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American Farmland Trust
SAVING THE LAND THAT SUSTAINS US

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Easement Program Division
Natural Resources Conservation Service
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COMMENT ON THE INTERIM FINAL RULE FOR THE FARM AND RANCH LANDS PROTECTION PROGRAM

Please find below American Farmland Trust's comments on the Interim Final Rule for the Farm and Ranch Lands Protection Program (FRPP) published in the Federal Register on July 27, 2006 by the Commodity Credit Corporation.

American Farmland Trust (AFT) is a national conservation organization working across the country to save the land that sustains us. Established in 1980, we are the only national nonprofit organization dedicated to protecting the best farm and ranch land, planning for a future for agriculture and keeping the land productive and healthy.

For the past twenty-six years, AFT has worked with state and local governments and nonprofit entities to protect our nation's valuable farm and ranch land. We worked closely with Congress to establish the Farmland Protection Program in the 1996 Farm Bill and to create the FRPP in the 2002 Farm Bill. Through forums, meetings with Natural Resources Conservation Service (NRCS) staff and our national conference, AFT has worked to provide a line of communication between the program's cooperating entities and the NRCS.

These experiences have helped to shape our comments on the Interim Final Rule for the FRPP. Based on our conversations with cooperating entities, we are convinced that the proposed changes to the FRPP will prevent rather than assist the program in achieving its goal of protecting farm and ranch land. The interim final rule fails to recognize the diverse nature of agriculture by adopting a one-size-fits-all approach while adding a level of redundancy that places an increased administrative and financial burden on partnering organizations.

AFT does not believe that the NRCS sufficiently explored alternative policy options that would enable the agency to meet its statutory obligations in a manner that is less burdensome to its users. Many of the proposed policy options flow directly from the Agency's re-characterization of the property interest being acquired by the federal

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government and its continuing efforts to standardize program regulations for all applicants, regardless of the administrative procedures and legal protections already afforded projects through well-established state and local programs. Indeed, many of the changes proposed in this rule move the Agency significantly and, in AFT's view, unnecessarily beyond its stated role as a "backstop" to program partners. AFT believes the Agency could more effectively and efficiently backstop its partners by developing a certification process that would waive certain program requirements for established state and local programs with a demonstrated track record in farm and ranch land protection. AFT encourages the Agency once again to consider such a process.

We hope you will consider these thoughts and the detailed recommendations below as you develop the final rule for the FRPP.

COMMENTS ON THE INTERIM FINAL RULE

I. Definition of Fair Market Value

Comment: AFT opposes the Agency's proposal to redefine fair market value. We believe that the amended definition conflicts with the statutory language governing many state Purchase of Development Rights (PDR) programs and will make it impossible for those programs to operate in conjunction with the FRPP. AFT recommends that the NRCS provide a waiver from the proposed definition to established state programs that can demonstrate that their state laws outline procedures to reasonably determine fair market value.

Recommendation: The NRCS proposes to change the definition of fair market value to consist of the difference between the value of the property before the easement and the value of the whole property after the easement. This "one size fits all" approach to determining fair market value is inconsistent with the program's expressed intent to work in cooperation with existing state and local Purchase of Development Rights (PDR) programs. Many state PDR programs have procedures for determining fair market value outlined in their statutory language. In instances where the state definition conflicts with the definition proposed by the NRCS, state legislatures would need to make statutory changes in order for the state program to comply with the current proposal. We urge the Agency to provide a waiver from the proposed definition to state PDR programs whose statutory language provides a reasonable alternative method for determining fair market value.

II. Eligibility of Forest Lands

Recommendation: AFT commends the NRCS for recognizing the regional differences in agriculture and acknowledging that in the eastern United States especially, forested acreage is an integral and important supplemental part of many farming operations. AFT supports the proposal to increase the amount of incidental forest land allowed in a FRPP

easement However, we recommend that the Agency exclude sugarbush acreage when it calculates forested acreage for the purpose of the cap established in §1491.4(d)(4) In addition, AFT recommends that this cap be applied only as it is written—in limiting the percentage of forested land that can be included in a FRPP easement—and not in calculating the amount of NRCS' contribution towards the easement payment.

