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Pennsylvania Department of  
**AGRICULTURE**

September 22, 2006

Easement Program Division  
Natural Resources Conservation Service  
1400 Independence Avenue, SW  
Room 6819-S  
Washington, DC 20250-1400

To whom it may concern:

Enclosed please find the review comments from the Pennsylvania Department of Agriculture concerning the Farm and Ranch Lands Protection Program (FRPP) published Interim Final Rule on July 27, 2006. These comments relate to the amendments to 7CFR part 1491 subject areas as outlined in the Interim Final Rule. The Department has discussed each subject as it relates to the Pennsylvania Agricultural Area Security Law (3P.S. §§901 et. seq.) Act 43 of 1981 and the corresponding Chapter 138e Rules and Regulations, which govern the administration of the Agricultural Conservation Easement Program.

We are hopeful that an equitable solution can be reached to resolve the many discrepancies between the NRCS policy and the Commonwealth's legislation and regulations.

Thank you for allowing the Commonwealth the opportunity to comment on the Interim Final Rule. We look forward to your consideration in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Sandra Robison".

Sandra Robison  
Director

Enclosures

cc: Robert Glennon, FRPP Program manager  
Craig Derickson, State Conservationist  
Bill Wehry, Deputy Secretary, PDA  
Wayne Grube, Project Review Specialist

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September 22, 2006

Easement Program Division  
Natural Resources Conservation Service  
1400 Independence Avenue, SW  
Room 6819-S  
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**RE: COMMENTS ON FARM AND RANCH LANDS PROTECTION PROGRAM  
(FRPP) INTERIM FINAL RULE PUBLISHED JULY 27, 2006.**

#### **SUMMARY**

The Interim Final Rule was published under the authority of Section 2702 of the Farm Security and Rural Investment Act of 2002, Pub. L. 107-17 which rule makes program changes to clarify existing Federal law and policy requirements under FRPP. Each of the subjects discussed below are contained in the Interim Final Rule as amendments to 7 CFR Part 1491 for public comment. The discussions represent the views and comments of the Pennsylvania Department of Agriculture who has the authority to administer the Agricultural Conservation Easement Program (ACE) under the approval of the State Legislature, Act 43.

The stated purpose of the FRPP to protect topsoil by limiting nonagricultural use of land is consistent with the goals and objectives of the Pennsylvania State Easement Purchase Program authorized by the Commonwealth under the Agricultural Area Security Law, Act 43 of 1981. Under Act 43, it is the policy of the Commonwealth to conserve and protect and to encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. It is also the stated policy of the Commonwealth to conserve and protect agricultural lands as valued natural and ecological resources which promote needed open spaces for clean air, as well as for aesthetic purposes.

Since the inception of the Farmland Preservation Program (FPP) in 1996, the Commonwealth has participated each year in the program by receiving federal allocations as matching funds to purchase conservation easements that protect prime and important farmlands from conversion to nonagricultural uses.

In Pennsylvania, the State Program has been in operation since 1987 with the first easements purchased in 1989. The State has consistently maintained strong administrative control on the eligibility of farmland applications, minimum eligibility criteria, LESA ranking system, approval

process, conservation planning and implementation of needed practices, inspections, monitoring, enforcement and prosecution of violations under the published Chapter 138e Rules and Regulations of Act 43. Since 1989, Pennsylvania has purchased a total of 2,925 agricultural conservation easements on farmland totaling 332,000 acres in 53 counties of the Commonwealth

The State, through the Department's Bureau of Farmland Preservation, is first in the nation with number of farms and acres preserved. Since 1996, the NRCS through the FRPP, has contributed \$13.1 million or less than 2.0% of the total Department expenditures in the State. Pennsylvania desires to continue this successful relationship to preserve even more farms in the future

At present we are concerned that the FRPP program changes through the Interim Final Rule would jeopardize Pennsylvania's eligibility to participate in the FRPP since these changes in criteria would require a change to our state law that has preserved 2,925 farms over the last 17 years. The comments listed below summarize our greatest concerns for the continued partnership between the State and Federal government through the FRPP program.

