(40) FRPP - IFR - SUFFOLK

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COUNTY OF SUFFOLK

OFFICE OF THE COUNTY EXECUTIVE

Steve Levy COUNTY EXECUTIVE

MICHAEL J. DEERING COMMISSIONER

DEPARTMENT OF ENVIRONMENT AND ENERGY

September 25,2006

Easement Program Division NRCS
1400 Independence Avenue, SW Room 6819-S
Washington, DC 20250-1400

Sent Via E-mail: Robert.Glennon@wdc.usda.gov Sent Via Facsimile: (202) 720-9689

Re: Interim Final Rule for the Farm and Ranch Lands Protection Program - Interim Rule Published in 71 Fed Reg *42567, et seq.* (July 27,2006)

Dear Sir\Madam:

Suffolk County appreciates the opportunity to comment on the proposed Interim Final Rules on the Farm and Ranchlands Protection Program ("FRPP"). Suffolk County has an enormous stake in preserving its farms, which are fast disappearing due to development pressure In 1973, Suffolk County was one of the first entities in the nation to establish a purchase of development rights program for protecting farmland. Since that time, Suffolk County has spent about $95 4 million to preserve 8,632 acres of mostly prime farm soil Moreover, not one farm has left the County's program, during its entire history

Based on Suffolk County's track record, the County is well qualified to administer its own program Suffolk County would like to see the FRPP provide block grants Furthermore, given the amount of funding made available by FRPP, Suffolk County is very frustrated with the oversight, redundant rules and red tape The FRPP and the proposed amendments do not recognize the evolving and different nature of agriculture from region to region; state to state; coastal zones to interior areas The onerous and frequently changing regulations make entry into the program difficult to justify to farmers who want to preserve their land

Also, while the discussion of the new rule mentions the word "partnership" several times, from an economic standpoint, there is not much equity The federal government needs to increase funding if this program is to have any significant impact on saving farms in the United States

Based on our many communications with farmers over the years, we believe that the current FRPP regulations, as well as the proposed changes in the regulations, will continue to discourage farmers in Suffolk County from participating in the program This effect will hinder, rather than facilitate the United States from using its dollars wisely to achieve farmland preservation goals. In addition, the increased redundancy in requirements places an increased administrative and financial burden on the County, further reducing the available dollars for farmland preservation.

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The County joins most of the State, municipal and not-for-profit FRPP participants in believing that the proposed regulations have the effect of moving the Natural Resource Conservation Service ("NRCS") unnecessarily beyond its stated role as a "backstop" to a program partner. The proposed regulations are duplicative of local protocols and seem to be micromanagement of the local programs The NRCS could more effectively and efficiently preserve farmland 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

Definition of Fair Market Value (amendment of7 CFR §1491.30(e))

The change in before and after valuation to reflect a landowner's entire property, rather than the property on which a conservation easement is acquired, will not necessarily result in a more accurate appraisal As an example, a farmer might own 1 00 acres and decide to sell farmland development rights to the County on 80 acres In the example, the 20 acres to which the owner retains title are waterfront property, while the 80 acres covered by the easement are not Under this scenario, using the proposed amended definition off air market value would increase the value of the development rights and increase the amount of money paid by the County Moreover, the assumption that land values of property adjacent to protected farmland may increase is not always correct Proximity to a farm with the attendant odors, noise and dust is not always a desirable factor which raises land value It is not clear who this proposed rule change would benefit

The proposed definition is inaccurate, arbitrary and may not be consistent with established rules for appraisals. Established State and local farmland preservation programs already have time-tested procedures and methodologies to determine fair market value New York State, for example, has defined fair market value, for real property transfer tax purposes, as:

[T]he amount that a willing buyer would pay a willing seller for real property It is generally determined by an appraisal based upon the value of the real property at the time of conveyance

20 New York Code of Rules and Regulations §575 1 The concept off air market value has also been refined through real property and appraisal practice and case law As shown by the New York rule above, fair market value is not generally based upon the value of adjacent property. No authority is cited for the proposed rule change States and localities should be allowed to continue using procedures, definitions and appraisal methods that have been defined and have worked over time

Real ProDerty Interest ofthe United States (7 CFR &&l491.22(e) and 1491.30(b))

