

Decker, Denise - Washington, DC

From: Sara Hopper [shopper@edf.org]
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Attachments: GRP IFR comments 3.23.09.pdf



Thanks!

<<GRP IFR comments 3.23.09.pdf>>

Sara Hopper
Environmental Defense Fund
1875 Connecticut Ave. NW, Suite 600
Washington, DC 20009
direct dial: 202-572-3379
cell: 202-422-1823
shopper@edf.org

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March 23, 2009

Easements Program Division
Natural Resources Conservation Service
Grassland Reserve Program
P.O. Box 2890
Room 6819-S
Washington, D.C. 20013

Environmental Defense Fund submits these comments on the Interim Final Rule for the Grassland Reserve Program, published January 21, 2009, in the Federal Register.

Program purpose to protect “conservation values” associated with land used for grazing

When it was created in the 2002 farm bill, GRP’s stated purpose was “to assist owners in restoring and conserving eligible land.” The 2008 farm bill expanded this provision (1238N(a) of the Food Security Act of 1985, 16 U.S.C. 3838n(a)) to describe the program’s purpose as “assisting owners and operators in protecting grazing uses and related conservation values by restoring and conserving eligible land through rental contracts, easements, and restoration agreements.”

We strongly disagree with the statement in the preamble (in the section entitled “Summary of 2008 Act Changes”) that the expansion of the statement of purposes was intended to “changed the program’s focus from protecting, conserving, and restoring grassland resources on private lands.” Both the 2002 farm bill and the 2008 farm bill referred to “restoring and conserving eligible land.” No language in the statute or the Statement of Managers supports the interpretation the agency has apparently taken that the addition of the reference to grazing uses represents a significant shift that justifies a decreased focus in the rule on meeting the program’s conservation purposes.

We believe it is important to make this point because the change in program purposes in the statute is cited in the preamble to the interim final rule as justification for a number of changes USDA has made to the rule. For example, the change in purposes is cited to support the agency’s decision to remove, in 7 C.F.R. 1415.1(b), the statement that one of the objectives of GRP is to “emphasize preservation of native and naturalized grasslands and shrublands.” The preamble states that the change in program purposes means that the program is “not limited to native and naturalized grasslands.”

We agree that GRP is “not limited” to enrolling native grasslands. Nor was the program so limited in the 2002 farm bill. That is why the rule promulgated after 2002 stated that one of the objectives of the program was to “emphasize” the preservation of native and naturalized grasslands. Enrolling native grasslands and supporting restorations which aim to re-establish native plants will provide more conservation benefits than enrolling

parcels or funding restoration projects that do not focus on the use of native plants. According to the “Final Environmental Impact Assessment for the Interim Final Rule, GRP 2004”, native grassland restorations have “the potential to provide the greatest diversity of plants and animals and habitat structure.” The 2004 EIA indicates that restorations that utilize non-native plant mixtures also provide environmental benefits, and may be more appropriate in situations “when native cultivars are not available or are not feasible to re-establish, particularly in the short-term.” In order to maximize the environmental benefits of GRP, USDA should prioritize enrollment of native grasslands and restoration projects focused on re-establishing native plants.

USDA clearly has the discretion now, just as it did after the 2002 farm bill, to include provisions in the rule that send a clear signal to states that the restoration and conservation of native grasslands should be a priority. While the preamble states that USDA “continues to recognize the conservation value of native and naturalized grasslands,” and allows states to prioritize enrollment of those lands, we urge USDA to send a stronger signal to states that enrollment of our remaining native grasslands should be prioritized, as should restoration contracts that will re-establish native plants. We provide recommendations on establishing priorities for enrolling eligible land below. We also praise the agency for recognizing, in section 1415.1(b)(4) of the interim final rule, that one of the objectives of GRP remains to “maintain and improve plant and animal biodiversity” – an objective that clearly justifies prioritizing, in all states, the enrollment of existing native grasslands and restoration contracts that focus on re-establishing native grassland ecosystems.

