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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: Final rule.

SUMMARY: This final rule sets forth the policies implementing the Farm and Ranch Lands Protection Program. The Farm Security and Rural Investment Act of 2002 repealed the Farmland Protection Program (FPP), established by the Federal Agriculture Improvement and Reform Act of 1996, and authorized a new farmland protection program. The new program will be called the Farm and Ranch Lands Protection Program (FRPP) to both distinguish it from the repealed program and to better describe the types of land the program seeks to protect. Under the FRPP, the Secretary of Agriculture, acting through the Natural Resources Conservation Service (NRCS), is authorized, on behalf of the Commodity Credit Corporation (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. The final rule promulgates policy regarding the implementation of the FRPP, while the Request for Proposals (RFP), which will continue to be used, announces national fund availability and sets forth nationwide application procedures and ranking criteria. Conservation easements recorded on or following this date will be administered according to this final rule. Cooperative agreements signed on this date or following this date also will be administered according to this final rule.

DATES: This final rule is effective May 16, 2003.

ADDRESSES: This final rule can be accessed via the internet. Users can access the Natural Resources Conservation Service (NRCS) homepage at: <http://www.nrcs.usda.gov>.

FOR FURTHER INFORMATION CONTACT: Denise Coleman, Farm and Ranch Lands Protection Program Manager, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013-2890. Telephone: (202) 720-9476. Electronic mail denise.coleman@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:

Executive Order 12866

This 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, it has been determined that this 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 final rule implements the Farm and Ranch Lands Protection Program, 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 final rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This final rule will not result in annual effect on the economy of \$100,000,000 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

An Environmental Assessment (EA) has been prepared to assist NRCS in determining whether this final rule would have a significant impact on the quality of the human environment such that an Environmental Impact Statement (EIS) should be prepared. Based on the results of the draft EA, NRCS has issued a Finding of No Significant Impact (FONSI). Copies of the EA and FONSI may be obtained from Denise Coleman, Farmland Protection and Community Planning Staff, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013-2890. The FRPP EA and FONSI will also be available at the following Internet address: 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 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 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 were to be identified, the final rule would preempt the State or local laws or regulations found to be in conflict. The provisions of this 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 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 \$100,000,000 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.

Background Related to the Farm and Ranch Lands Protection Program

Urban sprawl continues to threaten the Nation's farm and ranch land. Social and economic changes over the past three decades have influenced the rate at which land is converted to nonagricultural uses. Population growth, demographic changes, large lot development, expansion of transportation systems, and economic prosperity have contributed to increased agricultural land conversion rates. Increased population, growing affluence, and an expanded transportation infrastructure have accelerated the depopulation of the urban centers and have resulted in the conversion of farm and ranch land. Between 1960 and 1990, metropolitan area population grew by 50 percent, while the acreage of developed land increased 100 percent. About 45 percent of new construction between the years of 1994 and 1997 occurred in rural areas, with nearly 80 percent being land bordering urban areas. Overall, this translates to over 2.2 million acres being converted per year (USDA, *Maintaining Farm and Forestland In Rapidly Growing Areas*, 2000).

According to the USDA National Resources Inventory (NRI), urban and built-up areas increased from 65.3 million acres in 1992, to 79 million acres in 1997, equaling an area approximately the size of Ohio. Perhaps more important than the overall rate of land conversion is the location and type of land subject to this change in land use. On average, prime and important farmlands are being converted at a rate of two to four times that of other lands. Based on NRI urban and built-up data for the 1980s, 46 percent of the land converted to urban and built-up uses comes from cropland and pasture, while 38 and 14 percent comes from forest land and range land, respectively. Much of the land being lost is prime, unique, or important farmland located near

cities. Moreover, an end to farm and forest land conversion is not in sight. The National Home Builders Association forecasts an expansion of 1.3 to 1.5 million new homes per year through 2010 (USDA, *Maintaining Farm and Forestland In Rapidly Growing Areas*, 2000).

As a result of these land use changes, there is growing national interest in protecting farm and ranch lands. Once developed, productive topsoil is effectively lost forever, placing the Nation's future food security at risk. Furthermore, land use devoted to agriculture provides other significant public benefits, including environmental quality, historic preservation, and scenic beauty.

Overview of the Farm and Ranch Lands Protection Program

The FRPP is a voluntary program that helps farmers and ranchers keep their land in agriculture. The program provides matching funds to State, Tribal, and local governments, and non-governmental organizations with existing farmland protection programs to purchase conservation easements. NRCS is authorized by statute to purchase conservation easements, or other interests in land. NRCS cannot use FRPP funds to restore historical or archaeological resources, nor share in the cost of installing conservation practices.

Under the FRPP, NRCS solicits proposals from Federally recognized Indian Tribes, States, units of local government, and non-governmental organizations to cooperate in the acquisition of conservation easements on farms and ranches for the purpose of protecting topsoil from conversion to nonagricultural uses. Although NRCS has authority to acquire other interests in land, the FRPP will seek to fund the acquisition of conservation easements.

Discussion of Comments and Changes

The Natural Resources Conservation Service (NRCS), on behalf of the Commodity Credit Corporation (CCC), published a proposed rule on October 29, 2002 at 7 CFR 1491. NRCS received 296 timely filed letters containing nearly 800 comments. Respondents included the following: 1 Congressional representative, 1 Federal agency, 5 State agencies, 5 local governments, 59 non-governmental organizations, and 225 from individuals. Comments were received from California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire,

New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, Wyoming, and the District of Columbia. Some letters and e-mails did not indicate from which State they originated. Some comments pertained to a specific situation or locality and were not national in scope; therefore, these comments were not addressed in the final rule.

The discussion that follows is organized in the same sequence as the proposed rule.

Subpart A—General Provisions

Section 1491.1 Applicability

This section addresses the scope of the Farm and Ranch Lands Protection Program. The Farm and Ranch Lands Protection Program is available in all 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands. One respondent asked whether this final rule governs the policy for fiscal year 2002 applications. This final rule is effective upon publication. Conservation easements recorded on/or following this date will be administered according to this final rule. Cooperative agreements signed on this date or following this date also will be administered according to this final rule. One respondent asked that there be a discussion of how the final rule differs from the Request for Proposals, while one respondent requested that NRCS continue to use national Request for Proposal announcements, as it did under the Farmland Protection Program. The final rule promulgates policy regarding the implementation of the FRPP, while the Request for Proposals, which will continue to be used, announces national fund availability and sets forth nationwide application procedures and ranking criteria.

Three respondents indicated their overall support for the FRPP program and its proposed rule, while two respondents indicated that they did not support FRPP, contending that tax dollars should not be used on programs where the Federal government decides how private lands are to be used, and that a program such as FRPP invites more "boom and bust" land speculation. FRPP is a voluntary program that protects agricultural land from conversion to nonagricultural uses. FRPP, coupled with community planning and zoning, such as the use of agricultural districts, can help curb

“boom and bust” land speculation and ensure that farm and ranch lands remain viable in communities across the Nation.

Two respondents indicated their support for the program’s name change from the Farmland Protection Program to the Farm and Ranch Lands Protection Program. Another respondent supported the name change as long as east coast farms remained competitive in acquiring FRPP funds. As it always has, FRPP will continue to protect both farm and ranch land from conversion to nonagricultural uses. The reason for the name change is not to shift the Program’s purpose, but rather to distinguish it from the repealed program and to better describe the types of land the Program seeks to protect.

Another respondent raised the concern that farms and ranches located outside of priority areas be protected. FRPP promotes flexibility and local decision making as it relates to parcel protection. Priority area designation is at the discretion of the State Conservationist, with advice from the State Technical Committee.

Section 1491.2 Administration

In this section, the roles and responsibilities of NRCS were identified. Three respondents indicated that FRPP duplicates many processes already in use by various State and local governments and non-governmental organizations. One of these respondents further went on to state that the FRPP provisions “go way beyond the necessary criteria needed for Federal reimbursement of the easement purchase price and challenge the rights of the State, County, or non-governmental organization as Grantee.” For this reason, the respondents requested that NRCS enter into Memoranda of Understandings with existing State and local farmland protection programs under which non-Federal review procedures and selection criteria would suffice for Federal purposes.

The Farm Security and Rural Investment Act of 2002 states:

The Secretary, acting through the Natural Resources Conservation Service, shall establish and carry out a farmland protection program under which the Secretary shall purchase conservation easements or other interests in eligible land that is subject to a pending offer from an eligible entity for the purpose of protecting topsoil by limiting nonagricultural uses of the land.

In accordance with this statutory language, the Farm and Ranch Lands Protection Program is not a grant program, rather it is a land procurement program that acquires an actual Federal

interest in the Property. In the case of FRPP, the interest acquired is a contingent right. In order to carry out the intent of the statute, NRCS has been active in conducting eligibility determinations, ranking parcels based on its own criteria, and reviewing and approving conservation easements.

Moreover, even if FRPP was a grant program, memoranda of understandings (MOUs) or memoranda of agreements (MOAs) are not legally binding instruments. Therefore, the Federal government does not utilize MOUs or MOAs to provide Federal funds to recipients. NRCS understands the fact that a number of State and local farmland protection programs have a longer history of acquiring parcels than FRPP. Many of these State and local governments have well established procedures to acquire parcels. For this reason, NRCS has and will continue to work with established farmland protection programs utilizing the State Technical Committee. In consultation with the State Technical Committee, NRCS:

- Issues Statewide application guidance;
- Develops ranking criteria that meets the objectives of FRPP and the State and local farmland protection programs; and
- Establishes NRCS State policy as it relates to FRPP easement acquisition.

Eighteen respondents asked that NRCS address FRPP’s association with other conservation programs administered by the United States Department of Agriculture (USDA). NRCS encourages landowners to utilize other conservation programs to protect natural resources on FRPP land. Landowners who enroll in FRPP are eligible to participate in USDA’s cost share programs, including the Agricultural Management Assistance Program (AMA), Conservation Reserve Program (CRP), Environmental Quality Incentives Program (EQIP), Wildlife Habitat Incentives Program (WHIP), and the long-term contract options under the Wetlands Reserve Program (WRP) and Conservation Reserve and Enhancement Program (CREP). One respondent suggested that permanently protected lands, such as FRPP, receive priority ranking in other USDA programs. Current policy allows the NRCS State Conservationist to establish ranking criteria at the State level for other conservation programs. The NRCS State Conservationist has the authority to rank FRPP parcels higher than other parcels, if the State Conservationist deems it to be appropriate.