The proposed changes would re-characterize what the NRCS has formerly considered to be a contingent right to be a presently vested real property right. Suffolk County concurs with other program participants that the recharacterization is unnecessary and likely to have a chilling effect on participation on the program Farmers themselves are reluctant to add the federal government to the process, asking; "What will they be requiring of us?" Local farmers fear intrusion on their ability to farm

Suffolk County strongly objects to identifying the United States as a grantee in the FRPP funded deeds. If the United States is listed as a grantee, its interest should be expressly limited to the extent of its contribution to the acquisition cost There are 30 years worth of deeds of development rights filed with the County Clerk with the County of Suffolk listed as the grantee The County has a Farmland Committee that meets periodically to review any activity within a participating farm that may be violating protection standards and to permit new structures The Farmland Committee is composed primarily of experienced farmers. By contrast, the NRCS is not equipped to set up panels to make farmland management decisions needed to administer a program

Over the past 30 years, the County has developed a good working relationship with its farming community and the County feels that it is in the best position to ensure protection of the farmland and protect our respective governmental interests If the NRCS believes that some areas of the country are not providing the necessary oversight of participating farms, the NRCS could consider establishing minimum requirements necessary to safeguard its interests If the local municipality meets those requirements, then the municipality should continue to administer the program and there is no need for duplicate names on the easement Suffolk County would be amenable to work with the NRCS in developing those standards.

Despite the Agency's assertion that its proposed clarification of the United States FRPP property right will not alter the relationship between NRCS with its partners, the County agrees with other grantees that making the United States a co-grantee ofa FRPP easement, even under circumstances which limit the exercise of the United States' rights, will chill landowner interest in protecting land through the program

For those state farm and ranch land protection programs that already authorize more than one easement holder, the proposal by NRCS to add the United States as an additional co-holder will further complicate what is often an already complicated process For grantees, conferring co-holder status upon the United States will cloud the grantee's ability to resolve issues and respond timely to landowners requesting changes and approvals The United States will need to be consulted on many management issues that formerly were left to the local grantee and the farmer to resolve, which will potentially include even issues in areas not covered by the U S regulations The NRCS has no established procedures or capability to achieve this kind of easement management. Furthermore, since the federal regulations appear to change on almost a yearly basis, there is no stability, predictability and consistency for the farmer or the local grantee, in terms of what constitutes compliance with the easement

In instances of disagreement on management issues between the United States and the grantees, by virtue of the proposed United States Rights provision, the United States will always have the heavy-handed option of threatening to take over enforcement of the easement The farmer will not be able to rely upon decisions made by local grantees There is little assurance that a landowner, operating in good faith per an approval given by a grantee/partner, will not be found by the United States to be in violation of the terms of the easement

Based upon the County's experience, we believe that many farmers are and will continue to be uncomfortable with having the United States listed as a grantee on the deed, together with the many restrictions from participating in the FRPP We concur with many FRPP partners in this regard Over the years, we have found almost no farmers willing to engage with United States government involvement in their livelihood and to participate in the FRPP

Under the proposed regulation, in the event that the grantee attempts to terminate transfer or otherwise divest itself of any rights, title or interests in the Conservation Easement, without prior consent of the Secretary of Agriculture and payment of consideration to the United States, then at the option of the Secretary, all right title and interest in the Conservation Easement will become vested solely in the United States of America This provision is inequitable, in that the federal contribution to a FRPP easement is no more than 50 percent of the acquisition cost. The United States of America should be limited to recovering its investment by becoming the owner of only fifty percent of the Conservation Easement The grantee should retain its half of the easement. The proposed provision constitutes an unfair confiscation ofthe County's property rights and, ifnot illegal, is patently unfair to the County's taxpayers.

The County believes that NRCS can sufficiently protect its interest by maintaining the current "contingent rights" language Under the current language, the Secretary of Agriculture can enforce or take title to the easement if the cooperating entity is not doing a sufficient job, or attempts to divest itself of title Re-characterizing the rights will not increase the ability of the United States to protect its interests. However, recharacterizing the United States rights will alienate grantees and farmers, and decrease the effectiveness of the program

Title Review

Suffolk County has established procedures for title review of its proposed acquisitions and the County opposes the requirement that the Office of General Counsel ("OGC") review all titles for legal sufficiency. This requirement is duplicative and burdensome, and its current procedures have already negatively impacted the County's acquisition process Also, the proposed requirement that the grantee use a state-certified general appraiser should further ensure that title review is adequate.