Comment: The FRPP rule notes that agricultural uses should be defined by the State's Purchase of Development Rights (PDR) program or the State agricultural use assessment program.[1] However, in its discussion of the proposed changes to the definition of forest land, the NRCS states that "not more than two-thirds of the easement acreage may be occupied by forested acreage, including sugarbush and pulpwood."[2] While there is no question that sugarbush occupies forested acreage, in many areas of the Northeast it plays an important role in the agricultural economy Many producers grow and manage sugarbush in addition to traditional crops and livestock. AFT recommends that the agency allow for larger amounts of sugarbush acreage when it calculates percentage of forested acreage in states where the State PDR program or agricultural use assessment program has determined that sugarbush is considered an agricultural use.

In the discussion of eligibility of forest land, the NRCS asserts that the new policy "permits NRCS to pay for forest land up to the same acreage amount as the non-forested, agricultural soils acreage. "[3] AFT believes the proposed calculation for payment on forested acreage runs counter to the flexibility provided in allowing a greater percentage of forest acres. In addition, the discussion of how the Agency would calculate payments for forest acreage is unclear at best. The proposed language concerning forest land found in §1491.3 and §1491 4(d) does not contain the procedure that the NRCS intends to use when calculating payments on forested acreage. We recommend that the Agency implement the percentage of forest land limitations as proposed in §1491 3 and not place payment limitations on forested acreage

III. Real Property Interest of the United States

Recommendation: AFT believes that the Agency's re-characterization of what it has considered to date to be a contingent right in easements acquired through the FRPP is unnecessary and likely to have a chilling effect on participation in the program AFT strongly recommends that the Agency maintain the current "contingent rights" provision.

Comment: Despite the Agency's assertion that its proposed clarification of the property right being acquired through the FRPP will not "alter the fundamental relationship NRCS has had with its partners," AFT believes otherwise.[4] AFT also expects that making the United States a co-grantee of a FRPP easement, albeit limiting the circumstances under

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[1] 7 *CFR* §1491 3 (2006)
[2] 71 *Fed. Reg* 42568 (27 July 2006)
[3] 71 *Fed. Reg* 42568 (27 July 2006)
[4] 71 *Fed. Reg* 42568 (27 July 2006)

which it will exercise its rights, will nonetheless chill landowner interest in protecting land through the program.

For those state PDR programs that already authorize or require more than one easement holder; the proposal by the NRCS to add the United States as an additional co-holder will further complicate what is often an already complicated process. For all partners, conferring co-holder status upon the United States will cloud their ability to resolve issues and respond timely to landowners requesting changes and approvals. Partners will also be left to second-guess what the Secretary may consider to be a failure by the grantee/partner to enforce the terms of the easement.

Many FRPP partners anticipate a strong negative reaction from the agricultural community over the United States being named as a co-grantee in the FRPP easement. While the language stipulates the circumstances under which the federal government will exercise its rights, there is little assurance in the language, as discussed under Section V below (Exercising the United States' Rights), that a landowner, operating in good faith per an approval given by a grantee/partner, will not be held responsible for an action found by the United States to be in violation of the terms of the easement.

The federal contribution to a FRPP easement is no more than 50 percent of the acquisition cost. Given this distinction between the FRPP and most other USDA land acquisition programs, AFT believes that the NRCS can sufficiently protect its interest in maintaining its current "contingent right" in FRPP easements instead of attempting to re-characterize the right. The "contingent right" enables the Secretary to enforce or take title of the easement if the cooperating entity is not doing a sufficient job, which is precisely what the Agency says it will continue to do once it switches from a "contingent right" to a full "right." Re-characterizing the rights held by the United States will alienate partners and decreases the effectiveness of the program.

IV. Title Review

Recommendation: AFT opposes the provision that would require the Office of General Counsel to review all titles for legal sufficiency. This provision establishes redundant and burdensome procedures that will negatively impact the operation of the FRPP. AFT recommends that the Agency develop detailed title review procedures for its FRPP partners and conduct a random sampling of title reviews in each state to ensure sufficiency of title.

Comment: The proposal to require the Office of General Counsel (OGC) to review the titles of all pending FRPP projects for legal sufficiency is unnecessary and redundant for those partners that have procedures in place through their own programs to ensure legal sufficiency of title. This proposal is also likely to add additional time to what is often already a lengthy process for project completion. AFT recommends that the NRCS develop a set of title review standards for partners to follow and institute a procedure by which the OGC would conduct random reviews of title reports to ensure compliance with

OGC standards. This will allow the FRPP to operate in an efficient manner and reduce the amount of redundant procedures.

