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August 3, 2009

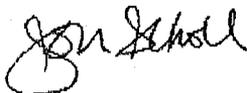
John Glover, Acting Director
Easement Programs Division
Room 6819-S
Natural Resources Conservation Service
U.S. Department of Agriculture
P.O. Box 2890
Washington, DC 20013-2890

RE: Farm and Ranch Lands Program Comments

Enclosed are comments from the American Farmland Trust concerning the Farm and Ranch Lands Protection Program Interim Final Rule (Docket Number NRCS-IFR-08013) as corrected on July 2, 2009. We request that our comments be considered and adopted as NRCS revises the rule and implements the program.

We appreciate the opportunity to provide these comments and encourage you to contact us should you have any questions.

Sincerely,



Jon Scholl
President

American Farmland Trust Comments
On the Interim Final Rule for the
FARM AND RANCH LANDS PROTECTION PROGRAM

Docket number NRCS-IFR-08013

Issue: Contingent Right of Enforcement

Comment: American Farmland Trust is pleased with the new language regarding the contingent right of enforcement. Specifically, AFT agrees with USDA's statutory interpretation that the contingent right of enforcement is not a Federal acquisition of a real property right intended to trigger Federal procedures such as the Department of Justice title standards. We believe this change corrects what had been an incorrect interpretation of the contingent right of enforcement contained in the January 16, 2009 Interim Final Rule and is now consistent with the statutory language and Congressional intent as described in the Joint Statement of Managers accompanying the 2008 Farm Bill conference report.

While USDA is no longer acquiring the right of enforcement, USDA continues to assert that the inclusion of a contingent right of enforcement in a conservation easement deed is nonetheless a vested property right "which provides the NRCS Chief, on behalf of the United States, the ability to sue to ensure the protection of the farmland protection and related conservation values identified in the conservation easement deed." This interpretation appears to provide the necessary authority for language relating to condemnation in section 1491.22; namely, that the "'right of enforcement' clause...is a vested property right and cannot be condemned by State or local government."

USDA's position that the contingent right of enforcement remains a vested property right appears likely to mean the continuation of the FRPP requirement that language relating to general indemnification and environmental warranty be included in conservation easement deeds acquired with FRPP funds. For at least one state program, USDA's proposed indemnification language creates a conflict with its state constitution, preventing the State from signing a cooperative agreement with USDA. While these two language requirements arguably provide a layer of liability protection for both the United States and the eligible entity, AFT does not believe either provision is essential to protect the federal government's right of enforcement.

Recommendation: AFT commends USDA on its clarification of the contingent right of enforcement and decision to eliminate FRPP title standard requirements. AFT urges USDA to not only eliminate title standard requirements for cooperative agreements signed in 2009 and beyond, but to waive the requirements for projects that remain under 2007-2008 cooperative agreements. AFT further recommends that the Final Rule or FRPP policy manual allow flexibility in the wording of indemnification and environmental warranty language to address entity concerns and reduce conflicts with

state laws and constitutions; where conflicts cannot be reconciled, USDA should allow a waiver of the requirement.

Lastly, because of USDA's changed interpretation of the contingent right of enforcement, AFT urges USDA to re-evaluate all elements of the Interim Final Rule, policy manual and template cooperative agreement for their consistency with the new interpretation. Having determined that USDA is no longer acquiring a federal property interest but facilitating the purchase of easements by FRPP partners, USDA should consider whether other aspects of program implementation that were predicated on the earlier interpretation should be modified accordingly.

Issue: Certification

Comment: AFT is disappointed that, like the Interim Final Rule, the corrected IFR does not create a meaningful certification process. Without a robust certification process, USDA will continue to manage the program on a one-size-fits-all basis, creating unnecessary and duplicative administrative burdens on established and experienced state and local farmland protection partners. Indeed, implementation of the program to date in 2009 has entailed continued NRCS title and appraisal reviews, the creation of a new NRCS landowner interview process, and the proposed inclusion in conservation easement deeds of prescriptive language relating to permitted and prohibited uses—requirements that may be warranted for inexperienced entities, but that are redundant and unnecessary burdens on experienced entities and the state NRCS staff responsible for implementing them. A robust certification process could reduce these burdens while safeguarding the federal government's investment in easements acquired with FRPP funds.