### **GENERAL PROVISIONS**

Subpart A amends the §1491.3 to change the definition of fair market value to the value of the landowner's whole property before and after easement. The current definition appears to be more consistent with the fair market value as defined under the State's ACE program which assesses the before and after easement value of the proposed eased land excluding buildings and the value of other non-protected land owned by the same individual. The State's appraisal system does account for the IRS enhancement provisions concerning any increase in land withheld from the easement by the landowner for speculative development in the future as the demand increases for the adjacent non-protective land for development. Any other assessment of non-protected land owned by the landowner through the appraisal system would require a change in the basic Act 43 State legislation and the Chapter 138e Rules and Regulations for development of an Appraisal Report. Any changes to the State legislation and rules and regulations would require a lengthy process involving the Independent Regulatory Review Commission approval after opportunity for public review and comment. It is not possible that changes to Act 43 and Chapter 138e could be accomplished within a two-year process. The Department requests that implementation of this change in definition for Fair Market Value be waived as a FRPP requirement in favor of completing the necessary IRS enhancement criteria where necessary for individual farms participating in FRPP.

### **ELIGIBILITY OF FOREST LAND**

The change in the FRPP §1491.4 limitation that no more than two-thirds (2/3) of the easement acreage may be occupied by forested acreage does not present any conflicts with the State ACE program in Pennsylvania. The State program will continue to require that less than 50 percent of the eligible eased land be devoted to forestland as meeting the ten (10) percent land cover and use criteria under FRPP.

## **REAL PROPERTY INTEREST OF THE UNITED STATES**

The regulations promulgated under 16USC 3838i found at 7 CFR § 1491 requires that a Federal contingency right interest must be included in each easement deed. The contingent right must provide that the Secretary of the USDA has the option to acquire title to the easement if the eligible entity fails to uphold the easement or attempts to transfer the easement without first securing the consent of the Secretary. Additionally, the deed of easement requires that: the easement area be maintained in accordance with FRPP goals and objectives for the term of the easement; the easement term be for perpetuity; that a conservation plan be developed and implemented; that the cooperating entity shall acquire hold, manage and enforce the easement; that NRCS must sign the conservation easement deed concurring with the terms, and accepting the contingent interest; that an indemnification clause requiring landowners to indemnify, defend and hold harmless the United States from any liability resulting from the negligent acts of the landowner. These requirements are consistent with the State's Deed of Agricultural Conservation Easement in conjunction with the Federal Addendum; as cooperatively developed by the State and NRCS

The NRCS Conservation Programs Manual Policy Part 519 Farm and Ranch Lands Protection Program § 519.11 (C)(3) requires that a contingent right in the United States of America statement is included in the easement deed or other instrument prior to authorizing payment. Section 519.60(H) and (I) require that the provisions found at 7 CFR § 1491 discussed in the previous paragraph be included in the deed. These requirements are consistent with the State's Deed of Agricultural Conservation Easement in conjunction with the Federal Addendum template developed between the State and NRCS, as presently in use. The use of the cooperative Federal Addendum template currently in use has minimized the need to modify the standard deed provisions in order to conform to the FRPP policies. The State supports the use of the conservation easement Federal Addendum template as a means of incorporating the co-grantee status of the United States interests in the easement and other FRPP policies.

## **TITLE REVIEW**

The title review and approval process by the Office of General Counsel (OGC) for determination of legal sufficiency adds another bureaucratic level of complexity that delays the easement process for completing the easement purchase. The State has setup an elaborate system of title search, title commitment and title policy review and scrutiny that ensures that any "clouds" on the title have been removed or subordinated before easement closing occurs. The State legal counsel maintains a close review and oversight on the legal status of each easement purchased and continually monitors legal problems and potential violations of the easement provisions. The legal sufficiency of the easements is assured by the State review process to the satisfaction of the closing agents before an easement is purchased. The closing agent, which is generally, the title insurance company attorney or county government solicitor follows all the necessary provisions outlined in the title insurance commitment at the time of settlement before the easement is purchased. The duplication of effort by the Federal OGC is unnecessary as a separate bureaucratic time consuming and costly duplication of taxpayer resources

Since the Federal government through NRCS obtains its own separate title insurance policy under FRPP, time needs to be spend and effort directed toward the Federal process of obtaining its own title insurance rather than scrutinizing the title insurance process conducted by the State for the past 17 years of experience. Be assured, we are not going to get cheated in the title insurance process by not obtaining free and clear title to the eased area and free and clear of all encumbrances

It is our position that NRCS needs to waive this requirement for FRPP and concentrate on obtaining separate title insurance for the Federal government's interests in the eased land.

