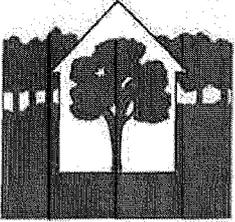


**Vermont
Housing &
Conservation
Board**

August 3, 2009



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Executive Director

RE: Comments on the Farm and Ranch Lands Program Interim Final Rule , As Amended on July 2, 2009

Friends,

Please accept the attached comments from the Vermont Housing & Conservation Board regarding the Farm and Ranch Lands Protection Program (FRPP) Interim Final Rule (Docket Number NRCS-IFR-08013) as amended on July 2, 2009. As a long-time partner with NRCS in implementing FRPP in Vermont, we appreciate the opportunity to comment, and hope that our thoughts will be considered as NRCS revises the rule. We welcome any questions you might have about our comments.

Sincerely,

Gus Seelig
Executive Director

**Vermont Housing & Conservation Board Comments
Interim Final Rule, July 2, 2009
Farm and Ranch Lands Protection Program**

Docket Number NRCS-IFR-08013

I Introduction

The 2008 Farm Bill made substantial changes to the Farm and Ranchland Protection Program (FRPP). The purpose of the program was changed from protecting topsoil to facilitating and providing funding for the purchase of conservation easements. A certification process was established to give eligible entities that met certain criteria longer agreements, and presumably more responsibility and flexibility, in carrying out the purposes of the program. Congress also broadened the definition of forestland, and included a new criteria for eligible land (land “the protection of which will further a State or local policy consistent with the purposes of the program.”)

Though the intent of Congress was to make the program more flexible and less bureaucratic, the revised Interim Final Rule does not achieve this goal, and nor do the FRPP Program Manual and template Cooperative Agreements. The national NRCS office continues to require duplicative and burdensome oversight of program details for all eligible entities which is contrary to the language in the statute. A “one-size fits all” approach to farmland conservation is not workable; it does not reflect the realities of agricultural production in the United States, which vary dramatically across regions, depending on topography, climate, resource base, and custom. The Vermont Housing and Conservation Board (“VHCB”) asks the Secretary to make additional changes to the Rule, as well as to the FRPP Program Manual and Cooperative Agreement language, to give eligible entities, particularly certified entities like VHCB, the discretion, responsibility and flexibility to administer the program within the framework of our own standards and requirements, duly approved by NRCS, regarding appraisal, title and easement deeds and reviews.

Vermont has been working in partnership with the federal government on farmland conservation for 18 years. Vermont was the pilot state for the federal Farms for the Future program in the 1990s (the precursor of FRPP). The Vermont Farmland Conservation program, administered by the Vermont Housing & Conservation Board, received a clean GAO audit of the Farms for the Future program in 1994. Our strong partnership with the state NRCS office over many years has resulted in the conservation of over 48,500 acres of farmland using FRPP funds and about 209 farm projects. Vermont’s co-holder stewardship model of partnership with well-established land trusts such as the Vermont Land Trust and the Upper Valley Land Trust as well as the state Agency of Agriculture, Food & Markets, ensures that three established and capable organizations hold, steward and enforce each farm easement.

II United States' Contingent Right of Enforcement

The Vermont Housing and Conservation Board ("VHCB") appreciates and thanks NRCS for making it clear that the right of enforcement held by the United States does not constitute a Federal acquisition of real property. This means that the Office of General Counsel (OGC) will no longer review title under the Department of Justice standards. However, as discussed below, VHCB believes that the Secretary should take the logical next step, especially for Certified Eligible Entities, and relieve NRCS Vermont Staff of any responsibility to review title reports, provided that VHCB has had the template conservation easement approved by OGC and obtains a Title Insurance Commitment prior to closing. VHCB will obtain a Final Title Insurance Policy but suggests that it is no longer necessary to provide a copy to NRCS.

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III The Secretary Should Adopt a Meaningful Certification Program

In our view, the goal of certifying eligible entities is to give NRCS a process to ensure that partners were fully eligible and capable of carrying out FRPP requirements and that, once certified, the administrative burden on NRCS would be reduced by allowing the certified eligible entities to administer, monitor and enforce easements and otherwise ensure that FRPP funds are spent appropriately and in a timely manner on eligible lands. The Interim Final Rule provides no real advantage to certified entities. Furthermore, the only criteria to achieve certification are experience enrolling parcels of land in FRPP and the timeliness of completing easement acquisition. There is no certification process; national program staff chose entities for certification without any communication with the entity.

