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March 13, 2009

Mr. John Glover, Acting Director
Easement Programs Division
Natural Resources Conservation Service
Farm & Ranch Lands Program
1400 Independence Street
Room 6819-S
Washington, DC 20013

RE: Delaware's Comments to the Interim Rules - Docket Number NRCS - IFR-08006

Dear Mr. Glover:

We are pleased to attach our comments concerning the Farm and Ranchlands Protection Program Interim Final Rule. For Delaware, as is the case for many states committed to preserving America's vanishing farmland, it is crucial that the Final Rule reflect both the intent of Congress regarding this program and the urgency of the problem of farmland loss. Cooperation between the Federal government and all the parties striving to protect America's most important resource, our farms, must be our goal. Through cooperation between the states and our national government all our citizens will benefit in maximizing the acres of farmland preserved, protecting a secure food supply, enhancing the prosperity of our farm economy at this critical juncture and ensuring the myriad benefits to the environment which our farms provide.

We in Delaware stand ready to work together to preserve America's farms. We trust our comments will receive careful consideration and the Final Rule will reflect these important concerns. Thanks for the opportunity to comment.

Sincerely,

Ed Kee
Secretary of Agriculture

EK:cmm

cc: Mr. Robert F. Garey, Chairman, Delaware Agricultural Lands Preservation Foundation
F. Michael Parkowski, Esq., Counsel to the Foundation
Mr. Michael McGrath, Chief of Planning,

COMMENTS OF THE DELAWARE AGRICULTURAL LANDS PRESERVATION FOUNDATION AND THE DELAWARE DEPARTMENT OF AGRICULTURE ON THE INTERIM FINAL RULE FOR THE FARM AND RANCH LAND PROTECTION PROGRAM.

Docket Number NRCS-IFR-08006

The manner in which NRCS administered the Farm and Ranch Land Protection Program (FRPP) under the 2006 Interim Final Rule served to frustrate the purpose of the enabling legislation to effectively provide matching funding for the acquisition of conservation easements designed to protect soils on farmlands and ranches. The FRPP structure and measures adopted to protect the federal property interest in conservation easements impeded State and local programs and resulted in conflicts with State and local laws. The review process which was adopted can best be described as Byzantine. The complaints by those the FRPP was intended to benefit were many and substantive.

The enactment of the Food, Conservation, and Energy Act of 2008 (the 2008 Act) was greeted with a great deal of enthusiasm by funding recipients. The purpose clause of the program expanded the FRPP to include agricultural use and related conservation values (Section 1238I(b)). It provided for a Certification process for eligible State and local programs which promised reduced requirements and resultant efficiencies. The 2008 Act allows funding recipients to use easement deeds with their own terms and conditions to satisfy program requirements and to provide enforcement protection. Included is flexibility to impose limits on allowed impervious surfaces consistent with the agricultural activities conducted (Section 1238I(g)(4)).

The intended improvements of the FRPP under the 2008 Act are in large measure defeated under the proposed Interim Final Rule. The NRCS proposal in its current form is substantively little different than the much criticized 2006 Interim Rule. The proposed Interim Final Rule can best be described as a take back by NRCS, which deviates from the changes contained in the 2008 Act, and which reflects bad policy for achieving the intended purpose of protecting soils, agricultural uses and related conservation values.

THE CONTINGENT RIGHT OF ENFORCEMENT

The primary problem with the proposed Interim Final Rule is the interpretation that the contingent right to enforce required in conservation easements is a federal property right. From that interpretation comes numerous restrictions which are stated as needed to protect that federal property right. There is a prohibition against condemnations and approval requirements for utility and other uses of conservation easement property. It is these same restrictions which have prevented participation of or imposed great difficulties on potential funding recipients in the past.

The interpretation of NRCS that “the contingent right to enforce” is a federal property right is inconsistent with the legislative history. At 74FR 2815-2816 NRCS states its position regarding the interpretation as follows:

“The FRPP statute requires that the easement deed include a contingent right of enforcement. Given the requirement for inclusion of a contingent right of enforcement in the terms of the deed, the Agency has determined that it is Congress’ intent that such a right run with the land for the duration of the easement.

