

U.S. Fish and Wildlife Service



Division of Fisheries & Aquatic Resource Conservation

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To:

Mr. John Glover

Acting Director

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FWS Comments -
Proposed Rule for the
Healthy Forests Reserve Program

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From:

U.S Fish & Wildlife Service
Division of Fisheries & Aquatic Resource Conservation
4401 North Fairfax Drive, MS 700
Arlington, VA 22203
Tel: (703) 358-1715
Fax: (703) 358-2487
<http://fisheries.fws.gov/>



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



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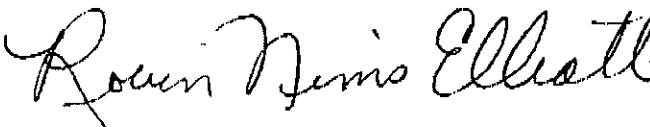
John Glover, Acting Director
Easement Programs Division
United States Department of Agriculture
Natural Resources Conservation Service
Healthy Forests Reserve Program Comments
P.O. 2890, Room 6819-S
Washington, DC 20013

Dear Mr. Glover:

The Fish and Wildlife Service (Service) has reviewed the Natural Resources Conservation Service's (NRCS) proposed rule amending regulations for the Healthy Forests Reserve Program (HFRP) and offers the attached comments for your consideration. The comments are submitted in response to the publication and request for public comments on the HFRP proposed rule in the *Federal Register* on January 14, 2009 (Vol. 74, No. 9, Pages 1954-1971). The proposed rule makes changes to the HFRP regulations resulting from enactment of the Food, Conservation and Energy Act of 2008.

We appreciate the opportunity to review and comment on the proposed rule and to work closely with NRCS on the implementation of HFRP over the past several years. Please contact me at (703) 358-2161, or Dave Walker, Farm Conservation Programs Coordinator at (703) 358-2310, if you have any questions or need further information.

Sincerely,


for David J. Stout
Chief, Division of Habitat and Resource
Conservation

Attachments

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Fish and Wildlife Service Comments on the Proposed Rule for the Healthy Forests Reserve Program

March 20, 2009

General Comments

The Service appreciates the opportunity for close coordination with Natural Resources Conservation Service (NRCS) in the implementation of the Healthy Forests Reserve Program (HFRP). The proposed rule will continue this essential coordination throughout program implementation, including determinations of land eligibility, establishing enrollment priorities, development of HFRP restoration plans, modification of restoration plans, and transfers of land. The Service supports the coordination requirements in the proposed rule and recommends the expansion of coordination beyond the Service and the National Marine Fisheries Service to the appropriate state fish and wildlife agency in all aspects of program implementation. This recommendation recognizes that lands eligible for enrollment in HFRP include lands that will be restored, enhanced or improved for the well-being of State-listed species and other species of special concern for which States have management authority and responsibility. For some species that authority and responsibility is shared by the Service and the States.

To ensure that all three program objectives are working toward a common goal and not at cross purposes, the focus of the program has been and should continue to be on native plants and animals. The proposed rule should clarify that conservation practices designed to achieve the HFRP objectives of promoting species recovery, improving biodiversity, and enhancing carbon sequestration will contribute to the restoration and enhancement of native forest ecosystems.

The Service recommends that the rule clearly identify how landowner protections operate for program participants who may choose to return the enrolled area to baseline conditions upon expiration of the term of the HFRP easement, 30-year contract or restoration cost-share agreement. The rule also needs to differentiate between landowner protections that are voided as a result of termination of a contract or agreement (section 625.13(d)(1)(iv) and landowner protections that are retained until the contract or agreement expires, as long as the participant is complying with the terms under which the landowner protections were given, including a return to baseline conditions upon expiration of the contract or agreement.