Thirteen respondents asked NRCS to address, as it relates to FRPP implementation, the Partnership and

Cooperation provision that was authorized in the 2002 Farm Bill. Partnerships and Cooperation, as authorized under the Farm Security and Rural Investment Act of 2002 (Title XII, Subtitle E, Section 1243 (f)), offers new opportunities to address pressing conservation and natural resource needs. The provision provides authority for the Secretary of Agriculture to use resources provided under other conservation programs to enter into stewardship agreements with State and local agencies, Indian tribes, and non-governmental organizations. Under this provision, the State Conservationist, with advice from the State Technical Committee, may designate special projects to enhance technical and financial assistance provided to owners, operators, and producers, and to address natural resource issues related to agricultural production. The U.S. Department of Agriculture is presently working to define the operational aspects of Partnerships and Cooperation. The provision is unique among the new Farm Bill authorities in that it builds from seven core programs, including the Farm and Ranch Lands Protection, Wetlands Reserve, Environmental Quality Incentives, Conservation Reserve, Wildlife Habitat Incentives, Grassland Reserve, and Conservation Security Programs. A number of these core programs required rule development or revision, many of which are in various stages of completion. The results of these activities will influence the overall design for Partnerships and Cooperation.

Section 1491.3 Definitions

This section provides and defines the common terms used throughout the FRPP proposed rule.

Agricultural Uses

Two comments were received concerning this definition. One comment suggests that the term “agricultural uses” should include “the construction of on-farm structures necessary for farm operations,” while the other comment suggests that agricultural uses be defined by the State’s Purchase of Development Rights (PDR) Program, or where no PDR program exists, agricultural uses should be defined by the State agricultural use assessment program. NRCS prefers to continue to utilize the flexibility afforded by the proposed rule’s definition, which allows agricultural uses to be defined at the State level; however, NRCS supports the latter comment of making the definition consistent with the PDR or State

agricultural use assessment programs' definitions. For this reason, the definition of agricultural uses has been modified in the final rule. To ensure that broad State definitions of agricultural uses do not conflict with FRPP's mandate to protect soils, NRCS has chosen to continue to retain the language: "NRCS reserves the right to impose greater deed restrictions on the property than allowable under a State definition of agriculture in order to protect topsoil."

Conservation Easement

Comments were received from one respondent who requested that the term "agricultural conservation easement" should be used instead of the generic term "conservation easement." NRCS has chosen to continue using the term "conservation easement" because it provides a greater flexibility to work with cooperating entities which may use conservation easements that seek to protect not only farm and ranch lands, but also multiple, compatible conservation values, such as open space, scenic, and wildlife values.

Conservation Plan

Ten respondents requested clarification on the scope of a conservation plan. Several were confused because the preamble stated that "all lands enrolled in FRPP must have a conservation plan developed based on the NRCS Field Office Technical Guide specifications and highly erodible land and wetland conservation provisions in accordance with 7 CFR part 12," while the proposed rule defined a conservation plan as a plan that covered only highly erodible cropland. In accordance with the Food Security Act of 1985, as amended, the authorizing FRPP legislation, a conservation plan under the FRPP will cover only highly erodible cropland. Conservation planning on other lands or on other resources is at the discretion of the NRCS State Conservationist and the cooperating entity.

In addition to the comments requesting clarification of the scope of the conservation plan, nineteen respondents requested that all lands enrolled under FRPP have a conservation plan that addresses all natural resources, not only soil erosion. These resources include: water, wildlife, air, and plants. Three sources noted that a conservation plan should address all natural resources as a benefit to the United States taxpayer. Two respondents suggested that resource concerns be addressed within a specified time frame. In addition to the nineteen respondents, several

respondents asked that specific resources or management activities be addressed in the conservation plan. One respondent requested that water quality should be specifically addressed in the conservation plan, while another requested water quality and wildlife habitat be addressed. Another respondent requested that the conservation plan address pest and weed control, while another requested that all forest land have a forest stewardship plan. Nine respondents requested that a conservation plan be required, but the respondents gave no indication as to what level or whether all the land should be covered by a conservation plan.

Two respondents requested that NRCS consider only those lands with highly erodible soils, and that landowners never be required to have a higher level of planning than those mandated at the time of easement signature. One respondent indicated that planning only for highly erodible land was inadequate for their program. Based on these comments, NRCS has chosen an option that one respondent suggested. The rule will be modified to state that any higher level of conservation planning and implementation be at the discretion of the cooperating entity and the NRCS State Conservationist. By doing this, for FRPP purposes, farmers and ranchers would never be held to a higher erosion standard than at the time of easement signature; the conservation plan would only be required on highly erodible soil as legislatively mandated; yet more land and more resources may be addressed under a conservation plan if the NRCS State Conservationist and cooperating entity deem it to be appropriate.

Other respondents requested modifications to the proposed rule's definition of a conservation plan to incorporate greater landowner involvement. Two respondents suggested modifying the definition to read as follows: "A conservation plan meeting the NRCS Field Office Technical Guide will be developed by the landowner with NRCS assistance," while another respondent suggested the definition include the following statement: "technically feasible, based on local resource conditions, cost effective; and not cause undue economic hardship on the landowner." These suggestions echo NRCS' current conservation planning policy, which takes into account the landowner's needs and economic situation, as well as local resource conditions. For this reason, as well as the intent to mirror FRPP's authorizing legislation's conservation plan definition, NRCS has

chosen not to alter the proposed rule's conservation plan definition.

Eligible Land

One respondent requested that NRCS modify its definition of eligible land to include lands that protect drinking water sources, while another respondent requested that NRCS include in its definition the qualifier that "eligible lands must be under active management that fits the definition of agriculture used by the existing State Purchase of Development Rights (PDR) program, where no such program exists, the definition of agriculture used by the State agricultural use assessment program." Another respondent requested that NRCS specify to what degree non-traditional farm, ranch, and forest land are eligible. The purpose of FRPP is to protect agricultural lands from conversion to nonagricultural uses. NRCS believes that the definition of eligible lands, as currently defined in the statute and the final rule, is broad enough to allow the NRCS State Conservationist to protect any farm and ranch land in any geographic area or under any land use that the State Conservationist, with advice from the State Technical Committee, chooses to protect, as long as it meets the program's broad eligibility guidelines. For this reason, NRCS has chosen to retain the proposed rule's eligible land definition.

Fair Market Value

Three respondents suggested that the definition of fair market value be revised. They indicated that the proposed rule's definition only refers to the fee simple value of a property, not the "before" and "after" values needed to determine the value of a conservation easement. NRCS agrees with amending the definition to account for how conservation easement values are derived. For this reason, NRCS amends the definition as follows:

Fair market value is ascertained through standard real property appraisal methods. Fair market value is the amount in 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 competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer. Neither the seller nor the buyer act under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal. In valuing FRPP easements, the certified general appraiser estimates both the fair market value of the whole property before the easement acquisition and the fair market value of the remainder property after the easement has been imposed. The difference

between these two values is deemed the value of the conservation easement.

Farm Succession Plan

Thirteen respondents requested that Farm Succession Plan be added to the final rule's list of definitions. NRCS accepts this suggestion and adds the definition to read as follows:

Farm or ranch succession plan is a general plan to address the continuation of some type of agricultural business on the conserved land; the farm or ranch succession plan may include specific intra-family succession agreements or strategies to address business asset transfer planning to create opportunities for beginning farmers and ranchers.

Historical and Archaeological Resources

Several respondents raised questions regarding the determination of what FRPP considers historical and archaeological resources. Most of the respondents recommended or provided comments on the second bullet in the proposed rule regarding which properties will be considered. One respondent suggested that the second bullet describing parcels eligible for the National Register is confusing, and suggested the following language: "Formally determined eligible for listing in the National Register of Historic Places by the Keeper of the National Register;" while another respondent suggested that the second bullet be worded as follows: "Be determined eligible for listing on the National Register of Historic Places through a written determination by a State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO)." Regarding the first recommendation, because only the Keeper of the National Register may make formal determinations of eligibility, NRCS does not believe that the rule needs to add this reference. Regarding the second recommendation, NRCS does not have the authority to establish a new National Register eligibility determination process for the FRPP program, such as using written determinations by SHPOs and THPOs, beyond that which is currently in effect for compliance with section 106 of the National Historic Preservation Act.

In relation to the FRPP historical and archaeological definition, two other respondents suggested that a broader definition of historical and archaeological resources exists. One respondent suggested that where there is no formal listing in the State, refer instead to other inventories and have the SHPO or THPO provide an additional certification of significance, while another suggested that a fourth

bullet be added: "Identified in a congressionally authorized study of U.S. battlefield sites, including the July 1993 report on the Nation's Civil War battlefields prepared by the Civil War Sites Advisory Commission." Regarding the suggestion that NRCS establish a new certification of significance process, NRCS believes a separate and distinct evaluation process beyond the current National Register programs and State and tribal register programs would cause confusion. Additionally, NRCS believes that by keeping the focus on existing registers and inventories, NRCS is supporting and strengthening our partners' programs without adding to their current workload. As it relates to the use of the inventory in the Civil War Sites Advisory Commission's 1993 Report, NRCS acknowledges the importance of these properties, but also recognizes that the inventory was developed, in part, for use by a Department of Interior battlefield protection program, one that has a much narrower focus than that of the FRPP (protection of farm and ranch lands across the entire United States). If NRCS elected to use this one very specialized list, it would have to also consider using other specialized lists of cultural resources (*i.e.* bridges, lighthouses, dams, industrial resources) developed for other programs. Additionally, it is most likely that the properties in this battlefield inventory are already in State inventories and registers. Another respondent questions what it meant to be "determined formally eligible on the National Register." NRCS believes that this language is clear and need not be further explained. Finally, one commenter suggested that the FRPP rule is more restrictive regarding determinations of eligibility than current historic preservation compliance guidelines. NRCS does not agree and does not want to establish a separate determination and evaluation process. This would undermine existing historic preservation evaluation and designation programs and would also risk further confusion.

Land Evaluation and Site Assessment System (LESA)

NRCS did not receive any comments on this definition, but for clarification NRCS has defined what is meant by "Federal" for the purposes of FRPP. For this reason, NRCS amends the definition to read as follows: "Land Evaluation and Site Assessment System (LESA) is a land evaluation system approved by the NRCS State Conservationist used to rank land for farm and ranch land protection purposes, based on soil potential for agriculture, as well as

social and economic factors, such as location, access to markets, and adjacent land use. (For additional information see the Farmland Protection Policy Act regulation, 7 CFR part 658.)"

Non-Governmental Organization

Four respondents suggested inserting the word "and" in the definition for eligible non-governmental organizations to clarify that non-governmental organizations must be a conservation organization and must be recognized by the Internal Revenue Service as tax exempt by virtue of being operated for religious, charitable, scientific or similar purposes. Despite these suggestions, NRCS has chosen to retain the original definition which reflects FRPP's authorizing legislation:

Non-governmental organization, is defined as any organization that:

- Is organized for, and at all times since the formation of the organization, has been operated principally for one or more of the conservation purposes specified in clause (i), (ii), (iii), or (iv) of section 170(h)(4)(A) of the Internal Revenue code of 1986;
- Is an organization that is described in section 501(c)(3) of that code that is exempt from taxation under 501(a) of that code;
- Is described in section 509(a)(2) of that code; or
- Is described in section 509(a)(3) of that code and is controlled by an organization described in section 509(a)(2) of that code.

