sufficiency on behalf of the USDA. Under FRPP, the United States is acquiring an interest in land, and the Government must comply with 40 U.S.C. 3111. Consequently, the legal sufficiency of title of all FRPP funded easements must be reviewed and approved by OGC prior to conveyance. OGC title review is non-delegable. The process used to approve title for FRPP-funded acquisitions is generally the same as other real property acquisitions of the Department, such as the Wetlands Reserve Program or the Grassland Reserve Program. FRPP conservation easements are purchased by partners, and these partners also review title for sufficiency prior to the acquisition of a conservation easement. The Agency is sensitive to this fact, as well as the need for timely review, given closing deadlines. USDA will work closely with its partners to ensure that title review is completed in a timely manner. The partners can facilitate OGC's review by

ensuring that any [clouds] on title have been removed or subordinated as necessary, and by promptly forwarding title documents to NRCS for review. The Department's experience thus far with the sufficiency of title review by its FRPP partners has varied. Some partners are thorough in their title review; other partners are not. A review by OGC will ensure that title acquired on all FRPP funded easements is legally sufficient. This benefits the United States, as well as its partners, because adequacy of title is critical in ensuring the viability of the conservation easement itself.

### Exercising the United States' Rights

The FRPP partners have asked the Agency about the process it intends to follow when it exercises its rights under FRPP easements. To date, NRCS has not had to exercise its enforcement rights, nor has it had to take title to any FRPP-funded easements. However, the Agency believes that it is important to set forth a uniform, predictable process that will be utilized if and when the need arises to enforce or take sole title to an FRPP easement. Consequently, the Agency is amending the FRPP regulation at paragraph 1491.30(g) to set forth the general process the Agency will follow when exercising the United States' rights. Specifically, NRCS will notify the grantee/partner in writing, by certified mail at the last known address, prior to exercising its rights. NRCS also will specify in that notice the particular right that is being exercised and will state the specific event of noncompliance which caused the action. The grantee/partner will have up to 60 days to address the noncompliance. If NRCS determines that the noncompliance is not cured within the 60-day period, the NRCS right of enforcement will become final. In cases where imminent harm may occur to the conservation values being protected or to the easement deed itself, the Agency reserves the right to waive the period to cure. In these cases, NRCS will still send a written notification to the grantee/partner. The Agency is amending the definition § 1491.3 to define the term "imminent harm" to mean those easement violations or threatened violations that, in the opinion of the Agency, would likely cause immediate and significant degradation to the conservation values; for example, those violations which would adversely impact soil structure or result in the erosion of topsoil beyond acceptable levels as established by NRCS.

The general circumstances under which NRCS may exercise the United

States' rights under FRPP easements are contained within the rights language itself. In exercising its rights, the United States will be guided by its stewardship responsibilities and the protection of the conservation values that the easement seeks to protect.

### Appraisal

In keeping with Federal and congressional efforts to improve the validity of conservation easement appraisals, the Agency is also addressing issues related to its appraisal policy in this rulemaking. As set forth at 7 CFR 1491.4, the value of the conservation easement must be appraised prior to FRPP fund disbursement. However, the FRPP final rule at 7 CFR 1491.4(e) erroneously states that such appraisals are to be conducted by a State-certified or licensed general appraiser. This rule amends that language to provide that NRCS requires that appraisals must be completed and signed by a State-certified general appraiser and must contain a disclosure statement by the appraiser. This change is made to clarify the requisite experience needed to appraise FRPP-funded easements. The Real Property Appraiser Qualification Criteria, published by The Appraisal Foundation, states that Certified General appraisers have the training and experience enabling them to complete a variety of complex property type appraisals.

Conservation easement appraisals are complex because they involve using an income approach in calculating the value of the easement and the application of the Uniform Appraisal Standards for Federal Land Acquisitions in the valuation process. In addition, the size of the easements is larger than lots for residential housing. In contrast, licensed appraisers are defined as limited to appraising non-complex, one to four residential units having a transaction value less than \$1,000,000, and complex one to four residential units having a transaction value of less than \$250,000.

It is in the public interest to require the use of Certified General appraisers in the valuation of FRPP easements because utilizing the services of licensed appraisers dramatically increases the risk of overpayment for acquisitions due to inaccurate appraisals.

In addition, this rule amends the 7 CFR 1491.4(e) to provide that the appraisal must conform to both the Uniform Standards of Professional Appraisal Practices (USPAP) and the Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA)

and any Supplemental Standards issued by NRCS. Requiring the use of both USPAP and the UASFLA is simply stating the professional standards for Federal appraisals.

