



UNITED STATES DEPARTMENT OF AGRICULTURE  
OFFICE OF INSPECTOR GENERAL  
Washington, D.C. 20250



DATE: November 19, 2009

REPLY TO  
ATTN OF: 10703-1-KC (2)

TO: Dave White  
Chief  
Natural Resources Conservation Service

ATTN: Lesia Reed  
Acting Deputy Chief  
Strategic Planning and Accountability

FROM: Robert W. Young /s/  
Assistant Inspector General  
for Audit

SUBJECT: American Recovery and Reinvestment Act – Emergency Watershed Protection  
Program Floodplain Easements

Under the American Recovery and Reinvestment Act of 2009 (Recovery Act), the Natural Resources Conservation Service (NRCS) received \$145 million to purchase easements on lands that have a history of flooding. This program is known as the Emergency Watershed Protection Program. In enacting the Recovery Act, Congress emphasized the need for accountability and transparency in the expenditure of these funds. Further, on April 3, 2009, the Office of Management and Budget issued guidance requiring Federal agencies to establish rigorous internal controls, oversight mechanisms, and other approaches to meet the accountability objectives of the Recovery Act.<sup>1</sup>

The Office of Inspector General (OIG) initiated this review to assess NRCS' activities and to ensure that the agency expended funds in a manner that minimized the risk of improper use. Specifically, we determined if NRCS had adequate controls for acquiring permanent easements on private land or certain land owned by units of State and local governments.<sup>2</sup> Since a crucial aspect of purchasing easements involves determining the value of the land in question, Federal regulations require that property should be appraised before an owner can participate in the program.

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<sup>1</sup> Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009.

<sup>2</sup> This memorandum is the second in a series that will report on our oversight activities regarding the Emergency Watershed Protection Program – Floodplain Easements (EWPP-FPE). Issues identified in these memoranda will be compiled into a final report at the conclusion of the audit.

We found, however, that once NRCS began receiving Recovery Act funds, it stopped using appraisals as its method for determining the value of easements without adequately justifying or documenting its determination for making this change. Because NRCS believed that the appraisal process would be too slow, it eliminated the requirement that land be appraised, and instead substituted the method it uses to determine the value of easements under its Wetland Reserve Program.<sup>3</sup> According to this method, NRCS would purchase easements by offering landowners the lowest of the following three amounts: (1) a value based on a market analysis, (2) a geographic value established by the NRCS State Conservationist, or (3) the landowner's offer.<sup>4</sup>

In February 2009, NRCS consulted with the Office of the General Counsel (OGC) to confirm NRCS' legal authority to use the Wetland Reserve Program valuation method for conservation easements under the Recovery Act, instead of the appraisals it would ordinarily perform for floodplain easements.<sup>5</sup> NRCS personnel explained that they believed the Wetland Reserve Program's method would allow them to obligate funds more quickly, which was an important emphasis of the Recovery Act.

In April 2009, OGC informed NRCS that the legal requirement to use appraisals for valuation of the Recovery Act easements under the Emergency Watershed Protection Program "is conditioned by [the phrase] 'to the greatest extent practicable,'" and that the NRCS Chief "might be able to make a finding that using the NRCS normal appraisal process is NOT to the greatest extent practicable, and determine that an alternative that finds a reasonable market value is appropriate. Of course, this doesn't fix the appraisal requirement for regular [floodplain easement] acquisitions by NRCS under [Emergency Watershed Program], and you may still want to seek a legislative fix for that." OGC officials clarified that this legal advice meant that it would be prudent for NRCS to document how it arrived at its decision to stop using appraisals, in case NRCS were asked to justify its decision.

In May 2009, NRCS notified OGC that it would cease using appraisals for both regular *and* Recovery Act easements under the Emergency Watershed Protection Program. NRCS argued that "it can best ... ensure consistent treatment of landowners by using the same compensation methodology for all [floodplain easements] and [Wetland Reserve Program] transactions." Subsequently, on June 3, 2009, the NRCS Chief sent a memo to four Midwest State Conservationists authorizing NRCS staff to determine the purchase price of any floodplain easement—for both regular and recovery programs—by using the Wetland Reserve Program's method instead of appraisals. We believe that, in taking this step, NRCS did not comply with OGC's recommendations that it document how it arrived at this decision, nor did it seek and receive legislative change.