In creating a new FRPP certification process in the 2008 Farm Bill, Congress clearly intended certification to reduce what was widely perceived as burdensome requirements for experienced entities. The report accompanying the House-passed bill states the following:

The NRCS changed many of the rules related to this program last year. These changes raised many concerns among state and local FRPP users, most notably in the mid-Atlantic and Northeastern region of the country. Program partners were particularly concerned with changes made to the appraisal methodology, and title and easement review requirements on each and every contract. These changes became additional administrative requirements that led to additional cost and, in some instances, a reduction in applications.

In an effort to alleviate these extraneous requirements, the Committee substitute establishes a certification process for States to receive and administer funds, while protecting the integrity of the program...Therefore, the committee substitute allows the Secretary to enter into agreements for other eligible entities as established and defined in current law, with certain requirements to protect the easement, but without onerous legalities that have had the effect of delaying contracts and discouraging participation.

In noting that the conference report establishes a certification process similar to the House bill for all eligible entities, the Joint Statement of Managers also states:

The managers expect the changes to the [program] will provide flexibility and certainty to program participants. The substitute makes changes to the administrative requirements, appraisal methodology, and terms and conditions of cooperative agreements which shall make the overall program more user-friendly.

Similarly, the Senate summary of the 2008 Farm Bill conference report notes that:

The program has also been streamlined to make it easier for partners, such as states and nonprofit organizations, to participate in farmland protection projects under the program.

While the Interim Final Rule spells out some of the contours of a certification process, it provides no meaningful incentive for entities to become certified and does nothing to streamline program requirements for experienced farmland protection partners. Additionally, the IFR does not provide a way for entities to request certification, stating only in Section 1491.5 that the Chief shall make a determination whether an eligible entity is a certified entity based on information provided by the entity's general FRPP application, the data in the national FRPP database, and the criteria set forth in Section 1491.4(d). AFT does not know how many entities were certified in 2009, but understands that entities were not given an opportunity to request certification and that many experienced program partners were not certified by NRCS this year.

Recommendation: AFT strongly recommends that USDA develop a meaningful certification process that provides significant and valued return to those entities achieving certified status. Eligible entities should be allowed to apply for certification. Certification criteria should include an entity's experience with agricultural conservation easement transactions (not just with FRPP projects), capacity to complete acquisitions in a timely fashion and to effectively monitor and enforce easement terms, and the necessary appraisal and title procedures to safeguard the public's investment in the program. Once an entity is certified, the following should apply:

- Certified entities should be entitled to use their own easement terms and conditions without limitation, and be permitted to include or reject USDA language on indemnification and environmental warranty at their option;
- Certified entities should be entitled to use their own project criteria and selection process;
- NRCS title reviews of projects being done by certified entities would no longer be necessary;
- NRCS appraisal reviews of projects being done by certified entities would no longer be necessary;
- Where certified entities are conducting environmental assessments, NRCS hazardous materials records searches, landowner interviews and site visits would not be necessary.

Issue: Easement terms and conditions

Comment: Section 12381(g)(4) of the program's authorizing statute allows eligible entities to use their 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 are consistent with the purposes of the program, permit effective enforcement of the conservation purposes of such easement, and include a limit on impervious surfaces to be allowed. However, in reviewing the template 2009 cooperative agreement for eligible entities—developed in accordance with the Interim Final Rule published in January—AFT is alarmed by the prescriptive nature of the language to be included in conservation easement deeds. The language both articulates limits on permitted uses of the protected property and includes a number of prohibited uses. While USDA has allowed some entities to negotiate changes to this language in their 2009 cooperative agreements, it is unclear the extent to which all entities are aware of, or have been afforded, the opportunity to do so.

Many of the terms and conditions included in the template cooperative are problematic for FRPP entities; some conflict with state laws, some are inconsistent or more restrictive than an entity's own terms and conditions, and some are likely to chill landowner participation in the program. These include language relating to:

- Forest management plans
- Customary rural enterprises
- Construction
- Motorized vehicle use
- Signage
- Subdivision

Section 1491.22(c) of the corrected Interim Final Rule gives the Chief authority to "exercise the option to promulgate standard minimum conservation deed requirements as a condition for receiving FRPP funds." The Chief appears to have exercised this option this year, given the number of standard deed requirements in the 2009 template cooperative agreement.

