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Easement Programs Division  
USDA Natural Resources Conservation Service  
Farm and Ranch Lands Protection Program

Re: Comments on Farmland Protection Interim Rule --  
Docket Number NRCS-IFR-08013

On behalf of the **New York State Department of Agriculture and Markets** we offer the following comments to the interim final rule referenced above as well as follow up comments to IFR-08006.

*General Comments:* As we stated in our earlier comments in response to IFR 08006, we remain disappointed the IFR does not adhere more closely to the clear Congressional intent to transform FRPP from a conservation easement acquisition program to a financial assistance program. While the interim rule "correction" more clearly articulates this change, it is still not reflected to any great degree in the corrections or in the template cooperative agreement.

We do acknowledge and appreciate the recognition that the contingent right of enforcement as articulated in the 2008 Act amendments is not a Federal acquisition of a real property right intended to trigger federal procedures such as the DOJ Title Standards. However we remain frustrated by the fact that other detailed requirements outlined in the previous interim final rule were not changed, and in fact have been incorporated into the template cooperative agreement that will be used to implement the program.

1) *Impervious Surface Limitation:* Notwithstanding the strong objection of every single program in the Northeast to the 2% impervious surface limitation, it remains in effect subject to a *parcel by parcel* waiver process up to a more acceptable limit of 10%. As we emphasized in our earlier comments, this is the type of project level micro-management that Congress clearly wanted to eliminate when it changed both the purpose of the program from topsoil to agriculture and its operation from acquisition to financial assistance.

We reiterate that NRCS should not retain the 2% limit, or at least allow the State Conservationist the discretion to waive the requirement for the entire state and/or state or local program and not on a parcel by parcel basis.

2) *Definition of Agricultural Uses:* In our previous comments we objected strongly to the NRCS reservation of the right to define agricultural uses more narrowly and "impose greater deed restrictions on the property than allowable under that State definition of agriculture in order to protect the agricultural uses and related conservation values." Rather than utilizing existing state standards and program requirements, NRCS is opening the door for a separate, and perhaps inconsistent, set of program requirements for FRPP, in direct contravention of the clear Congressional intent.

This reservation should be removed.

3) *Certification:* As we observed in our prior comments, the certification process as outlined in the proposed rule provides little, if any, benefit to the state and local programs that are "certified". As a result, the proposed rule fails to utilize programmatic certification as a way to streamline the review process and reduce administrative burdens and unnecessary program requirements for state and local programs that already have them in place.

Certification requirements should be rewritten to more closely adhere to the Congressional intent to facilitate existing programs without creating additional and duplicative program requirements.

4) *Eligible Land:* Congress did not intend for NRCS to impose a national definition of eligible land. Instead, they envisioned that the federal rule would further state or local policy consistent with the purpose of the program. Rather than set a percentage requirement, the rule should provide a more qualitative standard that is consistent with existing state and local program requirements.

5) *Forest Management Plans:* The proposed rule adds yet another requirement with respect to forest management plans without any statutory authority to do so. In addition, the threshold of 10 acres is unrealistically low and will impose unnecessary burdens on landowners and undermine interest in the program

As a result, the requirement should be eliminated; or if not, the threshold should be increased to at least 50 acres (the current acreage minimum in the NYS forest tax assessment program).

6) *Renewable Energy:* New York State strongly supports renewable energy development as an important way to reduce reliance on fossil fuels, reduce greenhouse gas emissions and to create new opportunities for economic development in rural areas. Consistent with the State's strong support for working landscapes comprised of farms and forests, we strongly encourage NRCS to accommodate renewable energy uses to the maximum extent possible under FRPP.

In New York's standard easement, we permit, and encourage, the development of renewable energy structures and improvements and address siting, construction and

site restoration in our easement provisions. We require review and approval of the siting of structures for generation and transmission as well as access roads and construction staging sites. We also require adherence to our construction standards, and lastly, we require compliance with our restoration standards once the structures and improvements are in place. We believe that our 2% limit on surface alteration and guidelines for mitigation of construction impacts and restoration requirements adequately ensure that the agricultural uses will not be significantly impaired.

