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COMMENTS ON THE INTERIM FINAL RULES ISSUED IN THE FEDERAL REGISTER, Volume 71, No. 144 (Thursday, July 27, 2006) CONCERNING THE FARM AND RANCH LANDS PROTECTION PROGRAM NRCS, USDA

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Author: James Conrad, Executive Director
Maryland Agricultural Land Preservation Foundation (MALPF)

Introduction

While these comments are specifically addressing the interim final rules for the Farm and Ranch Lands Protection Program (FRPP) issued in July, 2006, these comments must be made within a broader context and history.

Established in 1977, Maryland's farmland preservation program, MALPF, is, with the Massachusetts program, one of the two oldest state purchase of development rights programs in the country, and one of the country's most successful. It currently owns about 1,800 agricultural preservation easements on approximately 250,000 acres. It manages an investment of $380 million in public funds that is currently valued at between $850 million and $1 billion. For FY 2007, MALPF has a capital budget for easement purchases between $80 and $90 million.

MALPF has participated in FRPP since the first RFP was issued in the 1990s. Over the history of the program, I believe that Maryland overall (through the MALPF consolidated application, independent county applications, and applications from private land trusts) has received more funding from FRPP than any other state, though this may now be changing with the announcement of the new grants for the Federal FY 2006 when Maryland dropped from being ranked first or second to sixth, apparently for "non-performance."

MALPF has been able to make FRPP work very well with its land preservation program, despite incompatible ranking systems and somewhat more restrictive easement language that historically have required flexibility on both the part of MALPF and the State's Program Manager at NRCS. FRPP funding played a critical role keeping the MALPF program operating during the recent period of statewide budget shortfalls. Though some provisions in the rules, the manual, and cooperative agreement were introduced starting in FY 2003 that had the potential to create problems, MALPF was able to create workarounds and satisfy FRPP requirements with minimal impact on the operation of the MALPF program. Both because MALPF had been able to make FRPP work and because MALPF staff was not aware when rules were issued or that comments on the rules could be submitted until recently, MALPF has not submitted comments during the rulemaking process until these comments.

With little or no warning, no title reviews, easements, appraisals, or other documentation submitted to NRCS were approved after January 1, 2006, during the middle of committing funding from the FY 2004 and 2005 cooperative agreements. When it became clear that settlements were being delayed and the issues would not be easily resolved, MALPF sought and received approval from the Maryland Board of Public Works to replace federal funding commitments with uncommitted state and local funding. MALPF currently has about $10 million in uncommitted federal funds from FY 2004 and 2005 and has recently received approximately $2 million in additional federal funding for federal FY 2006. If MALPF can work through the unresolved issues, this $12 million (±) would be committed against offers made during MALPF's FY 2007 easement acquisition cycle that will begin in March or April, 2007. (The application deadline was July 1, 2006; MALPF received 336 applications.)

MALPF will be working between now and March 2007 to seek to resolve pending issues with FRPP. In developing these comments, four issues must preface the discussion that follows. First, it is not possible to comment on the current interim rules without also commenting on the impact of rules developed and/or implemented in recent years. A major problem with FRPP has been incremental rule-making. Every year, additional restrictions or requirements are adopted or past rules are implemented that previously MALPF had been able to work around. It is difficult to get a handle on FRPP, because it has become, in effect, a moving target. Until MALPF knows which cooperative agreement from which the funding will be coming, MALPF cannot inform the landowner what restrictions will be imposed or know to what rules (or implemented rules) MALPF itself will be held. This makes it very difficult to market the program. Certainly, programs change over time, but the perception as a grant recipient is not that these changes are necessarily directed at improving the program, but at maximizing control over the provisions of state programs. Most new rules have increased the time necessary to go to settlement (a critical issue in running a program) and raised the costs necessary to incorporate federal funding commitments.

Second, the MALPF program is very closely tied to Maryland State statute. Thus, changes or requirements (such as how value is determined) may be easy for some land preservation organizations to adopt, but cannot easily be adopted by MALPF, given statutory constraints. Indeed, in certain cases, requirements imposed by FRPP were requirements at one point in the development of the MALPF program, but have since been rejected by the General Assembly in favor of more desirable alternatives. For example, "before and after" appraisals were required by Maryland's land preservation programs until the 1990s when they were replaced by the "before" value being set by a fair market appraisal and the "after" value set by a formula required by statute developed by the University of Maryland Agricultural Extension Office (in the case of MALPF) or by appraisal-normed easement valuation systems (EVS) whereby landowners are paid in part based on the conservation practices to which they agree to subscribe (in the case of the Rural Legacy program in the Department of Natural Resources). Part of the evaluation of any rule-making for FRPP must be the way that a rule or rules interact with MALPF's statutory requirements.

