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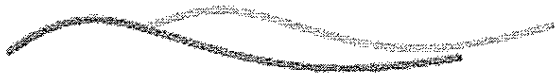

Land Trust Alliance

Conservation Leadership for America's Future

September 22, 2006

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

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

Dear Friends:

Thank you for the opportunity to comment on the Interim Final Rule for the Farm and Ranch Lands Protection Program (FRPP) published in the Federal Register on July 27, 2006.

The Land Trust Alliance (LTA) is a national organization representing more than 1,000 land conservation nonprofits across the country, many of whom have used FRPP funds or work closely with state and local government agencies that use those funds.

LTA has been a longtime supporter and advocate for the FRPP, and worked closely with Congress on the authorizations for FRPP, and on expansion of its funding. We believe that FRPP creates nationally important conservation, and has an enviable record of achievement.

It is important to recognize that FRPP works through a partnership in which the Department helps various partner organizations – state and local government programs and conservation nonprofits – carry out on-the-ground conservation work. It is the partners who strategically target their efforts and then work with landowners to purchase and steward permanent conservation easements on important agricultural lands.

Earlier this year, the FRPP program issued a Request For Proposals (RFP) that set out major changes in the rules and requirements for program partners and landowners, with little advance notice and very little time for partners to implement. I have attached a copy of the Farmland Preservation Report covering the reaction of FRPP partners to these changes, so that it will be made part of the record. This private sector newsletter, which covers farmland protection efforts around the country, does a good job of conveying the dismay with which program partners reacted to the RFP.

We support the creation of clear standards and methods of evaluation for FRPP, to enable the program to track and improve its effectiveness, and that of its partners, in meeting the purpose of the program – to conserve important farm and ranch land from loss to nonagricultural uses.

Regrettably, many of the changes in the recent RFP and in the proposed regulation seem to be focused on securing and re-securing property rights for the Department of Agriculture rather than on increasing conservation, despite the fact that the Department has never, in the course of twelve years experience, had to assert those rights[1].

Looking ahead to Congressional consideration of a new farm bill in 2007, we urge the Department to propose changes to the authorizing legislation that would make FRPP a program that grants funds to partner organizations for the purpose of achieving important, on-the-ground conservation efforts, instead of a program under which the Federal Government acquires property rights. The federal government does not acquire property rights to projects funded with Environmental Quality Improvement Program dollars -- it is simply funding on-the-ground conservation by others. This program should be no different.

That being said, we believe that there is a great deal of flexibility within the current authorizing language for regulations and rules that recognize the partnership nature of the FRPP, and help the Department's partners market and deliver conservation of agricultural lands.

We hope you will consider the detailed recommendations below.

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[1] See 71 *Fed. Reg.* 42569 (27 July 2006) "To date, NRCS has not had to exercise its enforcement rights, nor has it had to take title to any FRPP-funded easements."

COMMENTS ON THE INTERIM FINAL RULE

I. Real Property Interest of the United States

Recommendation: LTA believes that the Department would be best served by reverting to the program's prior characterization of its interest in FRPP easements as a "contingent right" Requiring that the Department be a "co-holder" of the easement is fraught with negative consequences for the program, its partners, and landowners.

Comment: It is important to note that after 12 years, the Department has yet to have a problem requiring it to assert its property rights in an FRPP easement. Yet the interim rulemaking focuses intensely on establishing further protections of those rights. In doing so, we believe the Department has ignored some serious negative consequences

The first is a problem for the program and the Department. Having a major federal agency signed on as an equal holder of an easement sends an unmistakable signal to its partners (and their funders, including rightfully parsimonious state and local legislatures) that they do not have to be prepared to defend and enforce their easements – because the big guns of the U.S. Department of Agriculture are ready to.

This is exactly the wrong signal to send. It is bad for conservation, and it is asking for trouble for the Department. Why let your partners rely on the Department and its resources (to say nothing of those of the Department of Justice) for responsibilities that we all agree the partners should be able and willing to shoulder on their own?

The difference between being a co-holder and enforcing a contingent right is an important one. If NRCS holds a contingent right, NRCS is focused on ensuring that the easement holder – its partner – is doing its job. That properly delegates the implementation of the program, and responsibility for the program If NRCS is a co-holder, it suddenly – no matter how it couches the terms of the contract – is just as responsible for dealing with the landowner and enforcing the terms of the easement as its partner. This is inefficient, awkward, and, according the record, unnecessary

The second is a problem for your partners. An important element in their success is their ability to sell conservation easements to the farmers whose land most merits protection It is one thing for a local government agency or nonprofit to convince a farmer to sell an interest in the farmer's land to them, based on the farmer knowing and being comfortable with that local agency or nonprofit as a co-owner. It is another thing for your partners to convince someone to sell an interest in their land to a third party (USDA) who is not present, not a neighbor or

a known quantity, and is run by a large hierarchy headquartered hundreds or thousands of miles away

The Department may say all this doesn't matter, as there still will be people who will be willing to take the Department's money on these terms. That misses the very important point that while the number of acres the Department helps protect is certainly important, which acres it helps protect is even more important. The ability of the Department's partners to implement this program in a strategically effective way depends on the Department's partners having an attractive, sellable easement.

