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Vermont Housing and Conservation Board Comments on the Interim Final Rule for the Farm and Ranchland Protection Program

Below, please find the Vermont Housing and Conservation Board's comments on the Interim Final Rule for the Farm and Ranchland Protection Program (FRPP) published in the Federal Register on July 27, 2006 by the Commodity Credit Corporation, Department of Agriculture.

The Vermont Housing and Conservation Board (VHCB) is a quasi-state agency established in 1987 with a broad mission: to create affordable housing, and to conserve and protect Vermont's agricultural lands, historic properties, important natural areas and recreational lands. Over the past 19 years, VHCB, working in partnership with our state Agency of Agriculture, Food & Markets and many non-profit entities, including the Vermont Land Trust and the Upper Valley Land Trust, has permanently protected over 115,000 acres of Vermont farmland, and over 405 farms.

While our specific comments on the Interim Final Rule are detailed below, our general comment is this: the Interim Final Rule will make the program more bureaucratic and cumbersome than ever, forcing redundant oversight and placing increased administrative and financial burdens on VHCB and our farmland conservation partners. These changes are not moving the program in the right direction! The one-size-fits-all approach reflected in the Interim Final Rule fails to recognize the incredibly diverse nature of agriculture – in terms of land resource, type and scale of operation, type of crops, markets and production methods – that exists throughout the country.

VHCB continues to believe that states with established programs and with documented track records of successful project selection and stewardship of conserved farms should be given the ability, through a certification process, to manage the funds according to appropriate rules and oversight. This would be a far more cost-effective and efficient way to administer FRPP, and would lead to a more successful outcome for all concerned, including most importantly the farmers who participate in the program.

Equal Housing Opportunity

Here is some additional background information on VHCB's role in farmland conservation, and the statewide Vermont Farmland Conservation Program. VHCB worked closely with our congressional delegation, particularly Senator Leahy, in the establishment of the Farms for the Future Program in 1990, the Farmland Protection Program in 1996, and FRPP in the 2002 Farm Bill. For years we have partnered with the state NRCS office on the implementation of FRPP in Vermont. VHCB is the only entity in Vermont that has chosen to apply for FRPP funds, and we use this federal money on each and every farm project we fund, with state funds (and in some cases, bargain sales and private foundation funds as well) providing the match.

While VHCB is the funding source (using both federal and state dollars) for Vermont's statewide Farmland Conservation Program, our work is the result of close collaboration with both our state Agency of Agriculture, and our land trust partners. Three entities co-hold every farm easement we fund: VHCB, the Agency of Agriculture, and the land trust partner (most often the Vermont Land Trust). The land trust is the lead steward, taking responsibility for annual monitoring. The Vermont Land Trust has one of the most comprehensive stewardship programs in the country, with twelve full-time staff dedicated to stewarding over 1,000 easements.

Specific Comments on the Interim Final Rule:

I. Definition of Fair Market Value:

NRCS proposes to change the definition of fair market value to the value of the landowner's whole property before the easement, and the value of the landowner's whole property after the easement. This change seems largely motivated by a desire to capture possible enhancement value to the part of the property that may be excluded from the easement. VHCB's appraisal standards have always required appraisers to consider enhancement to any parcel excluded from the easement, including land owned by family members. This change will dictate the way in which appraisers must consider this. While this does not present a significant, statutory problem for the Vermont program as it does for some states, we view it as an unnecessary change, and an example of micro-management. This change will result in more complicated and costly appraisals, placing further burdens on both landowners' and partners' financial resources. (See further comments about appraisal requirements.)

VHCB Recommendation on the Definition of Fair Market Value:

Require that appraisals consider enhancement value to land excluded from the conservation easement, but don't dictate how that should be done. Delete the definition of Fair Market Value from the rule.

II. Eligibility of Forest Land

Allowing an increase in the amount of incidental forestland in FRPP easements is a positive change, and one which attempts to accommodate regional differences in agriculture. While we commend NRCS for recognizing the issues caused by the 50% limit for forestland, we would like to see acreage in sugarbushes recognized as agricultural land. In Vermont, maple sugaring can be a crucial source of diversified income for farmers, and in some cases is the primary agricultural operation. Under Vermont law, maple syrup production from sugarbushes is considered "farming".[1] We are perplexed as to why even sugarbushes on prime and statewide soils do not qualify as agriculture under FRPP. Since the FRPP rule notes that agricultural uses should be defined by the State of Vermont farmland conservation program, VHCB recommends that NRCS consider sugarbush acreage as agricultural acreage, and not as forestland.

