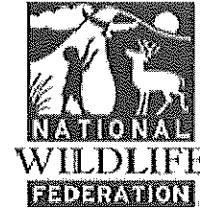


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Easements Program Division
Natural Resources Conservation Service
United States Department of Agriculture
Room 6819-S
PO Box 2890
Washington, DC 20013



Via electronic submission: www.regulations.gov

Farm and Ranch Lands Protection Program Comments

I am writing to provide the comments of the National Wildlife Federation on the Interim Final Amended Rule to implement the Farmland Protection Program provisions of the 2008 Farm Bill.

National Wildlife Federation is America's largest member-supported conservation organization. Through our national organization and in partnership with our state affiliates, the National Wildlife Federation works to actively educate, inspire, and promote achievable solutions to everyday Americans in communities from coast-to-coast.

We appreciate the efforts of the Natural Resources Conservation Service to amend the rule implementing the Farmland Protection Program (Section 2401 of the 2008 Farm Bill), designated the Farm and Ranch Lands Protection Program (FRPP) under the rule.

Contingent Right of Enforcement

Congress clearly required that the "contingent right of enforcement" be included in the easement (or other interest in the land), but the Managers Report for the bill notes that the Managers did not intend for this contingent right to be an acquisition of real property by the federal government. We recognize that requiring such easements to meet federal property acquisition standards would introduce new and unneeded complications. We also recognize that providing for a contingent right of enforcement for NRCS is a very important protection under the program.

• *We support the new NRCS interpretation of the statute, and support the language in the amended rule that would require that the contingent right of enforcement be included in each easement, but that would not consider that a federal acquisition of real property.*

Land Eligible for Inclusion in the Program

The original Interim Final Rule included an outright prohibition on enrolling land owned in fee title by an agency of the United States, a State or local government, or an entity whose purpose is

to protect agricultural use and related conservation values, or land already subject to an easement or deed restriction limiting its development. In our original comments, we noted our support for the general philosophy behind this prohibition, that the program should not be used to protect land that is already protected.

However, as we noted in the comments we filed on the Interim Final Rule, “there are instances where an entity will purchase a property that is on the market, to protect it from development, and where the selling landowners were unwilling or unable to wait for a FRPP-funded easement. Where the sole purpose of the acquiring entity is to put a conservation easement on the land to protect it from development and then sell the land to a farmer or rancher, the use of FPP funds could be justified.”

We recommended that language be added at the end of section 1491.4(f)(6) to explain circumstances in which the NRCS could approve such a FRPP application, and we suggested some language which tracks the justification included in the “Discussion of Program” of the Amended Interim Final Rule.¹

The amended rule addresses this issue by giving the Chief authority to waive that provision (Section 1491.4(f)(6)), but without providing guidance or explanation of the circumstances under which the Chief might exercise that authority. By not providing such guidance in the rule, the rule could (1) open up NRCS to many requests from government agencies and non-governmental organizations seeking a waiver for whatever reason, and (2) open the NRCS to legal challenge from an entity turned down under this provision.

• We recommend that NRCS retain the authority for the Chief to waive the prohibition, but include language in this provision (Section 1491.4(f)(6)) that provides guidance on the circumstances under which the Chief might exercise his or her authority, and we suggest that the language track the explanation included in the discussion included in the amended rule.

Mitigating Climate Change

We appreciate the NRCS request for public input on how the FRPP can achieve its purposes and 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. We see at least three opportunities where NRCS could maintain the statutory purposes of the program while addressing climate change issues.

First, in scoring and ranking FRPP applications, under the Interim Final Rule at least one-half of the ranking system score must come from the national ranking criteria, but those national criteria ignore climate change or other conservation or environmental benefits, unless added as an additional criteria by the Chief under Section 1491.6(f)(9)). The state ranking criteria may

¹ The language we suggested: “*The Chief may approve the enrollment of land owned by a non-governmental entity where the Chief determines that the land was purchased at or near market value by an organization for the purpose of protecting the agricultural use and related conservation values of the land, where the organization will sell the land once the conservation easement is in place, and where approval of the application will further the purposes of the program.*”

include other criteria, including “environmental benefits” among other “multifunctional benefits” (Sec. 1491.6(g)(3)), although climate change is not specifically mentioned.

• We recommend that NRCS add climate change as a national ranking criteria to the rule, or that the Chief designate the impact on climate change as an additional national criteria to be considered. Under this provision, an application that would provide climate change benefits -- for example, by restricting a native grassland or forest from being converted to cropland -- would score additional points and thus be more likely to receive funding.

Second, as we noted in our comments on the original Interim Final Rule, “the new statutory language makes it a clear purpose to protect the “related conservation values” of land enrolled in the program. This is a significant change from the old statute. However, in its rules, NRCS would only ensure protection of those conservation values by requiring that a landowner comply with Highly Erodible Land and Wetland Conservation provisions of the Farm Bill (also required under the old rules), and by requiring a Forest Management Plan on lands that contain 10 acres or 10 percent or more forested land.”

