Ohio | **Department of Agriculture**

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Phone:		**Date:**	March 17, 2009
Re:		**cc:**	

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

• **Comments:**

Please see attached letter and comments regarding the FRPP interim rules.

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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

Dear Associate:

Enclosed are comments concerning the Farm and Ranch Lands Protection Program Interim Final Rule (Docket Number NRCS-IFR-08006) as published on January 16, 2009. The Ohio Department of Agriculture Office of Farmland Preservation shares the concerns and issues expressed in these comments, which were extracted from those authored by the American Farmland Trust We request that these comments be adopted as NRCS revises the rules and implements the program.

In addition, some of the recent data collected from the Census of Agriculture from Ohio and its counties appears inaccurate If such data is used in the FRPP ranking factors, the inaccuracies of this data could greatly misconstrue the ranking results and reduce the ability for Ohio to preserve farmland.

We appreciate the opportunity to provide these comments and encourage you to contact us should you have any questions, 614-728-4828

Sincerely,

Mark A. Forni

Mark A. Forni
Executive Director

Enclosure: ODA's Comments on the FRPP Interim Rules

American Farmland 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 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." 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: 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. Additionally, the agency's determination of a vested property right appears to provide the justification for the agency's reservation of the right to require additional specific language or to remove language in the conservation easement deed to protect the interests of the United States—language that is inconsistent with the statutory language contained in Section 1238I(f)(4) that authorizes eligible entities to use their own terms and conditions for conservation easements except for three enumerated purposes, none of which is to "protect the interests of the United States."

AFT believes the agency's interpretation of the "contingent right of enforcement" as a vested real property right is inconsistent with Congressional intent, as set forth in the statute, the joint statement of managers and an October 23, 2008 letter to USDA Secretary Ed Schafer from the principal authors of the revised FRPP language in the 2008 Farm Bill, Sen. Patrick Leahy and Rep. Tim Holden. AFT urges USDA to revise the rule to clarify that the nature of the interest is as Congress intended—a contingent right that limits the Federal Government's interest to enforcing the terms of an easement only when and if an eligible entity fails to do so. This would allow NRCS to administer the program much as it was administered prior to the 2006 Interim Final Rule

AFT further believes that the program should be administered in a way that recognizes the protections afforded some easements under state law and constitutions. Where an easement is held or co-held by a state and that state's laws or constitution not only gives its Attorney General standing to enforce its easements, but would compel him or her to do so, the United States' interests are adequately protected through the state's obligation to enforce its easement terms. Where an eligible entity can show that its easements will enjoy the same degree of protection through state law or constitution as would be provided through a federal contingent right of enforcement, USDA should allow for a waiver or assignment of the federal right of enforcement to the state. For these entities, a number of program provisions designed to protect the interests of the United States are duplicative and unneeded and should be eliminated. These include:

- Title review as described by Department of Justice title standards
- Technical review of USPAP appraisals
- NRCS' "reserved right" to require additional language or to remove language in an easement deed to protect the interests of the United States

The above requirements would still apply to eligible entities that cannot demonstrate the same level of state protections afforded to the easements they hold.

Issue: Certification

As proposed in Section 1491.20 of the rule, the term for cooperative agreements shall be a minimum of five years for certified entities and three years for other eligible entities. According to the NRCS rule, this 2-year difference in the length of a cooperative agreement appears to be the only benefit afforded to certified entities. The rule does not reflect any further use or development of the certification process as laid out by Congress in the statute.

AFT comments: During consideration of the 2008 Farm Bill, Congress established a certification system which could be used to streamline the procedures and reduce the requirements for those eligible entities with established farmland protection programs and a proven history of success. While acknowledging certification for an eligible entity in the statute, the rule provides no meaningful incentive for an entity to go through the certification process.

The certification process is a very significant point in the statute that NRCS has failed to adequately consider in the rule. Certification could provide a valuable means to reduce administrative burdens and unneeded program requirements for well-established farmland protection programs while retaining these administrative reviews and program requirements for

entities that have little experience and need additional oversight AFT recommends that NRCS rewrite the rule to develop a robust certification program for certified entities that would minimize appraisal and title reviews, enable entities to use their own project selection criteria and process, allow entities to use their own terms and conditions without any reserved authority on the part of USDA, and eliminate what has been described by the FPP National Program manager as a new requirement for landowner interviews. Certification could also provide the mechanism for reviewing the state protections, if any, afforded easements held by an eligible entity, and allowing an assignment or waiver of the contingent right of enforcement in those instances where states have an equivalent obligation to enforce the terms of an easement.

Issue: Definition of agriculture

Section 1491.3 of the rule defines *agricultural uses* as those defined by a state's farm or ranch land protection program or equivalent, or, where no such program exists, by the state's agricultural use tax assessment program. However, the rule reserves the right for NRCS to impose greater deed restrictions on properties being protected with FRPP funds if NRCS finds that a state definition of agriculture is so broad that an included use could lead to the degradation of soils and agricultural productivity.

AFT Comments: This "reservation" of authority by NRCS seems inconsistent with two statutory changes made to the program in the 2008 Farm Bill. The first was to the purpose clause of the program (section 1238I(b)), which expanded the program's purpose beyond protection of topsoil to protection of the "agricultural use and related conservation values of eligible land by limiting nonagricultural uses of that land." The second was a change that authorized eligible entities to use their own easement deed terms and conditions so long as those terms and conditions are consistent with the purposes of the program, permit effectiveness enforcement of the easement, and include a limit on impervious surfaces.

