



AMERICAN FARM BUREAU FEDERATION®

600 Maryland Avenue S.W. • Suite 800 • Washington, DC • 20024 • (202)406-3600 • fax (202)406-3604 • www.fb.org

August 14, 2006

Robin Heard
Acting Director, Easement Program Division
Natural Resources Conservation Service
P.O. Box 2890
Washington, D.C. 20013

RE: COMMENTS ON HEALTHY FOREST RESERVE PROGRAM

The American Farm Bureau Federation (AFBF) is pleased to offer these comments in support of the Healthy Forest Reserve Program (HFRP).

The HFRP was authorized by Title V of the Healthy Forest Restoration Act of 2003. Pursuant to the Act, the Healthy Forest Reserve is established for the purposes of restoring and enhancing forest ecosystems for listed and candidate species under the Endangered Species Act (ESA) and for the improvement of biodiversity and carbon sequestration.

The program is administered by the Natural Resources Conservation Service (NRCS). Under the program, private landowners would be able to enroll eligible lands into the Healthy Forest Reserve on a voluntary basis, pursuant to a sign-up notice from NRCS. The statute provides three enrollment options: 10-year cost-share agreements, 30-year easements or easements not to exceed 99 years. The amount of easement and/or cost-share payments depends on the enrollment option that is selected. Lands enrolled in the HFRP are subject to the provisions of a restoration plan developed by the landowner and NRCS, in conjunction with the Fish & Wildlife Service and NOAA Fisheries, which have jurisdiction under the ESA. Enrolled landowners are eligible for technical assistance to comply with the plans and also are eligible for incidental take, safe harbor and other protections afforded under the ESA.

The HFRP represents—on a very limited basis—the kind of inter-agency integration of conservation programs that is essential to make efficient use of cost-share dollars and to implement conservation practices effectively on the ground. Effective conservation is a complex combination of several different considerations—wildlife and habitat, resource health, erosion control and water quality to name a few. Practices and programs often emphasize one of these conservation goals and hope that the others will be promoted as well. That does not always happen, however.

One of the impediments to this holistic approach to conservation can be the narrow interest and mission of the particular federal agency operating the program. For example,

Fish & Wildlife Service and NOAA Fisheries have jurisdiction over listed species under the Endangered Species Act, the Department of Agriculture and NRCS have jurisdiction over land resource programs like the Conservation Reserve Program (CRP) and the Environmental Quality Improvement Program (EQIP), where landowners are paid to implement conservation practices on their lands for soil control and other purposes. The Environmental Protection Agency (EPA) is responsible for clean water and water quality issues. In many cases, these programs might be enhanced by the involvement of the other agencies and a joint but streamlined effort to achieve mutual conservation goals, but they are constrained from doing so for various reasons.

The HFRP breaks this mold in a positive way. Although administered through the NRCS, the program also brings in the Fish & Wildlife Service and NOAA Fisheries to advise on the listed and candidate species aspects of the program. It is significant that this type of inter-agency cooperation and integration embodied in the HFRP was the result of legislation, because it is only through legislation that these agencies can integrate functions in a positive way.

The program combines the goals of forest restoration, habitat enhancement, and carbon sequestration into a single program. It shows the beginnings of what conservation programs of the future must be in order to be effective.

The HFRP embodies the principles of Executive Order 13352 with regard to “cooperative conservation” involving the collaboration of federal agencies in conservation programs.

We therefore believe this program has significance far beyond the limited purpose for which it was established. It is the beginning of the second generation of conservation programs, where different conservation functions and agency missions are integrated into a single program. The manner in which NRCS, FWS and NOAA Fisheries interact to combine the goals of ESA recovery and healthy forest restoration will serve as a model for future conservation programs, whether administered by NRCS, FWS, NOAA Fisheries or by some other agency.

The statute requires that the program be carried out in coordination with FWS and NOAA Fisheries. It is important that this “coordination” be conducted in a cooperative manner in which each agency is as respectful of the goals of the other as well as its own. Agencies should work together to achieve the aims of the program with regard to species recovery and forest restoration, recognizing that the achievement of one necessarily helps achieve the other.

One other aspect of this program that is of interest is that it contemplates active management and enhancement of habitat. Even the easement options provide for the active management of the land. In most cases, experience has shown that lands actively managed for species do better than lands set aside with little or no management. Forest restoration and species habitat enhancement require hands-on implementation of land use practices that achieve the goals of the program.

Following are some specific comments on various aspects of the proposal:

1. Landowner Protections. The legislation requires NRCS to make available “safe harbor or similar assurances of protection” to participating landowners. Since the landowner protections cited in the statute are ESA landowner protections under the jurisdiction of FWS and NOAA Fisheries, we are particularly interested in how NRCS plans to meet this statutory obligation.