With the State's experience of easing farms in the past 17 years, it appears presumptuous to think the title insurance documents need any further scrutiny and approval by the Federal government for the few FRPP easements that are purchased each year by the extremely limited federal funding.

### **EXERCISING THE UNITED STATES RIGHTS**

The Department has an extensive responsibility under Act 43 and the Chapter 138e Rules and Regulations to monitor, inspect and enforce any and all violations of the Deed of Easement. These legislative directives include the field inspection of individual eased farms each year by county personnel. Inspection reports are submitted to the Bureau of Farmland Preservation along with any violation notices for review and action.

The Department and Bureau have numerous reservations concerning the future participation of the State in FRPP if the proposed new rules are adopted for federal administration by NRCS. Pennsylvania may be placed in a position of not being able to participate in the future FRPP matching fund program resulting from the conflicts arising between the expanded administrative responsibilities of NRCS in areas of enforcing the Deed of Easement, monitoring, enforcement and prosecution of violations as stated under Sections 1491.22, 1491.23, 1491.30, 1491.31 and 1491.32

The Pennsylvania Legislature under Act 43 gave the Department, Bureau and Counties enforcement responsibilities as Grantees of the conservation easements through the County Court of Common Pleas system. It is inconceivable that the Commonwealth will relinquish this authority and subject future applicants to federal enforcement responsibilities under NRCS by participating in the FRPP matching fund process. We feel that since neither NRCS or CCC are Grantees of the recorded conservation easements with individual landowners, NRCS has no responsibilities under law to monitor, enforce or prosecute violators of the easements. Therefore, NRCS should not impose rules and regulations covering these enforcement authorities already legislated by the Commonwealth under Act 43. These portions of the proposed FRPP rules should be removed and confine any rules to the administration of the application and disbursement of federal match funds and not to the administration of the Deed of Easement which the State and County have been legislated by the Commonwealth.

There are many other state programs where the U.S. Department of Agriculture cooperates by providing funding which do not contain federal enforcement authorities with landowners. It is difficult now under the FRPP to convince landowners to sign the "reversionary clause" as part of the recording of the Deed of Easement. It would be nearly impossible in Pennsylvania to convince landowners to accept the stringent federal monitoring, enforcement and violation rules in addition to those imposed by the State Program. The proposed FRPP rules are a major disincentive for landowners to sell an easement on their land subject to these federal rules.

Under the Section 1491.3 Definitions, the definition for a conservation plan is inadequate for any conservation easements purchased in Pennsylvania. Since the inception of the easement program in Pennsylvania in 1987, the conservation plan, as defined, has always embraced the concept of a Resource Management Systems plan (RMS) as prepared by NRCS. An HEL plan does not meet the State requirements to improve and maintain the soil, water, and related plant and animal resources of the land. The RMS plan, by definition, shall meet the minimum tolerable soil loss criteria of "T." An HEL plan does not meet this criteria. The RMS plan treats all the resources of soil, water, plants, and animals, while an HEL plan does not. The RMS plan has nutrient management components, which HEL plans ignore. There is no way the Pennsylvania Easement Purchase Program criteria would be lowered to meet this very minimum, inadequate standard for HEL.

In order to meet the high standards set forth by the Pennsylvania Easement Purchase Program, a conservation plan would need to meet the completed conservation plan criteria set-up by NRCS under the Resource Management System (RMS) as outlined in the NRCS National Conservation Planning Handbook.

Again, it points out that the standards maintained by the State are in excess of those required by NRCS in the FRPP Interim Final Rule concerning the use of an RMS Conservation Plan criteria which more adequately impacts the soil and erosion resources in a positive manner than does the HEL criteria being imposed on the FRPP easements. The State standards will maintain the stewardship responsibilities and protection of the conservation values on the easements to a far greater extent than the Interim Final Rule portrays. The Department requests that this part of the Interim Final Rule be waived in favor of the State maintaining more stringent monitoring, inspection, and enforcement criteria and experience than demonstrated by the NRCS Interim Final Rule.