V. Exercising the United States' Rights

Recommendation: AFT opposes the proposal to impose a 60-day period for a grantee/partner to address any alleged non-compliance of an easement term. AFT recommends that the Agency require only that a grantee/partner demonstrate that it has taken steps to address the noncompliance issue within the 60-day period, but allow additional time for a landowner to cure the violation. Additionally, AFT recommends that the NRCS provide guidance for how enforcement disputes between the multiple easement holders will impact a landowner who has complied with the policies and decisions of the easement holder with primary stewardship responsibilities

Comment: AFT believes that FRPP partners and participants should know the process under which the NRCS will exercise its rights to enforce a FRPP easement. This proposal is the first step toward developing that process. AFT has two concerns with the proposed changes in this area.

First, AFT believes that the 60-day period proposed by the Agency is not a sufficient amount of time to address all types of noncompliance. We recommend that the NRCS require that a grantee/partner demonstrate that it has taken steps to address the noncompliance issue within the 60-day period even if it takes the landowner additional time to cure the violation.

Second, AFT notes that the notification process and 60-day period to cure is addressed to the grantee/partner and does not indicate how a landowner will be notified or given an opportunity to cure an alleged violation of the easement terms. Landowners must be able to rely in good faith on stewardship and enforcement decisions and determinations of the easement holder(s). By vesting sole discretion in the Secretary to determine that an action or inaction by the grantee/partner constitutes a failure to enforce the terms of the easement, the proposal jeopardizes a landowner's ability to rely on stewardship and enforcement decisions of any grantee/partner. AFT recommends that the Secretary be required to demonstrate an actual failure to enforce the easement on the part of the grantee through a formal process—rather than merely at the discretion of the Secretary—before taking any enforcement action against a landowner acting in compliance with a disputed stewardship or enforcement policy, practice or decision.

VI. Appraisal

Recommendation: AFT opposes the proposal by the NRCS to require cooperating entities to conform to both the Uniform Standards of Professional Appraisal Practices (USPAP) and the Uniform Appraisal Standards for Federal Land Acquisition (Yellow Book) when conducting appraisals. We believe that this proposal places an excess

financial burden on cooperating entities, lengthens an already cumbersome application process and is not required by federal statute We recommend that the Agency continue to allow FRPP partners to use either the USPAP or the Yellow Book when conducting appraisals.

Comment: The NRCS proposes to require that all FRPP easements conform to the Uniform Standards of Professional Appraisal Practices (USPAP) and the Uniform Appraisal Standards for Federal Land Acquisition (Yellow Book) rather than one or the other. In the discussion of changes section of the rule, the Agency indicates that this change is "stating the professional standards for Federal appraisals "[5] However, the Agency is not required by federal statute to adhere to the Yellow Book appraisal standards.

The Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970 (Uniform Act) governs the acquisition of real property by the Federal government [6] The final rule implementing the Uniform Act issued in January 2005 by the Department of Transportation requires the use of Yellow Book appraisals on all land acquisition projects receiving federal funds. Congress responded to this requirement by inserting a provision in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (PL 109-59) excluding voluntary conservation easements from the Yellow Book requirement.[7] Thus, the proposal by the NRCS to require Yellow Book appraisals on all FRPP easements is in direct contradiction with federal law. We urge the NRCS to follow its statutory obligation under PL 109-59 and allow cooperating entities to use either the USPAP or the Yellow Book when conducting appraisals

Despite the Agency's assertion otherwise, we believe that the purchase of a FRPP easement differs markedly from the purchase in fee of property by the Federal government. Under the FRPP, the NRCS is contributing 50 percent of the cost of a conservation easement on a property It is not acquiring the property in fee Because the United States is not acquiring property in fee, the concerns that the Yellow Book standards were intended to address do not exist. The USPAP standards allow FRPP partners to get an accurate and uniform appraisal without having to go through the burdensome Yellow Book process. Any concerns that the Agency might have about uniformity under the USPAP standards should be addressed by the proposal that would require that all appraisals be conducted by a State-certified general appraiser

This proposal also presents a major change from the current rule. By requiring cooperating entities to adhere to both appraisal standards, the NRCS is placing a number of additional burdens on its FRPP partners. Nationwide, there are very few appraisers trained to conduct Yellow Book appraisals. This will dramatically increase the amount of

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[5] 71 *Fed. Reg* 42569 (27 July 2006)

[6] 42 U.S C 4601 et seq

[7] PL 109-59 §1119(o) provides the following limitation on applicability: The requirements of the January 4, 2005, Federal Highway Administration, a final rule on the implementation of the Uniform Relocation Assistance and Real Property Acquisition policy Act of 1970 (42 U S C. 4601 et seq.) shall not apply to the voluntary conservation easement activities of the Department of Agriculture or the Department of the Interior.

time needed to complete a FRPP project. We believe that the amount of additional time it will take to complete a FRPP application and close on an easement will dissuade property owners from participating in the program. In addition, the Yellow Book requirement places an additional financial burden on FRPP partners who do not receive technical assistance funding.