Prime Farmland

One respondent requested that the term "prime farmland" be changed to "prime soils" since it is the soils that NRCS is describing in the definition. NRCS is choosing to retain the "prime farmland" definition to make it consistent with the definition from which it is derived in 7 CFR part 657. Two respondents asked whether land that grows Christmas trees, flowers, nursery stock and grapes for wine are considered prime since they are not producing food, feed, and forage. NRCS may consider these areas prime, unique, Statewide or locally important in accordance with 7 CFR part 657, since these areas have a special combination of soil quality, location, growing season, and moisture supply to produce these crops.

Ranch Land

Two respondents requested that the term "ranch land" be clarified so that it is more inclusive of many of the lands used in ranching across the country. Both respondents suggest that the following NRCS Pasture and Range Handbook definition be utilized,

Land on which the historic climax plant community is predominantly grasses, grasslike plants, forbs, or shrubs. Includes

lands revegetated naturally or artificially when routine management of that vegetation is accomplished mainly through manipulation of grazing. Rangelands include natural grasslands, savannas, shrublands, most deserts, tundra, alpine communities, coastal marshes, and wet meadows.

NRCS believes that the aforementioned ranch land definition is too broad and that a broad definition of ranch land could lead to the protection of ranch land that does not meet the statute's intent of protecting prime, unique, and important soils. Moreover, such a definition may limit NRCS' flexibility to protect lands not included in this definition. Another respondent generally stated that eligibility criteria for prime, unique farm and ranch land should be broadened. For the aforementioned reasons, NRCS has chosen not to limit the enrollment of farm and ranch land to one single definition, but instead chooses to determine eligible farm and ranch lands through already established procedures. In determining eligible farm and ranch lands, NRCS will continue to use the procedures that identify important farm and ranch lands outlined in 7 CFR part 657. Under this rule, farm and ranch lands not considered prime and unique may be considered Statewide or locally important, if a State agency or local planning body determines the land to be of importance. If determined to be prime, unique, or Statewide or locally important, these soils are then eligible for FRPP assistance. NRCS believes this process provides sufficient flexibility to protect farm and ranch lands that may not meet the prime and unique definition, but at the same time assures that the Congressional intent of protecting land that has "prime, unique, or other productive soil," is maintained. For this reason, NRCS chooses to retain the original eligibility definition and process determining prime, unique, and important soils.

Section 1491.4 Program Requirements

Three respondents directly or indirectly referred to FRPP as a grant program and that NRCS does not need to substitute its judgment for that of State and local farmland protection programs. As explained previously, the Farm and Ranch Lands Protection Program is not a grant program, rather it is a program where the Federal Government acquires an interest in the Property for the purpose of protecting the resource. For this reason, NRCS has been active and will continue to be active in conducting eligibility determinations, ranking parcels based on its own criteria, and reviewing and approving conservation easements in

order to meet the statutory requirements of the Program.

One respondent questioned FRPP's emphasis on topsoil, stating that "Too much emphasis is placed on protecting topsoil and prime and unique farmland, more of an emphasis should be placed on protecting rangeland and watersheds," while two other respondents believed that requiring a pending offer is unrealistic, burdensome, and requires an expense on the part of the partner. As a result, land deals often fall through because a pending offer is required. In response to these comments, NRCS refers to the FRPP authorizing legislation which sets forth FRPP's purpose, "protecting topsoil by limiting nonagricultural uses of the land." The statute further defines eligible land as "farm and ranch land that has prime, unique or other productive soil; or contains historical or archaeological resources; and is subject to a pending offer for purchase from an eligible entity." In order to comply with its authorizing legislation, NRCS has placed a program emphasis on protecting prime, unique, and important farm and ranch land, as well as requiring a pending offer from an eligible entity. One respondent stated that historical and archeological resources and a pending offer should be factors to consider, not essential to eligibility. NRCS, once again refers to FRPP's authorizing legislation which states that "eligible land means land on a farm or ranch that has prime, unique, or other productive soil; or contains historical or archaeological resources; and is subject to a pending offer for purchase from an eligible entity." NRCS is bound by the statute. Consequently, NRCS has determined that land on a farm or ranch must contain historical or archaeological resources or prime, unique, or other productive soil to be eligible. In either case, the land must also have a pending offer to be eligible for FRPP. One respondent stated that the proposed rule adequately reflects the intent of the statute as it relates to historical and archaeological resources, while one respondent questioned whether parts of a farm can be enrolled. NRCS will enroll all or part of a farm or ranch, so long as 50 percent of the farm or ranch land enrolled consists of prime, unique, or important soils, or contains historical and archaeological resources and is subject to a pending offer.

One respondent stated that all FRPP easements should be perpetual. NRCS agrees with this comment; however, in some States, perpetual easements are prohibited. As a result, NRCS has required that "all easements will be in

perpetuity unless prohibited by State law."

Two respondents indicated their support of NRCS' criteria used to evaluate interested entities that wish to receive FRPP funds in 1491.4(c)(1-4). NRCS will continue to use these criteria to evaluate eligible entities, and to ensure the entities have the capacity to hold, manage, and enforce conservation easements.

Several respondents questioned NRCS' policy on only acquiring conservation easements on privately owned land. One respondent thought that State-owned prison farm and ranch land should be eligible for FRPP, while another respondent questioned whether lands temporarily bought in fee simple by the State or local government can be acquired under FRPP. With a vast majority of the Nation's farm and ranch land being privately owned, the demand for the protection of prime, unique, or important farmland on privately owned land exceeds available funds. As a result, NRCS will continue to place emphasis on protecting privately owned farm and ranch land; however, NRCS will assist public entities with protecting lands if the acquisition of land is temporary and the land will later be sold to a private land owner in fee simple. NRCS will not disburse Federal payment to the public entity until the fee simple rights are transferred to a private landowner.

Six respondents raised concerns about the adjusted gross income land eligibility requirement. Two respondents argued that the adjusted gross income limitation should not apply to FRPP since NRCS is getting equal value in the land and oftentimes at a bargain sale; therefore, the FRPP payment should not be considered a benefit, but rather an equal exchange between the landowner and the United States Department of Agriculture. One respondent stated that the sale of land should not be considered in computing the adjusted gross income limitation, while two respondents stated that this will limit high value land often owned by developers or other landowners, who derive a majority of their income from non-farm or ranch enterprises. One respondent requested that the adjusted gross income limitation be subject to regional variation, while another requested that NRCS explain how this affects corporate owners. Another respondent requested that NRCS specify the adjusted gross income limitation requirements in the final rule, while another respondent indicated that this is just another burdensome step in the easement acquisition process. One respondent requested that the

cooperating entity not be held responsible for verification or auditing of the certification by the landowner.

In order to avoid a conflict with any policy contained within the Adjusted Gross Income Limitation final rule, NRCS directs respondents to the Adjusted Gross Income Limitation final rule, which is currently being promulgated. However, to clarify some matters raised during the FRPP proposed rule comment period, NRCS will briefly explain the adjusted gross income limitation and identify how this limitation relates to the FRPP. Section 1604 of the Farm Security and Rural Investment Act of 2002 (Pub. L. 1-7-171) prohibits individuals and entities exceeding an average adjusted gross income limitation of \$2.5 million from receiving USDA payments, unless 75 percent or more of their adjusted gross income is derived from farming, ranching or forestry production. Landowners receiving FRPP payments would be subject to this adjusted gross income limitation. The proposed Adjusted Gross Income Limitation rule, 7 CFR part 1400.6, clarifies this income limitation, and sets forth the criteria to be applied in determining whether certain income limits have been exceeded by an individual. Policy on corporate ownership and land sale revenues, as well as administrative procedures, such as income verification, are addressed in 7 CFR part 1400.6. In order to comply with Section 1604 of the Farm Security and Rural Investment Act of 2002, NRCS will comply with the statute and final rule governing the adjusted gross income limitation.

Twelve respondents raised concerns regarding NRCS' appraisal policy. One respondent requested that all appraisals be done in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA) and that they be reviewed by a Federal appraiser. The same respondent stated UASFLA standards must be used, since the Uniform Standards of Professional Appraisal Practice (USPAP) does not address the "before" and "after" technique used to evaluate conservation easements. To provide cooperating entities maximum flexibility and reduce transaction costs, appraisals conducted for the FRPP shall conform to USPAP or USFLA standards. NRCS acknowledges that the "before" and "after" technique is an appropriate methodology to use in order to determine conservation easement value, and shall be adopted by FRPP. One respondent requested that NRCS address in the final rule how appraisal reports should be submitted and how these reports will be used. Another respondent requested that the

reproduction of appraisal reports for NRCS use be minimized and that an annual meeting between NRCS and the cooperating entity would suffice, while another respondent suggested that providing a copy of the appraisal report is possible, but providing priority rating criteria is not. NRCS concurs with the need to streamline the appraisal submission process. However, due to the complexity of the appraisal review process and the fact that this type of administration issue is more appropriate for manual policy, NRCS has addressed specific appraisal review and process issues in its current policy manual, CPM part 519. CPM part 519 can be accessed via the Internet at: http://policy.nrcs.usda.gov/scripts/lpsiis.dll/M/M_440_519.htm.

Two local government respondents requested that NRCS adopt alternative real estate evaluation systems used by local governments, which reduce easement acquisition costs, rather than requiring that appraisals be conducted. Considering these comments, NRCS has determined that the adoption of alternative evaluation systems, which under certain circumstances were permitted in the Farmland Protection Program, conflicts with the terms of the FRPP authorizing legislation that states "the Federal share cannot exceed 50 percent of the appraised fair market value of the conservation easement." For this reason, NRCS has determined that only appraisals are appropriate to value FRPP parcels.

In addition, the FRPP is subject to the Department of Transportation regulations at 49 CFR part 24, which the USDA has adopted by reference in its own regulations at 7 CFR 21.1. 49 CFR part 24 implements the Uniform Relocation Assistance and Real Property Policies Act of 1970 (the 1970 Act) and applies to real property acquisition, including the acquisition of partial interests, such as conservation easements. One of the main purposes of the 1970 Act is to ensure that owners of real property to be acquired by the Federal Government or through Federally-assisted acquisitions are treated fairly. Because the FRPP is a voluntary program, the FRPP is exempt from the regulations that govern Federal acquisition. However, FRPP must comply with the terms of the exemption that is set forth at 49 CFR 24.101. Accordingly, cooperating entities receiving FRPP funds must comply with the requirements of 49 CFR 24.101(a)(2) which provides that: (1) Prior to making an offer for the property, the FRPP cooperating entity must advise the landowner that it is unable to acquire the property (e.g. by eminent domain) in

the event negotiations fail to result in an amicable agreement; and (2) inform the owner of what the FRPP cooperating entity believes to be the fair market value of the property. In order to determine the fair market value of a property, an appraisal by a State-certified general or licensed appraiser must be done.