VHCB appreciates being designated as a certified entity; however, we are mystified as to why we were the only New England program so chosen. We appreciate the 5 year agreement but VHCB believes that Vermont and other farmland protection programs have demonstrated over many years our ability to properly administer FRPP and other federal programs. Despite the statutory language allowing certification, NRCS proposes to continue to review each and every appraisal report, title policy, and easement deed for every FRPP project. For capable, experienced and qualified certified entities, this additional layer of review is duplicative, time-consuming and unnecessary.

Recommendations:

- Develop a meaningful certification program for certified entities that would give them the authority, assuming they met the certification standards and periodic program evaluations, to conduct their own appraisal and title reviews, use their own project selection criteria and process, and their own template easement deed. NRCS should focus on reviewing and approving appropriate appraisal standards, title policy, and template easement deeds, for each entity, and no longer review each appraisal report, title policy, and easement deed.

- In states with multiple easement holders (such as Vermont), NRCS could choose to waive the contingent right of enforcement language altogether, since three separate parties already have an obligation to enforce the easement terms.
- The certification program should include standards other than speed of easement acquisition, to ensure that certified entities are fully capable of administering the requirements of the program without constant oversight from NRCS, thereby relieving NRCS staff of unnecessary and duplicative work. NRCS could still review projects on an individual basis for entities that do not meet the certification standards.
- Certification standards in addition to those listed in the rule regarding monitoring, enforcement, FRPP experience and having a dedicated stewardship fund could include:
 - documentation of policies and procedures regarding project selection criteria that are compatible with FRPP goals;
 - documentation of appropriate legal capacity to review title and other closing documents;
 - documentation of appropriate financial systems to track and use FRPP funds as required;
 - proven track record of successful partnerships with other governmental and non-profit organizations as a part of achieving FRPP goals.

IV NRCS Should Give More Discretion to VHCB on Title, Appraisal and Easement Issues

The message from Congress to the Secretary is to give more discretion, responsibility and flexibility to eligible entities like VHCB to carry out the purposes of FRPP¹. Below, we point out three examples of how the Secretary could defer to VHCB.

A. Title Review by NRCS Staff is Unnecessary

Since OGC is no longer reviewing title, NRCS should accept title review by VHCB and VLT/UVLT lawyers provided that VHCB obtains Title Insurance and provides NRCS with the title commitment at closing. OGC and NRCS should be able to rely upon the legal review of public and private lawyers working for certified eligible entities like VHCB and its farmland conservation partners. We are confident that NRCS Vermont staff can review title reports and

¹ The FRPP law provides:

SEC. 1238I. FARMLAND PROTECTION PROGRAM.

(a) Establishment- The Secretary shall establish and carry out a farmland protection program under which the Secretary shall facilitate and provide funding for the purchase of conservation easements or other interests in eligible land. (b) Purpose- The purpose of the program is to protect the agricultural use and related conservation values of eligible land by limiting nonagricultural uses of that land. ...

(g)(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 purchases 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.

title insurance policies; however, it does not seem to be efficient or necessary for NRCS to duplicate the review that is currently done by experienced real estate and land conservation lawyers. Now that the Department of Justice Title Standards do not apply, VHCB suggests that NRCS just require eligible entities to provide the title insurance commitment. Grantees will continue to obtain the Final Title Insurance Policy.

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If NRCS is unwilling to use this approach for all eligible entities, the first step may be to do so for certified farmland protection programs that have sufficient legal protections to protect the investments of federal, state, county and local government in this nation's important farmland. For new land trusts just beginning to protect agricultural land or inexperienced state farmland protection programs, NRCS and OGC could require a higher level of title review.