The only legislative history discussing the nature of the contingent right of enforcement is found in the Manager’s Report for the FRPP. Here the Managers indicated that Congress did not want the contingent right of enforcement considered an acquisition of real property. The House version of the FRPP included specific statutory language stating that the contingent right of enforcement was not a real property acquisition. However, Congress adopted the Senate version (with amendment) which did not include this language.”

The reference to the Manager’s Report does not accurately state the case. The language in the Manager’s Report found at pages 55-56 (Joint Explanatory Statement of the Committee of Conference) reads in pertinent part as follows:

“(19) Farm and Ranchland Protection Program (Section 1238I of FSA):

The House Bill provides for the Federal Government to retain a Federal contingent right of enforcement or executory limitation in an easement to ensure its enforcement. This right is not considered an acquisition of property.

The Senate amendment requires the protection of Federal investment through an executory limitation, but specifies that the executory limitation is not a Federal acquisition of real property and will not trigger any Federal appraisal or other real property requirements.

The substitute provides for the Federal Government to retain a Federal right of enforcement in an easement to ensure its enforcement. 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.

(Section 2401 of Conference substitute).”

Although qualifications have not been specifically included in 16 USC Section 3838 i (f)(2), this new term “contingent right of enforcement” has been directly linked throughout the legislative history with the qualifications that (1) the limitation is not a Federal acquisition of real property, and (2) the limitation does not trigger a Federal appraisal or other real property requirements.

Other references in the legislative history to the linkage of the term contingent right of enforcement to a disclaimer of federal property rights can be found in the published “Section by Section Comparison of House Bill, Senate Amendment, and Current Law” summary released by the Conference Committee on HR2419, which provides the following:

B. House Bill (H.R. 2419): “Sec. 2110 (Sec. 1238I FSA, as amended):
Allows

the federal government to retain a federal contingent right of enforcement or executory limitation in an easement to ensure its enforcement. This right is not considered an acquisition of property.”

C. Senate Amendment: “Sec. 2371(b)(3) (amends Sec. 1238I(d)FSA):
Requires

protection of Federal investment through executory limitation, but specifies that the executory limitation is not a Federal acquisition of real property and will not trigger any Federal appraisal or other real property requirements.”

See also the reference in the July 23, 2007 Report to Accompany HR 2419 at page 62 in which the federal contingent right of enforcement is addressed as follows:

“The Secretary may require the inclusion of a Federal contingent right of enforcement or executory limitation in a conservation easement or other interest in land for conservation purposes purchased with Federal funds under the program, in order to preserve the easement as a party of last resort. The inclusion of such a right or interest shall not be considered to be the Federal acquisition of real property and the Federal standards and procedures for land acquisition shall not apply to the inclusion of the right or interest.”

Likewise, on the Senate side in Senate Bill 2302, entitled, “Food and Energy Security Act of 2007”, under Section 2317, subsection 2317(b)(3)(d) reads as follows:

“Protection of Federal Investment—

(1) In general—The Secretary shall ensure that the terms of an easement acquired by the eligible entity provides protection for the Federal investment through an executory limitation by the Federal Government.

(2) Relationship to Federal Acquisition of Real Property—The inclusion of a Federal executory limitation described in

paragraph (1) shall—

- (A) not be considered the Federal acquisition of real property; and
- (B) not trigger any Federal appraisal or other real property requirements including the Federal standards and procedures for land acquisition;’ and ...”

The Senate Report 110-220 (Food and Energy Security Act of 2007) in its discussion of “Subchapter B – Environmental Quality Incentive Program”, reads in pertinent part as follows:

“Subsection (d) requires the protection of Federal investments through executory limitation, but specifies that the executory limitation is not a Federal acquisition of real property and will not trigger any Federal appraisal or other real property requirements.”