Three respondents requested that NRCS reimburse the entity for the cost of appraisals, while another respondent requested that appraisals older than one year may be acceptable if agreed to by NRCS and the cooperating entity in a Memorandum of Understanding. NRCS is required by law not to exceed "50 percent of the appraised fair market value of the conservation easement." As a result of this statutory requirement, NRCS requires an appraisal. The appraisal shall not be more than one year old prior to easement closure, in order to ensure that the Federal share does not exceed 50 percent of the appraised fair market value. One respondent asked that the appraiser certification be addressed, as well as stated that the Uniform Standard of Professional Appraisal Practice (USPAP) system does not utilize the "before" and "after" technique for partial acquisitions. NRCS believes that the "before" and "after" technique is the appropriate method in valuing conservation easements for the purpose of FRPP. The "before" and "after" technique does not conflict with other methodologies used by USPAP and is therefore adopted as a recommended way to determine FRPP easement values. NRCS has addressed appraisal review in CPM part 519 including administrative and technical reviews of appraisals by NRCS. CPM part 519 can be accessed via the Internet at: http://policy.nrcs.usda.gov/scripts/lpsiis.dll/M/M_440_519.htm.

The same respondent suggested that the final rule insert the word "general" in the appraiser description to read "State certified general appraiser," while another respondent has asked that the Section 1491.4(e) be reworded as follows: "Prior to FRPP fund disbursement, the value of the conservation easement must be appraised." NRCS acknowledges that "State certified general appraiser" is the correct terminology, it also agrees with the second suggestion which inserts the clarifying language that the value of the conservation easement must be appraised. As a result, NRCS has changed the rule accordingly.

Six respondents provided comments on 1491.4(f), which stated that at the discretion of the Chief, a standard easement will be required as a condition

for program participation. Four respondents objected to the Chief requiring a standard easement, while two respondents suggested that NRCS utilize a standard conservation easement deed, but provide for the local entity to supply other language as needed to comply with their specific requirements. One respondent objected to NRCS' use of a standard easement template, since NRCS was not a Grantee and the Federal Government's right of asserting the use of a standard easement was questionable. Three other respondents suggested that NRCS develop a standard easement template in each State. One respondent further clarified that the standard easement template should be a part of a Memorandum of Understanding that is signed by the cooperating entity and NRCS. NRCS chooses to retain the flexibility to develop conservation easement deed template by retaining the proposed rule language, if it determines it to be appropriate in order to protect the interests of the United States. However, NRCS finds the current process in which NRCS and the Office of General Counsel review and approve conservation easement templates provided by the cooperating entity to be sufficient at this time. As it has previously done, NRCS and the Office of General Counsel will continue to review conservation easement template deeds to ensure that the easement deeds protect the Federal interest and uphold FRPP's policies and objectives. Where an easement sufficiently deviates from the agreed-to template, NRCS and OGC may review the easement deed.

As it relates to specific language within the proposed rule, another respondent inserted that "at the discretion of the Chief, a standard easement, or equivalent legal form which meets the intent of the 2002 Act, will be required as a condition of program participation." Some entities that partner with NRCS use other forms of deeds to convey the acquisition of development rights. For this reason, NRCS has chosen to adopt this suggestion. Section 1491.4(f) has been changed accordingly.

There was one comment on the confidentiality of information related to the agricultural operation as set forth in 1491.4(g). The respondent requested that information related to the agricultural operation, as well as other incidental information be held in confidence by the State or local farmland protection program and NRCS. The respondent further stated that NRCS should require confidentiality from the non-governmental organization as a condition of partnership with

NRCS. Section 1244 of the Food Security Act of 1985, as amended, states that information provided to the Secretary or a contractor of the Secretary for the purpose of providing technical or financial assistance to an owner, operator, or producer with respect to any natural resources conservation program administered by NRCS or FSA shall not be considered to be public information and shall not be released to any person or Federal, State, local agency or Indian tribe outside the Department of Agriculture. The issue of requiring confidentiality from non-governmental organizations and other cooperating entities will be addressed in a regulation pertaining specifically to confidentiality, which is being developed by NRCS in accordance with Section 1244 of the Food Security Act of 1985, as amended.

Another respondent asked about the timing of the development of the conservation plan. The conservation plan will be developed prior to the payment disbursement made by NRCS to the cooperating entity. One respondent requested that NRCS take the lead in monitoring conservation plans and make the initial determination that the landowner is not in compliance, after which the Grantee will be required to take necessary action. As it relates to monitoring the conservation plan on highly erodible land, the respondent's suggestion is current NRCS policy. If the landowner is found out of compliance with a conservation plan on highly erodible land or is violating wetland conservation provisions, NRCS will work with the landowner to assist the landowner in getting back into compliance. If the landowner refuses to comply with the terms of the conservation plan and has been afforded all the appeal and other administrative rights in accordance with 7 CFR part 12, NRCS will report the conservation plan violation to the cooperating entity. At such time, the cooperating entity will consider such noncompliance with the conservation plan to be an easement violation and the cooperating entity will proceed with their administrative or judicial procedures as it relates to easement violations.

Section 1491.5 Application Procedures

This section articulates how interested entities apply for FRPP assistance. One respondent requested that NRCS require from entities a plan showing how the entity plans to spend FRPP money. The respondent also suggested that NRCS review the entity's management strategies, as well as their ability to manage. NRCS believes that

these concerns are addressed during the application review and the ranking and evaluation of parcels as set forth in Section 1491.6. One respondent requested that a consistent date for annual applications be established to allow for coordination between the Federal and State programs. Two factors make the establishment of a fixed application date problematic. Historically, USDA waits until Congress appropriates funds through an appropriation law. Second, because FRPP is funded annually through CCC, the Office of Management and Budget must apportion the funds to NRCS, before NRCS can obligate the funds to eligible entities.

Section 1491.6 Ranking Considerations and Proposal Selection

This section outlines how NRCS will rank and evaluate proposals from eligible entities. It also examines criteria that may be used by the NRCS State Conservationist to evaluate parcels. A number of respondents commented on this section, particularly the criteria that may be used by the NRCS State Conservationist.

As it relates to overall program administration, two respondents requested that memoranda of understandings be signed with State and local programs to determine a mutually acceptable way for non-federal entities to review and select parcels based on FRPP criteria. The memoranda of understandings, between the NRCS State Conservationist and the State or local programs, would outline mutually acceptable criteria to use in evaluating FRPP proposals. Decisions on which parcels to fund would be made by the cooperating State or local program, not NRCS. In the opinion of the two respondents, it would provide the needed flexibility at the State level, while at the same time reduce duplicative efforts in evaluating parcels. One respondent requested that NRCS purchase properties in a geographic area and match FRPP dollars with State program dollars, not choosing actual parcels which to fund, but rather selecting specific geographic areas. A majority of these concerns regarding review and selection of parcels have been addressed in Section 1491.2 Administration. However, NRCS wishes to further clarify that the FRPP authorizing legislation has a specific purpose of protecting prime, unique, and other productive soil from conversion to non-agricultural uses. This purpose is not always the primary purpose of cooperating entities' programs. For these reasons, as well as the practical reason that NRCS has

many parcels submitted by numerous cooperating entities, making execution of memoranda of understandings impractical. As a result, NRCS has chosen to retain the current procedures of selecting and evaluating parcels using uniform criteria at the State level.

Another respondent suggested that NRCS utilize a two-step process whereby eligible entities can be certified prior to the identification of eligible lands so that the cooperating entities might be poised to make an offer when eligible farmlands become available. This option is not possible under FRPP because the authorizing legislation requires that the entities have pending offers prior to NRCS awarding funds to eligible entities.

Four respondents requested clarification on how the National and State criteria are used in selecting parcels. The FRPP proposed rule set forth the national criteria used in determining State allocations. The national criteria are based on national agricultural land conversion rates as provided by the National Resources Inventory (NRI), as well as information gathered from interested entities through the FRPP State Plan process. This latter information includes but is not limited, to entity history, entity acquisition strategies, anticipated average FRPP cost per acre, and total acres needing to be protected in that fiscal year. The proposed rule also stated that national criteria, in addition to State criteria, will be used to evaluate parcels. Currently, FRPP policy states that parcels will be evaluated using State criteria and national criteria, with no less than 50 percent of the weight placed on national criteria. While criteria such as the NRI agricultural land conversion rates cannot be used beyond the State level, State conservationists have the flexibility to choose the national criteria which they deem appropriate. NRCS believes that the mix of national and State criteria allows national FRPP objectives to be met, while at the same time providing the NRCS State Conservationist the necessary flexibility needed to evaluate parcels at the State level. One respondent suggested that NRCS adopt a committee approach in developing ranking criteria, such as that used by USDA's Forest Legacy Program, while another respondent requests that NRCS develop a process for obtaining public input on ranking criteria. The final rule allows for the NRCS State Conservationist to develop ranking criteria with the advice from the State Technical Committee. In a majority of States, the NRCS State Conservationist currently develops ranking criteria

based on the advice of the State Technical Committee. NRCS believes this committee approach allows for public input to be obtained.

Several respondents suggested on expanding FRPP ranking criteria. One respondent suggested that an emphasis be placed on watershed protection, while another suggested that agricultural economic viability of a farm or ranch be included as criteria. Another respondent suggested that FRPP criteria consider fish and wildlife habitat and water quality, as well as soils. One respondent questioned the applicability of the criteria, "proximity to other protected clusters" in areas where conservation easements are not utilized, while another respondent, in an area with increasing development pressures, suggested that NRCS consider the rate of land conversion relative to the remaining agriculture in the geographic area. This same respondent, as well as another respondent, suggested that NRCS evaluate parcels relative to specific geographic areas in which they were protecting. For example, the anticipated FRPP cost per acre or acreage to be protected should be considered in relation to the geographic area where the parcel is located. Another respondent suggested that LESA criteria should be modified so that sites near sewage lines, water lines, or other public utility lines should receive a higher ranking. NRCS has not changed the final rule as it relates to parcel ranking and evaluation because the agency believes that the State Technical Committee process, as well as the State Conservationist's ability to choose his or her own criteria to evaluate parcels, provide the NRCS State Conservationist the necessary flexibility to develop criteria and rank eligible parcels for funding.