AFT believes that the rule's proposed "reserved" right provides NRCS with a backdoor means of imposing additional deed restrictions that it could not otherwise impose pursuant to Section 1238I(f)(4). Given the change in the purpose clause of the program, AFT believes that a state's definition of agriculture—for its state farmland protection program, or, where no such program exists, for its current use tax assessment program—is the best reflection of the type of agricultural uses found in a state and should not be subject to second-guessing by NRCS. AFT recommends that this "reserved" right be eliminated

Issue: Eligible land (Soils)

Section 1491.4 (f) of the rule states in part: "Eligible land: (1) Must be privately owned land on a farm or ranch and *contain at least 50 percent* prime, unique, Statewide, or locally important farmland..." (Emphasis added)

AFT Comments: The statutory language requires that eligible land have prime, unique or other soil, but makes no provision as to the extent to which eligible land must contain a certain percentage of any type of farmland soils. Further, since the 2008 statutory revisions to the program established the purpose of the program to be to "...protect the agricultural use and related conservation values of eligible land by limiting the nonagricultural uses of that land" (Section 1238I (b)), we believe that the land area threshold tied to soil types proposed in the rule is inappropriate.

Issue: Eligible land (State or local policy consistent with the purposes of the program)

The statutory revisions to the program envision the protection of agricultural land not solely based on the quality of farmland soils. In defining eligible land, the statute now includes land "...the protection of which will further a State or local policy consistent with the purposes of the program." (Section 1238H(2)(A)(iii))

AFT comments: We believe that Congress included this provision as it relates to "eligible land" to specifically recognize land with resource values important to agriculture unrelated to soil quality such as availability of water, ancillary support land, proximity to other agricultural land in a cluster or block, or access to adjacent or nearby public lands available for agricultural use.

The rule does not include a definition of "'state or local policy consistent with the purposes of the program." As with the other factors covered under Section 1491.4(f), AFT recommends that the rule include a definition in this regard. AFT proposes the following as a definition: "A state or local policy consistent with the purposes of the program is defined as a duly adopted state or local policy, program or ordinance that targets land resources the protection of which is important to the continuation of agricultural activities and operations."

Issue: Impervious Surfaces

The 2008 statutory revisions to the program modified the purposes clause of the program so that the program's purpose is no longer strictly the protection of topsoil, but the protection of the agricultural use and related conservation values of the eligible land. This change brings the purpose of the federal program in closer alignment with many established state and local farmland protection programs, whose missions embrace the continued agricultural viability of land protected through their programs in addition to protection of natural resources.

The change in the purpose clause along with language contained in the *minimum requirements* provision (Section 1238I(g)(4)) of the statute establish the basis for a different treatment of Impervious Surfaces on farms and ranches protected through the program than that previously applied by NRCS. The language in the *minimum requirements* section allows eligible entities to use their own terms and conditions for conservation easements so long as such terms and conditions "include a limit on the impervious surfaces to be allowed that is consistent with the agricultural activities to be conducted." The clear intent of this language is to allow state and local partners broad flexibility in determining the appropriate impervious surfaces standard for agricultural activities on easements purchased with program funds.

As proposed in Section 1491 22 (i) of the rule, language regarding impervious surfaces remains essentially unchanged from current NRCS policy. Impervious surfaces are limited to no more than 2% of the FRPP easement area, except that now NRCS State Conservationists may provide for a waiver on a parcel-by-parcel basis allowing for impervious surfaces of up to 10% of the easement area.

AFT Comments: The proposed provision has a number of problems:

- A national standard for impervious surfaces is not in keeping with the intent of Congress regarding this issue as outlined above.
- Establishing a set formula for impervious surfaces runs counter to the minimum requirements established in the 2008 Act, which clearly allow eligible entities to use their own terms and conditions for conservation easements so long as such terms and conditions "include a limit on the impervious surfaces to be allowed that is consistent with the agricultural activities to be conducted."
- The current 2% impervious surface standard has never been linked to any scientific study on the subject that would inform the establishment of such a set formulaic standard
- The consideration of a waiver of the impervious surface standard on a "parcel by parcel basis," undermines the hoped-for efficiencies of a certification process that would allow certified entities to apply program funds and use their own terms and conditions for a conservation easement across an array of projects covered by a cooperative agreement.

We believe that the only appropriate role for USDA with respect to impervious surfaces is to ensure that eligible entities include in their deed of easement an impervious surfaces standard Permissible impervious surfaces standards should include standards that do not set numerical limits but provide for a review and approval process for agricultural structures. Because "consistent with the agricultural activities to be conducted" is a determination that is best made at the state and local level, we recommend leaving development of specific standards to the eligible entity.

Issue: Ranking consideration and proposal selection.

Section 1491.6 outlines a series of very specific national criteria for scoring and ranking projects for selection in the program. The 2008 Act makes no mention of the need for such a process.

Indeed, for those eligible entities that would achieve the standing of a "certified entity" as envisioned by Congress, many of the national criteria outlined in the rule are problematic. If a certification process were indeed established that recognized those entities with well-established farmland protection programs, project ranking criteria and selection process should be left to the certified entities. This would not only streamline the application process, it would enable NRCS to be a true partner in facilitating the purchase of conservation easements and other interests in eligible land tied to clear, state or locally-driven goals and objectives for the protection of the long-term agricultural use and related conservation values of the land.

AFT Comments: AFT recommends that the ranking considerations and proposal selection process for individual projects be left to certified entities as part of a robust certification process and system. For non-certified, eligible entities, a ranking consideration and proposal selection process developed by NRCS makes sense.

AFT recognizes that, in some states, NRCS may need to compare projects across the spectrum of applications submitted by certified and non-certified entities. Therefore, AFT recommends that NRCS identify broad categories of ranking criteria to be covered by certified entities in their criteria and selection process. These categories would ensure consideration of a common set of resource and location issues such as soils, land type, farm size, development pressure and proximity to other farms and protected lands without imposing the specificity of nationally applied criteria on certified entities as now envisioned by NRCS.