

September 8, 2009

Honorable Tom Vilsack
Secretary
United States Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

FARM AND RANCH LANDS PROTECTION PROGRAM
Docket number NRCS-IFR-08013

Dear Secretary Vilsack,

We have all submitted comments on the Interim Final Rule on the Farm and Ranch Lands Protection Program (FRPP) and understand that those comments will be considered as the USDA Natural Resources Conservation Service (NRCS) makes further changes to the Rule. However, in addition to those comments, which reflect differences in agricultural practices and regional perspectives, this letter is our joint expression over key, common issues. In short, we ask that NRCS give the states maximum discretion to implement FRPP as Congress has now directed.

Simply put, protecting farmland for future agricultural use is of utmost importance to every citizen of the United States. Going as far back as the late 1970's, our states and commonwealths have taken action to protect farmland so critical to maintaining the future viability of our agricultural sectors and rural communities. To date, the undersigned states are responsible for over 70% of all the acreage protected under state farmland protection programs. Since 1995, we acknowledge the important contribution of FRPP as a partner in our mutual efforts, with our states receiving 53% of all funds distributed by the program. We welcome NRCS as our partner and offer our perspective to improve the quality, efficiency and effectiveness of FRPP.

Unfortunately, we believe that the current Docket proposal does little to correct serious problems that 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 expectation among state farmland protection programs was that the 2008 Act would open the door to a more streamlined and effective federal program with deference to state interests. The two Docket proposals issued this year do not accomplish that result and we conclude they will perpetuate the obstacles to providing matching funding, which predated the 2008 Act and which have served to frustrate and prevent greater state level participation. These expectations derive from the Congressional record and statutory amendments contained in the 2008 Act. We believe these can be summarized as: FRPP was changed from a Federal real estate acquisition program to a program that facilitates financial assistance to non-Federal entities for conservation easement acquisitions; and, FRPP was expanded

beyond the purpose of protecting soils to protection of agricultural use and related conservation values.

Contingent Right of Enforcement

We commend USDA on its clarification of the contingent right of enforcement and decision to eliminate FRPP title standard requirements. However, we urge 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. Further, we recommend 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, we urge USDA to re-evaluate all elements of the Interim Final Rule, policy manual and template cooperative agreement for their consistency with the new interpretation. Since USDA is no longer acquiring a federal property interest but facilitating the purchase of easements by FRPP partners, USDA must also consider whether other aspects of program implementation that were predicated on the earlier interpretation should be modified accordingly. In our individual comments, we have suggested specific NRCS policies and procedures which should be re-evaluated.

Certification

We strongly recommend 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;
- Appraisals would need to be consistent with state standards and undergo review by the respective agencies. Appraisal reviews at the Federal level have proven to be a major obstacle to program implementation, therefore, NRCS appraisal reviews of projects being done by certified entities would no longer be necessary;
- NRCS hazardous materials records searches, landowner interviews and site visits would not be necessary.

Easement terms and conditions

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 1238I(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.

Forest management plans

We strongly recommend that the rule be revised to eliminate the requirement for a forest management plan. With regard to the IFR's assertion that a forest plan is needed to document forest land eligibility, we note 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. We believe 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. Another might be certification by the State Forester as provided in many use value assessment laws. Therefore, we recommend that NRCS allow multiple means for providing forest land eligibility under this category, not just through a forest management plan, and recommend that state NRCS offices be given the discretion to tailor guidelines regarding forest land eligibility to the circumstances present in that particular state.

Impervious Surfaces

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 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. We recommend 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. We welcome the contribution of our individual State Conservationists in the development of appropriate limits and standards.

National ranking consideration and proposal selection

We recommend that USDA 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, we recognize 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, we suggest that NRCS identify broad categories of ranking criteria that must be considered by eligible entities in their criteria and selection process. USDA's

own LESA (Land Evaluation and Site Assessment) model can provide guidance on criteria. 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.

In closing, we appreciate your consideration of each of the issues outlined above and we request an opportunity to meet with you via a conference call to discuss these matters in more detail. We have asked the American Farmland Trust to work with NRCS Chief Dave White on arranging an opportunity for us to speak with you in the very near future. Thank you.

Sincerely,



F. Philip Prelli, Commissioner
Connecticut Department of Agriculture



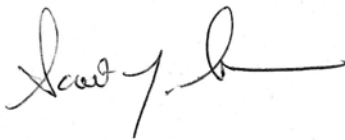
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Delaware Department of Agriculture



Seth H. Bradstreet, III, Commissioner
Maine Department of Agriculture,
Food and Rural Resources



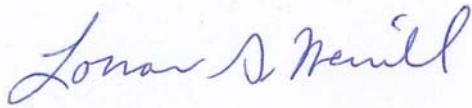
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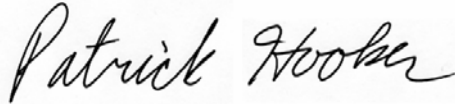
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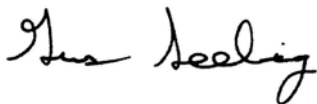
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