We support the use of all landowner protections available under the ESA to the maximum extent practicable in the implementation of this program. Safe Harbor Agreements, Candidate Conservation Agreements with Assurances, Incidental Take Statements, No Surprises—these and other protections should be fully available to participating landowners. The availability of these protections will provide attractive incentives for landowners to participate, and will allow landowners to conduct habitat enhancement projects without fear of unwittingly violating section nine take prohibitions.

The issue presented by the HFRA is that it requires NRCS to make such protections available, while FWS and NOAA Fisheries are responsible for administering them.

The system can be made to work through coordination among agencies. Requirements of safe harbor agreements or CCAAs can be developed in coordination by all agencies prior to the announcement of a specific program sign-up, and included in the enrollment specifications. This would be the framework for any such protection. Required consultations for any specific enrollment might occur before or during the enrollment period, and any terms and conditions resulting from the biological opinion could be incorporated in habitat restoration plans that must accompany an enrollment. With coordination and section seven consultation having occurred as early in the process as possible, any necessary conditions can be included in the restoration plans instead of requiring their amendment. NRCS would provide technical assistance to the agencies and to landowners as contemplated by the rule.

The rules provide that if the landowner protection requires a practice or term that is not contained in the habitat restoration plan, it will be added to the plan and be eligible for cost-share assistance. Careful and early coordination between agencies would eliminate the need for application of this provision. Wildlife agencies and NRCS should coordinate in the development of both habitat restoration plans and landowner protections to ensure consistency.

It is particularly important that participating landowners not be required to undergo a section seven consultation with regard to every activity carried out in accordance with the terms of their agreements or easements. A single consultation between NRCS and the wildlife agencies should be sufficient to

encompass activities that would be undertaken by individual landowners pursuant to their agreements.

The key to the effective and efficient implementation of landowner protections is the inter-agency coordination at the earliest stages of enrollment. The more coordination that can occur prior to announcement of an enrollment or to the end of an enrollment period, the fewer delays and less confusion will be encountered.

2. Enrollment Criteria, Ranking and Selection. NRCS indicates that enrollments may be given priorities on the basis of regional forest ecosystems, or other basis. The act provides some flexibility to NRCS in the selection of enrollments. With the limited acreage available in the reserve (up to two million total acres), the lands and ecosystems subject to enrollment must be carefully chosen.

The selection of lands for enrollment should reflect a combination of factors, including: species in need of habitat enhancement, percentage of private lands in an ecosystem (the higher the percentage, theoretically the more impact the program might have), available funding and the condition of lands within an ecosystem, to name a few.

Selection should be made in close coordination with FWS and NOAA Fisheries. With limited conservation funding and limited acreage, it is important to achieve the highest level of conservation possible. That might mean enrollments based on the most endangered species, the most endangered habitat or any combination. The priorities of FWS, NOAA Fisheries and NRCS should be meshed together as much as possible so that scarce resources are spent in the places where there is the greatest need or where the greatest results can be achieved.

One of the priorities for habitat protection under the ESA is “critical habitat,” which is that habitat that is essential for the survival and conservation of a species. It is designated by either FWS or NOAA Fisheries through a rule-making process.

“Forest ecosystems” include more than just lands with trees on them. They can include rangelands and other lands that are integral parts of a forest ecosystem and vital to the habitat of species or the enhancement of biodiversity and carbon sequestration. These lands should be eligible for inclusion in the HFRP to the same extent that areas covered with trees might be.

Selection of regional forest ecosystems also requires, to some extent, the development of regional criteria and ranking procedures. Funds would be distributed on a regional basis and projects must be evaluated regionally instead of at the state level. In such cases, a regional ranking system should be developed in contrast to the traditional state system that is used for other conservation programs such as EQIP. Projects in a regional enrollment must be judged on the same criteria without state variations. In this regard, we suggest that affected

state conservationists develop a uniform set of ranking criteria for a particular regional enrollment.

3. Technical Assistance Requirements Should be Coordinated Among Agencies.

The proposed rule contemplates NRCS providing technical assistance to landowners to help them obtain a Safe Harbor Agreement or other form of landowner protection. Similarly, there may be circumstances where FWS or NOAA Fisheries might provide technical assistance in the administration of the HFRP.

In either situation, the technical assistance that is provided must be consistent with the methods and practices of the other agencies. Coordination between and among agencies is essential in order for technical assistance provided by the one to be accepted by the agency administering its program. For example, NRCS personnel must know what and how to implement practices for safe harbor agreements that will be acceptable to the wildlife agencies that grant them.