B. The Secretary Should Permit VHCB to Use Supplemental Appraisal Standards

In the 2008 Farm Bill, Congress repealed the requirement that fair market value be based on appraisals done to 'yellow book' standards and authorized eligible entities to use an industry approved method² approved by the Secretary. VHCB has always required that appraisals conform to the Uniform Standards of the Professional Appraisal Practice (USPAP) and, in addition, has always required appraisers to consider possible "enhancement" to land excluded from the easement area, to avoid using public funds to purchase an easement for more than its value. It appears that NRCS appraisal standards, not released to VHCB until June 1, 2009, may not allow VHCB to consider any potential additional value that may accrue to land excluded from the easement when the entity is using USPAP standards, although this requirement in no way conflicts with USPAP. On the other hand, entities may choose to continue to use the Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA), which require a consideration of land excluded from the easement by requiring that the "larger parcel" be valued. These two choices essentially disallow the consideration of excluded land in one case, while requiring it in another. These are clearly inconsistent standards that conflict with Congressional intent.

VHCB asks NRCS to work with us in reviewing and approving our adopted Supplemental Appraisal Standards and then to allow VHCB to ensure that appraisals meet these standards by conducting our own administrative and technical reviews.

² 12381 (d) Determination of Fair Market Value- Effective on the date of enactment of the Food, Conservation, and Energy Act of 2008, the fair market value of the conservation easement or other interest in eligible land shall be determined on the basis of an appraisal using an industry approved method, selected by the eligible entity and approved by the Secretary.

C. NRCS Should Give Maximum Discretion to VHCB on Easement Language

VHCB appreciates the excellent professional relationship that has developed among VHCB staff, Office of General Council (OGC) lawyer Laurie Ristino and Vermont NRCS staff, now Vicky Drew and Judy Doerner. As a result of this longstanding relationship, VHCB has a great deal of confidence that NRCS will consider VHCB's reasonable requests that language in Cooperative Agreements and Template Conservation Easements be changed to accommodate Vermont's approach to farmland conservation, provided that these legal documents are consistent with OGC legal opinions and NRCS policy. VHCB plans to discuss the following easement provisions with NRCS and OGC staff later this month: amendments and separate conveyances of conserved farmland.

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With respect to amendments, prior to the adoption of Section 519.60 (M) of the Conservation Program Manual on easement modifications, VHCB proposed to NRCS and OGC that Easement Grantees in Vermont be authorized to amend easements, provided that NRCS was involved in "major amendments". Now that the Secretary has clarified the nature of the Right of Enforcement and NRCS is giving eligible entities even more discretion for template easements, VHCB will propose to OGC that NRCS revisit the definition of "major" and "minor" so that Grantees can finalize minor amendments without NRCS approval. However, NRCS would have the right to review and approve major amendments.

For example, when VHCB approves a minor easement change such as the reconfiguration of a farmstead complex with no substantive changes in the conservation easement, under CPM 519.60(M) NRCS needs to approve the amended legal description of the complex area. NRCS review adds no value here and appears unnecessary.

The FRPP program application requires that the easement deed identify a possible separate conveyance of farm parcels ahead of time, and requires upfront NRCS approval for including any separate conveyance language in the easement. Again, we feel that VHCB should be given the discretion to configure projects without NRCS oversight on every detail.

V Treatment of Forested Land

The rule includes as eligible land forest land "that contributes to the economic viability of an agricultural operation or serves as a buffer to protect an agricultural operation from development" (language that is taken directly from the statute). However, the rule also stipulates that FRPP easements "must not include forest land of greater than two-thirds of the easement area," and further requires that "forest land that exceeds the greater of 10 acres or 10 percent of the easement area shall have a forest management plan before closing."

In Vermont, the definition of agriculture specifically includes the cultivation of Christmas trees and maple sap, and the production of maple syrup. Vermont farms often include significant wooded acreage, which could involve both a sugarbush that is a vital part of the farm operation

and income, as well as forestland periodically harvested for lumber, which also provides another revenue stream for the farm. In some cases, the percentage of woodland exceeds 67% -- and the rule provides no flexibility. The effect of this requirement in Vermont has been, and will continue to be if it is not changed, to contribute to the parcelization and fragmentation of Vermont's working landscape. Farmers who wish to conserve their lands using FRPP funds must exclude wooded lands beyond 67% of the easement area, leaving those parcels unprotected, and at risk of subdivision. Even if not developed, small parcels of forested land are difficult to manage and harvest efficiently.