Nineteen respondents requested that NRCS add the following to the list of possible State criteria: "History of an eligible entity's commitment to assisting beginning farmers and ranchers, to promoting opportunities in farming and ranching, and to farm and ranch succession and transfer planning," while another stressed the importance of funding entities who place priority on protecting parcels in zoned agricultural areas. To encourage that these farms and ranches remain agriculturally viable in the future, NRCS has added these suggestions for the NRCS State Conservationists to use in State ranking criteria, if they deem appropriate. Two respondents questioned what is meant by "degree of leveraging guaranteed by eligible entities." One of these respondents suggested that NRCS rephrase this criterion to read as

follows: "Amount of the Federal share to be contributed to the acquisition of the conservation easement relative to the fair market value of the conservation easement." NRCS partially accepts this suggestion and has rephrased the criteria accordingly.

Section 1491.7 Funding Priorities

Several respondents requested that NRCS place a priority on a variety of factors when evaluating parcels. One respondent requested that the highest priority should be given to parcels and areas that protect drinking water sources. Twelve respondents requested that NRCS place a priority on those farms and ranches that have a comprehensive resource management system where all the natural resources are addressed on the farm or ranch, seventeen respondents requested that NRCS place a higher priority on applications from landowners who have developed farm or ranch succession or transfer plans with a preference for plans that will benefit beginning farmers and ranchers. One respondent requested that NRCS place a higher priority on lands and locations where parcel size, soils, markets, local farm infrastructure, proximity of other agriculture, and other considerations make it more likely that the protected lands will constitute or contribute to an economically viable, independent farming operation.

NRCS has incorporated some of these comments in the final rule; however, as indicated previously, the State Conservationist, with advice from the State Technical Committee, develops criteria used to select parcels in accordance with the statutory objectives of FRPP. In addition, the selection of one set of criteria over another is at the discretion of the State Conservationist. For this reason, NRCS has chosen to include these suggested priorities, but continues to encourage and permit the NRCS State Conservationist with advice from the State Technical Committee, to determine the ranking criteria preference based on State natural resource conditions, anticipated funding, geographic priority areas, and other factors deemed to be important in each State.

NRCS also received comments requesting clarification of the meaning of Section 1491.7. For example, one respondent requested clarification of what is meant by on-site and off-site conditions. Examples of what is meant by on-site or off-site conditions are respectively a farm that contains a hazardous waste site, or a ranch that neighbors a commercially zoned area. Where on-site or off-site conditions exist, NRCS may choose not to fund a

parcel because of the implications surrounding that acquisition. One respondent requested that NRCS clarify what is meant by multi-functional benefits, while another respondent requested that historical and archaeological protection be added to the lists of lands that provide multifunctional benefits where NRCS may place a higher priority. NRCS concurs with the second respondent and will add historical and archaeological protection to the list of multi-functional benefits. In response to the initial comment, NRCS believes that multi-functional benefits vary across the nation; therefore, these multi-functional benefits are best determined by the State Conservationist, with advice from the State Technical Committee. Another respondent asked how certain geographical areas will receive high priority. As it relates to multi-functional benefits in a general sense, NRCS believes that multi-functional benefits and geographic priority areas can best be determined at the State level, where local input is provided through the State Technical Committee on State ranking criteria.

Subpart B—Cooperative Agreements and Conservation Easement Deeds

Section 1491.20 Cooperative Agreements

The section outlines the process of how NRCS enters into cooperative agreements with eligible entities and what constitutes a cooperative agreement. One respondent indicated that NRCS must provide oversight of non-governmental organizations participating in FRPP to assure FRPP obligations are met. NRCS believes that the cooperative agreement, the contractual document between NRCS and the cooperating entity, binds the entity to perform duties and tasks in accordance with program policy and standards. NRCS oversight of these cooperative agreements ensures that

NRCS program policy and objectives are met. Other comments received on topics contained within this section were addressed in other sections of the rule.

Section 1491.21 Funding

The Farm Security and Rural Investment Act of 2002 (2002 Act), provided policy direction for cost sharing in three areas:

- First, it specified that the Federal share could not exceed 50 percent of the appraised fair market value of the conservation easement.
- Second, it made it possible for landowner donations to be included as part of the entity's share.
- Third, it limited the amount of the donation that could be used as part of the entity's share to not more than 25 percent of the conservation easement's appraised fair market value.

The 2002 Act did not provide guidance on the minimum cash contribution by the entity. As a result, the proposed rule attempted to set forth cash requirements by the cooperating entity. Based on these three premises, the agency stated in the proposed rule that an entity may:

- (1) Provide in cash, at least 25 percent of the appraised fair market value of the conservation easement, when accompanied by a landowner donation; or
- (2) Provide in cash, at least 50 percent of the conservation easement purchase price. In this situation, the NRCS share cannot exceed the entity's contribution.

This proposal was met with a great deal of opposition primarily from the land trust community. Of the total 296 letters received, 214 objected to NRCS requiring cooperating entities to provide a minimum cash contribution. They maintain that by proposing a minimum cash contribution by the entity, NRCS is discouraging bargain sales by the landowner. While four respondents argued that if a land owner donated 50 percent of the easement's value and the Natural Resources Conservation Service (NRCS) paid 50 percent, the letter of the law could be met without any cash

commitment from the land trust, fifty-five other respondents suggested a contribution provided by the entity but in a lesser degree to what NRCS proposed, stating that the requirement of a cash match will significantly restrict the number of properties that can be protected under FRPP. Forty-one respondents specifically stated that a landowner should be able to donate more than 25 percent of the appraised fair market value, and that the 25 percent contribution of the appraised fair market value limits the contribution by the landowner, while 175 respondents asked that the rules be rewritten to "base the required match for an easement on the price paid for the property not the price it would be on the open market." In response to all of the above comments, NRCS did not intend to mislead readers that a landowner donation be limited to 25 percent. On the contrary, land donations by the landowner are readily accepted, since the easement acquisition cost is less for both NRCS and the cooperating entity. To take advantage of sizeable landowner donations, NRCS clarified the final rule language by inserting the "50 percent of the purchase price" option.

In response to NRCS' proposed rule options, many within the land trust community countered NRCS' proposal by suggesting the elimination of any mention of the 25 percent of the appraised fair market value requirement and several respondents suggested the following or similar language:

"The entity must provide, in cash, an amount at least half of that provided by the NRCS."

The following table summarizes the FRPP and cooperating entity shares given the proposed rule's language and the above-mentioned language suggested by the land trust community. The analysis assumes that the appraised fair market value of the conservation easement is \$100,000.

COMPARISON OF COST SHARING CRITERIA
PROPOSED FRPP RULE AND THE LAND TRUST SUGGESTION
[Dollars]

| Land owner donation | Proposed rule | | Land trust suggestion | |
|---------------------|-------------------|------------|-----------------------|------------|
| | Entity cash share | FRPP share | Entity cash share | FRPP share |
| Zero | \$50,000 | \$50,000 | \$50,000 | \$50,000 |
| 10,000 | 40,000 | 50,000 | 40,000 | 50,000 |
| 25,000 | 25,000 | 50,000 | 25,000 | 50,000 |
| 40,000 | 25,000 | 35,000 | 20,000 | 40,000 |
| 55,000 | 22,500 | 22,500 | 15,000 | 30,000 |
| 70,000 | 15,000 | 15,000 | 10,000 | 20,000 |

Note that the cash shares for the cooperating entity and FRPP are identical from zero donation to a \$25,000 (25 percent) donation level. At donation levels greater than \$25,000 the cooperating entity contributions are greater with the proposed rule. In this example, if the landowner makes a \$40,000 donation then the cash requirement is \$5,000 greater in the proposed rule scenario as compared to the suggested change by the land trust community.

After considering these comments, NRCS has decided to retain the same funding options albeit with some clarification. NRCS believes that the final rule's language supports large bargain sales by the landowner and requires only that in these cases, the entity match NRCS' contribution dollar-for-dollar. Assuming a \$100,000 easement, if the landowner chooses to donate 70 percent of the appraised fair market value, the actual easement purchase price would be \$30,000. In this case, NRCS and the cooperating entity both contribute \$15,000. By providing the option for the entity to choose either 25 percent of the appraised fair market value or 50 percent of the purchase price, NRCS is accommodating the cooperating entities desire to take advantage of bargain sales and at the same time, ensuring that the Federal investment is secured with some contribution by the cooperating entity. Consequently, the final rule adopts the language of the proposed rule.

Several respondents suggested that NRCS take into account donations of other lands by an entity, as a matching offer. NRCS interprets the statute to mean that an entity's contribution pertains specifically to the parcel of land, which is subject to a pending offer in which the Secretary is purchasing an interest. Using land as match for the purchase of such land is not within the statutory authority of the program.

Five respondents recommended that to the extent that they are ordinary, necessary and reasonable, administrative costs associated with NRCS requirements be reimbursable with FRPP funds, or at the very least count towards the entity's share. In accordance with the statute that authorizes NRCS to cost share only the purchase of a property interest, NRCS does not reimburse a cooperating entity's easement costs associated with easement acquisitions, nor do these easement acquisition costs count towards an entity's share of the contribution. One respondent requested that NRCS insert in the final rule that easement administrative and transaction

costs will not be paid for using FRPP funds. NRCS agrees with this recommendation and has inserted this policy into the final rule.

One respondent requested that NRCS provide the option to the entity to issue landowner payments in installments. NRCS concurs with this recommendation. However, due to the complexity of the payment process, will address this issue in its policy manual, CPM part 519.

Section 1491.22 Conservation Easement Deeds

One respondent requested a clear articulation of FRPP's goals and objectives in Section 1491.22(a). NRCS agrees with the respondent and has inserted clauses under Section 1491.22(a) to more fully describe the goals and objectives of FRPP. As set forth in FRPP's authorizing legislation, the purpose of FRPP is to purchase conservation easements for the purpose of protecting topsoil by limiting nonagricultural uses of the land. With this in mind, NRCS has inserted the following goals into section 1491.22: (i) To protect the topsoil from conversion to nonagricultural uses; and (ii) to ensure that the agricultural capacity of the soils remains viable for future generations.

Several other respondents requested specifics on what is or should be allowed in FRPP. Two respondents stated that easements associated with FRPP should clearly provide for continued, active management of the farm, ranch and associated forest land. One respondent stated every conservation easement deed should require a farm succession plan. While NRCS encourages that these farms be actively farmed for perpetuity, the agency also recognizes that FRPP's authority is limited to protecting the soils, not ensuring that the farm or ranch be actively farmed for perpetuity, nor does the agency believe it is practicable to do so.