II. Appraisals

Recommendation: LTA strongly supports the application of the Uniform Standards of Professional Appraisal Practice to appraisals of conservation easements, and believes it is entirely reasonable to require the use of state general certified appraisers for easement appraisals.

However, we believe that the NRCS should not require conformance with the Uniform Appraisal Standards for Federal Land Acquisition when conducting appraisals. This places unnecessary financial and practical burdens on its partners, lengthens an already cumbersome application process, and appears to us to be contrary to the intent of the Congress.

Comment: The Interim Rule proposes to require that all appraisals of FRPP easements conform to the Uniform Appraisal Standards for Federal Land Acquisition (commonly known as the Yellow Book) – something never before required of program partners.

This seems quite contrary to the direction from Congress in section 1119(o) of Public Law 109-59, enacted just last year as H.R. 3 and signed into law by President Bush. The statute says:

> (o) 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 USC 4601 et seq.) shall not apply to the voluntary conservation easement activities of the Department of Agriculture or the Department of the Interior.

Since one of the significant elements of the January 4 rulemaking was to cover purchases of easements (which had not been previously covered by the Uniform Relocation Act) and in doing so to allow agencies to require Yellow Book conformance for these purchases, it seems that the Congress was specifically stating that they expressly disagreed with treating voluntary conservation easement purchases in the same manner as condemnations.

The Yellow Book is described as "a compendium of federal eminent domain appraisal law." It was designed to produce appraisals that would withstand judicial review in contested condemnations of property by the federal government. This standard is simply overkill for a program that purchases a fractional part (no more than 50%) of a partial interest (a conservation easement, rarely consisting of more than 70% of the total value of a property) only from voluntary sellers, by a program that does not have the power of condemnation.

Appraisers familiar with and qualified to do Yellow Book appraisals are, in fact, few and far between in many parts of the country, presenting a significant practical barrier to this new standard. Yellow Book appraisals are also more complicated, time consuming and expensive – although not necessarily any more accurate – than professional appraisals meeting the Uniform Standards of Professional Appraisal Practice.

This is expensive overkill. We think cost is an important issue. Every dollar that goes into process and documentation is a dollar that must be provided, in its entirety, by the Department's partners, the program implementers. Were this change designed to provide necessary and useful documentation, we would be happy to support it. In this case, however, it is requiring more process and documentation than is needed to assure that the Department is spending program dollars well. In short, the Department is mandating new costs of its partners that reduce the conservation this program can produce.

III. Impervious Surface

Recommendation: We believe the proposed standard, by using a single percentage standard and a standard waiver, probably is unnecessarily restrictive of smaller FRPP easements, while at the same time it is probably not nearly strict enough for larger ones. We hope the Department will consider other options.

Comment: We think some sort of impervious surface limit for FRPP easements is a good one. It provides an assurance that this program is protecting natural resources, not just economic ones – and this is very important in ensuring continued broad public support for the program.

That being said, a 2% limit with a waiver of up to 6%, produces wildly different results on different sized easements. A one acre limit on a 50 acre farm is very small. On the other hand, a 6% limit on a 1,000 acre ranch could accommodate an entire subdivision!

IV. Indemnification

Recommendation: We believe that the indemnification language is unnecessary, and we strongly recommend that the Department eliminate the proposed inclusion of an indemnification clause in FRPP agreements.

Comment: The Department proposes to include indemnification language in all FRPP easements to protect the Federal government from any liability associated with the property. This language is unnecessary since case law to date has held that easement holders do not qualify as "owners or operators" under 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.

This is another instance of a solution by the Department that has great potential to make things worse, rather than better. There is currently no good legal precedent for anyone to use in support of an assertion that a conservation easement holder has liability under CERCLA. But by insisting that its partners indemnify the federal government for such a potential liability, the Department is actually providing a legal basis for parties to assert that the Department's partners are, in fact, liable.

V. Title Review

The proposed rule requires the Office of General Counsel (OGC) to review the titles of all individual FRPP projects for legal sufficiency. This is another redundant and inefficient consequence of defining the program as one of accumulating property rights for the federal government. OGC has better things to do than to check sufficiency of title when its partners implementing the program in the field have already done so. This is another good reason to change the legislative authorization of FRPP to a grants program.

VI. Further Comment

The Department's practice of implementing the FRPP program through an annual Request For Proposals (RFP) issued shortly before the deadline for project proposals to be submitted is a recipe for bad relations between the program and the partners responsible for its implementation. This is especially true when the RFPs are used to set out detailed rules for real estate transactions that often take a year or more to complete

Part of this is the fault of the current authorizing language, requiring that projects be submitted only when an agreement by a landowner to sell an easement is already in place. Part of it is due to the federal budget process.

We urge the Department to propose changes to that authorizing language to change this, and to create a system that allows both meaningful dialogue with program partners about proposed RFP terms prior to the issuance of an RFP, and sufficient time for partners to actually implement those terms in a timely fashion.

Thank you again for the opportunity to comment on the Interim Rule.

Sincerely,

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cc: Arlen Lancaster, Chief, NRCS