Sustainable timber management on the wooded portion of Vermont farms is another important economic contribution to some farm operations, representing both a source of diversified income for farmers, and a source of raw material for the wood products industry in Vermont. In some cases, landowners may wish to conserve tracts of farmland that include greater than 66% woodland, even if they cannot receive payment for the portion over that amount. Setting an arbitrary limit on the amount of forested acreage allowed in the easement, without regard to the quality of the acreage and the role it may play in the economic viability of the farm operation, is unnecessary, and leads to awkward project configurations. Excluding wooded acreage merely to comply with the rule will lead to the further fragmentation of Vermont's forestland, with negative consequences for both forest management and wildlife habitat.

VHCB Recommendations on Eligible Forest Land

1. **Since Vermont considers maple syrup production from sugarbush acreage an agricultural use, when NRCS calculates percentage of forested acreage for FRPP, sugarbush acreage should not be included.**

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[1] Under 10 VSA §6001, "farming" means:
(A) the cultivation or other use of land for growing food, fiber, Christmas trees, maple sap, or horticultural and orchard crops; or
(B) the raising, feeding or management of livestock, poultry, equines, fish or bees; or
(C) the operation of greenhouses; or
(D) **the production of maple syrup; or**
(E) the on-site storage, preparation and sale of agricultural products principally produced on the farm; or
(F) the on-site production of fuel or power from agricultural products or wastes produced on the farm.

2. **Use the 66% cap on forestland only as a limit on what NRCS will contribute to the easement. In other words, allow the typical 50% easement cost share on farm projects that include up to 66% forested acreage, when that acreage makes an economic contribution to the farm operation. Forested acreage over 66% would not be eligible for the 50% cost share, but could still be included in the same easement, with funding coming from another source, including bargain sale by the landowner.**

III. Real Property Interest of the United States

VHCB strongly opposes NRCS' decision to recharacterize its "contingent right", and to require that the United States be identified as a grantee in the easement. We disagree that it is legally necessary, especially in a state such as Vermont, where we already have three co-holders on each farm easement – VHCB (a quasi-state agency), the Vermont Agency of Agriculture (a state agency), and a land trust. All three co-holders must already agree to any requests for approvals or changes from the landowner, resulting in a solid system of checks and balances for stewarding farm easements. The prospect of all three co-holders failing to enforce the easement, and all three co-holders attempting to divest themselves of the easement, is absurd.

The farmers we have spoken with about this change have uniformly reacted very negatively, and we expect that this will affect participation in the program. Although NRCS claims that its proposed clarification of its property rights will not change the relationship it has with its partners, and will not result in the federal government becoming involved in the day-to-day task of stewarding farm easements, this assertion does little to reassure farmers who are considering selling a permanent easement. We recommend that NRCS stick with the "contingent rights" language agreed to previously.

The redefinition of "Contingent Right" to "Rights" of the United States in 7 CFR 1491.22(d) is based largely on the legal recommendations of the Office of General Counsel (OGC) and stems from the difficulty, in some jurisdictions, of obtaining appropriate title insurance for the interest of the United States. However, in jurisdictions like Vermont, where title insurance has been available for the interest of the US, VHCB should have the option of continuing to use the Contingent Rights paragraph. Though NRCS and OGC may approve FFY 2006 conservation easement language which reinforces the intent of NRCS not to change the relationship with the Grantees (monitoring, stewardship, approvals and enforcement), the presence of any language which characterizes the US as a grantee will discourage some governmental entities and some farmers from seeking or accepting FRPP funds. And, more

importantly, the Contingent Rights paragraph gives the US all the resource and legal protection it needs to protect the FRPP investment.