Allocation of GRP funding to NRCS and FSA state offices

Sec. 1415.2(a)(2) provides that in allocating GRP funding to states, USDA will “use a national allocation formula that emphasizes support for grazing operations, biodiversity of plants and animals, and grasslands under the greatest threat of conversion to uses other than grazing.” In addition, this provision notes that the allocation formula may include other factors designed to improve program implementation, and that it may be modified periodically to change the emphasis of factors in the formula “in order to address a particular natural resource concern, such as the precipitous decline of a population of a grassland-dependent bird(s) or animal(s).”

We are pleased that the agency has retained the language from the old rule emphasizing that supporting biodiversity remains one of the primary objectives of GRP and providing an example of how the program can be used in a targeted way to address specific concerns. However, we believe Sec. 1415.2(a)(2), as written, does not provide sufficient assurance that the agency will use the national allocation process in a way that maximizes the conservation benefits that grazing operations can deliver.

Specifically, the provision that allows for periodic modification of the allocation formula to address the precipitous decline of a species does not adequately incentivize states to use

GRP to benefit particular at-risk species or to maintain and improve the health of ecosystems. States should be encouraged, through the allocation process, to leverage GRP as part of an overall strategy to assist private landowners in protecting and restoring important grassland habitats while supporting grazing operations. In general, species protection efforts have a much higher chance of success and will be much less costly if the risk to the population is identified and addressed early on, rather than waiting until the species has reached a state of “precipitous decline.” By the time the allocation formula is modified to prioritize a particular species in decline and a state responds to the modified formula, it may be too late to provide any benefits for the declining species. USDA should instead use the allocation process to reward states that use GRP effectively to achieve state, regional, and national objectives related to the protection and restoration of grassland habitats, including the protection and/or restoration of important movement corridors for wildlife and crucial habitat for species identified State Wildlife Action Plans as being of greatest conservation need.

Encouraging use of native plants under restoration agreements

“Restoration” is defined in Sec. 1415.3 as implementing conservation practices or activities that restore the functions and values of grasslands and shrublands. In many cases the highest conservation values that can be obtained from restoration projects will be generated by the predominant use of native plants. The definition should make it clear that native plants should be utilized in restorations to the maximum extent practicable. In situations where conditions are not suitable for establishing native cover because of degraded conditions, and attempts to re-establish native plants might result in more damage to soil, water, or air, mixtures of non-native plants appropriate to the ecological site should be used instead. The preamble to the rule states that the emphasis on native plants contained in the definition of restoration in the previous rule was removed to reflect the shift in the program purpose from protecting grassland resources to protecting grazing uses. As discussed above, the change in the program’s purposes is not a significant one and does not require elimination from the rule of provisions that encourage the restoration of native plant communities when practicable. On the contrary, establishing a clear priority for the protection and restoration of native grasslands, while also protecting the grazing use of those lands, will ensure the program protects the most significant conservation values associated with lands used for grazing.

Ensuring grazing management plans protect “related conservation values”

The 2002 farm bill was silent on the need for conservation plans. The rule implementing the 2002 farm bill’s GRP provisions, however, required a conservation plan that met Resource Management System requirements. The 2008 farm bill modified GRP to require a grazing management plan on any land enrolled in the program.

The preamble explains that under the interim final rule, any land enrolled in GRP will be required to have a grazing management plan that meets USDA Field Office Technical

Guide standards for prescribed grazing, but that only enrollments designed to protect additional conservation values (unrelated to the grazing plan) would require a full conservation plan, and only those that include grassland restoration would require a restoration plan.

Although the preamble argues that the new statutory requirement for a grazing management plan justifies the shift away from requiring conservation plans for all contracts, the statute does not actually suggest any need to do away with the conservation management plan requirement. The purpose of GRP still includes the need to protect “related conservation values” associated with the enrolled land. USDA clearly retains discretion to require conservation plans in all cases. If it decides not to do that, the agency has an obligation to ensure that the grazing management plan protects “related conservation values” identified on the eligible land. The Statement of Managers accompanying the 2008 farm bill supports the inclusion of conservation values in the grazing management plan: “With the inclusion of a grazing management plan, the Managers emphasize the conservation purposes of the program...”.