USPAP and UASFLA contain different guidance that must be followed in concert to adequately appraise property. The foregoing change requiring that both the practices and standards are followed was made in order to: Ensure that easement prices are correctly determined by using established methodologies; foster consistent valuations across the Nation; and standardize the appraisal process so that supportable, defensible, and documented bases exist for the purchase of each conservation easement by USDA. In order for USDA to ensure that its financial contribution towards the purchase of the conservation easement is accurately determined, the Agency has amended paragraph (e) of § 1491.4 to state that the NRCS shall require specific appraisal instructions and appraiser and technical appraiser reviewer qualifications to be followed in determining the value of the conservation easement to be purchased.

#### **Impervious Surface Limitations**

As set forth in FRPP's authorizing legislation, the purpose of FRPP is to purchase conservation easements in order to protect topsoil by limiting nonagricultural uses of the land. The Agency's experience in implementing FRPP has been that its partners allow for varying degrees of development on the land covered by their conservation easements. This is, in part, a result of differing conservation purposes between the Agency and its partners. For example, some partners have set their goal of preserving agricultural viability and, therefore, are willing to allow more development including outbuildings, residences, and utilities. In contrast, FRPP is an agricultural soils protection program where conversion of the soils conflicts with the clear purpose of the statute. The Agency, using public dollars to protect farm and ranch lands, has a fiduciary responsibility to ensure that the public receives the full benefits of the soil resource protection rights for which it is paying. The Agency has been largely successful in finding common ground with its partners even when the partner's main goal may be wildlife or open space protection. However, in order to ensure the purpose of FRPP is met and to facilitate uniform program implementation, NRCS has had to develop an impervious surface policy for FRPP easements.

In developing the impervious limitation policy, NRCS analyzed

information from internal reviews of conservation easements proposed by its partners, an external audit review, and numerous studies about the impacts of impervious surfaces on the Nation's waterways. NRCS further took into consideration the documented negative effects that impervious surfaces have on ground water recharge, water quality, and changes in hydrology that result in downstream flooding. In June 2003, NRCS issued the FRPP Manual (CPM Part 519) to FRPP State Managers based upon the above analysis. This guidance contained policy limiting the amount of impervious surface allowed within FRPP easements. The policy was as follows:

Impervious surfaces, which includes residential buildings, agricultural buildings (with and without flooring), and paved areas, both within and outside the conservation easement's building envelope(s), shall not exceed two percent of the total easement acreage. For easements less than 50 acres, one acre of impervious surface area is permitted.

Following issuance of the policy, several NRCS FRPP State managers and partners, particularly State Departments of Agriculture in the northeast, raised concerns about the impervious surface limitation. In response to these concerns, NRCS adjusted the 2-percent policy by allowing limited waivers to be granted by State Conservationists based upon objective criteria developed in consultation with the State Technical Committee. NRCS also developed a model template for the field to use when developing criteria to waive the 2-percent limit. In order to provide for flexibility at the State level, the model allows for a sliding scale for impervious surface limit of up to six percent if certain criteria are met. Farms are allowed up to six percent impervious surface coverage if they are located in a densely populated area, contain a large amount of open prime and important soil, and are less than 50 acres in size. The impervious surface limit applies to existing and new construction, but not NRCS-approved conservation practices.

While this policy has been in place, NRCS' experience has been that these criteria have been successful in: limiting the geographic area where this waiver can occur, focusing on protecting farms that have a high ratio of protected open prime or important land versus covered lands; and ensuring that this waiver is instituted primarily for smaller, more intensive farms in specific geographic areas.

NRCS is amending this final rule to include this impervious surface policy by adding a new provision at paragraph 1491.22(i) to read:

Impervious surfaces shall not exceed two percent of the FRPP easement area. However, the NRCS State Conservationist may waive the two percent impervious surface limitation on a parcel-by-parcel basis, provided no more than six percent of the easement area is covered by impervious surfaces. To waive this limitation, the NRCS State Conservationist must examine, at a minimum, population density, the ratio of open prime and important soil versus impervious surfaces on the easement area, and parcel size. All FRPP easements must contain language limiting the amount of impervious surfaces within the easement area.

For example, the typical easement in the northeast is 100 acres which, under this policy, would provide up to 6 acres of impervious surface. Likewise, in the west, a 1000 acre easement could have up to 60 acres of impervious surface. Without this impervious surface policy, which provides reasonable flexibility for infrastructure while still protecting the bulk of agricultural soils, the Agency would have no flexibility to allow for impervious surfaces. The Agency is particularly interested in receiving comments on this policy.

#### **Indemnification**

NRCS is amending paragraph 1491.30(e) to clarify the nature of the indemnification required in all FRPP funded easements. Given the fact that the United States is only holding title to a conservation easement, the United States is requiring, as is standard practice in the land trust community, an indemnification clause that addresses liability, whether arising from hazardous materials or otherwise, related to the property under easement. The indemnification clause ensures that the landowner continues to be responsible for liabilities arising from their property. To effectuate this clarification, paragraph 1491.30(e) is being amended to read as follows:

The conservation easement must include an indemnification clause requiring landowners to indemnify and hold harmless the United States from any liability arising from or related to property enrolled in FRPP.