When it learned of NRCS' decision, OGC met with the NRCS Chief on July 13, 2009, to express its concerns about NRCS' decision to cease using appraisals for valuation of regular floodplain

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<sup>3</sup> NRCS also argued that using the same method for both programs would result in producers being treated more consistently.

<sup>4</sup> In practice, we found that compensation was usually equal to the published geographic area rate caps unless the landowner offered less.

<sup>5</sup> The Office of the General Counsel (OGC) is an independent legal agency within the U. S. Department of Agriculture (USDA). OGC provides legal advice and services to the Secretary of Agriculture and to all other officials and agencies of the Department with respect to all USDA programs and activities. All legal services are centralized within OGC and the General Counsel reports directly to the Secretary.

easements. The NRCS Chief agreed with these concerns and stated that he would re-consider his memo. To date, however, the memo is still in effect.

Although OIG recognizes NRCS' desire to streamline the process for determining the value of easements purchased with Recovery Act funds, we maintain that if NRCS is going to change its procedures for Recovery Act funds, it must follow OGC's legal advice and provide justification for that decision. When we asked for its determination to arrive at this change in policy and procedures, NRCS could not provide us any documentation supporting its determination beyond its letter provided to OGC in May 2009. In our opinion, appropriate easement compensation is best determined by an appraiser on a case-by-case basis, reflecting the unique characteristics of the land being appraised, the market conditions in the area, and the rights retained by the landowner. If NRCS believes that this process is too cumbersome for easements purchased with Recovery Act funds, then it must follow OGC's advice and provide justification for any decision it makes to change the method it has used for the regular program.

Given the problems we identified, we are recommending that NRCS:

- Stop approving any further option agreements to purchase using the Wetlands Reserve Program easement valuation method for Emergency Watershed Protection Program floodplain easements until NRCS demonstrates that the currently required appraisal method is not practicable for ARRA-funded floodplain easements.
- Rescind the specific direction provided to the State Conservationists on June 3, 2009, authorizing the use of the Wetland Reserve Program's easement valuation method for floodplain easements.
- In consultation with the U. S. Department of Agriculture's OGC, determine and implement appropriate valuation procedures for the floodplain easement programs. Document the support and rationale for any procedures implemented.

Please provide a written response to this letter within 10 days, outlining your proposed actions. If you have any questions, please contact me at 720-6945, or have a member of your staff contact Ernest M. Hayashi, Audit Director, Farm and Foreign Agricultural Programs, at 720-2887.



Natural Resources Conservation Service  
P.O. Box 2890  
Washington, D.C. 20013

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December 1, 2009

**SUBJECT:** Response to the Office of Inspector General Report 10703-1-KC (2)  
American Recovery and Reinvestment Act (ARRA) – Emergency Watershed  
Protection Program Floodplain Easements

**TO:** Robert W. Young  
Assistant Inspector General for Audit  
Office of Inspector General

This memorandum is in response to the Office of Inspector General (OIG) memorandum of November 19, 2009. Your report suggested several recommendations regarding the implementation of the Emergency Watersheds Protection Program Floodplain Easement (EWPP-FPE), both as such implementation relates to the use of ARRA funds and the traditional implementation of the program. In particular, you indicated that while NRCS may have had the authority to waive the individual appraisal requirements for ARRA-funded easement transactions, the agency must expressly justify its decision that adherence to such appraisal requirement is not practicable. You also indicated that OIG, based upon discussions with the Office of the General Counsel (OGC), does not believe NRCS has the authority to waive the appraisal requirements for the regular implementation of EWPP-FPE not funded by ARRA until they are demonstrated to be impracticable, and that NRCS must consult with OGC to determine and implement appropriate valuation procedures.

Attached are the written responses to the following specific suggested recommendations.