VHCB Recommendations on Contingent Rights/Rights of US

1. **Given Vermont's strong performance in using FRPP funds for conservation easements and excellent working relationship with NRCS to resolve FRPP programatic and legal issues, Vermont's Farmland Conservation Program, and other well-established state, county and local programs should be given the option of continuing to use the Contingent Right language, provided that the interest of the US is protected by title insurance. Given the review of the conservation and legal staff in Vermont and VHCB's strong and well-documented track record of stewardship (monitoring and enforcing easements) under VHCB's Stewardship Memorandum of Understanding with the Vermont Land Trust ("VLT") and the Upper Valley Land Trust ("UVLT"), the contingent rights approach included in the Final Rule dated May 16, 2003 should be added to this Interim Final Rule.**

2. **If NRCS continues to require VHCB to include the language in the Interim Final Rule in easements, NRCS and OGC should approve language which makes it abundantly clear that, notwithstanding its vested right as a grantee, the US will play no role in stewardship prior to exercising its right to enforce. Though not VHCB's first choice, this clarity will reduce the public relations problem created for Vermont conservation land trusts, and reassure farmers.**

IV. Title Review

VHCB opposes the requirement that the OGC must review all titles for legal sufficiency. This requirement is redundant and unnecessary, since VHCB and its partners already have in place procedures to ensure legal sufficiency of title. In Vermont, our land trust partner first hires outside counsel to review title for each farm project. Then, attorneys at the land trust review that title work. Then VHCB attorneys again review the title prior to closing. Adding yet another legal review is duplicative and wasteful, and will further delay FRPP closings.

Though VHCB understands that OGC lawyers have advised NRCS that federal law, 40 USC 3111, requires that the "Attorney General give prior written approval of the sufficiency of title to the land", the requirement that an OGC lawyer in Harrisburg review and approve the proposed Conservation Easement, Title Report and receive copies of all the liens, mortgages or other encumbrances is an inefficient and unnecessary use of valuable legal talent on the part of OGC. Though VHCB has been advised that OGC cannot delegate this legal review, instead of adding this unnecessary layer of review, NRCS

the part of OGC. Though VHCB has been advised that OGC cannot delegate this legal review, instead of adding this unnecessary layer of review, NRCS should be seeking authority from Congress to delegate legal review of FRPP transactions where, in the sole discretion of NRCS, it believes that itsstate partners, like the State of Vermont, can perform this legal review in a prompt and professional manner and obtain a title insurance policy for the United States that ensures that its legal interests are protected.

We recommend that NRCS use the support in Congress for FRPP and for the effective and efficient use of federal funds to find a bill that can carry this language:

> *Notwithstanding 40 USC 3111, the Secretary of the United States Department of Agriculture ("Secretary") and the Office of General Counsel ("OGC") are authorized to delegate to their qualified governmental and nonprofit partners real estate title review and approval prior to the purchase of interests in farmland under the Farm and Ranch Land Protection Program.*

VHCB Recommendations on Title Review:

OGC should delegate title review to its governmental and nonprofit partners, provided that those partners have a positive track record and can perform legal review in accordance with reasonable title standards.

V. Exercising the United States' Rights:

VHCB opposes the language in the rule that vests sole discretion in the Secretary, in the event that the grantee/partner fails to enforce any of the terms of the easement. As described previously, Vermont's Farmland Conservation Program has an outstanding, professional easement stewardship program, which includes annual monitoring visits, and automatic visits with "successor landowners" (landowners purchasing already conserved farmland), to explain the terms and conditions of the easement. This is another example of a function best delegated to state, county and local programs that have demonstrated competence through a certification process. While we are not opposed to the "contingent right" language in the easement as discussed above, we feel that the sole discretion sentence in the Interim Final Rule goes beyond that, and is unnecessary. We appreciate the statement in the "Discussion of Changes" section of the rule: "*These changes do not alter the fundamental relationship NRCS has had with its FRPP partners or their primary stewardship for FRPP funde easements.*" We expect that NRCS will follow this logic in decisions relative to easement stewardship and enforcement.

landowner. Requiring the grantee/partner to demonstrate within 60 days that it is taking steps to enforce the alleged non-compliance is reasonable, but it may take additional time for a landowner to cure the violation. It is important that both the grantees and landowners understand the process and circumstances under which NRCS will exercise its rights to enforce a FRPP easement. VHCB recommends that the Agency be required to demonstrate an actual failure to enforce through a formal process – rather than at the sole discretion of the Secretary – and to establish a clear system for communication with the landowner as well.