The specific indemnification language required in FRPP easement will be set forth in the FRPP cooperative agreement.

#### **Regulatory Certifications**

##### *Executive Order 12866*

This Interim Final Rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. The Office of Management and Budget (OMB) has determined that this final rule is not a significant rulemaking action.

Therefore, no benefit/cost assessment of potential impacts is necessary.

#### *Regulatory Flexibility Act*

Pursuant to 5 U.S.C. 605(c) of the Regulatory Flexibility Act, this Interim Final Rule will not have a significant economic impact on a substantial number of small entities as defined by that Act. Therefore, a regulatory flexibility analysis is not required for this final rule. This Interim Final Rule implements FRPP, which involves the voluntary acquisition of interests in property by NRCS in partnership with State, local, and tribal governments and nonprofit entities.

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

This Interim Final Rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This Interim Final Rule will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based companies to compete in domestic and export markets.

#### *Environmental Analysis*

In May of 2003, an Environmental Assessment (EA) was prepared to assist NRCS in determining whether the final rule for FRPP would have a significant impact on the quality of the human environment such that an Environmental Impact Statement (EIS) should be prepared. Based on the results of the draft EA, NRCS issued a Finding of No Significant Impact (FONSI). That EA has been reviewed for adequacy and was found to still adequately reflect the environmental impacts of FRPP, as amended by this Interim Final Rule. Copies of the EA and FONSI may be obtained from Robert Glennon, FRPP, NRCS, Post Office Box 2890, Washington, DC 20013-2890. The FRPP EA and FONSI are also available at the following Internet address: [http://www.nrcs.usda.gov/programs/Env\\_Assess/FPP/FPP.html](http://www.nrcs.usda.gov/programs/Env_Assess/FPP/FPP.html).

#### *Paperwork Reduction Act*

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

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

This Interim Final Rule has been reviewed in accordance with Executive Order 12988. NRCS has not identified any State or local laws or regulations that are in conflict with this regulation or that would impede full implementation of this rule. Nevertheless, in the event that such a conflict was to be identified, the Interim Final Rule would preempt the State or local laws or regulations found to be in conflict. The provisions of this Interim Final Rule are not retroactive.

Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR part 614 must be exhausted.

#### *Executive Order 13132, Federalism*

This Interim Final Rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. NRCS has determined that the rule conforms to the federalism principles set forth in the Executive Order; would not impose any compliance cost on the States; and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities on the various levels of government.

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

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531-1538, NRCS has assessed the effects of this rulemaking action of State, local, and tribal governments, and the public. This action does not compel the expenditure of \$100 million or more by any State, local, or tribal government, or anyone in the private sector; therefore, a statement under Section 202 of the Act is not required.

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

Administrative practice and procedure, Agriculture, Soil conservation.

#### **Text of Rule Amendments**

■ For the reasons stated in the preamble, Title 7, Chapter XIV of the Code of Federal Regulations is amended as follows:

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

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

**Authority:** 16 U.S.C. 3838h-3838i.

■ 2. Section 1491.3 is amended by removing the definition of “contingent

right” and revising the definition of the term “fair market value,” and adding the definitions for “forest land,” “imminent harm,” and “United States” rights” to read as follows:

#### **§ 1491.3 Definitions.**

\* \* \* \* \*

*Fair market value* is ascertained through standard real property appraisal methods. Fair market value is the amount in cash, or in terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date of the appraisal, after a reasonable exposure of time on the open competitive market, from a willing and reasonably knowledgeable seller, to a willing and reasonably knowledgeable buyer with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal. Easement price will be determined by completing an appraisal for market value of the whole property (larger parcel) before the easement (before value) and an appraisal for market value of the whole property (larger parcel) after the easement (after value) is placed. The difference between the before value and the after value is deemed the value of the conservation easement.

\* \* \* \* \*

*Forest land* means a land cover/use category that is at least 10 percent stocked by single-stemmed woody species of any size that will be at least 4 meters (13 feet) tall at maturity. Also included is land bearing evidence of natural regeneration of tree cover (cut over forest or abandoned farmland) that is not currently developed for nonforest 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. The minimum area for classification as forest land is 1 acre, and the area must be at least 100 feet wide. Exceptions may be made by the Chief for land primarily managed through a low-input system for food, fiber, or other agricultural products.

\* \* \* \* \*

*Imminent harm* means those easement violations or threatened violations that, in the opinion of the Agency, would likely cause immediate and significant degradation to the conservation values; for example, those violations which would adversely impact soil structure or result in the erosion of topsoil beyond acceptable levels as established by NRCS.

