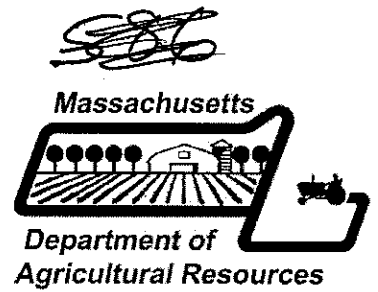


THE COMMONWEALTH OF MASSACHUSETTS
 EXECUTIVE OFFICE OF ENERGY AND
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Department of Agricultural Resources

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July 31, 2009

Jon Glover, Acting Director
 Easement Programs Division, USDA-NRCS
 Farm and Ranch Lands Protection Program Comments
 P.O. Box 2890
 Washington, DC, 20013

RE: Docket Number NRCS-IFR-08013

Director Glover,

The Massachusetts Department of Agricultural Resources (MDAR) is pleased to provide the comments included herein relative to the interim rules and the rule making process associated with the Farm and Ranch Lands Protection Program (Docket Number NRCS-IFR-08013). The Commonwealth of Massachusetts is proud to have a more than 30 year history with our Agricultural Preservation Restriction Program that has enabled the permanent protection of farm land resources; to date permanently protecting more than 12% of the State's nearly 520,000 farm land acres. A critically important component of the Commonwealth's ability to maintain our farm land protection activities has been the strong and interactive partnership that we continue to enjoy with our federal counterparts at the USDA. Through 2008, USDA's Farm and Ranch Land Protection Program (FRPP) and the MDAR's Agricultural Preservation Restriction Program have successfully protected over 9,016 acre, while timely and effectively utilizing \$24.4 million federal funds. Similarly, our efforts to enhance the delivery and availability of technical assistance to our *growing* agricultural sector has been the result of our ability to develop and implement creative delivery systems that we believe have maximized the beneficial impact of Federal and State resources. To that end, we have reviewed the interim rules for the Farm and Ranch Protection Program and have included comments in this correspondence that we believe will facilitate our continued efforts and strengthen the already strong relationship that we enjoy with our Federal partners.

We welcome the opportunity to describe our comments further and to work with you toward a fruitful implementation of the Food, Conservation, and Energy Act of 2008.

Respectfully submitted,

Scott J. Soares, Commissioner

Massachusetts Department of Agricultural Resources

Comments on the Interim Final Rule for the
FARM AND RANCH LANDS PROTECTION PROGRAM

Docket Number NRCS-IFR-08013

The passage of the Food, Conservation and Energy Act of 2008 (the 2008 Act) provided optimism and enthusiasm to state entities, which in contrast to previous guidelines under the 2006 Interim Final Rules for administering the Farm and Ranch Land Protection program were frustrated by impediments within the past rules. The Massachusetts Department of Agricultural Resources (MDAR) felt the Act of 2008 recognized some of the shortfalls from the 2006 rules, which conflicted with State Statutes and encumber existing state program standards that have demonstrated to be resilient over the test of time. Therefore, MDAR urges revision to the IFR within the following subject matters:

THE CONTINGENT RIGHT OF ENFORCEMENT

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. 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 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 will be included in conservation easement deeds acquired with FRPP funds. While these two provisions arguably provide a layer of liability protection for both the United States and MDAR, MDAR does not believe either provision is essential to protect the federal government's right of enforcement.

MDAR urges USDA to reevaluate all elements of the Interim Final Rule and the template cooperative agreement in light of the revised interpretation of the right of enforcement.

MDAR also 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. Additionally, 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.

CERTIFICATION FOR QUALIFIED ENTITIES

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. Program implementation 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 such as MDAR and the state NRCS staff responsible for implementing them. 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. 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 rule does not provide a way for entities to request certification.

MDAR urges that a robust certification process be developed that provides significant and valued return to those entities achieving certified status. Eligible entities should be allowed to apply for certification. Said certification's criteria should consider an entity's: experience with agricultural conservation easement transactions, capacity to complete transactions in a timely manner, effectively monitor and enforce easement terms, 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 permitted and prohibited uses, 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; and finally where certified entities are conducting environmental assessments, NRCS hazardous materials records searches, landowner interviews and site visits would not be necessary.

EASEMENT TERMS AND CONDITIONS

Section 12381(g)(4) of the FRPP 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. The nature of the language contained in the template 2009 cooperative agreement is alarming. The language requires the inclusion of specific terms and conditions that limit permitted uses of the protected property and prohibit other uses. Many of the language provisions are problematic for MDAR and some conflict with Massachusetts General Law, some are inconsistent or more restrictive than MDAR'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, and impervious surfaces.

MDAR urges that every entity should be afforded an opportunity to negotiate with NRCS over the terms and conditions of their template conservation easement deed, and NRCS should defer to the 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), those requirements should be limited to ensuring that an entity's easement terms and conditions meet the statutory requirements of Section 12381(g)(4). Further, certified entities should be exempt from any minimum deed requirements.

IMPERVIOUS SURFACES

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 language in Section 12381(g)(4)(c) of the statute 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 not only directly contradicts the language in Section 1238I(g)(4)(c) of the statute, but is arbitrary and has no scientific basis.

MDAR urges 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 and consistent with entity program criteria. USDA should allow as permissible impervious surface limits that do not set numerical limits but provide for a review and approval process for agricultural structures.

PROJECT RANKING CONSIDERATION

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 such as ours, the national criteria conflicts with established state or local program criteria that are tied to clear, locally-driven goals and objectives.

MDAR urges 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. NRCS should, at most, identify broad categories of ranking criteria to be covered by certified entities in their criteria and selection process. These categories would ensure consideration of a common set of resource and location issues such as soils capabilities, land type, farm size, development pressure and proximity to other farms and protected lands without imposing the specificity of nationally applied criteria on certified entities as now envisioned in the IFR.

COOPERATIVE AGREEMENTS

The statute and Interim Final Rule authorize multi-year cooperative agreements, MDAR is in the process of signing a multi-year cooperative agreement that complies 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.

MDAR urges that the final rule should 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.