This NRCS proposal is likely to add additional time to what is often a lengthy process for project completion A more acceptable option would be for NRCS to develop a set of title review standards for grantees to follow and institute a procedure by which the OGC would conduct random reviews of title reports to ensure compliance with OGC standards This would allow the FRPP to operate in an efficient manner and reduce the amount of redundancy Another alternative would be for the OGC to conduct audits contemporaneously, at the same time that he County conducts its audits This would be a less disruptive way of conducting the process

Exercisin!! the United States' Ri!!hts (Amendment of7 CFR &1491 30

The discussion ofthe proposed amendment states that the goal is a uniform, predictable process that will be utilized when the need arises, to enforce or take sole title to a Conservation Easement The NRCS has not spelled out that process in sufficient detail, nor has it indicated how it intends to treat local governments' rights to these same lands

The Secretary of Agriculture should be required to demonstrate an actual failure to enforce the easement on the part of the grantee or the landowner through a formal process, rather than allowing the Secretary to exercise the United States' rights in the Secretary's sole discretion. The grantee should have a right to a hearing The farmer should also receive notice and have a right to hearing By vesting sole discretion in the Secretary to determine that an action constitutes non-compliance or failure to enforce the terms of the easement, the proposal jeopardizes a landowner's ability to rely on stewardship and enforcement decisions of the grantee

Furthermore, the NRCS has not established a process for the landowner or the grantee to appeal the Secretary's determination to take over easement management or title An appeal process is necessary to ensure a fair, unbiased determination made by an unrelated third party The lack of a fair, equitable process will place this entire program in jeopardy, since State and local governments and farmers will be reluctant to participate in the FRPP

There is a proposal to impose a 60-day period for a grantee/partner to address any alleged non-compliance ofan easement term. The NRCS should require only that a grantee/partner demonstrate that it has taken steps to address the noncompliance issue within the specified period

The 60-day period specified in the proposed regulations is unrealistic. The NRCS should allow time for consultation between the multiple easement owners to determine an acceptable plan for management or correction of the non-compliance In addition, there must be reasonable and sufficient time for a landowner to cure the violation

Appraisal (Amendment to 7 CFR §1491.4(e))

The County is already in conformance with some of the proposed requirements, as the County already utilizes statecertified general appraisers and their appraisals conform to the Uniform Standards of Professional Appraisal Standards ("USPAP") On the other hand, requiring the County and other grantees to conform to the Uniform Appraisal Standards for Federal Land Acquisitions ("UASFLA") would require additional expense and additional education of the County's appraisers

The discussion of the proposed changes in appraisal standards which appears in the Federal Register does not present a detailed analysis of why the USPAP standards are inadequate and why the change to the UASFLA is necessary or desirable Furthermore, the proposed amendment does not address the procedure to follow ifUSPAP and the UASFLA do not agree on a particular standard Until the NRCS can establish that the UASFLA standards are superior to US PAP, the proposed change constitutes an unnecessary burden on the grantees

The proposed amendment provides that the NRCS could require an eligible entity to obtain an appraisal using NRCS appraisal instructions The County feels that this level of intrusion and interference with County procedures would be disruptive and unwarranted If the grantee is using qualified staff to write up the appraisal instructions under its standard, established procedures, there is no reason why the NRCS should require its own appraisal instructions.

In 71 Fed Reg 42569 (July 27,2006), the NRCS states that:

Conservation easement appraisals are complex because they involve using an income approach in calculating the value of the easement

The County does not agree with this assessment of the proper method for easement valuation. The conservation easement can be valued using a "before and after" scenario that does not involve using an income approach In fact, it relies solely on a sales comparison (or market data) approach.