Third, comments on the interim final rule cannot be done without considering how any new or newly implemented rules interact with other policies and practices of FRPP included in the manual, in cooperative agreements, and non-formalized policies and processes (or lack thereof). Of particular importance here is the lack of clarity concerning certain policies and processes dealing with what rights FRPP will allow a grantor to retain under the easement and the process by which those rights can be exercised. While this may seem a minor issue to those at the federal level, the retention of rights is a major issue for most potential grantors and being unable to give definitive answers concerning those rights makes it impossible to attract much interest by landowners in easements with federal funding commitments. Further, this lack of clarity interacts with the rules and program requirements in ways that undercut MALPF's (and FRPP's) ability to achieve its goals, as will be seen

Finally, earlier rule-making and the resulting requirements were predicated on a seemingly faulty understanding of what it is the federal government is acquiring with a contingent interest or right in an agricultural preservation easement. The acquisition of a contingent interest or right in a restrictive easement on farmland was equated to the fee simple acquisition of a parcel on which a federal office building would be constructed As a result, the same acquisition standards in terms of appraisal standards, title review standards, and subordination of interests came to be required for this contingent interest as for fee simple acquisition. The weakness of asserting this equivalence is clearly evident by tacit acknowledgment of the faulty logic by the new interim rule that requires the federal government be a co-holder of the easement to provide the justification for legal requirements of rules developed and implemented over the last few rounds of rule-making. I do not think this resolves the issue of the nature of the property rights that are being acquired, but at least it strengthens the logic of the requirement that the transaction meet certain federal standards

Comments on New Rule Changes

The purpose of the following comments is to establish the likely impact of these changes on the MALPF program, not to support or oppose those changes, unless support or opposition is explicitly stated.

The New Definition of Fair Market Value

The new definition of a fair market value takes into consideration the value of ALL properties owned by the landowner(s) in the "before" value and the value of ALL properties owned by the landowner(s) in the "after" value. The intent of this definition is to take into account the enhancement of the value of any non-preserved land owned by the landowner that may occur as a result of the preservation of some of the land.

This change will have the following impacts. First, in conversations with FRPP program personnel in one of the teleconferences, the question was posed whether or not ownership percentages of land will be taken into account in such adjustments. The response was that partial ownership would be treated the same as full ownership. Thus, consider an

example, if an individual has 100% ownership in the parcel to be preserved and a 1% ownership interest in an adjacent parcel, a serious disincentive will exist for that landowner to protect the farm in which he or she has sole ownership.

	Ownership interest	Total FMV (before the easement)	FMV (after the easement)	Change in Valuation from the Easement
Parcel A (to be preserved)	100%	$1,000,000	$300,000	-$700,000 (the value reduction from putting an easement on Parcel A)
Parcel B (not to be preserved)	1%	$1,000,000	$1,300,000	+$300,000 (the value enhancement on Parcel B from putting an easement on Parcel A)
Values of both		$2,000,000	$1,600,000	$400,000 (the easement value paid on Parcel A)
Landowner's Value of Both		$1,010,000	$313,000	$713,000 (retained value) $297,000 (lost value)

The ownership value to the person who owns 100% of Parcel A and 1% of Parcel B before the easement is sold would be $1,010,000. The amount of value this person retains by preserving Parcel A would be $713,000 (the "after" FMV of Parcel A + the easement payment + 1% of the "after" FMV of Parcel B + the easement payment). The total value the landowner loses by preserving Parcel A would be $297,000. While this is an extreme example, the ownership structure of farmland parcels can be very complex, and there will certainly be cases found where this policy will create strong disincentives for landowners not to preserve farmland.

Second, this rule will also create another significant disincentive to participation in combination with the FRPP policy on impervious surfaces and the uncertainty over the retention of rights by grantors. On the one hand, a potential grantor who may have impervious surface issues because of a broiler operation or who wants to retain flexibility for a minor child who may inherit the farming operation to build a house on the farm could exclude sufficient acreage to meet the impervious surface requirements or guarantee a retained lot right for a minor child. On the other hand, because the potential grantor will now be punished financially in the easement valuation process for

withholding this acreage to meet legitimate farming objectives, even though he or she may have no intention ever to sell or develop commercially the withheld acreage. The potential grantor will either face a strong disincentive not to preserve the farming acreage because of an existing broiler operation or the need to meet family contingencies or that landowner who chooses to preserve the farm will have an ongoing incentive to recover the lost value by this easement valuation system by commercially developing the withheld acreage, undercutting the objectives of both the MALPF program and FRPP

Third, and unrelated to the first two, this new requirement for appraising conservation properties has to potential to raise costs significantly because of the complexity of the methodology and the likelihood that fewer appraisers will be willing or qualified to bid on appraisals with such requirements, also raising costs In addition, the complexity of this consideration (which may require in effect multiple appraisals of different adjacent properties) will increase the time needed for appraisals to be completed.

