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FRPP IFR DELAWARE

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September 15, 2006

Easement Program Division, NRCS
1400 Independence Avenue, S.W.
Room 6819-S
Washington, D.C. 20250-1400

RE: Comments on Interim Final Rule Farm and Ranch Lands Protection Program (FRPP)

Dear Comment Reviewer:

The Delaware Department of Agriculture (DDA) would like to submit the following comments for inclusion in the public record regarding amending the Interim Final Rule for implementing the Farm and Ranch Lands Protection Program, specifically the amendments to 7 CFR part 1491. Foremost, the Department would like to reaffirm its support of the comments submitted to the Natural Resource Conservation Service (NRCS) on June 14, 2006 by Delaware Secretary of Agriculture the Honorable Michael T. Scuse, as well as the letter submitted by the member states of the Northeastern Association of State Departments of Agriculture (NEASDA) on June 12, 2006. The Department would also like to add specific comments below, which have been organized to address the summarized subject headings presented in the Federal Register Vol. 71, No. 144 on Thursday, July 27, 2006.

Subpart A – General Provisions

Definition of Fair Market Value

The DDA believes it is important that NRCS differentiate between a preservation program administered by a State government and a private land trust or other entity. The State of Delaware's Agricultural Land Preservation Program was created by statute, and

is administered under State laws and regulations. With regard to the purchase price, and fair market value (FMV), the Department is prohibited by law from paying more than the FMV of the land (minus the agricultural value of the land) for any property. Furthermore, because the federal contribution to any property purchased by the State is limited to a 50% match, the maximum federal interest in any property could only be 50% of the "development value" of the land. In addition, because the Department purchases property based solely on the discount offered by landowners, the State typically pays only 50% of "development value", in which case the federal government would only be contributing 25% of the cost to preserve agricultural land in Delaware. Clearly, the State of Delaware's Agricultural Lands Preservation Program offers the federal government considerable value and leverage in their efforts to preserve farmland in the United States.

The Department would also like to dispel some apparent confusion about the manner in which it determines a property's "agricultural value". It is our belief that NRCS is confusing the Department's method with the method the federal Internal Revenue Service (IRS) uses to compute the donation value of land for charitable deduction purposes.

The IRS method for determining the value of a charitable deduction resulting from the donation of an easement is fairly straightforward. The property is appraised and assigned a monetary value "before" the easement is placed on it. A second appraisal is performed "after" the easement is placed on the property. The difference between those two appraised values is the "easement value".

If the landowner receives no compensation for placing the easement on their property, then they are entitled to claim the full easement value as a charitable deduction on their federal taxes. If they receive compensation for all, or some portion, of the easement, that amount is deducted from the total easement value. The remaining amount, which they were not compensated for, is still eligible, depending on the taxpayer's tax status, as a charitable deduction for federal tax purposes.

The Department sets the "agricultural value" of a property eligible for agricultural preservation easement purchase differently. The agricultural value of a property is set for the purpose of negotiating an easement purchase price, not tax deduction. It should be noted that the Department places no separate easements on buildings, improvements, etc. only land.

First, the property is appraised by a qualified real estate appraiser, and the FMV is determined using comparable sales data for the area. Next, the Department calculates the "agricultural value" portion of the FMV by capitalizing a stream of income, a widely accepted and used valuation process. The Department uses the five-year averaged "agricultural land rent" for an acre of Delaware farmland as the stream of income. It then

capitalizes that income stream using the long-term return (interest) on United States Treasury bonds. This system is nearly identical to the IRS approach for establishing farm value for estate tax purposes.

The “agriculture only value” of the property is subtracted from the FMV to arrive at the “development rights value” of the land. The development value is presented to each land owner who has expressed an interest in selling their development rights via easement (thus permanently preserving the land’s use as agricultural). Because more than one landowner competes for a limited amount of funds each year, they generally have to accept less (discount) money than the full development rights value in order to be selected for easement purchase. Each year, the Department selects the properties offering the highest discounts first, until all the year’s funding is expended. In this competitive system, only the landowners who discount the most (i.e. accept the least relative amount of money for the development rights) are selected for easement purchase.

This method of competitive discounting among land owners has proved optimal for preserving the most possible acres at the lowest possible cost to the state and its preservation partners (i.e. NRCS).

Eligibility of Forest Lands

The United States Department of Agriculture (USDA) recognizes that managed forest is, in fact, an agricultural crop. The USDA has historically viewed trees as a crop, just as corn, wheat or soybeans, only with a longer time period between harvests.

Forest also provides additional environmental, aesthetic, recreational, etc. benefits that traditional annual crops cannot. Therefore, to limit the acreage of forest to 50% on an agricultural easement purchase not only hampers agricultural land preservation efforts, but also hinders nutrient management efforts, wildlife and habitat management, etc. The DDA, along with many other agencies, recognize this opportunity, and mutually benefit when programs compliment each other to enhance the overall effectiveness of land preservation and management efforts. In Delaware, farmland preservation, including forests, has complemented our State’s land preservation efforts by several agencies.

