



Maryland Department of Agriculture

Office of the Secretary

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The Wayne A. Cawley, Jr. Building
50 Harry S. Truman Parkway
Annapolis, Maryland 21401
TTY Users: Call via Maryland Relay
Internet: www.mda.state.md.us

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301.261.8106 Washington, D.C.
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MARYLAND AGRICULTURAL LAND PRESERVATION FOUNDATION

August 3, 2009

John Glover, Acting Director
Easement Programs Division
United States Department of Agriculture
Natural Resources Conservation Service
Post Office Box 2890
Washington, DC 20013-2890

Dear Mr. Glover:

I am writing on behalf of the Maryland Department of Agriculture (MDA) and the Maryland Agricultural Land Preservation Foundation (MALPF), an agency within MDA. MDA believes that the rule-making process should be directed at implementing the legislative intent in the recent Farm Bill rather than recreating the Farm and Ranch Lands Protection Program (FRPP) to include the elements that made it so difficult to utilize.

The Department is pleased that the NRCS has accepted the position explicitly taken in the Farm Bill legislation that the contingent right of enforcement does not imply an acquisition of real property, but an interest limited to the enforcement of the deed of easement if a cooperating entity fails to do so. MDA would like to see the implications of this change fully applied to the rules and procedures under which FRPP operates.

An ongoing problem since 2004 has been constant changes in both the rules and the procedures. In some cases, new rules and procedures seemed to be introduced every funding cycle, from yellow-book appraisal standards to the co-holding of easements. In other cases, existing rules and procedures not enforced for many years were suddenly enforced without forewarning, such as the non-substitution of eligible properties. And finally, some rules and procedures were enforced on some cooperating entities and not on others, such as yellow-book appraisals and the non-substitution of eligible properties. The constantly changing rules and procedures have had a significant impact on MALPF.

At the end of calendar year 2005, NRCS reinterpreted its requirements for acquiring a contingent interest in easements and started to apply rules and procedures that to that date had not been a requirement for participation. The sudden accumulation of issues made it difficult for FRPP to work with Maryland statute: NRCS took many months to identify the specific content of its issues with the MALPF program and simply stopped approving federal funding commitments to MALPF easement purchases. As a result, MALPF was compelled to substitute State for federal funds on the delayed pending easement acquisitions so they could settle within a reasonable time. About \$3 million in State funds had to be diverted to replace the commitment of federal funds.

MALPF was unable to apply for funding from FRPP for FY 2007 because of a newly applied rule that the cooperating entity cannot substitute alternative properties for properties approved for federal matching funds from the original funding proposal. MALPF cannot operate its program without the ability of substitution because:

1. MALPF operates on an application cycle that does not coincide with FRPP application deadlines, so the applicant properties submitted to FRPP can only be based on past applications and current application inquiries (MALPF notes that the FRPP process from FY 2009 onwards self-consciously *assumes* that "cooperating entities recruit landowners continuously" [USDA, NRCS, "Farm and

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- Ranch Lands Protection Program: 2008 Farm Bill Implementation Training. Cooperating Entities," Power Point presentation] which is *not* the case under Maryland statute for MALPF);
2. MALPF's ranking system is county specific and, in most cases, diverges from the federal LESA system; therefore, it is impossible to guarantee that properties getting offers based on county ranking systems will be the same that are selected for funding by FRPP; and
 3. Some applicants reject their offers, and some easements cannot settle because of title or non-subordination issues.

After being informed about the substitution issue and not applying, MALPF learned that NRCS had waived the non-substitution rule for other cooperating entities. MALPF was never offered that waiver opportunity. Because it did not apply for the FY 2007 cycle, MALPF was ineligible to receive funding for the FY 2008 cycle.

Finally, MALPF was unable to apply for FY 2009 funding because the RFP as issued required that a cooperating entity can only submit properties on which there is a pending easement offer with both a signed FRPP interview and a statement of income. This new requirement simply is unworkable with MALPF's easement offer cycle, its deadlines, and its rule-based operation.

Many of the rules and procedures that were developed and implemented over the recent years were justified as the logical product of the contingent right of enforcement defined as acquiring a real property interest, such as the range of title and appraisal reviews and standards and title commitments, indemnification requirements, etc. MDA would strongly recommend that the full range of rules and procedures be reviewed and reevaluated based on the change in understanding of the contingent right of enforcement and, as discussed below, the legislative intent of a meaningful certification program.

MDA has concerns with the introduction of restrictions required in the deed of easement language that have no statutory basis, for which (at least in the Maryland program) those selling easements are not compensated, and which often either conflict with Maryland statute or further differentiate the language in the deed of easement from easements purchased with just State and local funds.

The 2008 Farm Bill requires that a cooperating entity must have some limit on impervious surfaces. Unfortunately, in the rule-making process, this general requirement has become redefined to be a 2% maximum with a specific formula to apply to properties seeking waivers allowing up to 10% of impervious surface. While an improvement over the past formulation, because mid-Atlantic and northeastern states have a smaller average size farm and many more farming operations that can result in pervious surfaces, this 2% impervious surface requirement could result in limiting the ability of owners of agriculturally-preserved lands to adjust to changing agricultural markets to maintain farming profitability.