Finally, landowners who own large properties are often advised to bring their large properties into the program in stages, because the program rarely is able to purchase large expensive properties because of funding limitations. To do this, a landowner will either establish separate districts on a large single-parcel farm or place easements over separately titled parcels that together make up a single farming operation. While over time, this policy may result in spending the same total amount of money on the entire farm, it may also create a disincentive because of the uncertainty over values resulting from preserving the farm in stages.

Forestry Requirements

Under Maryland statute, owners of properties under MALPF easement must allow all normal agricultural activities to take place on easement properties MALPF does not allow landowners to permanently restrict normal agricultural activities unless it is approved by the MALPF Board of Trustees. Thus, a program participant cannot put a permanent easement on a MALPF easement property that permanently restricts harvesting trees on the property without Board approval. Board approval would only be granted if the "no cut" restriction was consistent with the recommendations of the water quality and soil erosion plan recommended by the soil conservationist as essential to protect water and soil resources.

MALPF is primarily concerned with the quality of the soils and the protection of those soils in determining the eligibility of a property, not the kind of agriculture that is being undertaken on a property. Most farms in Maryland are mixed use farming operations, including timber harvesting. Forest operations are defined in statute as agricultural, and harvesting timber is considered under statute to be a normal agricultural activity that cannot be restricted and is an important source of income to Maryland farmers. Indeed, MALPF requires any easement property with more than 25 acres of contiguous woodland to have a forest stewardship plan on the property before an easement is acquired in the interest of maintaining the quality and productivity of Maryland's timber industry. As

long as a property meets the soils eligibility requirement, MALPF does not pick and choose the kinds of agricultural production that takes place on easement property.

While meeting this requirement for properties receiving federal funding commitments is not a problem, it poses potential problems over time from the standpoint that it is a restriction of normal agricultural activities on easement property and may not be allowable under Maryland state statute without, at minimum, express approval of the Board of Trustees and, at maximum, statutory change. If an existing property with a contingent or co-held federal interest expanded its forested land to meet changing market incentives or simply as an operational decision of the landowner, that landowner may be out of compliance with the forestry requirements of FRPP Is MALPF then required to treat this operational decision as an easement violation, even though it is consistent with state statute?

Addendum to the Standard Deed of Easement

While in the abstract, relegating FRPP requirements to an addendum is an excellent idea, I would question if dealing with those requirements only in an addendum is possible, given that many programs' standard deeds of easement will have language that runs counter to FRPP requirements. If putting all of the appropriate language in an addendum is possible, so much the better, because it would be easier to provide that addendum to all option contracts on which offers are based. It would be easier for landowners to understand that, if federal funding is committed to the offer, the addendum will become part of the deed of easement; if federal funding is not committed to the offer, the addendum is superfluous. Given my experience with FRPP, I doubt that it will be this easy, because of the number of changes in MALPF's standard deed of easement most recently requested by the OCG

Title Review

MALPF would agree with the need for adequate title review to be certain that the purchase of the easement is from the properly titled owner and that a clear and accurate description of what is being acquired must be established. There are two issues here on which comments will be provided. First, the promise of timeliness in the turnaround of title review by federal reviewers is not currently believable, despite promises to the contrary. OGC title review is non-delegable On the one hand, MALPF provides a thorough title review; no issues have ever been raised concerning the legal sufficiency of title. On the other hand, there is only one dedicated title reviewer in the Harrisburg office for the mid-Atlantic region. Even if only problem title work is forwarded from the state NRCS office to Harrisburg, the turnaround time for titles to be reviewed by the local NRCS office is expected to be at least two weeks. MALPF has still not received title work submitted for review prior to January 1, 2006.

Second, the absolute requirement for subordination of all interests is unrealistic and perhaps counterproductive. Prior utility easements rarely can be subordinated. Certain mineral rights have only a minimal impact on a farming operation and provide

supplemental and predictable income to farmers. For example, in Western Maryland, MALPF is required by statute to consider accepting easements on properties for which natural gas rights will not be subordinated if the Board of Trustees determines that there is minimal impact on the farming operation (which is almost always the case). Certainly, mineral rights which could have an impact on the farming operation must be subordinated, but there are also difficulties in Western Maryland where the ownership of some gas and coal interests cannot be established; thus, the interest cannot be subordinated. In such cases, MALPF staff and Board will make the judgment whether MALPF should accept the risk of non-subordinated rights, contingent on the specific circumstances and the willingness of the landowner to provide indemnification.