Recommendation: Every entity should be allowed an opportunity to negotiate with NRCS over the terms and conditions of their template conservation easement deed, and NRCS should defer to that entity's terms and conditions unless they fail to satisfy the three statutory requirements of Section 12381(g)(4). While it is reasonable to give the Chief discretion to create standard minimum conservation deed requirements (Section 1491.22), such requirements should be limited in scope to ensuring that an entity's easement terms and conditions meet those three statutory requirements. Further, certified entities should be exempt from any minimum deed requirements.

Issue: Impervious Surfaces

Comment: 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.

Despite this clear statutory direction, Section 1491.22 (i) of the Interim Final Rule essentially codifies the NRCS policy on impervious surfaces that existed prior to the 2008 Farm Bill. Impervious surfaces are limited to no more than 2% of the FRPP easement area, with a waiver—on a parcel-by-parcel basis—of up to 10%, at the discretion of the State Conservationist. This continuation of a national 2% standard on impervious surfaces is problematic on a number of grounds:

- A national standard for impervious surfaces directly contradicts the statutory language in Section 1238I(g)(4)(c) and is contrary to Congressional intent on the subject;
- The current 2% impervious surface standard has no scientific basis, and has never been linked to any scientific study that would inform the establishment of such a set formulaic standard; and
- Requiring that any waiver of the 2% limitation be done on a parcel-by-parcel basis undermines the hoped-for efficiencies through the cooperative agreement process, where an entity negotiates terms and conditions for easements across an array of projects covered by a cooperative agreement.

Recommendation: AFT believes 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 limit that is "consistent with the agricultural activities to be conducted" under the easement. Because this is a determination that is best made at the state or local level, the appropriate standard should be left to the eligible entity to develop. AFT recommends that USDA allow as permissible impervious surfaces limits those that do not set numerical limits but provide for a review and approval process for agricultural structures

Issue: Definition of agriculture

Comment: Section 1491.3 of the Interim Final 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.

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 effective enforcement of the easement, and include a limit on impervious surfaces.

Recommendation: 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(g)(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)

Comment: Section 1491.4 (f) of the Interim Final 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)

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. 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)), AFT continues to believe that the eligibility threshold tied to soil types proposed in the rule is inappropriate.

Recommendation: AFT recommends that the rule eliminate the soils threshold for eligibility. The percent of prime and statewide soils would still be considered as part of the national ranking criteria, and could be included by the State Conservationist and State Technical Committees in the state ranking criteria.

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

Comment: 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))

With this provision, Congress specifically intended to recognize land with resource values important to agriculture unrelated to soil quality *per se*, 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.

Recommendation: 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: Eligible land (Ownership by eligible entity)

Comment: The corrected Interim Final Rule provides new flexibility to allow eligible entities in specific circumstances to own the land at the time of applying for and securing matching, grant funds from FRPP. As explained in the corrected IFR, this change will allow a state or local government or NGO to purchase in fee a property threatened with imminent development or foreclosure, protect the land with the assistance of FRPP and then re-sell the property, subject to a conservation easement, to a farmer to be farmed.

Recommendation: AFT welcomes this new flexibility. AFT recommends, however, that the Chief be given the authority to allow an eligible entity to continue to own the land in fee after it has been protected with a conservation easement using FRPP funds, provided the land will remain in active agricultural use. Many land trusts and non-profit organizations are purchasing and protecting farms that then remain in non-profit ownership for use for beginning farmer programs, for youth and adult agricultural education programs, or to increase local access to fresh, nutritional foods. These projects are helping to advance many of the nutrition, new farmer and community-based goals of the 2008 Farm Bill. This flexibility would enable FRPP to contribute to these important initiatives.

Issue: Forest management plans

Comment: Section 1491.4(f)(5) of the Interim Final Rule imposes a new program requirement related to forest land. The IFR requires a forest management plan before closing for projects that include forest land that exceeds the greater of 10 acres or 10

percent of the easement area. 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.” (Page 2812) USDA provides two additional rationale for the requirement: 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 a plan will ensure that the forested acreage continues to contribute to the viability of the agricultural operation.

While AFT supports the development of forest plans as a way to offer landowners a pathway to improved economic and environmental performance of their woodlots and forestlands, this new requirement imposes an unnecessary additional administrative burden on NRCS and FRPP partners 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.

