
THE
TRUST
for
PUBLIC
LAND



September 25, 2006

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

**COMMENT ON THE INTERIM FINAL RULE FOR THE FARM AND RANCH
 LANDS PROTECTION PROGRAM**

Please find below the official comments of the Trust for Public Land on the Interim Final Rule for the Farm and Ranch Lands Program (FRPP) published in the Federal Register on July 27, 2006, by the Commodity Credit Corporation.

The Trust for Public Land (TPL) is a national non-profit land conservation organization that works in communities across the nation to protect land for people. Since its founding in 1972, TPL has protected over 22 million acres of conservation land valued at over \$4.5 billion.

As part of its mission, TPL protects farms, ranches, and forests that support land-based livelihoods and rural ways of life. Using FRPP funds, TPL has worked with the Natural Resources Conservation Service, states, counties, local communities and private landowners on the protection of over 31,000 acres of important farm and ranch lands across the country. Through the 1996 and 2002 Farm Bills, TPL has also worked with the NRCS, Congress and other conservation organizations to fashion a federal farm and ranch land program that will bring real conservation successes on the ground by giving farmers and ranchers a meaningful alternative to subdivision and development

TPL believes that the FRPP is an incredibly important program whose potential has not yet been fully realized. There are many farmer and ranchers interested in conserving their land for future generations who are seeking FRPP funding to help bring that dream to reality. Our hope is that the program will be funded and implemented in such a way that productive agricultural lands will remain a critical part of the American economy. In our experience, permanent conservation of these productive lands is best achieved with multiple partners involved and with a minimum of duplication and regulation.

In that spirit of cooperation, we offer the following comments on the proposed interim rule:

With years of experience in federal and federally-assisted land conservation transactions, TPL understands the desire for the NRCS to devise program rules that maximize order and certainty and prevent abuse. However, we believe that several provisions of the proposed interim rule may have taken that too far, with the effect of moving too far away from a cooperative approach and squelching participation in the program.

Specifically:

Real Property Interest – TPL understands the position of the NRCS regarding its new interpretation of the FRPP authorizing language; however, we urge the agency to abandon its proposal to have the US acquire real property rights under this program. TPL believes that this new interim rule would seriously jeopardize the attractiveness to landowners of participating in the FRPP by having the US purchase a vested interest rather than rely on its current “contingent right” The difference between the two is substantial, and does not take the program in the proper direction toward “cooperative conservation.” In addition, there are many instances under FRPP where the federal contribution to the whole cost of the easement is relatively small; yet the proposed rule change would significantly alter the relationship among all parties to the easement.

There are numerous examples of other federal easement grant programs where the federal government grants funds to other entities to carry out the purposes of the program. This is the direction TPL believes the NRCS and USDA should go with the FRPP program, and we urge you to work with us to devise a program that facilitates farm and ranch land protection rather than weigh it down with new federal property rights.

TPL urges you to maintain the current “contingent right” language and work with us and other interested groups and public entities to create legislative language that reflects the true nature of this program. With action on the 2007 Farm Bill pending, we do not see the benefit of altering the current rule so drastically and changing significantly the relationship between the federal government and private landowners

In addition, we are very concerned about language in the proposed new rule which states, “In the event that the grantee/partner attempts to terminate, transfer or otherwise divest itself of any rights. . . .” Our concern is that “attempts to” is not defined and previous

efforts to secure a definition from the OGC have been fruitless. This lack of clarity has already caused concern among landowners as unacceptably vague and open-ended. In our view, it is clearer and more forceful to eliminate the words “attempts to” so that the provision reads: “In the event that the grantee/partner terminates, transfers or otherwise divests itself....”

Title Review – TPL believes that the agency should revisit this area and work with its state and local partners to find a process that does not jeopardize landowner agreements and transactional deadlines. Despite the agency’s statement in the Federal Register notice that it will work to ensure title review is completed in a timely manner, TPL remains concerned that title review will occur at the very end of a transaction, causing transaction deadlines to be missed and farm protection efforts to be lost forever. We want to work with you closely to ensure that a process for early and timely title review can be achieved for the FY 06 and 07 grant rounds.

Exercising the US Rights – TPL believes the language of the rule should be clarified to allow landowners alleged to be in non-compliance of an easement term to take sufficient steps towards compliance during the 60-day period, rather than require all compliance to be cured during that period. Landowners should be automatically granted additional time beyond the 60-day period if, within the 60 days, they have taken good faith steps to cure non-compliance.

Appraisal - First, there seems to be some discrepancy between the stated need to use federal Yellow Book standards for easement appraisals and the Congressionally-authorized waiver of rules requiring such standards included in the SAFETEA-LU bill (Section 1119, P L. 109-59). Requiring Yellow Book standards on all FRPP easements raises significant issues regarding appraiser capability and qualifications on a nationwide basis. Additional discussion of the statutory requirement for Yellow Book standards for FRPP appraisals is necessary to clarify why the agency has included this requirement in this new rule, given the impact it will have on FRPP projects.

In addition, the issue of technical appraisal review by the NRCS or USDA, though not a provision of the new rule, is of significant concern to TPL. Given our 30+ years of experience with appraisals using Yellow Book standards, we are very concerned about the internal process by which NRCS will review FRPP appraisals to determine whether they meet those standards. In our experience, easement appraisal review can be very time consuming and requires special staff skills. Given the new rule’s emphasis on following Yellow Book standards for FRPP appraisals, we feel compelled to raise this concern in this venue. We are very happy to work with you to devise an appraisal review process that will not be inordinately time consuming and will avoid jeopardizing transaction deadlines with willing landowners.

Indemnification – TPL believes this provision is unnecessary, given that case law has determined that easement holders are not liable for cleanup costs or other actions. By stating the unnecessary, this new easement provision may cause landowners to be wary of entering into an agreement under FRPP, thwarting our efforts to conserve valuable and

threatened farm and ranch lands. TPL suggests that this section either be eliminated altogether. If the agency cannot accept that suggestion, the provision should be amended to state that the indemnity will not apply if a court or arbitrator finds the US to be guilty of negligence or wilful misconduct

Thank you for the opportunity to comment on the proposed FRPP rule. We look forward to working with the NRCS as development of a final rule proceeds. If you have any questions, please let me know. I can be reached at 202-543-7552.

Sincerely,

Katherine B. DeCoster
Director of Federal Affairs