Although Delaware’s Agricultural Preservation Program recognizes and includes parcels with a significant amount of forested land in its easement purchases, the state adopted enabling legislation in 2006 to create a separate Forest Land Preservation Program to permanently preserve forested land. Once sufficient funding is provided to the Forest Land Preservation Program, it is anticipated that less forested land will be preserved through the Agricultural Lands Preservation Program. This will allow more non-forested agricultural land to be preserved.

Real Property Interest of United States

The subject of contingent rights again highlights the difference between a State administered program and other programs. When the State of Delaware purchases an easement, it is placed in inventory under the Secretary of State. The Secretary of State is a position created by the State's constitution and is not subject to "dissolution or termination" the way a land trust or other non-government entity might be. Although NRCS's concerns about the longevity and durability of an easement purchase involving non-government groups may be warranted, state administered programs should be considered just as durable and long-lasting as the United States of America.

Title Review

For the State of Delaware this requirement is unnecessary because "good title" is already required by statute [Title 3, Del. C., Chapter 9, §914(a)(1)] before easement purchase. In addition, the attorneys representing the State's agricultural lands preservation program thoroughly review each title before closing, and as a final "fail safe", title insurance is purchased for every easement the state purchases. Such insurance protects all those with an interest in the title we acquire, including the United States.

Exercising the United States' Rights

As previously stated, State administered agricultural lands preservation programs are not subject to dissolution, and provide sufficient resources to ensure compliance with easement agreements. Therefore, for state administered programs, there is no need for the federal government to adopt rules or regulations for assuming sole title of an easement.

As a state administered program, the State of Delaware's agricultural preservation program maintains a number of compliance controls on properties on which an easement has been purchased. For example, every two years each property is inspected to ensure it remains in compliance with the easement agreement; properties purchased using federal (i.e. FRPP) matching funds are inspected each year. In fact, the Department has contracted with the USDA's National Agricultural Statistics Survey (NASS) for their staff to conduct the actual surveys and compliance monitoring.

Appraisal

The appraisers contracted by the Department already meet the highest ethical and professional standards. In addition, they will comply and apply relevant regulatory and policy requirements when doing appraisals (i.e. yellow book appraisals).

Imperious Surface Limitations

Both the DDA and USDA encourage diversity and intensity among family farms in order to make them more profitable, and keep them in business. However, the 2% impervious surface limit (one acre) for parcels below 50 acres, runs contrary to that business model and discriminates against Delaware farmers, who often have poultry houses on their farms to supplement their farm income. In addition to poultry houses, Delaware also has a growing and profitable equine industry, greenhouse and nursery industry, mushroom industry, and aquaculture. While the waiver provision granting up to 6% impervious surface is an improvement, it will still discriminate against many farms across the nation, especially those along the east coast. These farms are typically small, family-owned and operated businesses, whose owners cannot afford to capitalize the purchase of additional farm land because land prices are largely determined by “development value”, not “agricultural value”. Therefore, these farmers must intensively and efficiently farm their land to be profitable. This provision will prevent farmers such as these from preserving their farmland using FRPP funds, and instead encourage them to sell their land for residential development, where impervious surface can easily exceed 30 percent or more, depending on zoning and permitted density allowances. This provision will also add another layer of approval to an already time consuming FRPP application process.

In addition, the Department does not believe it is a good idea to include environmental regulations and/or policies in agricultural easement requirements, because such requirements are subject to change over time. We believe this is the case with the impervious surface limitation, which is designed to improve water quality and help with other environmental objectives. As worthwhile as these objectives may be, to accomplish them through the FRPP land preservation grant program not only discriminates against smaller farms (which may actually have best management practices (BMPS) and other conservation practices already in place), but will also make it increasingly difficult for landowners who qualify for FRPP funding to comply with ever changing regulations and policies. The Department believes the primary purpose of agricultural land preservation programs is to stop the loss of agricultural land to development, not meet federal environmental policy objectives. We would anticipate that future environmental requirements for farmers will have adequate enforcement provisions of their own, as is the case today.

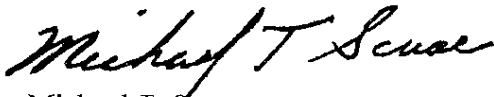
Indemnification

The Department does not oppose an indemnification clause.

In summary, the Delaware Department of Agriculture is confident that its method for valuing easements and its discount process for purchasing easements provides the best possible value to the state taxpayers and its preservation partners.

By imposing the proposed rules, NRCS will be prescribing a "one size fits no one" to all the states, which will prevent each state from using their own expertise and experience to provide the best value for everyone involved. The Department would like to reiterate its suggestion that NRCS evaluate each state's preservation program as a whole, top to bottom. It should then make a determination as to whether the program is successfully and efficiently preserving farmland in its respective state. If NRCS determines the program is successful, it should certify them, and provided future funding as a "block grant", confident that is being spent wisely. Of course, NRCS would continue to monitor the block grant recipients. The Department does not object to NRCS imposing reasonable accountability requirements, such as periodically auditing or evaluating individual programs to determine if they are still effectively preserving farmland in their state. This approach allows programs to operate on their own merits, and is far less burdensome and costly than NRCS participating in every easement purchase by every state.

Sincerely,

A handwritten signature in cursive script that reads "Michael T. Scuse".

Michael T. Scuse
Secretary
Delaware Department of Agriculture