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

Docket Number NRCS – IFR – 08013

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Those involved and interested in the Delaware Agricultural Lands Preservation program are disappointed that the concerns and criticisms voiced in comments to the prior Docket Number NRCS – IFR – 08006 have not been adequately addressed. The current Docket proposal does little to correct serious problems which undermine the purposes of the Food, Conservation, and Energy Act of 2008 (the 2008 Act) as they relate to the federal matching fund program to support the acquisition of conservation easements on farmlands.

The expectancy among farmland preservation program managers at the State and local levels has been that the 2008 Act would open the door to a more streamlined and effective federal program with deference to State and local interests. The two Docket proposals do not accomplish that result and are fraught with and perpetuate the obstacles to providing matching funding which predated the 2008 Act and which have served to frustrate and prevent greater State and local level participation. The expectancies derive from the Congressional record and statutory amendments contained in the 2008 Act which can be summarized as follows:

1. The FRPP has been changed from a Federal real estate acquisition program to a program that facilitates financial assistance to non-Federal entities for conservation easement acquisitions.
2. An eligible entity is authorized to use its own terms and conditions for conservation easements.
3. The FRPP has been expanded beyond the purpose of protecting soils to protection of agricultural use and related conservation values.
4. A Certification process has been created for the purpose of streamlining the approval of applications for matching funding.
5. Limitations on impervious surfaces have not been fixed on a national or regional basis.

The FRPP matching fund program deviates from the intended reforms of the 2008 Act with respect to the identified expectancies as follows:

1        Real estate acquisitions vs. financial assistance The interpretation that the federal Government is not acquiring a real property interest in funded conservation easements is consistent with the provisions of the 2008 Act and the Congressional record on the matter. The resultant action of NRCS that “yellow book” appraisals are no longer required is certainly justified. However, the appraisal review process under any appraisal standard will continue to be mired in endless federal review objections involving subjectivity and assertion of form over substance as long as the process is held captive by one individual with unfettered discretion operating under contract with NRCS. Appraisals prepared on behalf of eligible entities by credentialed and trained professional appraisers who have performed acceptable appraisals for other federal agencies deserve the deference of NRCS. The one man bottleneck system for review of appraisals, whether “yellow book” or otherwise, needs to be abolished.

Since the Government is not acquiring an interest in real property under the conservation easement, there is no justification for NRCS to insist on including environmental representations or indemnifications in the conservation deeds for the purpose of providing protection of the Government interests. If anything such provisions would suggest that the Government is in fact subject to liability. If there is a need for protection that determination should be made by the eligible entities which are obtaining property rights through the conservation deeds.

Given the interpretation that the Government is not obtaining a real property interest in conservation easements, it is disingenuous for NRCS at the same time to conclude that the “right to enforce” the conservation easement is a “vested property right”. The inconsistent vested property right conclusion serves as the bootstrap for the NRCS position that a conservation easement property can not be condemned at any time in perpetuity for any purpose by a State or local government. This ill conceived interpretation, which defies the realities of the current and future needs of State and local governments, is not supported by program legislation or the Congressional record. The interpretive skills employed by NRCS to determine that the conservation easements are not subject to federal property rights should be employed to reach a similar conclusion regarding the right to enforce. Properly viewed the right to enforce is a mechanism to assure that the terms and conditions contained in conservation easements are honored. The federal matching fund financial interest involving condemnations can readily be protected in a number of ways, such as a requirement that the Government’s proportionate share of condemnation proceeds be paid to the Government. The current condemnation prohibition position of NRCS is compelling many States to forego participation in the FRPP matching fund program

2.        Eligible entity terms and conditions in conservation easements For State and local governments with ongoing farmland preservation programs it is fundamental that the easement use requirements be consistent, whether or not federal matching monies are involved in the acquisition of the conservation easement. That could never be the case under NRCS dictated conditions subject to change at anytime. Many of the use restrictions contained in the proposed template easement deed, which when recorded apply in perpetuity, are unrealistic and reflective of naive notions about current and future

agricultural activities. These “desk drawer” policies are apt to change from time to time with differing NRCS employees and administrations, leaving a trail of legal misery for any farm owner foolish enough to sign an easement deed containing such limitations as, a prohibition of use of motorized vehicles except to support the permitted uses, a prohibition on subdivision (in perpetuity), and construction of structures and improvements that only support agricultural use. These examples are an indication of the reason the 2008 Act focused on the use of terms and conditions developed by those eligible entities most familiar with local and regional agricultural practices and reasonable controls. NRCS has, in lieu of providing the intended deference to eligible entities, chosen to use the criteria for accepting terms and conditions as a basis for superimposing its own terms and conditions, such as those indicated above. That intent is manifest in the corrected IFR under Section 1491.22 which allows the Chief of NRCS to “...exercise the option to promulgate standard minimum conservation deed requirements ...”.

It is imperative that the terms and conditions contained in conservation deeds are uniform for State and local programs and reflective of real world conditions of current and future agricultural life. The only time NRCS, in exercising its overview function, should become involved with the use provisions contained in conservation easements is when the activities involved are clearly outside the realm of farming and supported and related uses.

3. The FRPP purpose of protecting soils has been expanded to protecting agricultural use and related conservation values. Unfortunately NRCS has viewed the expanded purposes of the FRPP statute as an opportunity to impose limitations and restrictions. The definition proposed for agricultural use poses a problem because it gives NRCS the entitlement to impose additional conservation easement deed restrictions if NRCS does not agree with the State definition. NRCS should per se accept the definition of agriculture and agricultural and related uses as contained in any State or local farmland protection legislation, regulations and ordinances. Examples of further attempts to limit agricultural eligibility which do not have a statutory basis are (1) the proposed 50% requirement of prime, unique, statewide, or locally important farmland and (2) the requirement for a forest management plan if 10 acres or 10% of the easement area contains forestland.

4. The Certification process This measure introduced in the 2008 Act has been ignored as a means of streamlining the matching fund review process. A Certification program needs to be established which eliminates many of the additional requirements adopted in recent times. Overview of the State and local programs can be readily established for Certified entities through spot reviews and audits of transactions in lieu of the current detailed review of each transaction. The Certification process can also be used to effectuate a welcomed reform to the current appraisal review process. Certification needs to be made meaningful.

5. Impervious soils Although the 2008 Act expanded the purposes of the FRPP beyond protection of soils, the preexisting NRCS policy of limiting impervious

areas to 2% without a waiver remains. Many agricultural uses employ the use of buildings and paved areas (many times based on regulatory requirements) for such things as livestock, poultry, manure containment and waste water treatment. Each eligible entity should be provided the opportunity to set the impervious requirement to fit the local need and to accommodate the specific agricultural activities existent in their areas. The Certification process would provide a means for such allowance.

The purpose of the FRPP is to promote the preservation of our valuable farmlands without unreasonably handcuffing in perpetuity farmers who accept cost sharing monies. The Certification process can be used as a means of avoiding the “one size fits all” approach to managing the program. The participation of eligible entities should be encouraged, and not precluded by the imposition of additional layers of red tape and the creation of legal obstacles. Although some improvement has been made, a considerable amount of additional effort and change in program approach is needed in order to make the term “Cooperative” truly cooperative, and the term “Agreement” a genuine mutual agreement, so that under Cooperative Agreements NRCS and eligible entities can protect valuable farmland in a manner that “. . . will further a State or local policy consistent with the purposes of the program. . .” (2008 Act under Section 1238 H (2)(A)(iii)).