Nowhere in the legislative history is there a specific indication that the contingent right of enforcement was intended as a federal property right. Only the contrary view is expressed. Even the notion that eminent domain was to be prohibited with respect to conservation easements was rejected when an amendment to SB2302 introduced by Senator Casey at the mark up deliberations on October 24, 2007 was defeated by a voice vote. The amendment would have prohibited the use of eminent domain to condemn private property under conservation easements if the land was used for siting electric transmission facilities. The commentary to the proposed Interim Final Rule concedes that a contingent right of enforcement is not a standard property term (74 FR 2815). When the plain meaning of a statutory term involves some uncertainty, it is prudent to examine the legislative history. See Connecticut National Bank v. Germain, 503 U.S. 249, 253-254 (1992). The determination that the contingent right of enforcement is a federal property right as stated in the commentary to the proposed Interim Final Rule is not supported by the legislative history.

Recognizing that a contingent right to enforce is not a property term, the alternative approach would be to consider it as a contract right, thereby avoiding all the criticism rendered regarding the imposed limitations and restrictions involving condemnations, conservation easement uses, federal appraisals and federal title standards. Since NRCS is no longer to be a co-grantee of the conservation easement under the 2008 Act, its right to enforce the conservation easement could readily be derived from an assignment of a contingent right to enforce the conservation easement or chose of action from the grant recipient to NRCS under the Cooperative Agreement, with the assignment stated and acknowledged in the conservation easement. Other contractual mechanisms could also be employed.

Any concern regarding protection of the federal interest in the conservation easement can be more than adequately addressed by the imposition of a number of differing

requirements in addition to federal enforcement through the assignment approach. These requirements could include:

1. Recovery of the federal funds from the funds recipient;
2. Recovery of the proportionate share of condemnation proceeds;
3. Substitution of conservation easements with federal requirements on comparable property at no cost to NRCS; and
4. Denial of future NRCS funding

The allowance of limited conversion of conservation easement property to alternative uses could be permitted subject to satisfaction of conditions, such as those contained in State administered programs. Section 1238(f)(4) of the 2008 Act authorizes eligible fund recipients to use their own terms and conditions in conservation easements.

To achieve the purposes of the 2008 Act there is every reason to take advantage of changes to the prior legislation and its interpretation to promote flexibility, particularly for established State programs.

COOPERATIVE AGREEMENTS AND CONSERVATION EASEMENTS

The 2008 Act addresses the content of conservation easements under Section 1238(f)(4) as follows:

“(4) Minimum requirements

An eligible entity shall be authorized to use its own terms and conditions, as approved by the Secretary, for conservation easements and other purchase of interests in land, so long as such terms and conditions-

- (A) are consistent with the purposes of the program;
- (B) permit effective enforcement of the conservation purposes of such easements or other interests; and
- (C) include a limit on the impervious surfaces to be allowed that is consistent with the agricultural activities to be conducted.”

Recognizing that the purposes of the program have been expanded to support agricultural uses and related conservation values, the use of an eligible entity’s terms and conditions in the conservation easements requires deference to State and local laws which control such terms and conditions.

Absent direct conflicts with the 2008 Act, State and local terms and conditions derived from law need to be allowed in conservation easements with reasonable accommodation,

if necessary, to take into account federal interests. Some major problems of the past which need to be overcome are as follows:

1. Condemnation. If a condemnation of conservation easement property is necessary to serve a public purpose under State or local law the terms of the conservation easement need to recognize the allowance of such an action subject to terms and conditions which protect the federal interest, such as:
 - (a) payment of the proportionate share of the condemnation proceeds to NRCS;
 - (b) substitution by the eligible entity of conservation easements with federal requirements on comparable property at no cost to NRCS;
 - (c) reimbursement to NRCS of the federal funds provided for the conservation easement acquisition, with the balance of condemnation proceeds applied to the purchase of conservation easements by the eligible entity.

Whether the interpretation of the term contingent right of enforcement is considered a property right or a contract right, there is no need to establish a prohibition against condemnation which conflicts with State and local laws as currently proposed in the Interim Final Rule (Section 149.22 (d)), when suitable stated accommodations can be made.