Exercise of US Rights against Non-Compliance

MALPF staff has no problem with the US reserving its rights against non-compliance as a co-holder of the easement. However, such reserved rights should be symmetrically provided to both easement co-holders. Just as the US should reserve its rights against non-compliance as a co-holder of the easement against the other co-holder of the easement, the US should accept the State of Maryland reserving its rights against non-compliance as a co-holder of the easement against its partner, the US. The process by which non-compliance by the US is enforced by the State of Maryland should mirror the process by which non-compliance by Maryland is enforced by the US. Given that the State of Maryland will have 50% or greater share of the funds used to purchase the easement, its rights as co-holder should be equal or greater to those of the US as co-holder.

Just as it is difficult for MALPF staff to imagine the circumstances in which the US would exercise it rights against the State of Maryland for non-compliance (action for non-compliance is taken, anyway, against the grantor, not the grantee), it may be difficult to imagine the circumstances in which the State of Maryland would exercise its rights against the US for non-compliance. Under the MALPF easement, the landowner is required to keep its water quality and soil erosion plan current with NRCS, and the local conservation office is expected to cooperate in the design, implementation, and monitoring of such conservation plans. If NRCS is non-cooperative in its role, the State of Maryland should retain the right to exercise its rights against the US for non-compliance, forcing NRCS to live up to its responsibilities or take sole title to the easement.

Yellow Book Standard Appraisals and New Effective Date of Appraisals

This is another case where it is not clear to this partner the cost-benefit yield to land preservation programs of the new requirement for yellow book standard appraisals. Already, appraisals must be done to USPAP standards. Has a cost-benefit analysis been done to establish the value of the additional benefits to FRPP of requiring UASFLA (yellow book) standards as opposed to the additional costs imposed on land preservation programs?

MALPF's easement valuation system is fundamentally different from that required by FRPP. To make the two easement valuation systems work together, MALPF will have to secure a yellow book standard appraisal after an offer has been made with a commitment of federal funds. This appraisal will be the third appraisal secured and will be used only to satisfy FRPP requirements and set or justify the value of the FRPP funding commitment. Though the rules now specify the date of the appraisal to be the date of the signed cooperative agreement, in practice the date of the appraisal will really not much of a difference to MALPF, though it may be easier to administer than trying to determine a date within 12 months of settlement.

No clear benefits are created from this additional requirement, only additional and unnecessary costs in money and time are created for the MALPF program having to go through these additional contortions to secure a third appraisal used only to establish the value of the federal commitment. First, MALPF staff estimates that it will cost at least $3,500 extra to secure an additional appraisal that is a "before and after" appraisal done to yellow book standards and, where necessary, incorporating the additional appraisal work when adjacent parcels are under the same or shared ownership. It is more likely to cost $5,000 per appraisal.

Second, MALPF staff estimates that the additional appraisal will take 11 weeks to complete. The appraisal must be contracted, completed, reviewed by the State of Maryland, and reviewed by FRPP. It is not clear how many appraisals will be reviewed at the level of the state NRCS office and how many will have to be reviewed at the national headquarters of FRPP. The FRPP manual suggests between 10-20% minimum of appraisals will be carefully reviewed, though it is not clear if these reviews will take place at the state or national level. If additional appraisals or all appraisals must be reviewed by the FRPP NHQ, the time estimated here for appraisals will be longer. According to the FRPP manual, the minimum appraisals to be reviewed are as follows: where an entity conducts administrative reviews, NRCS should conduct administrative review on 10 percent of these appraisals; where an entity conducts technical reviews, NRCS should conduct technical reviews on 10 percent of these technical reviews.

It should also be noted that option contracts for easement purchases are approved by the Board of Public Works based on a specific allocation of funds among State, local, and federal funds. Because the federal commitment cannot be determined until the third appraisal is completed, the process by which option contracts is approved will have to be reviewed and alternatives worked out with the Board of Public Works. Also, because the federal commitments are not known until late in the process, extending offers to landowners is vastly complicated. The allocation of funds is fixed in statute. If the allocation of federal funds remains uncertain for individual offers until late in the process in moving towards settlement, the entire easement acquisition cycle will be disrupted. Staff must know the actual availability of funding to extend offers, but knowing the availability of funding when federal commitments cannot be finalized makes administering the easement acquisition cycle extremely difficult.

Impervious Surface Requirements

Impervious surface requirements quite simply are counterproductive, on the one hand, creating a disincentive for landowners to come into the program and, on the other hand, creating an incentive for landowners to exclude or withhold acreage which becomes more susceptible to development, undercutting the objectives of the State and federal programs.