The definition of grazing management plans in Sec. 1415.3 does not accomplish the protection of “related conservation values” and is not consistent with the stated intent of the Managers to ensure conservation purposes are met. That definition states:

“Grazing management plan means the document developed by NRCS that describes the implementation of the grazing management system consistent with the prescribed grazing standard contained in the Field Office Technical Guide (FOTG). The grazing management plan will include a description of the grazing management system, permissible and prohibited activities, any associated restoration plan or conservation plan if applicable, and a description of USDA’s right of ingress and egress.”

The stated intent of the prescribed grazing standard is “Managing the controlled harvest of vegetation with grazing animals,” and conservation purposes are secondary to this purpose. In some cases, practices that may facilitate grazing management may actually be detrimental to wildlife, such as fencing in places where it interferes with wildlife movement. USDA should revise the definition of “grazing management plan” to ensure that grazing management practices allowed under the plan will not have a detrimental impact on conservation values, and that any other practices or activities that may be needed to protect conservation values will also be included in the plan.

Sec. 1415.4(h) states that easement and rental contracts must allow activities outlined in the grazing management plan. One of the categories of activities allowed under this section is the installation of fencing and livestock watering facilities. These facilities can be detrimental to wildlife if they are not designed and sited properly. This subsection should make it clear that fencing and livestock watering facilities must be designed and installed in a manner that protects conservation values, for example by requiring fences to

be marked to increase visibility to birds such as the sage grouse, thereby decreasing mortality due to collisions. We recommend that Sec. 1415(h) be revised to read: “Grazing related activities, such as fencing and livestock watering facilities, provided that such activities will not adversely affect the related conservation values, including habitat for grassland- and shrubland-dependent birds and other animals.”

Land eligibility

The statute defines eligible land as:

“private or tribal land that

“(1) is grassland, land that contains forbs, or shrubland (including improved rangeland and pastureland) for which grazing is the predominant use;

“(2) is located in an area that has been historically dominated by grassland, forbs, or shrubland, and the land—

“(A) could provide habitat for animal or plant populations of significant ecological value if the land—

“(i) is retained in its current use; or

“(ii) is restored to a natural condition;

“(B) contains historical or archaeological resources; or

“(C) would address issues raised by State, regional, and national conservation priorities; or

“(3) is incidental to land described in paragraph (1) or (2), if the incidental land is determined by the Secretary to be necessary for the efficient administration of a rental contract or easement under the program.”

It is clear from this definition that land located in an area that is historically categorized as grassland is eligible for enrollment even if it is not in active use as grazing land. Land in this category must have other values as outlined in (2)(A) through (2)(C), primarily related to the conservation value of the land. The requirements for eligible land set in the rule go beyond the statutory requirements to say that land this of the statute to say that these lands must be compatible with grazing uses. This determination is unnecessary to upholding the purposes of the program, and goes beyond the intent of the statute. We suggest removing the phrase “and the State Conservationist, with advice from the State Technical Committee, determines that it is compatible with grazing uses and related conservation values.”

As discussed below, while it is critical for states in which native grasslands remain to prioritize those lands for enrollment, we also urge USDA to ensure that it encourages the enrollment – with restoration agreements – of lands that are not currently grasslands, but if restored to their natural condition could provide habitat for animal or plant populations of significant ecological value or would address issues raised by State, regional and national conservation priorities.