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Vermont farmland conservation easements require a forest management plan prior to a commercial harvest, and Vermont's Use Value Appraisal Program requires a forest management plan, updated every 10 years, if the farm has more than 25 acres of wooded land (that is not an active sugarbush). Most conserved farms are also enrolled in the Use Value Appraisal Program; if not, the easement requires a forest management plan prior to any commercial harvest. The new FRPP requirement for a forest management plan prior to closing is unnecessary. Neither NRCS nor any other partners have the resources to write additional forest management plans -- this burden would fall squarely on farmers, who would have to pay qualified foresters to write them, and then the administrative burden of reviewing them would presumably fall on NRCS staff, who are already swamped with other responsibilities. Requiring that the plans be submitted prior to closing will add to the already lengthy list of closing requirements, making it that much more difficult for both landowners and NRCS' partners to access FRPP funds, and further delaying project completion.

VHCB does not believe that Congress intended to require forest management plans, or to increase NRCS oversight (and administrative burden) over forested land in FRPP easements, by adding language expanding forest land eligibility. Rather, we believe that Congress intended to broaden the definition to allow states more flexibility in developing criteria suited to the agricultural operations specific to their locations. In the Northeast, particularly New England, where farms typically include forested land as a part of the working landscape, including wooded land in easements may make sense; in other parts of the country, the situation may be entirely different.

Recommendation:

- Delete the maximum forest land acreage, and the forest management plan requirement.
- Instead, direct state NRCS offices, working with the State Technical Committees (or the FRPP Subcommittee), to develop guidelines regarding forest land inclusion in FRPP-funded easements.

If NRCS continues to feel that forest land eligibility must be documented, the state conservationists, with advice from the State Technical Committee, can adopt eligibility determinations that provide some flexibility that might include, for example, proof of the land's

enrollment in a state's use value program, receipts from a maple syrup operation, or an existing forest management plan.

VI Eligible land issues

The rule retains the existing FRPP program requirement that at least 50% of the soils on the parcel be prime, unique, statewide or locally important farmland, unless otherwise determined by the State Conservationist. The rule also contains the new statutory language allowing land to be eligible if it "furthers a State or local policy consistent with the purposes of the program." VHCB staff believes that Congress inserted this new language to give states the flexibility to recognize as eligible land with resource values compatible with agriculture that might be unrelated to soil quality. For example, lands that contribute to watershed protection and to water supply, or that provide a link to other conserved lands, establishing blocks of protected lands, might enhance the agricultural protection – and overall conservation benefits - of a parcel, even if they do not contain ranked agricultural soils. Since the rule does not include an explicit definition of "a State or local policy consistent with the purposes of the program", VHCB assumes that state NRCS offices will have the ability to make this determination.

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Recommendation:

- Give NRCS State Conservationists, with input from the State Technical Committee and FRPP partner organizations, the ability to decide what lands might "further the definition of State or local policy consistent with the program."

VII National Ranking Criteria and Proposal Selection Process

Section 1491.6 outlines specific national criteria for scoring and ranking pending offers, although the 2008 Act does not mention the need for such a process. VHCB recommends that for eligible entities that achieve a meaningful certification status, as recommended above, that the selection process be delegated to those certified entities. This would relieve already overburdened NRCS staff, streamline the process and allow NRCS to truly "facilitate and provide funding for the purchase of conservation easements", as specified in the revised statutory purpose of the program. That way, well-established state and local farmland conservation programs could rank projects according to state and/or local goals and objectives, reflecting the agricultural uses and other conservation values in that state or local area. If NRCS receives applications from both certified and non-certified eligible entities in some states, and needs to compare projects, VHCB recommends that NRCS develop broad categories of ranking considerations for certified entities to address, leaving the specifics to those entities.

VIII Impervious Surfaces

The 2008 Act requires that eligible entities: "include a limit on the impervious surfaces to be allowed that is consistent with the agricultural activities to be conducted." With this language, VHCB expected that NRCS would direct certified eligible entities and/or state NRCS offices to

adopt policy on impervious surfaces that made sense in that state. Instead, Section 1491.22 (i) of the rule maintains the requirement that impervious surfaces shall not exceed two percent of FRPP easement area, allowing the State Conservationist to waive this limitation on a parcel by parcel basis to up to ten percent. This rule does not follow the intent of the statute: to give state programs and certified entities the discretion to adopt appropriate impervious surface limits that reflect the realities of agricultural uses in their locations.

