



DEPARTMENT OF CONSERVATION

DIVISION OF LAND RESOURCE PROTECTION

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Comments concerning the 2006 FRPP Interim Final Rule

The California Department of Conservation (Department), through its California Farmland Conservancy Program (CFCP), administers an agricultural conservation easement grant program to support the permanent protection of strategically important California farmland. Since its inception in 1996 the CFCP has received over \$85 million in state grant appropriations, and has permanently protected over 33,000 acres of farmland. During this same timeframe, the Department has entered into cooperative agreements with the NRCS for the administration of over \$15 million in FRPP grant funds. Under this cooperative arrangement the Department has assumed primary responsibility for completing these conservation easement transactions, including appraisal review, easement negotiation, and real estate due diligence to assure clear title, environmental warranties, and the multitude of other details that are of mutual need for the Department and NRCS.

With this history and background, the Department offers the following comments concerning the FRPP Interim Final Rule that was published in the Federal Register on July 27, 2006:

Real Property Interest of the United States

The proposal for the United State to assume a direct position in the chain of title by becoming a grantee of the conservation easement is a major setback for advancing the FRPP in California. The effect will be to create a barrier that greatly diminishes the pool of landowners that are willing to sell conservation easements.

Previous language imposed upon the FRPP in the form of the Contingent Rights of the United States, where grantees were forced to accept language that gave the United States unilateral authority to assume title to the easement, regardless of other public co-funders' interests, was already challenging enough in applying FRPP funds to actual conservation easement projects. The new provisions will almost certainly make the FRPP an option of last resort for landowners in California, being used by landowners out of financial desperation more than their having a strong conservation ethic. California's legislature established the CFCP specifically as a grant program specifically because of the desire to encourage holding of conservation easements by local entities that are most closely connected with the land and local agricultural conditions. While the state retains the right to approve amendments to these easements, as well as to enforce the terms of the easements, and be appropriately compensated for any easements that might be terminated in the future, the State of California is not a co-holder of these easements. The imposition of the federal government in title interests that had formerly been retained locally is not acceptable.

Title Review and Appraisal Review

The CFCP invests considerable time in each conservation easement in reviewing title documents and assuring that clear title to conservation easements can ultimately be conveyed. Likewise the program, in collaboration with other state agencies, invests tremendous resources in the review, critique, and oversight of conservation easement appraisals. The added burdens establishing additional federal involvement in these types of review, and finalization are redundant and will result in huge time delays in the completion of transactions, adding to a level of landowner frustration with the FRPP that borders on the extreme. There remains a significant disconnect between federal reviewers in Washington, D.C., and the unique agricultural conditions and urban growth pressures in California. On a number of occasions it has been suggested that the federal government should be able to reach a level of comfort and trust with established state agricultural land conservation programs, that these programs can become certified to perform the needed functions to complete agricultural conservation easements, without the burdensome, redundant, and inefficient added involvement of these types of federal review.

Impervious Surfaces Limitations

While well intentioned on the surface (pun intended) the FRPP's imposition of an impervious surfaces limitation on agricultural conservation easements is heavy handed and is an example of applying a narrow approach on a universal basis fails to serve the diversity of agricultural activities that take place across the country. The conclusion that the FRPP is more about the preservation of topsoil than the preservation of functional working farmland is unfortunate. The best way to preserve the maximum area of topsoil is to maintain options for farm operations rather than imposing rather arbitrary limitations on farm uses. The limitation is directly at odds with CFCP statute not to limit agricultural husbandry practices on easement encumbered property, and the definition that the purpose of the FRPP is to protect topsoil 'by limiting nonagricultural uses of the land' is ambiguous. In California, dairies, greenhouses, and other agricultural uses appear to now be grouped among nonagricultural uses. In California, the preferred approach is to define agricultural farmstead areas within easements in which structures and facilities are to be limited, and we feel there is already a functional ability to restrict nonagricultural facilities that cover the topsoil.

As a practical matter, in California, the strong bias is toward preserving prime farmland, which is the least likely for a farmer to seek to alter its agricultural productive capacity by covering with impervious surfaces. Finally, this approach has resulted in the unintended consequence of landowners seeking to exclude portions of their farm properties from conservation easements. The apparent clarification that more readily allows up to six percent of the area to have impervious surfaces is a welcome change, but the notion that this waiver should somehow be based upon population density is wholly illogical in California.

Title Insurance Requirements

The Department's CFCP already requires that each easement holder obtain title insurance to insure the easement interests being acquired, and also is named as an additional insured party within each policy. If the option of being identified as an additional insured on a single title insurance policy is no longer adequate for the NRCS, it is strongly recommended that NRCS take care of its own title insurance needs directly, rather than making it a requirement of the state or a local entity to acquire such insurance on their behalf.