While waivers are available, waivers are based in part on the proximity of the property to development. In Maryland, some of the farms on which waivers might be required and/or impervious surfaces might be an issue are dairy farms and chicken farms which are, given the nature of the farming operation, located far from developed areas. Chicken operations are often connected to large field crop operations that are used to support the chickens. Thus rejecting a farm because part of the farm is devoted to chickens may not be a productive policy.

Certainly there are farming operations with potential impervious surface issues that are near developed areas and may qualify for waivers, such as horse farms and nursery operations. However, those most in need of waivers probably will not qualify. An alternative is simply to exclude or withhold acreage either where current or potential farming operations or current or needed residential structures (such as a child's or tenant's house) that do or could pose problems are located

Unfortunately, this solution both punishes the grantor in the easement valuation system and creates the potential for development on non-easement property in the middle of areas otherwise permanently preserved, diminishing the public investment in preservation and undercutting the objectives of both MALPF and FRPP. Wouldn't it be better to include any retained residential rights or farming operations that include impervious surfaces, particularly any that benefit the farming operation (tenant house or a child's lot for the one inheriting the farm or farming structures), within the control of the easement than forcing the exclusion of acreage upfront?

Indemnification (and Environmental Warranty)

The federal requirement for an indemnification clause in the easement (and a related effort to include an environmental warranty) from the grantor also creates additional costs in money and time. While a Phase I Environmental Review is not a federal requirement, MALPF feels strongly that such a review is now necessary for landowners required to sign such a provision to be comfortable with it. It is possible that a landowner will be willing to waive a review, but MALPF would strongly recommend it be completed.

Securing environmental reviews is completely new to MALPF. MALPF has no track record of how long a review will take to secure, how many companies perform such reviews, or the minimum acceptable results of the review that would be sufficient for a landowner in good conscience to sign an environmental warranty and indemnification.

MALPF staff has been informed that such reviews cost about $5,000 and take about 7 weeks from soliciting bids to completion.

As earlier with yellow book standard appraisals, it is not clear to this partner the cost-benefit yield to land preservation programs of the new requirement for indemnification. Has a cost-benefit analysis been done to establish the value of the additional benefits to FRPP of requiring indemnification as opposed to the additional costs imposed on land preservation programs? Once the original grantor who signs the indemnification and environmental warranty sells or transfers the property, does the new owner assume the obligation, does it follow the original grantor, and what is the subsequent chain of obligation? What is the maximum cost of the risks against which it is insuring against versus the cost of implementing the indemnification provision in money and time?

The Impact of Recent Rule Changes and Rule Implementation

What is the relative cost difference in acquiring federal- vs. state-funded easements under the FY 2006 Cooperative Agreement?

Explicit costs: $8,500 per federally-funded easement
Implicit costs: $5,000 (based on expected staff workload and opportunity costs)

Explicit Costs	Federal
Subsequent before & after easement (yellow-book)	$3,500
Phase 1 Environmental Assessment	$5,000
TOTALS	**$8,500**

Other implicit costs:

- DGS staff work related to the third appraisal:
  - Put together bid package and solicit and evaluate bids
  - Review third appraisals
- OAG/DGS staff work related to securing title insurance on behalf of NRCS
- OAG/DGS and MALPF staff work to secure title insurance reimbursement
  - (note: title insurance costs for federal interests are reimbursable)
- MALPF staff work related to the Phase I environmental assessment
  - Put together bid package and solicit and evaluate bids
  - Review environmental assessment
  - Work with program administrators and landowner to explain the environmental warranty and indemnification requirements
- MALPF and program administrators staff work related to the cost of increased monitoring responsibilities (annually, which is 10x more often than normal monitoring) (not specific to FY 2006)
- MALPF staff work related to installment payments option and costs of fronting the necessary purchase of CDs and any installment payments option funds and be reimbursed as annual payments are being made.

- Reimbursement on installment payments option only as installments are being paid; means that MALPF has to invest and carry the amount of IPO forward until payments are made. All payments must be made by September 2011.

What is the relative difference in the timeline for acquiring federal vs. state funded easements?

Total additional time required: approximately 20 weeks or 5 months
Additional time required by FY 2006 cooperative agreement: approximately 16 weeks, of 4 months.
Note: "Before and after" appraisals would have to be implemented for MALPF's FY 2007 easement acquisition cycle. This is considered a "new" requirement, because it has not been implemented in earlier easement acquisition cycles.