2. Agricultural and Related Uses. Under Sections 1491.20 (a)(6) of the proposed Interim Final Rule NRCS can require in cooperative agreements:

“(6) Other requirements deemed necessary by NRCS to meet the purposes of this part or protect the interests of the United States.”

The “other requirements” should not include provisions which would prevent uses and activities allowed under the enabling legislation of State and local land preservation programs. Any pervasive and successful agricultural lands preservation program cannot be operated under two different sets of standards (federal, and State or local), and most State and local programs are designed to deal with the real world circumstances confronting farm and ranch owners.

3. Impervious Surface Limits. The 2008 Act under Section 3838 (i)(g)(4)(C) requires the cooperative agreement only to “. . . include a limit on impervious surfaces to be allowed that is consistent with the agricultural activities to be conducted.” The establishment of a limit of 2% with ad hoc adjustment to 10% as proposed in Sections 1491.22(c) of the Interim Final Rule is arbitrary, and does not satisfy the requirement for consistency with the agricultural activities. Most of the factors to be considered in waiving the minimal limit have no nexus to the agricultural activities the landowner utilizes (population density, ratio of open prime and other important farmland versus impervious surfaces on the easement area, and the impact to water quality concerns in the area). The impervious surface limits would be best addressed in the

cooperative agreements with categorical allowances which exclusively take into account current and future agricultural needs, rather than through some time consuming and costly administrative case by case review.

THE REVIEW PROCESS

The review process of the Proposed Interim Rule Section 1491.20 (a)(1) requires the cooperative agreements to provide the form and other terms and conditions of the easement deed. Section 1491.22 (c) allows the eligible entity to use its own terms and conditions in the easement deed which needs to be submitted to NRCS National Headquarters within 30 days of the signing of the cooperative agreement for approval. NRCS then reserves the right to change the language of the easement deed within no specified time frame “...to protect the interests of the United States”.

If the cooperative agreement is to have any meaning it should not be subject to after the fact unilateral change for any substantive reason. The easement deed proposed by the eligible entity should be reviewed and approved before the cooperative agreement is executed, and attached to it with a requirement of use.

The acquisition of conservation easements by State and local entities is an involved time consuming and costly process, and the ability of State and local programs to rely on a commitment of federal matching funding is critical. When the commitment to fund targeted conservation easement properties identified in cooperative agreements is made, the commitment needs to be honored and not undermined by some after the fact review.

Although not addressed in the proposed Interim Final Rule, it has been suggested that a new interview procedure for landowner applicants is under consideration by NRCS. Not only would such a procedure delay the procurement process, it would confuse it. There are already in place effective procedures utilized by State and local program representatives to procure conservation easements.

The review conducted by NRCS prior to easement closing involving concurrence with the terms of the conservation easement (Section 1491.22 (g) of the proposed Interim Final Rule) needs to be limited to a determination that the conservation easement conforms to the conservation easement form contained in the executed cooperative agreement.

SUMMARY

The comments and recommendations presented reflect a desire on the part of the State of Delaware and the Delaware Agricultural Lands Preservation Foundation to continue its efforts to preserve and protect the State's dwindling productive farmlands and forests. These efforts in the past have been significantly enhanced by the availability of federal matching monies provided through the FRPP, and it is only relatively recently that problems with federal funding have been encountered as the result of the administration

of the 2006 Interim Final Rule. The changes recommended to the currently proposed Interim Final Rule are submitted expressly for the purposes of correcting problems of the past which the 2008 Act addresses. In crafting the Interim Final Rule, there is a need by NRCS to recognize that comprehensive farmland and forestland preservation programs like those existing in Delaware need to be compatible with the FRPP. Federal matching funds are only a part of the total picture. For example, of \$150 Million expended under the Delaware programs, only \$18 Million has involved FRPP matching monies. However, the FRPP matching money has successfully been used to purchase 100 of the total 500 preservation easements acquired. There is a need for one consistent program with requirements that accommodate both federal and State or local needs. The intent for such an approach has been incorporated in the 2008 Act under Section 1238H(2)(A)(iii) through the stated purpose that the intended protection of land "...will further a State or local policy consistent with the purposes of the program."