

Scenic Hudson, Inc.
One Civic Center Plaza, Suite 200
Poughkeepsie, NY 12601-3157
Tel: 845 473 4440
Fax: 845 473 2648
email: info@scenichudson.org
www.scenichudson.org

*Devise
Eye
Suzt*



**SCENIC
HUDSON**

Fax 202-720-9689

554

August 3, 2009

Jon Glover
Acting Director, Easement Programs Division
USDA-NRCS
P.O. Box 2890
Washington, DC 20013

Re: Docket Number NRCS-IFR-08013 (Farm and Ranch Lands Protection Program Comments)

Mr. Glover:

For your consideration, we submit the following comments on the Interim Final Rule of the Farm and Ranch Lands Protection Program. Specifically, we provide comment on the following key programmatic implementation issues: certification, contingent right of enforcement, cooperative agreements, easement terms and conditions (including impervious surfaces requirements), eligible lands, forest management plans, and ranking consideration and proposal selection.

Certification

In creating a new FRPP certification process in the 2008 Farm Bill, Congress clearly intended certification to streamline and reduce program requirements for experienced entities. It is disappointing that the Interim Final Rule does not create a meaningful certification process that would allow for greater efficiency implementing the program for experienced entities and the state NRCS staff. We urge USDA to develop a robust certification process that allows eligible entities to apply for certification. Criteria for certification should consider an entity's:

- 1) experience with agricultural conservation easement transactions (not just FRPP projects);
- 2) capacity to complete transactions in a timely manner;
- 3) ability effectively monitor and enforce easement terms; and
- 4) appraisal and title procedures to safeguard the public's investment in the program.

Once an entity is certified, we ask that the following apply:

- 1) 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;
- 2) Certified entities should be entitled to use their own project criteria and selection process;
- 3) NRCS title and appraisal reviews of projects being done by certified entities would no longer be necessary; and
- 4) Where certified entities are conducting environmental assessments, NRCS hazardous materials records searches, landowner interviews and site visits would not be necessary.

Jon Glover
August 3, 2009
Page 2 of 3

Contingent Right of Enforcement

USDA is to be commended its clarification of the contingent right of enforcement and decision to eliminate FRPP title standard requirements. This revision corrects what many believe was an incorrect interpretation of the contingent right of enforcement 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. We urge USDA to eliminate title standard requirements for cooperative agreements signed in 2009 and beyond (and to also waive the requirements for projects that remain under 2007-2008 cooperative agreements). Allowing flexibility in the wording of indemnification and environmental warranty language will address entity concerns and reduce conflicts with state laws and constitutions.

Cooperative Agreements

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. We ask that the final rule provide specifically that cooperative agreements signed in 2009 can be re-opened and re-negotiated to reflect any rule changes that impact the terms of the cooperative agreement.

Easement terms and conditions (including impervious surfaces requirements)

While it is reasonable to give the Chief discretion to create standard minimum conservation deed requirements (Section 1491.22), those requirements should be limited to ensuring that an entity's easement terms and conditions meet the statutory requirements of Section 1238I(g)(4).

However, many of the language provisions (such as forest management plans, and impervious surfaces) are problematic for FRPP entities – some conflict with state laws, some are inconsistent or more restrictive than an entity's own terms and conditions. Further, every entity should be afforded an opportunity to negotiate with NRCS over the terms and conditions of their template conservation easement deed. Specifically, USDA should consider allowing as permissible impervious surfaces limits those that do not set numerical limits but provide for a review and approval process for agricultural structures.

Eligible land

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 "...protect the agricultural use and related conservation values of eligible land by limiting the nonagricultural uses of that land" (Section 1238I (b)), retaining an eligibility threshold relating to soils seems inconsistent with the revised statute. Additionally, in our region much of the important farmland in quality fruit and orchard production does not necessarily have high proportions of prime and unique soils, but nevertheless is some of the best land in fruit

Jon Glover
August 3, 2009
Page 3 of 3

production in New York State due to such factors as microclimate. For this reason, we urge USDA to consider eliminating the eligibility threshold relating to soils (a project's 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 as well).

Additionally, the statutory revisions to the program envision the protection of agricultural land not solely based on the quality of farmland soils. To this end, the rule should include a definition of "state or local policy consistent with the purposes of the program." For example, "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."

Forest management plans

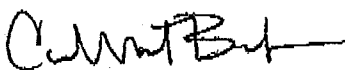
Section 1491.4(f)(5) of the Interim Final Rule requires a forest management plan before closing for projects that include forest land that exceeds the greater of 10 acres or 10 percent of the easement area. In our region, where most farms have supporting forest lands, this would impact a majority of the projects potentially funded by FRPP and would likely be construed as burdensome for forest land that is not actively managed. Furthermore, many agricultural easements often allow for the immediate conversion of forest land to agricultural land; something that may not be advised in a forest management plan. For these reasons we urge the USDA to eliminate the forest management plan requirement.

Ranking consideration and proposal selection.

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. For many state and local farmland protection programs, the national criteria may conflict with established state or local program criteria that are tied to clear, locally-driven goals and objectives. We believe that certified entities should be allowed to use their own ranking considerations and proposal selection process for individual projects rather than NRCS national and state criteria.

We appreciate the opportunity to comment on this important Interim Final Rule.

Sincerely,



Cari Watkins-Bates
Senior Land Project Manager
The Scenic Hudson Land Trust, Inc.

cc: Andy Bicking, Director of Public Policy and Special Projects, Scenic Hudson