\* \* \* \* \*

United States' rights means rights in real property including the right to enforce the terms of the conservation easement deed and take sole title to the conservation easement deed.

■ 3. Section 1491.4 is amended by revising paragraph (a), redesignating paragraphs (d)(4) and (d)(5) as (d)(5) and (d)(6), adding new paragraph (d)(4), and revising paragraph (e) to read as follows:

§ 1491.4 Program Requirements.

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

\* \* \* \* \*

(d) \* \* \*

(4) For a farm to be considered eligible, the forest land of a farm cannot exceed two-thirds of the easement area.

\* \* \* \* \*

(e) Prior to FRPP fund disbursement, 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 and the Uniform Appraisal Standards for Federal Land Acquisitions. In addition, NRCS may require an eligible entity to obtain an appraisal using NRCS appraisal instructions in order to ensure the accuracy of the conservation easement appraisal upon which the NRCS contribution towards fair market value is based.

\* \* \* \* \*

■ 4. Section 1491.22 is amended by revising paragraph (d) and adding a new paragraph (i) to read as follows:

§ 1491.22 Conservation easement deeds.

\* \* \* \* \*

(d) The conservation easement deed must identify the United States as a

grantee with rights as set forth in the deed. Among the rights that the United States acquires in each conservation easement is the right to enforce the terms of the easement under specified conditions and the right to assume sole title to the conservation easement should the grantee abandon or attempt to terminate the conservation easement.

\* \* \* \* \*

(i) Impervious surfaces shall not exceed 2 percent of the FRPP easement area, excluding NRCS-approved conservation practices. However, the NRCS State Conservationist may waive the 2 percent impervious surface limitation on a parcel-by-parcel basis, provided no more than six percent of the easement area is covered by impervious surfaces. The NRCS State Conservationist must consider, at a minimum, population density, the ratio of open prime and important soil versus impervious surfaces on the easement area, and parcel size when deciding whether to waive the two percent limitation. All FRPP easements must include language limiting the amount of impervious surfaces within the easement area.

■ 5. Section 1491.30 is amended by adding a new paragraph (g) and by revising paragraphs (b) and (e) to read as follows:

§ 1491.30 Violations and remedies.

\* \* \* \* \*

(b) In the event that the grantee/partner fails to enforce any of the terms of the conservation easement, as determined in the sole discretion of the Secretary of the United States Department of Agriculture, the Secretary and 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. In the event that the grantee/partner attempts to terminate, transfer, or otherwise divest itself of any rights, title, or interests in the conservation easement without the prior consent of the Secretary and, if applicable, payment of consideration to the United States, then, at the option of the Secretary, all right, title, and interest in the conservation easement shall become vested solely in the United States of America.

\* \* \* \* \*

(e) The conservation easement deed must include an indemnification clause requiring the landowner (grantor) to indemnify and hold harmless the United States from any liability arising

from or related to the property enrolled in FRPP.

\* \* \* \* \*

(g) In the event NRCS determines it must exercise the United States' right to enforce the terms of or take title to the conservation easement, NRCS will provide written notice by certified mail to the grantee at the grantee's last known address. The notice will set forth the nature of the noncompliance by the grantee and a 60-day period to cure. If the grantee fails to cure within the 60-day period, the United States will take the action specified under the notice. The United States reserves the right to decline to provide a period to cure if NRCS determines that imminent harm may result to the conservation easement deed or the conservation values it seeks to protect.

Signed in Washington, DC, on July 19, 2006.

Bruce I. Knight,

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

[FR Doc. E6-11959 Filed 7-26-06; 8:45 am]

BILLING CODE 3410-16-P

DEPARTMENT OF AGRICULTURE

7 CFR Part 2902

RIN 0503-AA26

Office of Energy Policy and New Uses; Designation of Biobased Items for Federal Procurement

AGENCY: Office of Energy Policy and New Uses, USDA.

ACTION: Interim final rule with comment period.

SUMMARY: The U.S. Department of Agriculture (USDA) is amending 7 CFR part 2902, Guidelines for Designating Biobased Products for Federal Procurement, to be consistent with the statutory changes to section 9002 of the Farm Security and Rural Investment Act (FSRIA) that were effected when the Energy Policy Act of 2005 was signed into law on August 8, 2005. In addition, USDA amends part 2902 in order to clarify that biobased products from certain designated countries must be treated by procuring agencies as eligible for the procurement preference under FSRIA. Finally, this rule amends part 2902 to clarify the USDA intent to exclude from the preferred procurement program biobased products that are merely incidental to Federal funding. The amendment is issued as an immediately effective interim rule, with opportunity for public comment.