If you require additional information, please contact Lesia A. Reed, Acting Deputy Chief for Strategic Planning and Accountability, at (202) 720-6297

/s/  
Dave White  
Chief

Attachments

Robert W. Young  
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cc:

Virginia (Ginger) L. Murphy, Associate Chief, NRCS, Washington, DC

Lincoln E. Burton, Acting Deputy Chief for Programs, NRCS, Washington, DC

Lesia A. Reed, Acting Deputy Chief for Strategic Planning and Accountability, NRCS,  
Washington, DC

Bruce Julian, Special Assistant to the Chief, NRCS, Washington, DC

George Cleek, IV, Acting Director, Easement Programs Division, NRCS, Washington, DC

Mike Martinez, Special Assistant to the Chief, NRCS, Washington, DC

Mike Permenter, Acting Compliance Team Leader, Operations Management and Oversight  
Division, NRCS, Washington, DC

**OIG RECOMMENDATION:**

Stop approving new ARRA-funded option agreements to purchase for EWPP-FPE using the Wetlands Reserve Program (WRP) easement valuation method until NRCS demonstrates that the individual appraisal process, to the greatest extent practicable, does not allow NRCS to obtain and restore floodplain easements in the timeframes allowed in ARRA.

**NRCS RESPONSE:**

NRCS submits that its decision adopting an alternative easement compensation methodology is justified because the use of the extensive individual appraisal procedures prevents NRCS from meeting the strict timeframes required by ARRA. Additionally, NRCS submits the alternative methodology meets ARRA time frames and the Uniform Relocation and Real Property Acquisition Policy Act of 1970 (hereinafter the Uniform Act) appraisal policy principles to the extent practicable. The timeline attached to this transmittal justifies this contention.

**Compliance with the Uniform Act appraisal requirement is not practicable, as applied to ARRA-funded acquisitions, and the NRCS alternative easement compensation methodology is justified due to the strict ARRA timeframes.**

Section 301 of the Uniform Act provides that: “In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following [appraisal] policies....” NRCS determined that the strict ARRA timeframes made adherence to Federal appraisal standards and procedures impracticable. You requested documented justification for this determination.

The attached document contains two timelines. One timeline outlines the elapsed time to obligate funds for easement acquisition when individual appraisals are used to determine easement compensation. The other timeline outlines the elapsed time to obligate funds for easement acquisition when geographic area values are used to determine easement compensation.

The timeline for the elapsed time to obligate funds for easement acquisition was developed from an analysis of over 600 appraisals. That analysis indicated that it takes, on average, 192 days from the time an appraisal is ordered and the obligation is entered into the financial system to the time the appraisal is accepted and the payment entered into the financial system. The timeline is based upon the average time it takes to meet standard procurement requirements, compile the necessary site documentation for the appraiser, the appraiser to schedule a meeting with the landowner, and research comparable sales, and development, review, and rectification of the appraisal report. The appraisal rectification process that occurs between the submittal of the original appraisal report to NRCS and the technical review approval alone can extend several weeks to a few months due to the respective workloads of the appraiser and review appraiser.

For almost 5 years, NRCS has actively worked to encourage the expedient procurement and utilization of appraisals that meet the Uniform Appraisal Standards for Federal Land Acquisition, also known as the “Yellow Book.” NRCS sponsored numerous training sessions for its employees and for private appraisers. However, there remains a dearth of qualified appraisers who are able to consistently meet the Federal appraisal standards and requirements. As a result, NRCS must rely upon the availability of qualified appraisers. For example, one appraiser in New York State provides appraisal services to three different NRCS State offices, and has taken up to 4 months to submit an original appraisal report.

The second timeline on the attached document was developed to portray the elapsed time to obligate funds for easement acquisition using Geographic Area Rate Caps (GARC). NRCS, being acutely aware of the need to implement ARRA funds in a reliable, fiscally responsible manner, determined that the adherence to the Federal appraisal requirements would undermine its ability to meet ARRA timelines, and therefore, adopted the statutorily sanctioned WRP alternative easement valuation methodology for EWPP-FPE. The Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) modified the easement valuation methodology for WRP to authorize NRCS to base easement compensation on the fair-market-value of the land determined through a market analysis, a GARC, or the landowner offer, whichever was least.