Function	Federal - weeks
Contract for yellow-book standard appraisal	3 weeks
Before and after yellow-book Appraisal	4 weeks
State appraisal review of before & after appraisal	2 weeks
Federal appraisal review of before & after appraisal	2 weeks
Title Review – Federal	2 weeks
Contract for Phase I Environmental Review	3 weeks
Phase I Environmental Review	4 weeks
On-site inspection - Federal	1 week
Easement Review and Signature - Federal	2 weeks
TOTALS	**23 weeks**

Some of these functions will overlap (for example, the on-site inspection by federal officials may overlap the easement review and signature period and contracting and securing the yellow-book standard appraisal is likely to overlap contracting and securing the environmental review.

Nonetheless, with a fairly wide range of variation (explained below), I estimate that an easement with a federal funding commitment will take approximately 20 weeks or 5 months more than an easement without federal funding.

APPRAISALS

- For the current FY 2006 federal award, the date of the yellow-book standard appraisal will be the date of the signing of the cooperative agreement. For FY 2004 and FY 2005 federal awards, the date of the before and after appraisal is within one year of settlement and need not be yellow-book standard.
- The requirement for "before and after" appraisals to be completed within twelve months of settlement will require that at least an initial title and property description review be completed and subordinations secured as soon as possible when a federal offer is forthcoming on a property to determine whether or not any outstanding issues may delay settlement before the additional appraisal is contracted. While this pressing need for an early indication of problems on

FRPP-funded properties is being addressed, properties without FRPP funding commitments will, as a result, have their reviews delayed, slowing down their settlement process.

- The estimates of the impact these FRPP requirements will have on the additional time it will take to go to settlement assume that fee appraisers are only expected to comply with yellow books standards, not be yellow-book certified; that review appraisers are only expected to review for compliance with yellow-book standards, not be yellow- book certified; and that the review standard used by the federal review appraiser is that appraisals should "acceptable," not "perfect " If any of these assumptions are incorrect, the impact on costs and the time necessary to go to settlement will be underestimated.
- It is not clear how many appraisals will be reviewed at the level of the state NRCS office and how many will have to be reviewed at the national headquarters of FRPP The FRPP manual suggests between 10-20% minimum of appraisals will be carefully reviewed, though it is not clear if these reviews will take place at the state or national level. If additional appraisals or all appraisals must be reviewed by the FRPP NHQ, the time estimated here for appraisals will be longer. According to the FRPP manual, the minimum appraisals to be reviewed are as follows:
  - Where an entity conducts administrative reviews, NRCS should conduct administrative review on 10 percent of these appraisals.
  - Where an entity conducts technical reviews, NRCS should conduct technical reviews on 10 percent of these technical reviews

TITLE REVIEW

- The title review by NRCS, according to recent information, will take place only at the level of the state office unless there are concerns raised in that review, in which case it will be forwarded for review by the OGC at the NHQ.
- The Chief of NRCS has promised a one-day turnaround on title review in the recent teleconference I believe that this is overly optimistic in my experience. I have allowed an average of 2 weeks based on a one week turnaround at the state level with the possibility that some title reviews will be forwarded to NHQ.
- Certain issues remain unresolved related to title review, particularly the subordination of pre-existing utility easements.

PHASE I ENVIRONMENTAL REVIEW

- This is not a federal requirement, but becomes necessary for landowners who are now required to sign an environmental warranty and indemnification. It is possible that a landowner will be willing to waive review, but MALPF would strongly recommend that it be completed.
- Securing environmental reviews is completely new MALPF has no track record of how long a review will take to secure, how many companies perform such reviews, or the minimum acceptable results of the review that would be sufficient for a landowner in good conscience to sign an environmental warranty and indemnification

ON-SITE INSPECTION

- According to the FRPP manual, in cases where the FRPP investment in a property exceeds $50,000 (in other words, all MALPF easements with federal funds), an

on-site review by the NRCS State Office is required prior to the NRCS National Office and the Office of General Counsel reviewing the conservation easement deed.

INSTALLMENT PAYMENTS OPTION

- According to the Grant or Cooperative Agreement, copies of the installment payments option "legal instrument" (option contract plus certificate of deposits?) must be submitted for approval to NRCS NHQ and OGC It is not clear if they are seeking approval review of each installment payments option used to settle an easement with federal funding or if they are seeking only a single review at the outset of the "legal instrument." This requirement has not been included in the additional time required for federally-funded easements because less than one-third of the easements settle with the installment payments option, and the nature of this requirement is not clear

REVIEW, APPROVAL, AND SIGNATURE ON THE DEED OF EASEMENT

- NRCS will review easement deeds with the assistance of OGC before execution of the deed NRCS State managers should be aware and report to OGC and the National Office any exceptions to clear title that may conflict with FRPP objectives (e.g. outstanding unsubordinated oil, gas or mineral rights on a property).
- It is unclear if this implies a single generalized review of the Deed of Easement at the outset of the cooperative agreement to verify that the required language from the cooperative agreement and the recommended Deed of Easement form is used, or if NRCS NHQ and OGC intends to review each individual Deed of Easement I have assumed that the Deed of Easement form will be reviewed once by the OGC and NHQ, but that individual Deeds of Easement will be reviewed and signed only at the level of the state office unless there are any unusual issues identified by the state program officer.