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For example, in Vermont, we have seen an increase in the number of small, intensive vegetable operations interested in selling development rights. These farms typically include multiple greenhouses, as farmers strive to extend Vermont's short growing season, and respond to the strong demand for year-round local food. Even in Vermont, farmers are experimenting with new ways to grow cool season crops through the winter in unheated greenhouses. Although most greenhouses are used to grow produce in the ground (meaning that the soil itself is still available and used for agriculture), they still count as impervious surfaces, since the plastic covers are indeed impervious. The goal of Vermont's Farmland Conservation Program is to protect good agricultural land that will remain in active and economically viable agricultural use. In some cases, limiting impervious surfaces to 2% may limit farmers' ability to have a profitable, viable operation.

Recommendation:

- Require certified and eligible entities to adopt a policy on impervious surfaces that is consistent with the agricultural activities to be conducted and to include these limits in their easements.

IX Renewable Energy Production and Climate Change Mitigation

The revised IFR includes a request for public input on how FRPP can further the Nation's efforts with renewable energy production, energy conservation, mitigating the effects of climate change, facilitating climate change adaptation, or reducing net carbon emissions. Farmers in Vermont, and throughout the country, are increasingly interested in reducing their own energy use, producing on-farm energy, and mitigating effects of climate change. Examples in Vermont include: farmers growing a variety of oil and seed crops and making bio-diesel both for on-farm use and for sale; methane digesters for energy production and manure management purposes on dairies; solar water systems on milk houses; and wind towers installed for on-farm use, with net metering. It is critical that easements provide enough flexibility for these innovations, within the context of protecting the resource that has been conserved. NRCS could encourage entities to prioritize farmland conservation projects from farmers who are also addressing renewable energy production, energy conservation or climate change on their farms.

The desire to mitigate climate change also makes it imperative that we minimize the exclusion of forestland from conservation easement protection because of the carbon sequestration that forestland provides. If not conserved, development of forestland will result in the loss of trees and may increase other environmental degradation, as well as the potential for conflict between farm operations and nearby residential use.

X Nonprofit Ownership

VHCB also appreciates that the Interim Final Rule now allows the Chief to make exceptions to the general rule that “non-governmental organizations that qualify as eligible entities are not eligible as landowners.” However, the exception should not be limited to the one example mentioned in the rule: preventing farmland in foreclosure from being sold at a sheriff’s sale for non-agricultural development. There are other situations where ownership of eligible land by a nonprofit dedicated to farmland conservation like the Vermont Land Trust (VLT) furthers the purposes of FRPP as well as Vermont’s goal of conserving farms so that they will be owned and/or operated by young farmers or as incubator farms for new farmers.

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VLT’s Farmland Access Program matches farmers looking for land with available farmland, conserving the land in the process. In many cases, VLT must purchase the farm before conservation, to get it off the market, and allow the buyer the time to find the financing to buy it at a conserved price. It can take one to two years for VLT to request proposals from buyers, review them, select one, and then for that buyer to obtain the necessary financing to purchase the farm. Allowing VLT to sell the easement prior to transferring the farm to a farmer would spread resources further, eliminating some of the carrying costs of owning non-conserved land.

Another example is the great interest in the agricultural community in establishing a few geographically dispersed incubator farms, modeled on the Intervale Center in Burlington. This non-profit leases farmland to thirteen different farm operations, comprised of a mix of beginning, “enterprise” (at least three years experience) and “mentor” (at least five years experience) farmers. This model allows new farmers to lease land and gain farming experience in a supportive environment without the capital investment of purchasing land and equipment. Since 1999, the Intervale Center has incubated thirty-two different farm operations, and at least six of those have purchased farmland (either already conserved, or conserving it in the process) and moved their businesses off of the leased land. We see the potential for two to four similar incubator programs around the state, and non-profits such as VLT and the Castanea Foundation might be willing to take on the responsibility of owning the land long-term, if they could sell a conservation easement to VHCB using FRPP funds, to make the farmland more affordable.

Conclusion

The amended Interim Final Rule, though improved, still does not reflect the intent of Congress in making significant statutory changes to FRPP in the 2008 Farm Bill. And the program manual and Cooperative Agreement templates produced by the national office continue to require a uniform, "one size fits all" approach to implementing FRPP that fails to give capable entities responsibility and flexibility in administering the program, and fails to address the differences among agriculture and among programs across the country. This approach requires detailed, burdensome oversight by state NRCS staff, without the necessary resources, and results in longer timeframes for closing projects without adding value to the program.