

August 21, 2008

Dear Chief Lancaster:

Thank you for inviting our input on the interim rulemaking taking place on the Farm and Ranchland Protection Program (FRPP).

The land trust community is a proud partner of NRCS in implementing this program in many parts of the country, and we look forward to building that partnership in the future. As active participants in the Farm Bill legislative process, we believe that many of the changes made to this program were specifically intended to make the program easier to use for NRCS partners (“eligible entities”) and for agricultural landowners – and even more effective in meeting our shared conservation goals.

Below are our comments on issues that we hope will be addressed in the rulemaking.

1. Changes to cost-share

The new Farm Bill continues the requirement that the Secretary contribute no more than 50% of the fair market value of an easement purchased by a partner with FRPP funds.

The new law does, however, change a key part of the cost-share requirements in order to provide a greater incentive for NRCS partners and landowners to seek the most-cost-effective conservation possible, though the use of charitable contributions by landowners.

In the past, NRCS gave partners a choice of providing a **minimum cash contribution** to the project of either **50% of the purchase price** of the easement, **or 25% of the appraised fair market value (FMV)** of that easement.

The new law sets a **different minimum cash contribution** for partners, of **25% of the purchase price (PP)**.

The old and new laws will look the same **until the landowner donates more than 25% of the fair market value of their easement** – that is, they sell for less than 75% of the market value. Let’s say the fair market value of the easement is \$100. The Secretary can pay up to \$50. The old and new laws work the same as long as the landowner is paid at least \$75 for their easement.

But let's take a case where the landowner agrees to sell the \$100 easement for \$50. This is not at all uncommon – the IRS reports that landowners donate more than \$1 billion a year in conservation easements. Many farm and ranch owners are highly motivated to protect their land, and will do so for less than fair market value.

Here, under the old law, NRCS gave the eligible entity a choice – pay half the purchase price (\$25), or pay at least 25% of the FMV (\$25). In this case, the Secretary pays \$25, the eligible entity \$25, and the landowner donates \$50. Note that no matter how much the landowner donates, the eligible entity must match the Secretary dollar for dollar, even though the total non-federal contribution is, in this case, 75% of the total fair market value of the easement.

In some instances this minimum cash requirement has been a serious barrier for eligible entities that are able to interest landowners in selling for far less than FMV, where there is not yet a dedicated funding source or well-established government farmland protection program. We have found that successful conservation projects in such places are a critical first step to creating, and then expanding, local farmland protection effort and funding, and believe strongly that it is in the program's interest to fund such projects.

Under the new law, the eligible entity pays at least 25% of the purchase price (\$12.50), the Secretary pays \$37.50, and the landowner donates \$50.

We urge you to recognize this lower minimum cash contribution requirement in the interim final rule, as it provides a stronger incentive to eligible entities to seek larger landowner donations (that is, to ask them sell their easements for less than fair market value), making the program even more cost-effective. It will also enable more nonprofits, and local governments, to become program partners.

2. Purchase or grant?

Prior law said “the Secretary shall purchase conservation easements” (Sec. 1238l (a)). The new law changed this to say “the Secretary shall facilitate and provide funding for the purchase of conservation easements.”

The Congress wanted the Secretary to retain the ability to enforce the easements purchased by partners, should they not be able to do so. But rather than doing so by having the Secretary be a co-holder of the easement (as NRCS had begun to do prior to the new law), or even by the Senate's proposal for having the Secretary retain an “executory limitation” (a contingent future property interest in the easement), the final bill requires “the inclusion of a contingent right of enforcement for the Secretary” – not an ownership interest at all. The conference report is quite clear that “the Managers do not intend this right to be considered to be an acquisition of real property.”

These two provisions were intended to make it clear that this was not a program in which the federal government was itself acquiring real property interests. Rather, it is to be a program in which the federal government facilitates and funds the purchase of property interests **by others** (“eligible entities” – its program partners), for the benefit of conservation. This is no different than NRCS’s cost-share assistance to individual farmers, which does not result in NRCS owning interests in dams, dikes and manure ponds constructed with those funds.