4. The Term “Consultation” As Used in the Rule is Confusing and Should be Changed.

The rule defines the term “consultation” or “consult with” to mean “to talk things over for the purpose of providing information, to offer an opinion for consideration...” The term “consultation” under section seven of the ESA is a term of art that has a long-standing and defined meaning. The rule acknowledges that “the term under HFRP does not have the same meaning as that same or similar term is understood to have under the ESA.” Because one of the HFRP’s goals is to improve habitat under the ESA, the result of one term having two different meanings under two different statutes will be confusion.

Part of the challenge of integrating functions into a single program is the reconciliation of possible confusion in terminology used by the agencies. This integration should avoid the use of terminology that might be confused with well established terminology in another statute. NRCS and the wildlife agencies must reconcile such differences as well with regard to this rule.

In this case, the ESA definition of “consultation” is the more established and understood definition. It has been part of the ESA since its enactment in 1973. NRCS should consider using another term. We realize that the term is used in the statute, but suggest that another term be used in the rule.

We offer the following suggestion to be added in the definition section:

“The term ‘consult’ as used in the statute shall have the same meaning as ‘confer,’ which is defined herein and used in this regulation.”

“Confer” then would have the same meaning as “consult” currently has, and the term “confer” shall be used in the rule instead of “consult.” In this manner, “consult” would be recognized as being a statutory term (not an insignificant recognition) but there will be no room for confusion in the rule. This type of distinction will erase any confusion.

We have no doubt that the use of the term “consult” in the Healthy Forest Restoration Act was not intended to have the same meaning as the term “consult” in the ESA. The passage of time blurs these intentions and results in misconceptions about the true meaning of terms. The use of the term “confer” instead of “consult” may not seem to be a big issue now but it could be an issue over time if a court at a later time is tasked with construing the term “consult” as used in the rule. A carefully drafted rule that avoids the term will not present that opportunity for confusion.

5. We Support Standardization of the Appraisal Process Used by NRCS.

The appraisal methodology used for valuing easements in the HFRP follows the Uniform Appraisal Standards for Federal Land Acquisitions or the so-called “Yellow Book” appraisal method. This method uses appraisals before the easement and after the easement and compares the difference in value over the entire property. This method is being introduced into other NRCS programs like the Wetlands Reserve Program. The Yellow Book method is used by most other federal agencies.

We support the employment of standard appraisal methods in all NRCS programs. Enrolled easements should be valued consistently in the same way across all NRCS programs. It provides uniform standards for NRCS appraisers and uniform expectations for farmers and ranchers considering enrolling property in one of the NRCS programs. Since the Yellow Book method is already used by most other federal agencies, it is an appropriate method to provide uniformity and consistency to the NRCS appraisal process.

6. There Should be No “Quotas” for Each of the Enrollment Options.

The HFRA provides three enrollment options for eligible lands in the Healthy Forest Reserve program: 10-year restoration agreements, 30-year easements and easements of up to 99 years. The act provides different payment and cost-share formulas for each option.

We are pleased that the program does not set any quotas for any of the options. Landowners and land use types within forest ecosystems may prefer one or other of the options and they should have the latitude and flexibility to choose the option that best fits their operation. For example, forested lands may be more amenable to the 30- or 99-year easement options, while a working farm or ranch

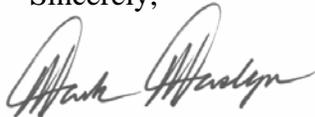
within the forest ecosystem may prefer the 10-year agreement (Farms and ranches are part of forest ecosystems and should be eligible for participation in the HFRP if they meet the eligibility criteria). Landowners should not be denied enrollment opportunity because of their choice of option.

We are pleased that the program is not so rigidly structured that it mandates a certain percentage of enrollment acres in each category, allowing the program to flow with the types of options chosen by the landowners. We hope that the agency will not internally adopt “informal quotas” that might limit the application of the program.

For 10-year contracts, the program properly allows land users who are not the owner to participate. Easements are different, since they involve transfer of a property right that can only be done by the owner of the land.

We look forward to the implementation of this program because of its value and contributions to conservation in the present and its value as a template for future cooperative conservation programs among different federal agencies and different federal programs. We look forward to assisting the agency in promulgating rules and working cooperatively with FWS and NOAA Fisheries to develop a program that will incorporate and effectuate the goals of the ESA, Healthy Forests, biodiversity and carbon sequestration efficiently and effectively.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Maslyn". The signature is fluid and cursive, with the first name "Mark" being more prominent than the last name "Maslyn".

Mark Maslyn
Executive Director
Public Policy