What are the restrictions on which properties can be acquired?

Properties excluded from federal funding: forested properties, properties with or expecting over 2% of impervious surface (chicken farms, horse farms, etc.), landowners who request installment settlements with more than five annual installments (including all installment purchase agreements), and properties with unsubordinated interests.

- For FY 2004 and FY 2005, federal funding commitments can only go to properties with 50% or less in woodland. For FY 2006, federal funding commitments can only go to properties with 65% or less in woodland.
- Properties with 2% or greater of impervious surfaces (or expecting to have greater than 2% impervious surfaces) cannot be funded with federal funds unless a waiver is requested. A waiver depends upon specified conditions and can only be granted for up to 6% total impervious surface under those specified conditions. For easement properties under 50 acres, one acre of impervious surface area is permitted.

- All mineral rights and other interests in the property must be subordinated. It is unclear if FRPP is willing to accept unsubordinated pre-existing utility easements that have the typical broad language that is found in such documents. The mineral rights issue eliminates a number of properties in Western Maryland with unsubordinated natural gas rights which, under statute, MALPF can accept into the Program if there is not likely to be an impact on the farming operation.
- Landowners who request installment settlements (IPA or the installment payments option) beyond 5 years will not be able to participate in a federally-funded offer. Even the 5 year maximum may be a problem if the property is slow going to settlement.

What are the additional restrictions and provisions under federally-funded easements?

Additional restrictions that federal funding will place on a property include co-held interest, no agricultural subdivision, indemnification and environmental warranty by the landowner, and impervious surface restrictions.

Additional restrictions that may or may not be placed on a property include retained development rights (family lots, tenant houses), condemnation by eminent domain, easement overlays, non-agricultural use (definitional issues), and boundary line adjustments.

- An unsettled issue is what retained rights can be retained under an easement funded with federal dollars. FRPP wants all development activity, such as family lots, tenant houses, and agricultural subdivisions done before the property comes into the Program. It is not clear what easement amendments can be made on properties with federal funds. The MALPF Deed of Easement delineating these rights has been approved by FRPP in past, but it is not clear if this will be the case in the future. According to the FRPP manual, construction within the easement should be generally prohibited. By purchasing a conservation easement, NRCS and the cooperator are purchasing the property's development rights. Allowing construction of dwellings (especially single family) and other buildings is essentially giving back to the landowner for free some of the rights that have been purchased. Moreover, permitting construction increases the cost of monitoring and the likelihood of adverse impacts to agricultural viability. Construction should only be allowed if it is necessary to keep a parcel viable for agricultural production. NRCS prefers to have construction limited to a designated building envelope, often called a Farmstead Area and/or Farmstead Complex. Typically, these discrete areas are identified on an attached baseline map and are located where there are existing buildings, easy access from existing roadways, and minimal impacts to prime, unique, or important soils. The building of additional single family dwellings should be prohibited. A limited exception to this general rule may be made for the landowner's children with the right of construction terminating upon the death of the children. This allows a landowner to provide for his or her family. No clear process is yet in place, but the FRPP manual recommends contacting the National Office and OGC if a request for building

additional dwellings for children is requested. Also according to the manual, any major amendments to the easement must be approved in writing and signed by the United States (NRCS), in addition to the signature of the grantor and MALPF, and recorded to be legally valid. MALPF has been informed verbally (not in writing) that its lot location policy may meet the NRCS requirement for the designation of a building envelope, but it would have to be reviewed and approved first by the OGC. According to FRPP, a minor amendment *to t*he conservation easement deed is a modification that does not affect the substance of the conservation easement deed. Such modifications include typographical errors, minor changes in legal descriptions as a result of survey or mapping errors, and address changes. A major amendment to the conservation deed is a modification that affects the substance of the conservation easement deed. Such modifications include, but are not limited to, building envelope adjustments, additional land added to the conserved parcel, amendments considered to be inconsistent with the purposes of the easement, and amendments necessary to correct errors in the conservation deed language, such as those that affect easement compliance or enforcement.