This change was clearly intended by the Congress to ensure that the Secretary would not impose federal real property acquisition procedures (including use of the “Yellow Book” appraisal methodology, requiring indemnification of the Secretary for any potential toxic substance liability, and requiring separate USDA title review of conserved properties) on these purchases – requirements that many program partners found burdensome and duplicative of their own efforts and standards.

We urge NRCS to make the interim final rule clear in reversing these prior requirements.

Section 1238I(d) of the new law states that “the fair market value of the conservation easement... shall be determined on the basis of an appraisal using an industry approved method, selected by the eligible entity and approved by the Secretary.”

Recognizing that some long-standing farmland protection programs utilize their own systems for valuation, we hope that NRCS encourages program partners to use appraisals that follow the Uniform Standards of Professional Appraisal Practice (USPAP), as set by the Appraisals Standards Board of The Appraisal Foundation. Congress gave this board the task of creating professional appraisal standards in the Financial Institutions Reform Recovery and Enforcement Act of 1989.

The Internal Revenue Service has just issued new draft regulations (see p.45908 of the Federal Register for August 7, 2008) on valuations of donated property that require that appraisals used to verify charitable contributions (such as the donation of part of the value of a conservation easement) must comply with “the substance and principles of the Uniform Standards of Professional Appraisal Practice.” Having a uniform set of standards for appraisals can help landowners understand and make best use of FRPP, state and local easement purchase programs and the opportunity to take a tax deduction for donating some of the value of their easement.

3. Minimum requirements

The Farm Bill says that:

“An eligible entity shall be authorized to use its own terms and conditions, as approved by the Secretary, for conservation easements.... so long as such terms and conditions;

- (A) are consistent with the purposes of the program;
- (B) permit effective enforcement of the conservation purposes of such easements or other interests; and
- (C) include a limit on the impervious surfaces to be allowed that is consistent with the agricultural activities to be conducted.”

The purpose of the program is, according to the farm bill “to protect the agricultural use and related conservation values of eligible land by limiting nonagricultural uses of that land.” We believe that it is important to recognize that this statement of purpose focuses on protecting “agricultural use... of eligible land” – essentially, soil-based agriculture.

This is a change of emphasis from prior law, which cited “protecting topsoil” as its sole purpose. This change recognizes that topsoil protection alone is not what this program intends to protect. Rather, it intends to protect land and topsoil so that they can continue to be used for agriculture. We note that the new law makes the presence “of prime, unique or other productive soil” one of three qualifications for land eligible for the program.

Any agricultural use of the land will have some impact on topsoil, and it has been understood from the start that it is not the purpose of this program to preclude any soil disturbance at all. We encourage the rulemaking to recognize that even “non-agricultural” uses that disturb soils may be allowed where that disturbance is temporary or insignificant to the continued use of the property for agriculture (such as the installation of a buried cable or pipeline).

The new law does, of course, acknowledge the need for limits to protect the soil resource. For example, the program always has required, and in the new law still requires, that “highly erodible cropland ... shall be subject to a conservation plan that requires, at the option of the Secretary, the conversion of the cropland to less intensive uses.”

Section (C) acknowledges that buildings and roads will have to be limited, to protect the continued viability of soil-based agriculture on the property – but it is also clear that those limits should not be so strict as to actually preclude appropriate soil-based agriculture from taking place.

At the same time, we believe the language is clear that its intention is to protect agriculture that depends on the land and its soil, as opposed to fishponds, animal confinement facilities, or greenhouses for potted plants or hydroponics. That's not to say that farms protected by FRPP easements may not have such things – they certainly may, within reasonable limits designed to ensure continued agricultural access to the farm's soils.