## **APPRAISAL**

There are several issues concerning the preparation of appraisal reports. The requirement under FRPP that a "Yellow Book" appraisal be prepared for FRPP participation is the major obstacle facing the entities responsibilities. Requiring that the appraiser have "Yellow Book" training and experience to complete the document only applies to a limited number of appraisers throughout the State that would be qualified under these requirements. The "Yellow Book" appraisal criteria and methodologies conflict directly with the State Act 43 criteria by including the additional evaluation using the Uniform Appraisal Standards for Federal Land Acquisition (UASFLA). The State criteria utilizes only the Uniform Standards of Professional Appraisal Practices (USPAP) standards which are less stringent than the federal (UASFLA) standards.

This will increase the cost of purchasing an appraisal report substantially for the State funding. In order to utilize UASFLA standards, the State legislature would need to amend Act 43 and revise Chapter 138e Rules and Regulations.

The Department requests that this provision in the FRPP Interim Final Rule be waived as being directly in conflict with the State legislation and 17 years of consistent practice of using the USPAP standards for appraisal preparation.

### **IMPERVIOUS SURFACE LIMITATIONS**

The FRPP restrictions on impervious surfaces are a major obstacle to participation in the FRPP program by the State and county entities. These restrictive provisions limited to 2% of the total easement acreage severely restricts the landowners from expansion of their farming operations and activities connected with agricultural production and maintenance.

Act 43 as well as 7 PA Code § 138e provide that all policies related to impervious surfaces are the responsibility of the County Board as part of the Rural Enterprise section of the County Program. Any Federal FRPP provision related to impervious surfaces included in the Deed of Easement would be inconsistent with Act 43 and the Code. The Department does not possess the authority to alter the provisions of the Act or the Code without a change in the basic Act 43 legislation.

The concerns of the State about his standard include:

- The lack of stated information or evidence justifying a 2% impervious surface standard (compared with a 5 or 10% standard).
- The standard could significantly restrict the profitability of some farm operations by limiting livestock (principally dairy) and greenhouse operations' ability to expand and construct desired agricultural buildings;
- The policy appears to be in conflict with NRCS conservation plans prescribing buildings and structures to meet nutrient management plan requirements and Concentrated Animal Feeding Operation requirements;
- The policy will reduce the attractiveness of FRPP to PA farms and likely result in the exclusion of farmsteads from FRPP conservation easements.
- The policy conflicts with state and local statutes and policies.

The Department requests a six (6) percent impervious surface standard be adopted by NRCS for future FRPP participation by entities.

### **INDEMNIFICATION**

This policy ensures that the landowner continues to be responsible for liabilities arising from their property. This provision appears to be consistent with the State requirements for landowners to indemnify and hold harmless the State and United States from any liability to property enrolled in FRPP.

Pennsylvania has more than demonstrated its willingness to work with USDA to make this program a success, however, many of the directives published in the FRPP Interim Final Rule come into direct conflict with key areas of Act 43 and Chapter 138e of the State Program. These criteria may disqualify the State from future participation in the program. The Pennsylvania Department of Agriculture has identified a number of eligibility provisions listed in the Interim Final Rule that are contrary to Act 43. Most notably they are: the impervious surface restriction limitation of 2% of the total easement acreage for expansion of the farming operation, the "Yellow Book" appraisal criteria, the title review and approval by OGC, and the real property interests of the United States.

Based upon the information provided above, it is apparent that many of the provisions that are required by NRCS in the Agricultural Conservation Deed of Easement for participation depend upon a waiver of the requirements by NRCS. As recognized in the FRPP 519 Manual, the provisions of the State Act or regulations should supercede those provisions in conflict.

Section 519 11(C)(5) of NRCS Conservation Programs Policy Part 519 provides that it is NRCS state level responsibility to prepare necessary State supplements to the manual where State or local laws may amend FRPP procedures. This section of the manual acknowledges that the policy in the manual is not law or regulations, and did not receive the same scrutiny that laws and regulations received. It further acknowledges that laws and regulations enacted at the State level supplant the policy contained in the Manual. Section 519.64 (L) of the Manual further provides that "the easement must be clearly drafted and avoid overly, complex provisions to the greatest extent possible."

The Farm and Ranch Lands Preservation Program is an extremely important program in Pennsylvania. We are hopeful that an equitable solution can be reached to resolve the discrepancies between the NRCS policy and the Commonwealth's regulations.

Thank you for your prompt attention to this matter.