The WRP valuation methodology, as authorized by the 2008 Farm Bill, provides rigorous internal controls, oversight mechanisms, and other approaches to meet the ARRA accountability objectives while allowing the agency to obligate and expend the funds as intended to meet the goals of the Administration and the Act. In particular, local real estate experts develop the market analyses upon which the fair market value is determined for different land types. NRCS, in consultation with the State Technical Committee, then develops GARCs. NRCS policy requires a separation of duties between the staff who procure area-wide values from real estate professionals and the staff who develop the GARCs. States submit both the area-wide values and the GARCs to the National Office for comprehensive review and approval.

Once NRCS has developed and approved the array of GARC values, the determination of easement value is an administrative matter that can be determined very expeditiously. NRCS staffs apply the specific GARC values according to a particular proposed easement area’s land types determined through an NRCS inspection of the site. The easement offer to the landowner is based on the number of acres for each land type multiplied by the respective GARC value.

ARRA identifies September 30, 2010, as the deadline for obligation of funds. However, from a practical standpoint, NRCS will not have the technical assistance or the financial assistance authority to make any significant adjustment or modifications to its agreements after FY 2010, and thus NRCS is attempting to expend ARRA funds by September 30, 2010. The alternative valuation method satisfies the limitations inherent in the ARRA timeline (see Attachment), which render the standard Federal appraisal approach impractical.

**OIG RECOMMENDATION:**

Rescind the specific direction provided to the State Conservationists on June 3, 2009, authorizing the use of the Wetland Reserve Program's easement valuation method for floodplain easements.

**NRCS RESPONSE:**

The June 3, 2009, memorandum expanded the use of the WRP easement valuation method to non-ARRA funded floodplain easement transactions. NRCS based its decision to follow the WRP valuation method for non-ARRA funded floodplain easement transactions on several separate and independent grounds. NRCS is currently discussing with OGC the parameters under which such an alternative valuation methodology may be implemented. Pursuant to OIG's recommendation, NRCS placed a temporary hold on the use of the WRP valuation methodology for floodplain easements pending resolution of this issue.

**OIG RECOMMENDATION:**

In consultation with the U. S. Department of Agriculture's OGC, determine and implement appropriate valuation procedures for the floodplain easement programs. Document the support and rationale for any procedures implemented.

**NRCS RESPONSE:**

NRCS is currently discussing with OGC the appropriate valuation procedures for the floodplain easement programs. NRCS will provide to OIG, in subsequent correspondence, the documented support and rationale for any procedures implemented.



**Compensation Determination  
American Recovery and Reinvestment Act (ARRA)  
Funded Floodplain Easements (FPE)**

One of the key purposes of ARRA is to stimulate the economy by expending funds for public works projects in an expedient manner. All funds are to be expended prior to **September 30, 2010**. For the ARRA-FPE program, these funds include easement acquisition and restoration funds.

**Acquisition Compensation**

To meet the **September 30, 2010**, deadline, funds for ARRA-FPE acquisition were to be obligated by **September 4, 2009**. Easements are to be closed prior to **February 3, 2010**. Due to the need to obligate and expend ARRA funds quickly, the decision was made to use the Geographical Area Rate Cap (GARC) process to determine the compensation amount for FPE, instead of the appraisal process. The GARC process is the authorized process for determining compensation for Wetlands Reserve Program easements.

Shown below are timelines comparing the two methods of determining compensation for easement acquisition:

**A. Timeline for making offers based on appraisals**

6/2/09 - Funding decisions announced by the Secretary of Agriculture. No ARRA funds could be obligated prior to the Secretary's announcement.

6/3/09 - States provided with lists of funded projects. States begin appraisal process by soliciting for proposals from Appraisal and Review Appraisal vendors. Vendor has 30 days to prepare proposal.

7/3/09 - Receive proposals. NRCS has 14 days to conduct review of proposals

7/17/09 - Make award and request quotes for task. Vendor has 7 days to prepare quote.

7/24/09 - Evaluate quotes. NRCS has 1 day to evaluate quotes.

7/25/09 - Sign contract with appraiser and obligate funds for appraisal.

2/2/10 - Obtain acceptable appraisals from vendors, including obtaining technical appraisal reviews and resolving technical appraisal review concerns. (An analysis of recent was conducted of the actual elapsed time it takes to obtain an approved appraisal. Based on a sample of more than 600 appraisals, it takes an average of 192 days to obtain an approved appraisal.)