Both the House and Senate expressed their concern with the lack of flexibility in the impervious surface limit required by NRCS in the past, which limited impervious surfaces to no more than 2% of the easement area, with the opportunity to apply for an exception allowing up to 6%. The Senate passed a sliding scale limit¹, allowing a higher percentage of impervious surfaces for smaller properties, and including a provision allowing eligible entities to seek approval to utilize a limit of their own construction, if it provided “*substantially-similar protection [to the sliding scale] consistent with agricultural activities regarding the impervious surfaces to be allowed.*”

The new law requires that easements include “a limit on impervious surfaces.” Both the House and Senate bills used language indicating that this standard should be “consistent with” agricultural activities – a clear indication that the standard was intended to be flexible enough to accommodate expansion of structures or roads that might be needed for agriculture in a world of changing agricultural practices and economics. At the same time, we strongly believe that this should be seen as accommodation for activities (or structures) consistent with continued soil-based agriculture.

To simplify this requirement, we urge NRCS to propose a model standard that the Secretary will accept (such as the Senate's sliding scale), while leaving room for partner-proposed limits that do not follow that model but are similarly protective of continued agricultural use of the land and its soils.

4. Certification

The Farm Bill requires the Secretary to “certify eligible entities that meet established criteria”, and allows such entities to develop long-term agreements with the Secretary. The law provides for those agreements to have a minimum life of 5 years, while non-certified entities are allowed agreements of up to 3 years. The law lists criteria for certification.

¹ Section 2371 of the Senate's amendment to the House bill provided that “*each easement shall include a limitation on the total quantity of impervious surface of not more than--*

- ` (I) 20 percent of the first 10 acres;
- ` (II) 5 percent of the next 90 acres; and
- ` (III) 1 percent of any additional acres”

Clearly, the law intended to provide a process by which it would be to the advantage of eligible entities to be certified by the Secretary, and that this group was intended to be entities that were continuing users of the program.

If the Secretary is able to certify such entities quickly, it would make sense for agreements with other (non-certified) entities to cover only a single project, and that the intent of the three year term of agreements with non-certified entities was simply to ensure that those entities would have sufficient time to complete those projects without changes in their terms or specifications.

If, in NRCS's judgment, it will need more time for initial certifications, it could provide for a round of multi-project agreements without certification, followed by a requirement that all future multi-project agreements require certification.

This would ensure that both certified and non-certified entities were guaranteed the opportunity to close their projects (and, in the case of certified entities, proceed to their next set of projects) without unanticipated changes in the rules, while providing a strong incentive for larger eligible entities to be certified. We believe that both – time without rules changes and a strong incentive for certification -- were the clear intention of the conferees.

5. Contingent Right of Enforcement/Successors

Prior to the new farm bill, NRCS specified that, in the event an eligible entity was unable or unwilling to enforce an easement, that the Secretary would take possession of the easement. Given that, as noted above, the Farm Bill conferees specifically stated that “the Managers do not intend this right [of contingent enforcement] to be considered to be an acquisition of real property,” we believe that care should be taken to avoid the Secretary taking possession of an FRPP easement project (whatever else he or she might do to enforce the easement's restrictions).

We would suggest that the rule require that each FRPP easement document either explicitly provide for a successor that is another qualified “eligible entity” or provide a clear process for choosing a successor if needed. Land trusts routinely do this with their own easements. Furthermore, we would suggest that transfer of ownership to a successor organization require the approval of the Secretary, and that the Secretary's right to approve a successor be addressed in the easement document.

6. Permanence

The FRPP program has had great success with the use of permanent conservation easements, and we urge it to continue in this. The complications for program administration introduced by allowing the program to fund other property interests – whether outright purchase of farmland or term easements – outweigh whatever usefulness such other instruments might have

in particular circumstances. We urge that the rulemaking echo the established practice of funding permanent conservation easements except where such easements are not allowed under state law, in which case easements will be allowed for the maximum possible term.

Thank you again for the opportunity to provide our input on this program and its implementation.

Sincerely,

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