We believe this approach falls short of protecting all of the “related conservation values” under the program, as is required by the statute. Where those related conservation values include an impact on climate change, the lack of a conservation plan may make it difficult to ensure that the benefits continue into the future.

• We repeat our recommendation from our earlier comments, that NRCS should revise the rules to require a Conservation Plan at the time of closing designed to identify and protect the related conservation values of the land enrolled, unless the State Conservationist determines that such a plan is not necessary to protect such conservation values for that easement. The rule should also provide a new definition of Conservation Plan that relates to the protection of the conservation values that the easement is designed to protect.

Third, as we noted in our comments, we believe the intent of Congress was to allow state and local organizations to include provisions that most appropriately protect the agricultural use and related conservation values of most significance in their area, and that meet the needs of the eligible entity and landowner. We urged NRCS, as it implements these provisions, to allow easement-holding entities and willing landowners that wish to use the easement to limit the kinds of agricultural use or restrict the destruction of native prairie to do so. The program’s purpose clearly anticipates not just the protection of agricultural purposes, but the protection of conservation values associated with each farm or ranch land parcel enrolled.

Where those ‘conservation values’ are integral to the land use -- as they would be in protecting a native prairie through an easement and grazing plan, or protecting an area from air quality problems and additional greenhouse gas emissions inherent in a large feedlot -- USDA should give broad latitude to eligible entities and willing landowners to determine the terms of the easement. In the cases cited above, the easement and conservation plan could also provide climate change benefits, or at least prevent additional greenhouse gas emissions, by restricting uses that would contribute to greenhouse gas emissions.

● *We again urge NRCS, in implementing the program, to allow easement-holding entities and willing landowners that wish to use the easement to limit the kinds of agricultural use or restrict the destruction of native prairie to do so.*

Other Issues Not Addressed

We raised other important issues in our comments on the original Interim Final Rule that were not addressed by the Amended Interim Final Rule. We again urge NRCS to look carefully at the issues raised by our March 16 comments, and to issue a Final Rule or Amended Interim Final Rule that addresses these important concerns.

We noted above our recommendation to require a conservation plan, developed by the landowner and easement owner with input and approval from NRCS, that would address and protect the related conservation values associated with the easement. While it has application with respect to climate change, with or without a focus on climate change we believe the recommendation for a conservation plan is an important one for ensuring that the rules meet the letter and intent of the statute to protect the related conservation values associated with each easement.

To recap our other recommendations not already addressed above:

● *Noting that Congress expanded the program's coverage beyond land with "prime, unique, or other productive soil", we recommended that NRCS include a new definition in Section 1491.3: "State or local policy consistent with the purposes of the program is a state or local law, program, or plan that identifies or prioritizes farm or ranch land for protection based on the public benefits of its continued agricultural use and related conservation values. The State Conservationist may, with advice from the State Technical Committee, designate such laws, programs, or plans as are appropriate in each state, and eligible entities that submit applications may suggest a law, program or plan related to the application that meets this definition, subject to approval by the State Conservationist. Examples of such plans could include a state farm and ranch protection plan, a state green space law, a local zoning ordinance, a state or local program that provides funding for farmland protection, or a state or regional wildlife plan that identifies the protection of agricultural lands as beneficial for wildlife."*

We noted that the original Interim Final Rule included national ranking criteria that would skew the selection of projects in ways that ignore an important new purpose of the program (protecting related conservation values), and that will under-value applications that meet the new eligibility criteria (applications addressing state and local policies) or that contain historical or archaeological resources, versus those that contain prime or unique farmland. We suggested two alternatives, which we repeat here:

● *(1) NRCS should use the three classes of eligible land (included in new 16 USC 3838h(s)), and determine national priorities based on those classes and the purpose of the program (to protect agricultural use and related conservation values) which could be used to allocate funding to each state NRCS office. Those allocation priorities could include areas where agricultural land and related conservation values face the most pressure from development, rapidly expanding urban areas, areas with little remaining land on which to grow crops, and*

other areas where development is impacting agricultural land use and related conservation values. Then, each State Conservationist, with input from the State Technical Committee, could use in-state priorities such as those outlined in Section 1491.6(g) of the rules to score and rank applications.

• (2) If NRCS chooses to retain the overall ranking and selection structure included in Section 1491.6 of the rules (using national criteria as at least half of the ranking score), then we believe that NRCS should strike subsection (f)(1) (because it prioritizes prime and unique soils to the exclusion of other program priorities); (f)(3) (because the relationship of the application to average farm size in the county would not seem to be an indication of the quality of the application); and (f)(6) (because population growth, not density, is the critical driver of development pressure).

Thank you for the opportunity to comment on the Amended Interim Final Rule with respect to the Farm and Ranch Lands Protection Program.

Yours in Conservation,

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