7) *Template Cooperative Agreement*: Our concern about the lack of response to our earlier comments has only been compounded by our recent review of the proposed "Template Cooperative Agreement". While we appreciate the fact that USPAP appraisals are now acceptable, there are a number of the "Conservation Easement Requirements" that are problematic and inconsistent with the clear Congressional intent to transform the program into a financial assistance program. In addition, to our knowledge, there was no advance consultation with state or local partners. We recognize that the timeframe for this particular cooperative agreement was very tight, and left little time for consultation. However, as a result, the proposed cooperative agreement is very problematic as drafted.

Specifically, under *Section VIII, paragraph 12* that addresses permitted uses, the general language that "permitted uses may be added if they do not conflict with the conservation values of the Protected Property" is at odds with several of the specific subparagraphs that follow.

*Subparagraph d* permits "Non-developed Passive Recreation and Educational Activities" if it does not impact the soils and the agricultural operations. It is unclear if commercial activities of that nature are permitted. In addition, if the impact on the soils and agricultural operations is what is important (and we agree), then why is the permitted use limited to "passive" recreation?

*Subparagraph e* permits "Customary Rural Enterprises", but only in buildings constructed and maintained for agricultural use. The prohibition on customary rural enterprises that require their own buildings demonstrates a perplexing lack of flexibility and does not distinguish at all between buildings located or constructed in a designated farmstead area and those built elsewhere on the farm property. We would suggest that a more appropriate and flexible standard for all customary rural enterprises is that they not conflict with the agricultural use (as outlined in the introductory language referenced above).

*Subparagraphs g and i* regarding roads and oil and gas exploration are also inconsistent with the introductory language that uses inconsistency with the agricultural use as the guiding standard for permitted non-agricultural uses. Here too, we would suggest a more flexible approach such as "consistent with" or "compatible with" or "not inconsistent with". If interpreted too narrowly, these standards would essentially eliminate any opportunity for renewable energy structures such as wind turbines or solar arrays as well as prohibit oil and gas extraction entirely.

In *Section VIII, paragraph 13* the first two sentences in the introductory paragraph are inconsistent. One refers to prohibited uses and the other refers to those that may be

prohibited subject to qualification. Similarly, several of the subparagraphs appear to require broad-based or blanket prohibition of certain uses or structures that are inconsistent with the "qualification" language in the introduction.

*Subparagraph b* limits construction to "structures and improvements that support the agricultural use of the Protected Property." This language is too restrictive and should be changed to language that is more flexible such as "consistent with or "subordinate to". The critical issue is to ensure that the construction (whatever it may be used for) does not significantly impair the agricultural use.

*Subparagraph d* prohibits motorized vehicle use "except to support" the permitted uses. Here as well, the language should be drafted more flexibly to allow use of motorized vehicles as long as they are "consistent with" or "subordinate to" the agricultural use. If the provision in the template were included in an easement as written and interpreted literally, it would be unjustified, unrealistic and unenforceable by any measure. Rural landowners, including farmers and ranchers, have been using motorized vehicles for a variety of purposes unrelated to farming or ranching for decades, and when used responsibly, with no significant impact on the agricultural use or related conservation values.

*Subparagraph g* is equally as unsupportable as drafted. Prohibiting signage with very narrow exceptions would appear to further no agricultural or conservation purpose. These are working lands and not scenic easements. In addition, farms and ranches that direct market their products would be unable to advertise what they are selling under the terms of this ill-advised prohibition. Consequently, it should be removed from the template entirely.

*Subparagraph h* generally prohibits subdivision and in so doing fails to recognize that the farm and ranch configurations that we have today may not be the most functional in the future. We strongly recommend a more flexible approach that would permit subdivision if would remain viable for agricultural production and/or would not substantially impair the agricultural purposes or related conservation values.

*Section IX, paragraph 6* states that the Cooperator "shall prohibit all non-agricultural uses of the encumbered properties except for . . ." This provision is inconsistent with language in the agreement and is overbroad. We would suggest language that reads "non-agricultural uses are not permitted if they are inconsistent with the agricultural use or related conservation values.

In sum, we urge USDA to rethink its approach to the Template Cooperative Agreement and work with its partners at the state and local level to substantially revise it and remove the specific provisions that are both overly prescriptive and too inflexible from the New York State Farmland Protection Program perspective.