One of these respondents also asked that NRCS consider forestry as an agricultural use, making it clear that the conversion of farm to forest does not constitute a conversion to non-agricultural use. NRCS agrees with this response; however, NRCS believes that the majority of farms and ranches accepted into the program will not be converted into forestland because the quality of farm and ranch land that are accepted into the program would make conversion to forest land economically infeasible. Moreover, NRCS believes that the FRPP ranking criteria favor parcels that will remain agriculturally viable in the future. NRCS

acknowledges that some parcels enrolled under FRPP may be converted to forest land in the future. Although the agency has attempted to structure the program so that the primary focus of the program is to protect high quality farmland that will be actively cropped or grazed, NRCS believes that it lacks the authority to mandate that farms and ranches remain actively farmed in perpetuity. NRCS believes that its authority extends only to ensure that the topsoil protected under FRPP easements is not converted to nonagricultural uses and that the agricultural capacity of the soils remains viable for future generations. Under this rationale, NRCS believes that the conversion of farm and ranch land to forest land retains the agricultural viability of the soils and that if future generations deemed it appropriate, the forest acreage could be harvested and the land could be tilled or grazed.

One respondent requested that NRCS clarify its association with other conservation programs. As previously discussed, NRCS encourages landowners to utilize other conservation programs to protect natural resources on FRPP land. Landowners who enroll in FRPP are eligible to participate in USDA's cost share programs, including the Agricultural Management Assistance Program (AMA), Conservation Reserve Program (CRP), Environmental Quality Incentives Program (EQIP), Wildlife Habitat Incentives Program (WHIP), and the long-term contract options under the Wetlands Reserve Program (WRP) and Conservation Reserve and Enhancement Program (CREP). However, NRCS believes that WRP 30-year and permanent easements, as well as CREP permanent easements which restore wetlands and limit agricultural uses, may undermine FRPP goals and objectives to protect the agricultural viability of topsoil for future generations. For this reason as well as the desire to maximize Federal dollars, NRCS has chosen to exclude WRP and CREP acreage from FRPP easements. For example, a landowner who wishes to enroll in both programs can continue to do so; however, the land under WRP easement must border the FRPP easement—the same acreage cannot be enrolled under both easements.

One respondent questioned the language in 1491.22(c) that required a review of the conservation easement by NRCS and the Office of General Counsel. The respondent argued that there is "no legal standing by the Federal government as Grantee." NRCS and the Office of General Counsel (OGC) refer once again to the statute that instructs the Secretary, acting through

NRCS, to purchase conservation easements. In interpreting the statute, NRCS has acquired an interest in the Property in the form of a contingent right. A contingent right in the conservation easement deed provides that all rights conveyed by the landowner under the easement deed shall become vested in the United States should the grantee abandon or attempt to terminate or extinguish the conservation easement. To ensure that the United States property interest is upheld and to ensure that the American taxpayer is acquiring legally sound conservation easement deeds, NRCS and OGC must review all conservation easement templates used by the cooperating entity. In the interest of time, NRCS and OGC try to negotiate standard deed templates with the cooperating entity. Once these standard easement templates meet OGC approval, the cooperating entity may use that template on all easement deeds acquired with FRPP funds.

Several respondents raised issues concerning the contingent right paragraph that is incorporated into every conservation easement deed acquired with FRPP funds. Three respondents requested that NRCS allow for a right of appeal to be granted to eligible entities regarding a determination by the Secretary that the entity has failed to enforce the easement. NRCS' authority is to purchase an interest in land. With this authority, NRCS purchases a contingent right in the land. This contingent right is activated only in cases, where the cooperating entity terminates, extinguishes or fails to uphold the conservation easement. NRCS has determined that it needs to have this absolute right in order to protect the Federal Government's property interest should the Federal Government determine that the Grantee has attempted to terminate, extinguish or fail to uphold the conservation easement. Another respondent objected to the Secretary having sole discretion in the contingent right paragraph and suggested that the contingent right paragraph be relaxed where conservation easements are co-held with State or local funds within the DelMarVa Conservation Corridor. For the reasons mentioned above, NRCS believes that it is in the interest of the Federal government to retain in the final rule, the contingent right that was set forth in the proposed rule. One respondent indicated that a Federal contingent right interest would not be acceptable to many landowners. The Federal contingent right interest may

discourage some landowners from participating in FRPP. However, FRPP is a voluntary program, and landowners are not forced to participate if they find the contingent right paragraph, or other conservation easement provisions unacceptable. One respondent recommended that should the cooperating entity transfer the conservation easement, the landowner should have the right of first refusal for reacquiring the easement interest. The United States' contingent right to hold the conservation easement negates a landowner's right of first refusal. In addition, the right of first refusal by a landowner undermines the purpose of placing a conservation easement on the land.

Currently, NRCS signs the conservation easement deed, accepting NRCS' property interest in the deed of easement. One respondent requested that the requirement that NRCS sign the conservation easement deed be included in the rule, while another respondent recommended that NRCS require that easements be recorded and that the entity provide proof of recordation. NRCS concurs with these recommendations and has included these provisions in the final rule.

One respondent recommended that if NRCS requires implementation of the conservation plan, NRCS should also provide cost-share assistance to the landowner. A majority of farmers and ranchers are already subject to highly erodible land and wetland conservation requirements through participation in other USDA programs. Where financial assistance is needed to help a producer reduce soil erosion on highly erodible lands, cost-share assistance through programs, such as EQIP, is available. Another respondent suggested that a landowner be notified in writing about and consulted regarding conservation measures required on the Property. As indicated previously, this suggestion replicates NRCS' current conservation planning policy which takes into account a landowner's needs and economic situation, as well as local resource conditions.

One respondent raised a concern about the enforcement issues surrounding the conservation plan and the conservation easement, stating "the important matter is a commitment to conservation planning, not to a particular static conservation plan. Enforcement should be about ensuring maintenance of an evolving plan." NRCS believes that the conservation planning process is an evolving and interactive process; however, NRCS has decided that a landowner should not be required to maintain a higher standard

of erosion reduction than the landowner originally agreed to at the time of easement signature. This does not mean however that the landowner is prohibited from achieving a higher standard of resource protection, if the landowner or cooperating entity deem appropriate. Another respondent recommended that if NRCS require an entity to enforce a conservation plan, the entity be required to be involved in conservation planning. NRCS has the responsibility to enforce the conservation plan as it relates to highly erodible land and wetland conservation provisions. If the landowner refuses to comply with these requirements and all the appeal rights and other waivers afforded the landowner in accordance with 7 CFR part 17 and 7 CFR part 614 have been exhausted, NRCS will report to the cooperating entity that the landowner is in violation of the easement. At this time, it becomes the responsibility of the cooperating entity to enforce the terms of the conservation easement.

Section 1491.23 Easement Modifications

Several respondents objected to or requested clarification on this section, which required that easement deed amendments be approved by NRCS. Three respondents requested that the final rule clarify who, within NRCS, is able to approve conservation easement modifications. NRCS has clarified this in the final rule by stating that the State Conservationist, with concurrence from the Office of General Counsel, shall approve or disapprove conservation easement modifications, in the form of deed amendments. One respondent supported NRCS approving easement modifications. They also suggested that NRCS establish a criterion that no amendment will be allowed if it would lower the net benefit of the easement for conservation. NRCS believes that a single criterion, such as lowering the net benefit of the conservation, is difficult to establish on a nationwide basis; therefore, NRCS has chosen to approve amendments on a case-by-case basis. One respondent asserted that the easement modification provisions are inconsistent and incompatible with their program and question NRCS and the Office of General Counsel's authority to accept or reject such modifications. It is not NRCS' intention to supersede the cooperating entity's decision to prohibit an easement amendment. However, where easement amendments are allowed, NRCS' response regarding easement modifications or amendments mirrors its response on easement review—

because the United States is buying an interest in the property, any modification or amendment shall be approved by NRCS and the Office of General Counsel. One respondent requested that NRCS interpret Section 1491.23 to give a cooperating entity the discretion to distinguish between a major and minor amendment. If appropriate, NRCS, with advice from the Office of General Counsel, will review and delegate authority for amendment review on a case-by-case basis as it relates to minor amendments.

Subpart C—General Administration

Section 1491.30 Violations and Remedies

Fifty-five respondents commented on this portion of the proposed rule. Fifty-two respondents recommended that section 1491.30(c) be reworded to allow for landowner notification prior to NRCS' entry on the property as it relates to conservation plan violations, while one respondent questioned the need to include this provision in the rule, but rather state it in the conservation easement deed. NRCS accepts the first set of recommendations and has modified the final rule provision to allow for landowner notification prior to NRCS entry. NRCS also addresses and inserts right of access provisions in all FRPP conservation easement deeds.

One respondent suggested that NRCS should contact the landowner, but it should not be prevented from exercising its imminent violation rights by rules outside of the easement or in the case of an emergency; therefore, they suggest that the wording be changed to NRCS notifies or reasonably attempts to notify. As a condition of program eligibility, landowners agree to allow NRCS to enter the land when they sign the AD-1026, Highly Erodible Land Conservation and Wetland Conservation Certification form; however, NRCS' policy is to make all reasonable advance notification to the landowner prior to any visit on the property.

One respondent has objected to NRCS accessing the easement area stating that it conflicts with the rights of the Grantee. The respondent notes that since neither NRCS nor CCC are Grantees of the recorded conservation easements, neither NRCS nor CCC have responsibilities under law to monitor, enforce or prosecute violators of FRPP easements. Therefore, NRCS should not impose rules and regulations covering these enforcement authorities already governed by State legislation. NRCS's monitoring responsibility relates only to the conservation plan, which is required by FRPP's authorizing legislation.

Violations related to the conservation plan and any other such violations that NRCS may encounter while on the farm or ranch will be reported to the cooperating entity. NRCS does not assume the role of any monitoring beyond the conservation plan compliance provision of the Food Security Act of 1985, as amended.

One respondent requested that if enforcement language is required in the deed, the rule should contain such language. The final rule contains the general guidelines related to conservation plan compliance, while the cooperative agreement between NRCS and the cooperating entity will articulate any specific enforcement language as it relates to the conservation plan. One respondent asked whether lands that do not contain highly erodible soils or wetland resources need to be monitored by NRCS. Lands that do not contain highly erodible soils or wetland resources do not need to be monitored by NRCS, unless the State Conservationist and cooperating entity have entered into a cooperative agreement whereby they have agreed to assist the cooperating entity monitor non-highly erodible lands enrolled under FRPP. One respondent requested that NRCS articulate whether all easements prior to the publication of the final rule will be monitored. NRCS will monitor easements that were recorded prior to the publication of this final rule in accordance with the terms and conditions set forth in individual conservation easement deeds.

One respondent requested that the NRCS clarify that the landowner be liable for any costs incurred by the United States as it relates specifically to the conservation plan.

NRCS agrees with this respondents request for clarification and has reworded the last sentence of 1491.30(c) to read as follows: "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 the easement requirements as it relates to conservation plan violations."

Two respondents requested that NRCS clarify section 1491.30(d) by adding "related to the FRPP easement." NRCS agrees with this recommendation and has redrafted this section to read as follows: "The United States shall be entitled to recover any and all administrative and legal costs, including attorney's fees or expenses, associated with any enforcement or remedial action related to the FRPP easement."