2/3/10 - Make offer to landowner. Landowners have 15 days to consider offer.

2/18/10 - Receive signed agreement from landowner and obligate funds for easement acquisition. Experience indicates that approximately 30 percent of potential participants withdraw at this point because the offer is too low. The process begins again at the "request for quotes stage."

Note: Environmental Due Diligence and title searches would be conducted concurrently with the acquisition of appraisals.

#### B. Timeline for making offers based on GARC

6/2/09 - Funding decisions announced by the Secretary of Agriculture.

6/3/09 - States provided with lists of funded projects. Make offer to landowner. Landowners have 15 days to consider offer.

6/18/09 - Receive signed agreement from landowner. Since landowners were informed of the GARC compensation amount per acre at the time of application, there should be very few landowners that decline their offer.

6/18/09 - States begin Environmental Due Diligence and title searches. NRCS has 30 days to obtain these services. (If an appraisal were used these services would be obtained concurrently to the appraisal process. In the GARC process they are obtained subsequently.)

7/18/09 - Earliest date to obligate funds for easement acquisition.

#### Closing of the Easement

The amount of time required to close an easement after the acquisition funds have been obligated is dependent upon tasks being completed that NRCS has little control over. For instance, a boundary survey must be completed prior to closing. Time requirements for a boundary survey can vary due to size of tract, availability of certified surveyors, and weather conditions. A majority of the ARRA-FPE easements are located in areas with inclement winter weather that prohibits year-round surveying. Title work and the closing process are two other tasks that are also dependent upon the availability and scheduling of certified professionals, such as title companies, closing agents, workload, and availability of attorneys within OGC.

The obligation date for an easement that would have utilized the appraisal process would be February 18, 2010. The average time required to close an easement after the funds have been obligated is approximately 8 months. This means that easements would be closing on October 18, 2010. This date is after the deadline for expending all ARRA funds, including restoration.

Any delay in the process, however slight, would cause a transaction to fall outside the September 30, 2010 deadline. At least 30 percent of the transactions, given the original potential participants rejecting the offer, would unlikely close by the end of fiscal year 2010. While

obtaining appraisals in advance may mitigate this risk, the situation illustrates the vulnerability that the lengthy appraisal process creates in the agency's efforts to meet ARRA purposes.

As noted in the timeline for easements utilizing the GARC process, the obligation date has been as early as July 18, 2009. As of November 20, 2009, two easements have closed, with another five set to close within 2 weeks. The remaining ARRA-FPE easements will be closed by the original February 3, 2010, deadline, due to using the GARC process for determining easement compensation. This will allow the maximum time for restoration activities to occur in the construction season as described below.

### **Restoration Deadlines**

Once again, one of the key purposes of ARRA is to stimulate the economy by expending funds for public works projects in an expedient manner. Restoration of the floodplain provides an excellent opportunity to stimulate the economy by saving or creating jobs. The NRCS deadline for expending the funds for restoration is **September 30, 2010**. Restoration efforts cannot commence until the easement is closed. As noted previously, the average date for closing easements using the appraisal process would be October 18, 2010. After this date, restoration could commence for these easements. Similar to closing of the easement, restoration activities are also dependent upon factors that NRCS has little control over. The availability of contractors and tree seedlings are two components of the restoration that have a direct impact on the timeliness in completing the restoration. Activities such as tree planting cannot occur in late summer without significant tree mortality. Activities for restoring floodplain hydrology, such as ditch plug removal or land de-leveling, can only occur when soil conditions are accessible (summer months).

### **Summary**

As stated on the Recovery.gov Web site, "The purpose of the \$787 billion Recovery package is to start the economy to create and save jobs". ARRA specifically addresses the timeliness of FPE with the statement, "Provided that such funds shall be allocated to projects that can be fully funded and completed with the funds appropriated in this Act, and to activities that can commence promptly following the enactment of the Act." Use of the normal appraisal process, given these timeframes and statutory purposes, was not practical. The use of the GARC process to determine easement compensation for ARRA-FPE is essential to enable the agency to meet the goal of expending the funds for easement acquisition and restoration by **September 30, 2010**.