Priorities for enrollment of land

Ensuring that all states are ranking applications effectively to prioritize those with the highest conservation values is the most important thing USDA can do to ensure that GRP is as effective as it can be in producing conservation results while supporting grazing operations. The provisions found in Sec. 1415.8 (dealing with enrollment and ranking) do not clearly require this. While we are pleased that the interim final rule retains, from the old rule, subsections (e) and (f), allowing states to establish separate ranking pools to address state, regional or national conservation priorities, and allowing states to emphasize enrollment of unique grasslands or specific areas of the state, we believe it is critical that USDA at the national level provide more guidance to the states. For example, state NRCS and FSA offices should be strongly encouraged to work closely with state resource agencies to target GRP enrollment to areas of the state that have been identified as important wildlife corridors, or to eligible lands that are providing (or will provide, if restored), habitat for species identified in State Wildlife Action Plans.

One way to accomplish this would be for USDA to use the national allocation process to reward the states that do the best job of implementing GRP in a manner that maximizes conservation values, as discussed above.

Enrolling land from CRP

GRP contains a new provision which allows land under expiring CRP contracts to be enrolled in GRP. This is an important provision. CRP contracts on approximately 3.9 million acres will expire at the end of September, and because the 2008 farm bill lowered CRP's acreage cap to 32 million acres, USDA only has the authority to offer contract extensions or re-enrollment to holders of contracts covering up to 1.4 million acres. This situation represents a significant threat to grassland-dependent bird species such as the lesser prairie chicken and the sage grouse in areas where the birds depend on CRP lands and a significant percentage of the acres currently enrolled are under soon-to-expire contracts. The problem cannot be solved using GRP alone, as it is a small program and only 10% of the total number of acres enrolled in GRP each year can be expiring CRP acres. USDA can and should, however, use GRP and other conservation programs in addition to CRP to provide incentives to landowners to keep land under expiring CRP contracts in grass when doing so will protect habitat for grassland-dependent species, particularly species like the lesser prairie chicken, which could be listed under the Endangered Species Act if its population declines further.

Compensation for easements and rental contracts

Sec 1415.10(h) on Environmental Services Credits appears to be intended to facilitate the participation of GRP easement holders in ecosystem services markets. We believe that ecosystem services markets can be an important incentive for increasing conservation on working lands and potentially a valuable source of income for producers. In order for these markets to create real environmental benefits, they must be administered in a way

that assures that the services being purchased have not already been purchased by another entity. Although USDA is asserting no interest in the credits that may be generated due to participation in GRP, it is possible that the rules of an ecosystem services market may preclude the purchase of credits that may have already been partially funded by the taxpayer. In almost all cases it is highly likely that USDA has only financed the creation of a portion of the credits that may be generated by an operation, and that a large percentage of the potential ecosystem service credit is being generated through ongoing labor and investment on the part of the producer. It would help ensure the ability of all USDA conservation program participants to sell ecosystem services credits in any ecosystem services market if USDA would calculate what portion of the potential credit they have financed, and what portion remains that could be sold into an ecosystem services market. This would create more stability and assurance for producers who wish to participate in these markets.

Sec. 1415.10(h)(2) stipulates that landowners are encouraged to request a compatibility assessment before entering into an environmental credit agreement. We recommend that this assessment be required in order to ensure that easement provisions will not be violated.

Cooperative agreements with eligible entities

Sec. 1415.17(e)(1) indicates that NRCS has the right to inspect and enforce an easement if the eligible entity fails to enforce the easement. As acknowledged in the preamble to the rule, the statute describes this as a “contingent right of enforcement.” The use of the word “contingent” implies that this right should only be exercised under certain circumstances. The preamble indicates that these circumstances may include situations such as condemnation of the property protected by the easement. In order to alleviate landowner concerns about arbitrary use of this right, the easement deed should make clear that the Federal right will only be exercised under certain specific circumstances.

We appreciate the opportunity to comment on the Interim Final Rule for the Grassland Reserve Program, and would welcome the opportunity to discuss these comments with you further.

Sincerely,

Sara Hopper, Agricultural Policy Director
Britt Lundgren, Agricultural Policy Specialist
Environmental Defense Fund
1875 Connecticut Ave, NW, Suite 600
Washington, DC 20009