Two respondents requested that NRCS soften the indemnification language. One entity requested that the

section be amended for cross indemnification, while another entity requested that the indemnification language read as follows: "(e) The conservation easement shall include an indemnification clause requiring landowners to indemnify, defend, and hold harmless the United States from any liability resulting from the negligent acts of the landowner." NRCS has chosen to retain the proposed rule's language as it relates to indemnification, which is similar to the second respondent's suggestion. In response to the first respondent's request for cross indemnification, NRCS does not have the authority to waive the Federal government's sovereign immunity.

Section 1491.31 Appeals

One respondent has objected to NRCS affording appeals to landowners and cooperating entities, asserting that it conflicts with the rights of the Grantee. The respondent notes that since neither NRCS nor CCC are Grantees of the recorded conservation easements with individual landowners, NRCS has no responsibilities under law to monitor, enforce or prosecute violators of easements. Therefore, NRCS should not impose rules and regulations covering these enforcement authorities already legislated by State legislation under which they are governed.

The Department of Agriculture Reform Act (Pub. L. 103-354; 7 U.S.C. 6991 et seq.), requires that USDA agencies covered by this Act develop and implement an informal and formal appeals policy. The USDA has developed regulations articulating how the appeal process works when making decisions over a disputed agency decision or determination. Accordingly, NRCS provides an appeal and mediation process to agency program participants where decisions and determinations made by the agency are disputed by the program participant. Under these provisions, program participant can mean the cooperating entity or the landowner, depending on the circumstance. Appealable items include, but are not limited to:

- The determination that the land is eligible;
- The determination that the conservation plan submitted by the landowner to the entity and further submitted to NRCS is not sufficient; and
- The determination by NRCS that the person farming the land under FRPP easement has violated the HELC or WC provisions.

Section 1491.32 Scheme and Device

One respondent has objected to the NRCS scheme and device provisions,

asserting that they conflict with the rights of the Grantee. The respondent notes that since neither NRCS nor CCC are Grantees of the recorded conservation easements with individual landowners, NRCS has no responsibilities under law to monitor, enforce or prosecute violators of easements. Therefore, NRCS should not impose rules and regulations covering these enforcement authorities already legislated by a State legislation under which they are governed. To clarify any confusion regarding the applicability of scheme and device provisions and to address the respondent's concerns, NRCS has removed the term "landowner" from the scheme and device paragraphs. However, NRCS has retained these paragraphs as drafted in the proposed rule in the event a cooperating entity with whom NRCS directly enters into a cooperative agreement commits waste, fraud, or abuse. These paragraphs have been edited to reflect this change in policy.

List of Subjects in 7 CFR Part 1491

Administrative practice and procedure, Agriculture, Soil conservation.

■ For the reasons stated in the preamble, the Commodity Credit Corporation amends chapter XIV by adding a new part 1491 as set forth below:

PART 1491—FARM AND RANCH LANDS PROTECTION PROGRAM

Subpart A—General Provisions

Sec.

- 1491.1 Applicability.
- 1491.2 Administration.
- 1491.3 Definitions.
- 1491.4 Program requirements.
- 1491.5 Application procedures.
- 1491.6 Ranking considerations and proposal selection.
- 1491.7 Funding priorities.

Subpart B—Cooperative Agreements and Conservation Easement Deeds ec.

- 1491.20 Cooperative agreements.
- 1491.21 Funding.
- 1491.22 Conservation easement deeds.
- 1491.23 Easement modifications.

Subpart C—General Administration

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

Authority: 16 U.S.C. 3838h–3838i.

Subpart A—General Provisions

§ 1491.1 Applicability.

(a) The regulations in this part set forth policies, procedures, and requirements for program implementation of the Farm and Ranch Lands Protection Program as

administered by the Natural Resources Conservation Service (NRCS). FRPP cooperative agreements and easements signed on or after May 16, 2003, will be administered according to 7 CFR part 1491.

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

§ 1491.2 Administration.

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

(b) NRCS shall— (1) Provide overall program management and implementation leadership for FRPP;

(2) Develop, maintain, and ensure that policies, guidelines, and procedures are carried out to meet program goals and objectives;

(3) Ensure that the FRPP share of the cost of an easement or other deed restrictions in eligible land shall not exceed 50 percent of the appraised fair market value of the conservation easement;

(4) Determine land and entity eligibility;

(5) Ensure a conservation plan is developed in accordance with 7 CFR part 12;

(6) Make funding decisions and determine allocations of program funds;

(7) Coordinate with the Office of the General Counsel (OGC) to ensure the legal sufficiency of the cooperative agreement and the easement deed or other legal instrument;

(8) Sign and monitor cooperative agreements for the CCC with the selected entity;

(9) Monitor and ensure conservation plan compliance with highly erodible land and wetland provisions in accordance with 7 CFR part 12; and

(10) Provide leadership for establishing, implementing, and overseeing administrative processes for easements, easement payments, and administrative and financial performance reporting.

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

§ 1491.3 Definitions.

The following definitions may be applicable to this part:

Agricultural uses are defined by the State's Purchase of Development Rights (PDR) program, or where no PDR program exists, agricultural uses should

be defined by the State agricultural use assessment program. (If the Agency finds that a State definition of agriculture is so broad that an included use could lead to the degradation of soils, NRCS reserves the right to impose greater deed restrictions on the property than allowable under that State definition of agriculture in order to protect topsoil.)

Chief means the Chief of NRCS, USDA.

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

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

Conservation Plan is the document that—

(1) Applies to highly erodible cropland;

(2) Describes the conservation system applicable to the highly erodible cropland and describes the decisions of the person with respect to location, land use, tillage systems, and conservation treatment measures and schedules;

(3) Is approved by the local soil conservation district in consultation with the local committees established under Section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 5909h(b)(5)) and the Secretary, or by the Secretary.

Contingent right is an interest in land held by the United States, which the United States may exercise under specific circumstances in order to enforce the terms of the conservation easement or hold title to the easement.

Eligible entities means Federally recognized Indian Tribes, States, units of local government, and certain non-governmental organizations, which have a farmland protection program that purchases agricultural conservation easements for the purpose of protecting topsoil by limiting conversion to non-agricultural uses of the land.

Additionally, to be eligible for FRPP, the entity must have pending offers, for acquiring conservation easements for the purpose of protecting agricultural land from conversion to non-agricultural uses.

Eligible land is privately owned land on a farm or ranch that has prime, unique, Statewide, or locally important soil, or contains historical or archaeological resources, and is subject to a pending offer by an eligible entity. Eligible land includes cropland, rangeland, grassland, and pasture land, as well as forest land that is an incidental part of an agricultural operation. Other incidental land that would not otherwise be eligible, but when considered as part of a pending offer, may be considered eligible, if inclusion of such land would significantly augment protection of the associated farm or ranch land.

Fair market value is ascertained through standard real property appraisal methods. Fair market value is the amount in 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. Neither the seller nor the buyer act under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal. In valuing conservation easements, the appraiser estimates both the fair market value of the whole property before the easement acquisition and the fair market value of the remainder property after the conservation easement has been imposed. The difference between these two values is deemed the value of the conservation easement.

Farm or Ranch Succession Plan is a general plan to address the continuation of some type of agricultural business on the conserved land; the farm or ranch succession plan may include specific intra-family succession agreements or strategies to address business asset transfer planning to create opportunities for beginning farmers and ranchers.

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

Historical and archaeological resources must be:

- (1) Listed in the National Register of Historic Places (established under the National Historic Preservation Act (NHPA), 16 U.S.C. 470, *et seq.*), or
- (2) Formally determined eligible for listing in the National Register of

Historic Places (by the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) and the Keeper of the National Register in accordance with section 106 of the NHPA), or

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

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

Landowner means a person, persons, estate, corporation, or other business or nonprofit entity having fee title ownership of farm or ranch land.

Natural Resources Conservation Service is an agency of the U.S. Department of Agriculture.

Non-governmental organization is defined as any organization that:

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

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

- (3) Is described in section 509(a)(2) of that Code; or

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

Other interests in land include any right in real property recognized by State law, including fee title. FRPP funds will only be used to purchase other interests in land with prior approval from the Chief.

Other productive soils are soils that are contained on farm or ranch land that is identified as farmland of Statewide or local importance and is used for the production of food, feed, fiber, forage, or oilseed crops. The appropriate State or local government agency determines Statewide or locally important farmland with concurrence from the State Conservationist. Generally, these farmlands produce high yields of crops when treated and managed according to acceptable farming methods. In some

States and localities, farmlands of Statewide and local importance may include tracts of land that have been designated for agriculture by State law or local ordinance. 7 CFR part 657 sets forth the process for designating soils as Statewide or locally important.

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

Prime and unique farmland are defined separately, as follows:

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

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

Secretary is the Secretary of the U.S. Department of Agriculture.

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

State Conservationist means the NRCS employee authorized to direct and supervise NRCS activities in a State, the Caribbean Area (Puerto Rico and the Virgin Islands), or the Pacific Basin Area (Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands).

§ 1491.4 Program requirements.

- (a) Under the 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 Federal contingent right interest in the property must be included in each easement deed for the protection of the Federal investment.

(b) The term of all easements will be in perpetuity unless prohibited by State law.

(c) To be eligible to receive FRPP funding, an entity must meet the definition of "eligible entity" as listed in § 1491.3. In addition, eligible entities wishing to receive FRPP funds must also demonstrate:

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

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

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

(4) The availability of funds.

(d) Eligible land must meet the definition of "eligible land" as provided in § 1491.3. In addition:

(1) Entire farms or ranches may be enrolled in FRPP.

(2) Farms must contain at least 50 percent of prime, unique, Statewide, or locally important soil, unless otherwise determined by the State Conservationist, or contain historical or archaeological resources.

(3) Eligible lands are farm and ranch lands subject to a pending offer, as defined in § 1491.3, for purchase of a conservation easement.

(4) Eligible land must be privately owned. NRCS will not enroll land in FRPP that is owned in fee title by an agency of the United States or State or local government, or land that is already subject to an easement or deed restriction that limits the conversion of the land to nonagricultural use, unless otherwise determined by the Secretary.

(5) Eligible land must be owned by landowners who certify that they do not exceed the adjusted gross income limitation eligibility requirements set forth in Section 1604 of the Farm Security and Rural Investment Act of 2002.

(e) Prior to FRPP fund disbursement, the value of the conservation easement must be appraised. Appraisals shall be completed and signed by a State-certified or licensed general appraiser and shall contain a disclosure statement by the appraiser. The appraisal shall conform to either the Uniform Standards of Professional Appraisal Practices or the Uniform Appraisal

Standards for Federal Land Acquisitions.