- Tenant house rights are not addressed by NRCS, but interaction with the OGC suggests that tenant houses are possible, but limits on size may be required (there is no documentation to support this position)
- According to the FRPP manual, all agricultural subdivision should be prohibited.
- Indemnification by the landowner
- Environmental warranty by the landowner
- Easement will be co-held by the federal government
- Impervious surface requirements
    - Permission may be necessary to build additional agricultural structures to track the impact on impervious surfaces
    - Impervious surface area created by conservation practices such as a manure storage facility and other listed in the FOTG will not count against the impervious surface limitations.
- Unclear if easement overlays can be done
    - Road widening and other utility easement overlays
    - Easement overlays in general, including forest conservation and wetlands mitigation easements – FRPP funds cannot be used to pay for an agreement that limits the type of agriculture that can occur on lands under an FRPP easement.
- States do not have the power to condemn a Federal property interest. If the State or local government proposes to condemn property upon which there is an FRPP easement, NRCS should be notified immediately and the consent of the Federal Government sought before such a condemnation action proceeds. Accordingly, any condemnation provision should require advance notice to NRCS. If the Federal Government consents to condemnation, then proceeds from the condemnation would be owing to the USDA as provided for in the proceeds provision. In a potential condemnation situation, OGC should be contacted as soon as possible.

- According to the FRPP manual, generally, boundary line adjustments in FRPP are prohibited. Boundary line adjustments are permitted in the case of technical errors made in the survey or legal description. In such cases, boundary line adjustments cannot exceed two acres for the entire easement parcel
- The definition of "agricultural use" may differ between NRCS and MALPF.

What other issues create problems for FRPP to work with the MALPF's state program?

Other problems created by FRPP include difficulties in determining the FRPP funding allocation until late in the settlement process, a legal restriction that keeps the State of Maryland from indemnifying the federal government, lower federal funding commitments for individual properties, lower offers for landowners, and the encouragement of residential development on farming properties.

- MALPF will be unable to determine the actual commitment of federal funds to a property until very late in the process going to settlement. Until now, the FRPP commitment was known at the time the offer sheets were created each year. The only change in the allocation of Federal funds came if an offer were rejected or the final property description showed less acreage than the acreage on which the offer had been based, in which case the offer and the FRPP commitment were adjusted downward. In the future, the value of the FRPP commitment can only be determined after the "before and after" appraisals have been completed and reviewed by State and Federal appraisal reviewers. This is very late in the settlement process and will have an unfortunate impact on MALPF's ability to administer the allocation of Program funds. If MALPF overestimates the FRPP commitment and additional State funds have to be allocated to an individual offer, that offer may have to be re-approved by the Board of Public Works, slowing down settlement by at least another month. To prevent having to take offers back for re-approval of their funding allocations, MALPF must underestimate commitment of FRPP funds to individual offers when they are presented for approval to the Board of Public Works. In either case, being unable to determine FRPP commitments until late in the settlement process will create havoc with the funding allocations (and program administration more generally), which are required by statute and regulation to follow a very rigorous distributional procedure (see COMAR 15.15.01.20 and Md. Ann. Code §2-508).
- Maryland, under State law, cannot provide indemnification to the federal government in the cooperative agreement.
- Several FRPP requirements are likely to lead to lower funding commitments to individual easement offers, spreading the federal funds across a larger number of easements, and may also result in reducing the overall offer from MALPF and may create development that otherwise would not take place.
    - If FRPP is serious that it wants all development to be in place (family lots, agricultural subdivisions, etc.) before the property goes under easement, the effect of this requirement will be to force landowners to exclude family lots that may otherwise never be requested (the landowners' children may be very young or not in a financial position to decide

whether or not to build on the farm) One result is that building lots are created that now WILL be developed, whether for family members or for sale on the commercial market, because the lots will no longer be subject to the restrictions of the easement. A second result is that the overall value of the easement will be reduced by the value of the lots held out. If the lots were not excluded, they may never be developed as family lots and the landowners would not be punished by losing the value of those lots in the easement offer.

- The "before and after" appraisal is likely to lead to lower federal funding commitments to individual properties, because the federal commitment will be based on 50% of the "before and after" calculation of easement value, not on the easement value calculated by the MALPF formula
- The appraisal process now requires that any land contiguous to the land put under easement owned even in small part by the same landowner(s) be appraised for any enhanced value from preservation of the target property and that any enhanced value be subtracted from the calculation of the easement value on which the 50% maximum for the federal funding commitment is based. This has the effect of reducing the federal funding commitment to certain individual properties, spreading the funding out over additional properties. It should be noted that, if FRPP requires all family lots to be excluded up front, not only will the landowner lose the value of those lots in the easement offer, the federal funding commitment will be reduced by any enhanced value on the excluded acreage from the acreage that is preserved.

For comments about and information on these comments, contact Jim Conrad, Executive Director, Maryland Agricultural Land Preservation Foundation, Maryland Department of Agriculture, 50 Harry S. Truman Parkway, Annapolis, MD 21401 (telephone: 410.841.5860; email: conradja@mda.state.md.us)