



ENVIRONMENTAL DEFENSE FUND

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Easements Program Division
Natural Resources Conservation Service
Healthy Forests Reserve Program
P.O. Box 2890
Room 6819-S
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Environmental Defense Fund submits these comments on the Proposed Rule for the Healthy Forests Reserve Program, published January 14, 2009, in the Federal Register.

- State listed species and other species of concern. The rules lack clarity as to how wildlife species not listed under the federal Endangered Species Act will be prioritized for protection through this program. We suggest addressing this by: 1) defining "State-listed species" more precisely and including in this category species listed in State Wildlife Action Plans as Species of Greatest Conservation Need, and 2) by specifying that "species identified by the Chief for special consideration for funding" should be native species chosen on the basis of conservation need. This could apply at regional, state, and national levels. We therefore suggest the following clarifying revisions to the rule language:
 - In Section 625.2 (Definitions): add a definition of "State-listed species" as follows: A species listed as threatened or endangered under State endangered species laws, a candidate for such listing, or one listed in a State Wildlife Action Plan as a Species of Greatest Conservation Need.
 - In Section 625.3 (Administration) add the following new subsection: (f) The Chief shall identify native species for special consideration for funding in consultation with the State Conservationist and with advice from FWS, NMFS, State Fish and Wildlife Agencies, and State Technical Committees. Species will be identified because of population declines or other conservation concerns related to population vulnerability at the regional, state, or federal level, such as climate-sensitivity, catastrophic events, small or isolated populations, habitat degradation, or pest/pathogen outbreaks.
 - In Section 625.4 (Program requirements), in subsections (a) and (c)(2)(ii), add "in accordance with Section 625.3(f)" after "or species identified by the Chief for special consideration for funding."
- Application Procedures. We strongly support the agency's intent, as stated in the preamble to the proposed rule, to establish a sign-up process that "will ensure that the limited HFRP funding will be used for the best projects nationally, and help maximize the expected benefits related to habitat restoration and protection that address the recovery of endangered species,

- improvement in biodiversity, and enhanced carbon sequestration.” To this end, we suggest that additional language be added to Section 625.5(a) (Sign-up procedures) to clarify that “project proposals” from State Conservationists should be proposals to use HFRP strategically to enroll willing landowners in an area or areas of the state where such enrollments will do the most to benefit national priority forest types (e.g., the longleaf pine ecosystem and the mesic hardwood systems of the Appalachian region, including the Cumberland Plateau) or will do the most to support the program purpose of benefitting species that are listed as endangered or threatened under section 4 of the Endangered Species Act, or candidate species, state-listed species, or species of special concern. Because resources for the Program are so limited, we strongly urge the agency to consider allocating Program resources only to those states in which State Conservationists have developed proposals likely to result in the most significant and cost-effective benefits to these forest ecosystems and species.
- Ranking procedures. In the preamble to the proposed rule, the priorities for enrollment in HFRP are described as being primarily endangered or threatened species and secondarily candidate species, state listed species, or special concern species. The ranking considerations in Section 625.6 seem to be in order of importance in the ranking process, but it is not clear how different ranking considerations will be weighted. Ranking considerations (3) and (4), improvement of biodiversity and increased capability of carbon sequestration, are followed by the phrase “if enrolled”. This seems to imply that these considerations will not be primary ranking factors but will only be used to prioritize between applicants that would otherwise be selected for funding because of the benefits the application will provide for the primary program purposes. This section should clearly separate the primary ranking considerations identified in the statute from secondary ranking considerations identified by NRCS. We also suggest that NRCS also coordinate with state Fish and Wildlife Agencies in the process of developing ranking criteria, because of the expertise these agencies have in State Wildlife Action Plans and the designation of Species of Greatest Conservation Need within these plans. We suggest the following changes to section 625.6:

(a) Primary ranking considerations. Based on the specific criteria set forth in a signup announcement and the applications for participation, NRCS, in coordination with FWS, NMFS, and State Fish and Wildlife Agencies, shall consider the following factors to rank properties:

