## Decker, Denise - Washington, DC

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**From:** Kathy DeCoster [Kathy.DeCoster@tpl.org]
**Sent:** Tuesday, March 17, 2009 6:36 PM
**To:** RA.dcwashing2.frpp
**Subject:** Docket Number NRCS-IFR-08006 Comments on FRPP proposed interimfinal rule
**Attachments:** FRPP 2009 rule TPL comments.doc

Re: Docket Number NRCS-IFR-08006

Please find attached the comments of The Trust for Public Land on the proposed interim final rule for the Farm and Ranch Lands Protection Program.

Thank you for the opportunity to submit.

Katherine DeCoster
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Washington, DC 20003
202-543-7552

THE TRUST for PUBLIC LAND

CONSERVING LAND FOR PEOPLE

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March 17, 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 Trust for Public Land 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.

Thank you for the opportunity to provide these comments. Please be sure to contact me if you have any questions.

Sincerely,

Katherine DeCoster
Director of Federal Affairs
202-543-7552

The Trust for Public Land Comments
On the Interim Final Rule for the
FARM AND RANCH LANDS PROTECTION PROGRAM

**Docket number NRCS-IFR-08006**

**Section 1491.3 Definitions**

1. Under the definition of "Landowner" in the definitions section of the rule, NRCS states that "State governments, local governments, and non-governmental organizations that qualify as eligible entities are not eligible as landowners." We strongly urge the NRCS to adopt a waiver process for this prohibition on a case-by-case basis. This is needed in order to provide a reasonable consideration of the rare situation where a non-profit, which may or may not be the eligible entity for the FRPP grant, needs to step in and purchase an FRPP property in order to keep it from being developed while the funds to protect it are being secured.

This same prohibition is repeated in **Section 1491.4 (f)(6)**. A waiver should be provided in that section as well.

2. Under the definition of "right of enforcement" NRCS states that this means an interest in real property, a position that is stated also in **Section 1491.20** Cooperative Agreements as a requirement of a cooperative agreement and again in **Section 1491.22 (d)** Conservation Easement Deeds as a requirement of the easement conveyance document.

These multiple references to a "right of enforcement" as an "interest in real property" are discussed at length in the Federal Register notice and are based on the statutory reference to inclusion of a "contingent right of enforcement" in the 2008 Farm Bill. 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." The Joint Statement of Managers accompanying the conference report clarifies 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."

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."

By asserting that the "contingent right of enforcement" is a vested real property right, the rule ignores Congressional intent and will continue many of the administrative burdens and increased programmatic requirements that were imposed on program partners through the 2006 Interim Final Rule. These include: standards and review procedures for appraisal and title commitments; inclusion in easement deeds of USDA language on indemnification and environmental warranties; review and approval by USDA of every easement deed; and, as explained in a recent NRCS web conference, a new interview procedure for landowner applicants.

TPL shares the concerns of many groups that NRCS has missed the Congressional intent of this statutory provision and urges a reconsideration of the position taken in the proposed interim rule.

**Section 1491.4 Program requirements**

Subsection (f)(5) requires that any FRPP project with forestland of more than 10 acres or 10 percent of the easement total shall have a forest management plan in place before closing. The rule indicates that this new requirement has been added in part to "define a newly established documentation requirement needed to demonstrate forest land eligibility when the 'forest land' is being enrolled under the 'contributes to the economic viability of an agricultural operation' land eligibility category...rather than requiring submission of receipts or tax returns, which may be viewed as intrusive." However, the rule provides two additional rationales: first that a forest management plan will help ensure that the federal investment in that forest acreage will have long-term viability for food, fiber and environmental benefits; and second, that the plan will ensure that the forested acreage continues to contribute to the viability of the agricultural operation.

While TPL generally supports the development of forest plans as a way to offer landowners a pathway to improve the economic and environmental performance of their woodlots and forestlands, we are concerned that this new requirement imposes an unnecessary additional administrative burden on landowners and adds another layer of red tape that could further erode landowner interest in the program. There is neither statutory authority for this provision nor any indication that Congress intended to require forest management plans; indeed, while Congress specifically expanded forest land eligibility, it did not include any corresponding requirement for the inclusion of forest management plans.

Although NRCS suggests that this requirement is needed to provide documentation of forest land eligibility, TPL believes that eligibility determinations could be made in a number of different ways, one of which might be a forest management plan. A second method might be proof of the land's enrollment in a state's current use or forestry assessment program. A third might be submission of sales receipts or tax returns. TPL

recommends that NRCS allow multiple means for providing forest land eligibility under this category, not just through a forest management plan.

We also take this opportunity to point out that the forest plan requirement appears to be more onerous than the requirement for a conservation plan, in that a conservation plan does not appear to be required prior to closing. Interestingly, conservation plans are required only in the case of highly erodible cropland while forest conservation lands are now required for ALL forests over 10 acres.

TPL strongly recommends that NRCS revisit this issue to separate out the land eligibility issue from the forest resource conservation issue and take a deeper look at when forest conservation plans are needed and whether forest conservation outcomes can be covered in a conservation plan. NRCS should strongly consider, at a minimum, raising the acreage level for which a forest management plan is required or eliminating this requirement altogether unless a meaningful purpose to such plans is determined.

**Section 1491.6 Ranking considerations and proposal selection**

Section 1491.6 outlines a series of very specific national criteria for scoring and ranking projects for selection in the program and requires that these national criteria shall comprise at least half of the ranking system score. Given that the 2008 Farm Bill did not require such criteria nor was there any discussion during consideration of the bill of such a census-based approach to FRPP program implementation, TPL is concerned that the on-the-ground impact will be very disruptive to ongoing farm and ranch protection efforts in many areas. We are also concerned, based on preliminary discussions with NRCS staff at the state level, that the interpretation of these national standards is inconsistent. Is there a process by which NRCS national office reviews each state's ranking criteria to ensure it meets the purpose of the rule? There seems to be enough confusion about the new ranking criteria that NRCS should reconsider the way the ranking factors are laid out in the proposed rule and work towards greater consistency and transparency in decision making. It is critical, in making these changes, that the FRPP does not skew away from long-standing effective farm protection efforts that have brought significant public benefits to states and counties and their agriculture-based economies.

In addition, TPL urges the NRCS to add "leveraging ratio" to the list of factors that may be included in ranking criteria developed by the State Conservationist. That list already includes "performance of an entity" and TPL believes that the ability of the entity to bring greater non-NRCS leverage to the program is critically important to stretching federal dollars and should be included as a specific ranking criteria factor.

**Non-rule issues**

There are other items not included specifically in the rule but noted in NRCS power point presentations that are of some concern to TPL. One is the requirement that due diligence including appraisals be completed 90 days prior to receiving funding. This could be a very difficult timeline to meet depending on the complexity of the transaction. We would suggest flexibility on this requirement.

Second, we would like more information about the landowner interview process mentioned in the FRPP power point presentation. As a group that works with many landowners and understand the sensitivities that attach to project negotiations, TPL would like to know more about NRCS guidance to its field staff on how these interviews will be conducted and the information that will be sought. We look forward to working with NRCS staff locally to facilitate landowner participation in the program.