VHCB Recommendation on Exercising the United States' Rights:

Delete the sentence in the rule giving the Secretary sole discretion rights to enforce the easement. Clarify the process for the Unites States' decision to enforce, making it clear that the United States will exercise only as a last resort, in circumstances in which a grantee (or, in the case of Vermont, all three grantees) have completely failed to uphold the easement.

VI. Appraisal standards

VHCB opposes the proposal by NRCS to require that all appraisals for FRPP easements conform to both the Uniform Standards of Professional Appraisal Practices (USPAP) and the Uniform Appraisal Standards for Federal Land Acquisition (USFLA, or Yellowbook). VHCB has always required that appraisals conform to USPAP, and be conducted by General Licensed Appraisers. Conformance with yellowbook standards will increase the cost both to the program (for which FRPP funds are not available) and to the landowner (with whom we cost-share each appraisal). The pool of appraisers in Vermont qualified to do this type of work is small already, and although several of our appraisers have already done yellowbook training, and some also attended a recent yellowbook training in New York, we expect this standard change to increase both the project cost and the length of time it takes to close a project.

VHCB Recommendations on Appraisal Standards:

Continue to require appraisals that conform to *either* USPAP or USFLA standards. If NRCS decides to continue to require Yellowbook appraisals, then provide funding to cover the additional cost of these appraisals.

VII. Impervious surface Limitations

The 2 percent impervious surface limitation requirement has not caused the same problems in Vermont as in other states, primarily because we now customarily exclude most infrastructure from farm easements. However, we do not support the proposal to limit impervious surfaces to 2 percent, seeing this as another example of a one-size-fits-all approach to agriculture, even though it

customarily exclude most infrastructure from farm easements. However, we do not support the proposal to limit impervious surfaces to 2 percent, seeing this as another example of a one-size-fits-all approach to agriculture, even though it varies tremendously from state to state. We recommend instead that the Agency work with its partners to establish an approval process for impervious surfaces that takes into account the differences in agricultural operations between states. If the 2 percent impervious surface limitation is adopted, we think it is essential that a waiver of up to 6 percent be permissible.

VHCB Recommendations on Impervious Surface Limitations:

Delete this requirement from the rule, and instead work directly with states to establish limits that take into account regional differences in agriculture.

VIII. Indemnification (and Environmental Warranty) Clauses

VHCB has already agreed to include Environmental Warranty and Indemnification clauses which were approved by NRCS and OGC in June 2004. VHCB agrees that these clauses were a reasonable addition to the farmland conservation easements but still contends that the likelihood that an easement holder or the United States would be held liable under applicable hazardous waste laws (including, but not limited to, CERCLA) is so low that the 2004 clauses remain sufficient.

IX Template for FRPP Easements

On Federal Register page 42569 of the Interim Final Rule, NRCS asks whether it should use a template addendum for FRPP conservation easements. VHCB understands that it may be difficult for OGC legal staff to review and approve easements from multiple jurisdictions. However, using a template addendum to FRPP conservation easements is not the answer and illustrates NRCS' apparent belief that "one size fits all" for FRPP. As will be evident from comments on this Interim Rule submitted by the American Farmland Trust and state, county and local programs that administer purchase of development rights ("PDR") programs, the business and nature of agricultural production on valuable farmland varies greatly from state to state and region to region. VHCB believes that any attempts to solve local, regional and state problems with one national approach will be unsuccessful. All of the governmental entities and private conservation land trusts involved in protecting farmland with FRPP funds are working with state and regional realities which vary tremendously. Although some of the NRCS legal requirements or objectives could be addressed by preparing a template addendum, the risk of such an approach is that it will harm the delicate balance involved in administering a national program while allowing states, counties, municipalities and land trusts to use legal tools which

address the unique characteristics of agriculture in that particular jurisdiction, as well as unique features of state law.

VHCB has developed an excellent working relationship with state NRCS staff and OGC attorney Laurie Ristino and has been able to negotiate template farmland conservation easement language which addresses the goals and objectives of FRPP while allowing Vermont to use legal documents which work well in our state. We urge you to continue this approach rather than taking another step toward uniformity, which will be full of unintended consequences and may discourage states and farmers from participating in FRPP.

Date September 25, 2006

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