VII. Impervious Surface Limitations

Recommendation: AFT opposes the proposal to limit the amount of impervious surfaces allowed on a FRPP easement to 2 percent. We believe that this requirement, even with a waiver that allows up to 6 percent impervious surfaces, will have a negative impact on the program and ultimately result in the loss of valuable farm and ranch land. AFT recommends that the Agency work with FRPP partners to determine an impervious surface limitation and approval process that will ensure continued support for the program.

Comment: The Agency's proposal to limit the amount of impervious surfaces on FRPP easements to 2 percent relies heavily on language found in the FRPP authorizing statute. The FRPP statute states that the program shall be carried out "for the purpose of protecting topsoil by limiting nonagricultural uses of the land."[8] In devising the 2 percent limitation, the Agency has focused on the idea of protecting soil. In doing so, it failed to recognize the importance of the rest of the aforementioned purpose statement. The statute clearly refers to limiting nonagricultural uses of the land. The proposed 2 percent standard would limit all uses of the land, agricultural or otherwise, that impact the topsoil.

The proposed 2 percent impervious surface limitation would place an additional burden on FRPP applicants and participants. The proposed policy would require farmers, ranchers and easement holders to determine the existing percentage of impervious surfaces, the percentage of impervious surfaces attributable to NRCS approved conservation practices and the extent of the additional impervious surface coverage that is being considered by the owner.

AFT believes that property owners should be allowed to add buildings such as greenhouses and barns that enable that property to remain in agriculture. By and large, FRPP participants are landowners who are committed to agriculture and want to continue farming and ranching into the future. They are continuously looking for ways to add value to their products or reinvent their operations. In some cases, this requires the construction of new buildings or the addition of other impervious surfaces. The 2 percent impervious surface limitation will dissuade many of these landowners from enrolling in the FRPP and ultimately result in the loss of valuable farm and ranch land.

While we agree that some limit should be placed on the amount of impervious surfaces allowed on a FRPP easement, we do not believe that the NRCS arrived at the 2 percent

[8] 16 U.S.C. § 3838i (a)

value in an appropriate manner. In spite of the Agency's assertion that the limitation was based on internal and external reviews as well as numerous studies, the 2 percent value appears to be an arbitrary attempt to make all of agriculture conform to one standard. In the Federal Register notice, the Agency points out that the proposal would allow up to 60 acres of impervious surfaces on a 1,000 acre ranch in the west. The Agency also notes that the average size of an easement in the northeast is 100 acres, which would allow for up to 6 acres of impervious surfaces.[9] This contradicts the waiver criteria outlined in the rule, which indicates that the 6 percent limit is only available on farm of less than 50 acres. This means that in actuality, on an average farm in the northeast of 100 acres, only 2 acres of impervious surfaces would be allowed. In an area of the country that relies on the dairy, specialty crop and horticultural industries, this limit is too restrictive. On the flipside, we believe that allowing a rancher in the west 20 acres of impervious surfaces on a 1,000 acre ranch may be too excessive. We believe that the NRCS should grant the authority to the State Conservationist and State Technical Committees to develop impervious surface limits appropriate for agriculture in that state.

VIII. Indemnification

Recommendation: AFT opposes the indemnification language proposed by the NRCS. We believe that the indemnification language is unnecessary, overbroad and inconsistent with case law. AFT recommends that the Agency either eliminate the indemnification clause or limit the indemnification to the extent of the Federal government's financial contribution to the project.

Comment: The Agency is proposing to include indemnification language in all FRPP easements that would protect the Federal government from any liability associated with the property. We believe that this language is unnecessary since case law to date has held that easement holders do not qualify as "owners or operators" under the CERCLA. As an easement holder, the United States would not be held liable for cleanup costs arising as a result of the presence of hazardous waste or other materials on an easement-protected property.

If the NRCS believes that language is needed to indemnify and hold harmless the United States, then we recommend that the amount of such an indemnity be capped at a dollar amount equal to the amount of the NRCS' financial contribution toward the purchase price for the easement, rather than having the potential liability of the party providing the indemnity be unlimited.

[9] 71 *Fed Reg* 42570 (27 July 2006)