On page 2814 of the IFR, USDA estimates that, based on historical program participation, this policy would have resulted in forest management plans on about 40 percent of parcels protected to date with FRPP funds. Based on discussions with program partners, AFT estimates that this percentage would be far higher in some regions of the country. To require a forest management plan, especially prior to the closing of a project, would severely limit the number of projects that would be eligible and would require the devotion of significant federal and/or state and/or private resources to the development of these plans, all of which are highly unlikely in the current economic climate.

Recommendation: AFT strongly recommends that the rule be revised to eliminate the requirement for a forest management plan. If the requirement remains, AFT urges NRCS to increase the minimum size at which such a plan is required, perhaps to a minimum of 100 acres. Additionally, AFT recommends that the rule specifically provide that a plan created for compliance with a state’s agricultural or forestry use tax assessment program suffice as an acceptable forest management plan.

With regard to the IFR’s assertion that a forest plan is needed to document forest land eligibility, AFT notes that the rule essentially continues the program’s current requirements related to forestland eligibility—namely, that forest land may not constitute greater than two-thirds of the easement area. AFT 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. AFT recommends that NRCS allow multiple means for providing forest land eligibility under this category, not just through a forest management plan.

Issue: Ranking consideration and proposal selection.

Comment: Section 1491.6 of the Interim Final Rule outlines a series of very specific national criteria for scoring and ranking projects for selection in the program. The program's statutory language makes no mention of the need for such a process. For many state and local farmland protection programs, the national criteria may conflict with established project selection and ranking criteria that are tied to clear, locally-driven farmland protection goals and objectives and have been developed through extensive stakeholder involvement.

Recommendation: AFT encourages USDA to waive national ranking criteria for eligible entities that can demonstrate that they have well-established program criteria for scoring or ranking farmland protection projects, developed with meaningful stakeholder input. Such a waiver should certainly be an element of any certification process.

If such a waiver were instituted, AFT recognizes that NRCS may need to compare projects within a state from entities for whom the national ranking criteria has been waived and for those for whom it has not. Accordingly, AFT recommends that NRCS identify broad categories of ranking criteria that must be considered by eligible 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 experienced entities as now envisioned by NRCS.

Issue: Cooperative Agreements

Comment: Because the statute and Interim Final Rule authorize multi-year cooperative agreements, many FRPP eligible entities have signed or are in the process of signing multi-year cooperative agreements in 2009 that comply with the Interim Final Rule promulgated in January 2009. The final rule is likely to change aspects of program implementation, which could affect provisions contained in cooperative agreements signed this year.

Recommendation: AFT recommends that the final rule specifically provide that cooperative agreements signed in 2009 may be re-opened and re-negotiated to reflect any changes in the final rule that would affect the terms of the cooperative agreement.

Issue: The contribution of the Farm and Ranch Lands Protection Program to furthering the Nation's efforts in renewable energy production, energy conservation, mitigating the effects of climate change, facilitating climate change adaptation, or reducing net carbon emissions.

Comment: AFT welcomes the opportunity to comment on the value of protecting agricultural lands from residential, commercial and industrial development to the

Nation's campaign to develop green solutions to our energy needs and to combat the effects of greenhouse gases.

Twenty-three states, over fifty local units of government and numerous non-governmental organizations around the country are currently engaged in permanently protecting farm and ranch lands with conservation easements. The Farm and Ranch Lands Protection Program is a vital and important Federal partner in these efforts. Permanently protecting agricultural lands from development retains the food producing capacity and capability of that land into the future. But much more is at stake and to be gained.

Protecting farmland means that the alternative, developed use of that land will not be contributing to increased vehicle miles; reducing water absorption rates; compromising the carbon-sink potential of the land; and, increasing energy consumption. Integrating the permanent protection of agricultural lands with Smart Growth principles creates economically and environmentally sustainable, livable communities.

Protecting farmland, particularly in, around and near our urban metro areas, maintains the opportunity for locally-grown food production, reducing the time between field and fork and the carbon footprint of our food supplies. USDA's 2005 Census of Agriculture reveals that 91% of fruit, 78% of vegetable and 67% of dairy production in the U.S. occurs in urban influenced counties as defined by USDA's Economic Research Service. Without protection, historic land use patterns place the land that produces this food in the path of future development.

The Farm and Ranch Lands Protection Program expands the Federal involvement through the Natural Resources Conservation Service in soil and water conservation activities to include protecting the land itself from irreversible development. FRPP is a critical partner for saving the land that sustains us.