Impervious Surface Limitations (Amendment to 7 CFR §1491.22(i))

The face oHarming is changing, especially in the coastal areas of the United States where urbanization is occurring at a rapid rate While we recognize the importance of protecting critical soils, the emphasis, especially in areas such

as Long Island, New York, must be upon saving the farm To do this, many farmers are stretching the envelope and being creative in establishing new ways to remain viable as a working farm Some have focused on "value added products" and have gone ITom wholesaling to retail in order to survive NRCS should not be using a single cookie cutter approach in its protection programs, trying to equate a farm in Nebraska or Florida, with a farm in Suffolk County. A standard limiting impervious surfaces to 2%, with a 6% waiver, may make sense for a 5,000 acre farm, but not for a 50 acre vineyard States and local governments should have the flexibility to make this determination on a case-by-case basis in a way that fits their unique geographical and economic situations. A "one size fits all" approach does not reflect the needs and circumstances of localities

Furthermore, Suffolk County agrees that the topsoil must be protected However, the mechanism for protecting topsoil is by preserving farms Ifno farms are preserved, the property could become covered 100% by impervious surfaces, particularly where development pressure is strong

By and large, FRPP participants are landowners who are committed to agriculture and want to continue farming and ranching into the future. Particularly in the Northeast, farmers need buildings such as greenhouses and barns to enable their farms to be viable operations. In the example given in the Federal Register Notice, a 100 acre farm could have up to 6 acres of impervious surface, and a 1000 acre farm could utilize up to 60 acres of impervious surface Note that the proposed regulations limit the 6% waiver to farms less than 50 acres in size, so the example is inaccurate. A 100 acre farm would be allowed only 2 acres of impervious surface, and would not be allowed the 6% waiver

This rule is inequitable Based on the climate, length of growing season and types of crops (such as dairy, specialty crop and horticultural industries), the 2% limit is not adequate Ifa limit on impervious surface is to be imposed, it should be imposed by State or local officials who are familiar with the agricultural needs of their State or locality The County's recommended approach will ensure continued support for the program

Suffolk County has a Farmland Committee to assist in administration of the County's Agricultural Farmland Development Rights Program Many members of the Committee are members of multi-generation farming families In the past, when the issue of the 2% limitation was brought up to the Committee, even considering the potential 6% waiver, the Committee members expressed their strong objections to this limitation.

The 2% and 6% figures are arbitrary The NRCS represents that the 2% and 6% figures were based upon numerous studies and regarding water quality and internal and external reviews Nowhere is it represented that farmers were interviewed to determine whether the figures provided adequately for farm viability in the Northeast This is a glaring omission. The amount of impervious surface should be based, in part, on the necessity of the requested structures

If the 2% impervious surface rule, even with a 6% waiver provision, does not allow farmers to build appropriate agriculture-related buildings, the rule will dissuade many landowners IIom enrolling in the FRPP and ultimately result in the loss of valuable farm and ranch land In more developed areas of Suffolk County, with countervailing development pressure, non-farm development could result in 100% impervious surface coverage.

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

It is important to keep in mind that the farmers receive no benefit or incentive to participate, while the 2% rule and other limitations of the FRPP act as a disincentive In the County's experience, almost every candidate farmer solicited by the County to participate in the FRPP Program has responded that the FRPP Program involves too much government intrusion into the farmer's livelihood and that there is no appreciable benefit to the farmer who participates

Also, tying a waiver to population density is irrelevant and illogical There is no reason set forth for this proposed criteria

We concur that protection of key agricultural soils and erosion prevention is an important criteria in considering erection of structures on farm property. However, with proper placement and planning, erosion can be mitigated In sum, the criteria for a waiver should consider the specific needs of the farmer. Whatever steps a farmer takes to help keep his farm viable should not be pre-judged by an arbitrary figure.

Indemnification (Amendment to 7 CFR &1491.30(e)

Suffolk County believes that the proposed indemnification section is unnecessary and overbroad. Furthermore, the NRCS should limit the indemnification to the extent ofthe Federal government's financial contribution to the project. 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's financial contribution toward the purchase price for the easement, rather than having the potential liability of the party providing the indemnity be unlimited

We thank you for your consideration of these comments.

Very truly yours,

Department of Planning

Thomas A. Isles, Director

Department of Environment & Energy

Michael J Deering, Commissioner

cc: Christine Malafi, Suffolk County Attorney Jennifer B. Kohn, Assistant County Attorney David P Fishbein, Assistant County Attorney