

**Decker, Denise - Washington, DC**

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**From:** lfrim@aol.com  
**Sent:** Tuesday, March 17, 2009 6:05 PM  
**To:** RA.dcwashing2.frpp  
**Subject:** Comments on the FRPP Proposed Rulemaking due today  
**Attachments:** commentsre1-16-09propruleTVCT.doc

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**I've been having trouble with internet and faxing, so I'm sending these again via email. Please accept these comments on the Proposed FRPP rulemaking. Larry Frimerman**

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March 16, 2009

Easement Programs Division  
Room 6819-S  
Natural Resources Conservation Service  
U.S. Department of Agriculture  
P.O. Box 2890  
Washington, DC 20013-2890

RE: Farm and Ranch Lands Program Comments

Enclosed are comments from the Three Valley Conservation Trust concerning the Farm and Ranch Lands Protection Program Interim Final Rule (Docket Number NRCS-IFR-08006) as published on January 16, 2009. We request that our comments be considered and adopted as NRCS revises the rule and implements the program.

We appreciate the opportunity to provide these comments and encourage you to contact us should you have any questions.

*Larry Frimerman*

Larry Frimerman  
Executive Director  
5920 Morning Sun Road  
Oxford, Ohio 45056

Three Valley Conservation Trust Comments  
On the Interim Final Rule for the  
FARM AND RANCH LANDS PROTECTION PROGRAM

Docket number NRCS-IFR-08006

Issue: Contingent Right of Enforcement

The Three Valley Conservation Trust believes that the statutory language of FRPP (Section 1238I(f)(2)) states that the Secretary “shall require the inclusion of a contingent right of enforcement for the Secretary in the terms of the conservation easement or other interest in eligible land that is purchased using cost-share assistance provided under the program.” In my read of the the Joint Statement of Managers accompanying the conference report, the Joint Statement articulates Congressional intent in this regard, stating that the Managers “do not intend this right to be considered an acquisition of real property, but in the event an easement cannot be enforced by the eligible entity the Federal Government shall ensure the easement remains in force.”

As with comments submitted by the American Farmland Trust, we identify concerns with respect to how this is being interpreted and carried out in the above-referenced draft Rule. “In its description of changes to the regulation, NRCS explains that “it cannot accomplish the intent of the Managers as reflected in the legislative history regarding the effect of the ‘contingent right of enforcement’ and give meaning to the plain statutory language of FRPP.” NRCS concludes that the contingent right of enforcement as used in FRPP means a vested real property right, which provides the Secretary, on behalf of the United States, the right to enforce the terms of the easement for the duration of the easement. NRCS indicates that it is interpreting the term ‘contingent’ to mean that the Secretary exercises that right under certain circumstances, not that the right itself is “contingent;” hence, to avoid confusion, NRCS refers to this right throughout the rule as simply a “right of enforcement.” In Section 1491.3, NRCS defines this right as “an interest in real property set forth in the conservation easement deed, equal in scope to the right of inspection and enforcement granted to the grantee, that the United State Government may exercise under specific circumstances in order to enforce the terms of the conservation easement.”” (AFT Comments).

We believe that the extent of requirements and duplication of effort that emanate from the above interpretation by the NRCS in the proposed Rulemaking creates unnecessary layers of bureaucracy in order to protect the interests of the United States.

While extremely well intentioned and crafted, we believe that Congress intended states and eligible entities to have greater flexibility in establishing and using guidelines that meet certain basic requirements. These include, but are not limited to:

- certified appraisers using either USPAP or Yellow Book standards,
- Broad easement language guidelines that meet certain basic requirements,

- Title reviews and certifications
- Impervious surface, soils types and forest cover provisions
- State-based priorities for selection of projects

Proposed measurements of the percentage of a county's land subject to development pressure, or of criteria demonstrating a strong preference to properties subject to development pressure, are contrary to very effective state laws, and could, in fact, prove counter to the aims of the program. While I personally would want to see the most sensitive lands subject to the greatest development pressure be protected first, Congress did not opine on this issue, and it would likely lead to islands of farmland not sustainable for the continuance of agriculture or for agricultural infrastructure demanding the clustering of remaining farmland and farms.

In addition, the requirements for certification of funding for easement defense and enforcement appear to unduly limit participation in this vital program. It may be that the drafters of the Proposed Rule intend for all land trusts to be fully Accredited, or to meet the Land Trust Alliance and Accreditation Commission requirements. Out of more than 1600 land trusts in the US, only a fraction can go through the accreditation process at a time, and hundreds of the most successful and experienced land trusts have not gone through the accreditation process. It would be more appropriate to require the demonstration that a land trust or other entity be a Qualifying Conservation Organization under the Internal Revenue Code (Section 170(h)), and that the eligible entity demonstrate the wherewithal to enforce and defend its easements. This could be done through the establishment of an effective easement monitoring program (with demonstrated annual monitorings), a monitoring endowment, an easement defense fund (or certified obtaining of easement defense insurance and/or services), and sufficient easement defense and monitoring language in the easement documents.

By the end of 2009, the Three Valley Conservation Trust will have more than 95 properties under permanent conservation easement covering more than 12,500 acres of farmland, woodlands, and sensitive stream habitats. These will include more than 8,000 acres funded through the efforts of NRCS and other entities. The Three Valley Conservation Trust has had Cooperative Agreements with NRCS since 2004, and has a well established easement program. A handful of entities in Ohio are of similar stature, and those that are have demonstrated levels of success and permanence by establishing monitoring, operations endowments, and have arranged for legal defense on at least a contractual basis.

Please understand that we are very pleased to be working with the fine staff here in Ohio as well as in Washington, DC. However, (given the fact that I served in state government and worked closely with federal agencies for the bulk of my own career, this actually is uncharacteristic of me), the NRCS must more closely pay heed to the intent of Congress to free entities to help NRCS better accomplish the mission of farmland preservation. To wit, creation of a broad set of minimum standards designed to eliminate unsustainable, short - term organizations would be in order. We hereby request adoption of the

proposed changes as described above, as well as those proposed by the American Farmland Trust and the Land Trust Alliance. Thank you for your kind attention.