- (1) Estimated conservation benefit to habitat required by threatened or endangered species listed under Section 4 of the ESA;
- (2) Estimated conservation benefit to habitat required by species not listed as endangered or threatened under Section 4 of the ESA but that are candidates for such listing, State-listed species, or species identified by the Chief for special consideration for funding; and
- (3) Estimated cost-effectiveness of the particular restoration cost-share agreement, contract, or easement, and associated HFRP restoration plan;

(b) Secondary Ranking Considerations. Based on the specific criteria set forth in a signup announcement and the applications for participation, NRCS, in coordination with FWS, NMFS, and State Fish and Wildlife Agencies, may also consider the following factors to rank properties:

- (1) Estimated improvement of biodiversity, if enrolled;
- (2) Potential for increased capability of carbon sequestration, if enrolled;
- (3) Availability of contribution of nonfederal funds;
- (4) Significance of forest ecosystem functions and values; and
- (5) Other factors identified in an HFRP sign-up notice.

The statute includes cost effectiveness as a primary ranking consideration. The rule does not clearly articulate how cost effectiveness will be estimated. We recommend that the cost effectiveness of the restoration cost-share agreement, contract, or easement and associated HFRP restoration plan be calculated by dividing the total expected environmental benefits by the total expected cost of the project. Separate ranking pools should be used to fairly evaluate the cost effectiveness of short term and long term agreements.

- **Landowner Protections.** The Proposed rule contains a good new discussion of how participating landowners can obtain Landowner Protections through Incidental Take Authorization, Safe Harbor Agreements, or Candidate Conservation Agreements with Assurances. However, the wording in section 625.13(d) is not clear. This section begins with the sentence “An HFRP participant who enrolls land in HFRP and whose conservation treatment results in a net conservation benefit for listed, candidate, or other species.” It seems that this sentence is intended to imply that these are the people who landowner protections will be made available for, but as the sentence is not complete this is inconclusive. We suggest that this sentence be modified to make it evident that the Landowner Protections discussed in this section are intended to apply to HFRP participants.
- **Easement Modification.** The purpose of HFRP as defined in statute is “restoring and enhancing forest ecosystems – (1) to promote the recovery of threatened and endangered species; (2) to improve biodiversity; and (3) to enhance carbon sequestration.” The provision in section 625.14 of the proposed rule expands on the three program purposes and requires restoration plan modifications to also “result in equal or greater wildlife benefits and ecological and *economic* values to the United States” (emphasis added). Economic benefits are not a stated program purpose, nor are they included in the description of HFRP restoration plan development in section 625.13. We recommend that the standard governing modifications of a restoration plan should be that modifications have no adverse effect on the forest ecosystem and result in net conservation benefits (related to the program purpose) still expected to be achieved.

There is a further inconsistency within Section 625.13 of the interim rule pertaining to the modification of restoration plans. The first sentence of that Section says that modifications may be approved if they do not “modify or void provisions of the easement.” Only three sentences later, however, the rule says that certain modifications “may require execution of an amended easement.” These two sentences are obviously in conflict: a restoration plan that does not modify or void provisions of the easement cannot also require execution of an amended easement.

- **Compatible Uses.** There is discussion in Section 625.11 about determining compatible uses for easement Section 625.10, which applies to 10-year cost share agreements. However, the proposed rule says nothing about compatible use determinations for 10-year cost share agreements. We suggest that it may be more important to address the issue of compatible uses in the context of 10-year agreements than in the context of easements, particularly if the standard “negative restricted easement deed” is used. As the preamble to the interim rule notes, the drafter of a negative restrictive easement “anticipates the possible uses of the property that might interfere with forest resources and specifically prohibits them.” Unless specifically prohibited, all otherwise lawful uses of the property are permitted. Thus, for those properties enrolled in the Program through easements, what is essential is that the easement (1) clearly specify those uses that are prohibited, and (2) clearly obligate the landowner to manage his property in accordance with the restoration plan. For properties enrolled in the Program through 10-year cost share agreements, there may be a need for the agreement to include a provision by which the landowner agrees not to engage in any use of the property that is incompatible with the objectives of the restoration plan. If so, some mechanism to determine such compatibility is needed, but it should not be needed for properties subject to easements, since the easement itself specifically prohibits certain uses and allows all others.

Sincerely,

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