The 2006 HFRP interim final rule included a more comprehensive description of landowner protections that included an explanation of how the two approaches under sections 7 and 10 of the Endangered Species Act (ESA) authorize incidental take that may occur as a result of a return to baseline conditions. The proposed rule does not address this important aspect of landowner protections, but could do so by adding the

preamble language from the 2006 interim final rule to the preamble of the final HFRP rule with modifications for changes made in the 2008 Farm Bill, or incorporating the information from the 2006 preamble in the appropriate sections of the final HFRP rule as described in the page-specific comments below

Specific Comments

Page 1964, Section 625.1(b) - Purpose and Scope

The Service recommends modifying the second program objective as follows:

- (2) "Improve **native** plant and animal biodiversity; and"

Page 1965, Section 625.2 - Definitions

To ensure that landowner protections include returning to baseline conditions, the Service recommends adding the following language from the preamble of the 2006 HFRP interim final rule at the end of the definition for *Landowner Protections*:

Under either approach, Landowner Protections will most likely allow HFRP participants to provide beneficial habitat that may attract listed species to their property, or increase the number of listed species already present, while not violating the ESA if the program participant chooses to return the enrolled area to baseline conditions upon expiration of the term of the HFRP easement, contract, or restoration cost-share agreement.

Page 1966, Section 625.4 (c)(2)(i) - Program Requirements

In determining whether land is considered eligible for enrollment, the Service recommends NRCS replace the language in the proposed rule with language found in the statute and in the preamble to the proposed rule on page 1956. The Service also recommends that eligible lands provide program benefits within the contract period. A suggested revision to Section 625.4 (c)(2)(i) and (ii) on page 1966 follows:

- (i): Within the contract period, such private land will restore, enhance, or otherwise measurably increase the likelihood of recovery of a species listed as endangered or threatened under Section 4 of the ESA; or**
(ii): Within the contract period, such private land will restore, enhance, or otherwise measurably improve the well-being of species that are not listed as endangered or threatened under Section 4 of the ESA but are candidates for such listing, state-listed species, or is a species identified by the Chief for special consideration for funding.

Page 1967, Section 625.8 (f) - Compensation for easements and 30-year contracts – Environmental Service Credits

The Service supports the approach taken by NRCS in addressing Environmental Service Credits and the need to ensure activities under environmental credit agreements meet HFRP program purposes and requirements. The Service recommends that NRCS maintain consistency by using the language in this paragraph for all other Farm Bill conservation program rules that address Environmental Service Credits.

Page 1968, Section 625.11(b)(2) - Easement participation requirements and 625.12(b)(2) 30-year contracts

The rule should recognize that some rights are traditionally reserved to the landowner, such as the right to control public access and the right to recreational use, such as hunting and fishing. Hunting and fishing should be removed as an example of compatible uses permitted by NRCS in Section 625.11(b)(2) and as an example of landowner activities allowed by NRCS in 625.12 (b)(2). Because prescribed fire can be an important tool in achieving HFRP goals and objectives, the Service recommends adding prescribed fire to the examples of compatible uses and offers the following revision for both sections of the rule:

The right to permit compatible uses by the landowner of the easement area/arca under contract, which may include such activities as the use of prescribed fire, grazing, and silvicultural practices, if such use is consistent with the restoration plan and the long-term protection and enhancement of the purposes for which the easement/contract was established.

Page 1969, Section 625.13 (c) - The HFRP restoration plan development and landowner protections

Consistent with our general comments provided above, the Service recommends the following modification to this section:

“To the extent practicable, eligible practices and measures will improve native plant and animal biodiversity and optimize the sequestration of carbon through management that promotes diverse and high quality native forest ecosystems to accomplish the goals of the restoration plan.”

Page 1969, Section 625.13(d) - The HFRP restoration plan development and landowner protections

To ensure that landowner protections include returning to baseline conditions, the Service recommends additional language consistent with the preamble to the 2006 HFRP interim final rule.

Add a new paragraph (iii) to Section 625.13(d)(1) Incidental Take Authorization:

The program participant will be covered by the authorization to NRCS for incidental take associated with restoration actions, management activities, or if the landowner so desires, returning to baseline conditions at the end of the applicable period.

Add a new paragraph (iv) to Section 625.13(d)(2) SHA or CCAA:

In exchange for their commitment to undertake conservation measures, the landowner receives a permit under section 10 of the ESA from FWS or NMFS authorizing incidental take of species covered by the SHA or CCAA that may occur as a result of restoration actions, management activities, or a return to baseline conditions at the end of the applicable period.