(f) At the discretion of the Chief, a standard easement or equivalent legal form, which meets the intent of the 2002 Act, will be required as a condition for program participation.

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

§ 1491.5 Application procedures.

(a) When funds are available, NRCS publishes a Request for Proposals in the **Federal Register** or, at the discretion of the Chief, uses another process to solicit applications from eligible entities to cooperate in the acquisition of conservation easements on farms and ranches. Information required in the application will be set forth in the Request for Proposals.

(b) To participate, an eligible entity submits a proposal to NRCS for the acquisition of conservation easements on eligible farm or ranch land, on which the entity already has pending offers. An entity's application contains a request to fund one or more parcels. All applications must be submitted to the appropriate NRCS State Conservationist by the specified date, as indicated in the Request for Proposals.

§ 1491.6 Ranking considerations and proposal selection.

(a) Once the NRCS State Conservationist has assessed entity eligibility and land eligibility, the State Conservationist shall use National and State criteria to evaluate the land and rank parcels. Entities and parcels will be selected for participation based on the entities' responses to the Request for Proposals. Selection will be based on national ranking criteria set forth by the Chief in the Request for Proposals and State criteria as determined by the State Conservationist, with advice from the State Technical Committee.

(1) Examples of national criteria may include:

(i) Acreage of prime, unique, and important farm and ranch land to be protected;

(ii) Total acres of land to be protected with the requested award;

(iii) Acreage of prime, unique, and important farm and ranch land identified in the National Resources Inventory as converted to nonagricultural uses;

(iv) Total acres needing protection;

(v) Number or acreage of historical and archaeological resources to be protected on farm or ranch lands;

(vi) Anticipated average FRPP cost per acre;

(vii) Rate of land conversion (e.g., local land use conversion rates);

(viii) Amount of the Federal share to be contributed to the acquisition of the conservation easement, as guaranteed by the eligible entity;

(ix) History of eligible entity's commitment to conservation planning and conservation practice implementation;

(x) History of an eligible entity's commitment to assisting beginning farmers and ranchers, to promoting opportunities in farming and ranching, and to farm and ranch succession transfer;

(xi) Eligible entity's history of acquiring, managing, holding, and enforcing conservation easements. This could include annual farmland protection expenditures, monetary donations received, accomplishments, and staffing levels;

(xii) A description of the eligible entity's farmland protection strategy and how the FRPP application submitted by the entity corresponds to the entity's strategic plan; and

(xiii) Eligible entity's estimated acres of unfunded proposed conservation easements on prime, unique, and important farm and ranch land.

(2) Examples of State or local criteria, as determined by the State Conservationist may include:

(i) Proximity of parcel to other protected clusters;

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

(iii) Parcel size;

(iv) Type of land use;

(v) Maximum FRPP cost expended per acre;

(vi) Amount of the Federal share to be contributed to the acquisition of the conservation easement, as guaranteed by the eligible entity;

(vii) History of an eligible entity's commitment to assisting beginning farmers and ranchers, to promoting opportunities in farming and ranching, and to farm and ranch succession transfer;

(viii) Existence of a parcel in an agriculturally zoned area.

(b) State ranking criteria will be developed on a State-by-State basis. Prior to proposal submission, interested entities should contact the State Conservationist located in their State for a full listing of applicable National and State ranking criteria.

(c) The NRCS State Conservationist may seek advice from the State Technical Committee (established pursuant to 16 U.S.C. 3861) in

evaluating the merits of the applications.

§ 1491.7 Funding priorities.

(a) NRCS will only consider funding the acquisition of eligible land in the Program if the agricultural viability of the land can be demonstrated. For example, the land must be of sufficient size and have boundaries that allow for efficient management of the area. The land must also have access to markets for its products and a support infrastructure appropriate for agricultural production.

(b) NRCS may not fund the acquisition of eligible lands if NRCS determines that the protection provided by the FRPP would not be effective because of on-site or off-site conditions.

(c) NRCS will place a higher priority on easements acquired by entities that have extensive experience in managing and enforcing easements.

(d) During the application period, pending offers having appraisals completed and signed by State-certified general appraisers within the preceding one year shall receive higher funding priority by the NRCS State Conservationist. Before funding is released for easement acquisition, the cooperating entity must provide NRCS with a copy of the certified appraisal.

(e) NRCS may place a higher priority on lands and locations that help create a large tract of protected area for viable agricultural production and that are under increasing urban development pressure(s).

(f) NRCS may place a higher priority on lands and locations that link to other Federal, Tribal, or State governments or non-governmental organization efforts with complementary farmland protection objectives (e.g. open space, watershed and wildlife habitat protection).

(g) NRCS may place a higher priority on lands that provide multifunctional benefits including social, economic, historical and archaeological, and environmental benefits.

(h) NRCS may place a higher priority on certain geographic regions where the enrollment of particular lands may help achieve National, State, and regional goals and objectives, or enhance existing government or private conservation projects.

(i) NRCS may place a higher priority on farms or ranches that have or will have a greater variety of natural resources protected.

(j) NRCS may place a higher priority on farms or ranches that have a farm succession plan or similar plan established to encourage farm viability for future generations.

(k) NRCS may place a higher priority on the national ranking criteria listed in § 1491.6(a)(1) than State criteria, if the NRCS Chief deems appropriate.

Subpart B—Cooperative Agreements and Conservation Easement Deeds

§ 1491.20 Cooperative agreements.

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

(1) The interests in land to be acquired, including the form of the easements to be used and terms and conditions;

(2) The management and enforcement of the rights acquired;

(3) The role of NRCS;

(4) The responsibilities of the easement manager on lands acquired with the assistance of FRPP; and

(5) Other requirements deemed necessary by NRCS to protect the interests of the United States.

(b) The cooperative agreement will also include an attachment listing the parcels accepted by the State Conservationist, landowners' names, addresses, location map(s), and other relevant information. An example of a cooperative agreement may be obtained from the State Conservationist.

§ 1491.21 Funding.

(a) The State Conservationist, in coordination with the cooperating entity, shall determine the NRCS share of the cost of purchasing a conservation easement.

(b) Under the FRPP, NRCS may provide up to 50 percent of the appraised fair market value of the conservation easement. Entities are required to supplement the NRCS share of the cost of the conservation easement.

(c) Landowner donations up to 25 percent of the appraised fair market value of the conservation easement may be considered part of the entity's matching offer.

(d) For the entity, two cost-share options are available when providing its matching offer.

(1) The entity may provide in cash at least 25 percent of the appraised fair market value of the conservation easement, or

(2) The entity may provide at least 50 percent of the purchase price in cash, of the conservation easement. This second option may be preferable to an entity in

the case of a large bargain sale by the landowner. If this option is selected, the NRCS share cannot exceed the entity's contribution.

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

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

§ 1491.22 Conservation easement deeds.

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

(b) Pending offers by an eligible entity must be for acquiring an easement in perpetuity, except where State law prohibits a permanent easement.

(c) The conveyance document or conservation easement deed used by the eligible entity may be reviewed and approved by the NRCS National Office and Office of the General Counsel (OGC) before being recorded.

(d) Since title to the easement is held by an entity other than the United States, the conveyance document must contain a "contingent right" clause that provides that all rights conveyed by the landowner under the document will become vested in the United States should the eligible entity (*i.e.*, the grantee(s)) abandon or attempt to terminate the conservation easement. In addition, the contingent right also provides, in part, that the Secretary takes title to the easement, if the eligible entity fails to uphold the easement or attempts to transfer the easement without first securing the consent of the Secretary.

(e) As a condition for participation, a conservation plan will be developed by NRCS in consultation with the landowner and implemented according to the NRCS Field Office Technical Guide and approved by the local conservation district. The conservation plan will be developed and managed in accordance with the Food Security Act of 1985, as amended, 7 CFR part 12 or subsequent regulations, and other requirements as determined by the State Conservationist. To ensure compliance with this conservation plan, the

easement will grant to the United States, through NRCS, its successors or assigns, a right of access to the easement area.

(f) The cooperating entity shall acquire, hold, manage and enforce the easement. The cooperating entity may have the option to enter into an agreement with governmental or private organizations to carry out easement stewardship responsibilities if approved by NRCS.

(g) Prior to fund disbursement, NRCS must sign the conservation easement, concurring with the terms of the conservation easement and accepting its interest in the conservation easement deed.

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

§ 1491.23 Easement modifications.

(a) After an easement has been recorded, no amendments to the easement will be made without prior approval by NRCS State Conservationist and the USDA Office of General Counsel.

(b) Easement modifications will be approved only when easement is duly prepared and recorded in conformity with standard real estate practices, including requirements for title approval, subordination of liens, and recordation, and when the amendment is consistent with the purposes of the conservation easement.

Subpart C—General Administration

§ 1491.30 Violations and remedies.

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

(b) In the event that the cooperating entity fails to enforce any of the terms of the easement as determined in the sole discretion of the Secretary, the Secretary and his or her successors and assigns shall have the right to enforce the terms of the easement through any and all authorities available under Federal or State law. In the event that the cooperating entity attempts to terminate, transfer, or otherwise divest itself of any rights, title, or interests of the easement or extinguish the easement or without the prior consent of the Secretary and 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 in the United States of America.

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

(d) The United States 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 as it relates to the enforcement of the FRPP easement.

(e) The conservation easement shall include an indemnification clause requiring landowners to indemnify, defend, and hold harmless the United States from any liability resulting from the negligent acts of the landowner.

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

§ 1491.31 Appeals.

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

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

§ 1491.32 Scheme or device.

(a) If it is determined by the Secretary that a cooperating entity has employed a scheme or device to defeat the purposes of this part, any part of any program payment otherwise due or paid

such a cooperating entity during the applicable period may be withheld or be required to be refunded with interest thereon, as determined appropriate by CCC.

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

Signed in Washington, DC, on May 8, 2003.

Bruce I. Knight,

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

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003-NE-16-AD; Amendment 39-13145; AD 2003-08-52]

RIN 2120-AA64

Airworthiness Directives; GE Aircraft Engines CT7-9B Turboprop Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: This document publishes in the **Federal Register** an amendment adopting Airworthiness Directive (AD) 2003-08-52 that was sent previously to all known U.S. owners and operators of GE Aircraft Engines (GEAE) CT7-9B turboprop engines. This AD requires rigging the compressor variable geometry (VG) to VG schedule N. This AD is prompted by reports of 12 compressor stall events that occurred over a six-month period. The actions specified in this AD are intended to prevent a dual-engine in-flight shutdown or power loss due to a compressor stall during deceleration from takeoff power to climb power.

DATES: Effective June 2, 2003, to all persons except those persons to whom it was made immediately effective by emergency AD 2003-08-52, issued on April 15, 2003, which contained the requirements of this amendment. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of June 2, 2003.

We must receive any comments on this AD by July 15, 2003.