MALPF already has impervious surface limitations in its program, but those limitations are applied through the review process for uses of preserved properties related to the farming operations. The Maryland impervious surface policy for MAPLF-preserved lands almost certainly meets the statutory intent of the Farm Bill, but does not meet the impervious surface requirements developed in the rule-making process. No explanation is provided as to why NRCS chose to interpret the statutory requirement much more narrowly than how it was worded in legislation.

Other requirements on easement terms and conditions should both reflect the new interpretation of the contingent right of enforcement and further should derive from the legislative intent of the Farm Bill and have a basis in statutory language. Rules and requirements that pose issues for MALPF participants and, in some cases, contradict Maryland statute include the following.

1. *Agricultural Subdivision.* This restriction requires any resulting parcels must be at least as large as the average farm in the county. It is simply too inflexible for Maryland's circumstances and differs from Maryland regulations on agricultural subdivision, the product of many years of working with this issue. In some circumstances, agricultural subdivision can result in more economically viable farming operations. No statutory basis can be identified for this requirement.

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2. *Forestry Management.* This requirement has no basis in statute. The treatment of forested land in FRPP has changed substantially over time. While MDA understands the benefit of forest management plans and, indeed, requires them on properties with 25 acres of contiguous forested land, this requirement diverges in significant ways from the MALPF policy, placing a significant burden on landowners and those developing forestry plans.
3. *Retained Development Rights.* While not formally or explicitly developed, the stated intent of FRPP has been only to accept properties that extinguish any remaining rights to residential development. This has no basis in statute and seriously contradicts Maryland statute that allows the retention of certain development rights in the interest of encouraging the continuation of the family farm and the ability to have on-site tenants. To insist on this restriction would destroy the utility of FRPP in Maryland because most landowners would reject offers including this provision. The requirement that at least one occupant per residence must be employed full-time on the farm or ranch is unreasonable and unenforceable.
4. *General Indemnification.* This requirement continues to be part of the easement terms and conditions. A Maryland State agency is *not* allowed by State law to provide indemnification.
5. *Prohibited Uses.* MALPF recently completed a five-year systematic and comprehensive review of uses allowed on its easement properties. MDA does not see the benefit of having a second poorly defined standard of allowable uses on federally-funded properties. As with all divergences in the terms of the deeds of easement, trying to reconcile two independent systems in a manner that is fair to MALPF program participants poses a burden on both staff and landowners with federal funds in their easement purchase.
6. *National Ranking System.* MALPF has already had problems making its county-specific ranking system work with the NRCS LESA ranking system, which has made it necessary to allow substitution of properties. To introduce national ranking factors as at least half of a parcel score is an unnecessary burden with two unfortunate effects. First, it will make it even less likely that the properties receiving offers from MALPF will also be those selected for federal funds by NRCS. Second, it will likely concentrate federal funds in only a few Maryland counties where the parcels are most amenable to the national ranking factors, delegitimizing FRPP participation for the majority of MALPF's county partners.
7. *Application Requirement for Pending Easement Offers.* For the first time in the history of MALPF's participation in FRPP, the application requirement has explicitly stated that a cooperating entity cannot apply for funds unless it has pending offers to purchase easements on a pool of properties. This requirement, given MALPF's deadlines and cycles, has made it impossible for MALPF to submit an application for FY 2009. This requirement is arbitrary, burdensome, and unworkable.

At least some of these requirements are a function of the NRCS decision to reserve the right to define agricultural uses arbitrarily to meet some subjective standards differing from agricultural uses as defined by a program such as MALPF. Using a narrow definition can thereby justify greater deed restrictions on the property than those allowed by the cooperating entity.

Most of these problems could be effectively addressed by developing a meaningful certification program with genuine incentives for certification based on the review of well-established programs with a long track record of successful farm and ranch lands preservation. MALPF was one of the first two State farmland preservation programs in the country, so it has a long history of acquiring easement lands and enforcing easement restrictions. MDA believes that certification would provide an appropriate mechanism by which these divergent and contradictory rules and procedures could be reconciled to minimize appraisal and title reviews, allow MALPF to use its own long-established and evolving easement terms, conditions, and applications, allow MALPF to use its own county-specific ranking systems and allocation rules for property selection, and eliminate the need for pre-interviews of landowners who might receive FRPP funds.

Should the MALPF program has been certified as a well-established and experienced cooperating entity, it would be able to operate its normal easement offer cycle without its deadlines contradicting the manner in which FRPP operates. Certification requirements should reflect the legislative intent of the Farm Bill which is to facilitate the

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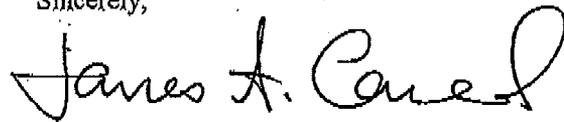
use of FRPP by well-established experienced programs without contradicting State statute, without creating disincentives for landowners to participate in the program (such as no additional compensation for additional restrictions or even the ability to know what the full range of restrictions actually are), and without unnecessary, duplicative, and burdensome review requirements. MDA notes, however, that even with MALPF's 31-year history of easement acquisition, 131 easement acquisitions funded with federal commitments, and over 275,000 acres preserved, under the criteria for certification, MALPF cannot meet the minimum closing efficiency requirements for the five-year period 1003-2007 through no fault of its own, because NRCS unilaterally stopped approving any new federal funding commitments for over two years, starting January 1, 2005.

NRCS has specifically requested public input on how FRPP can achieve its program purposes and further the Nation's efforts with renewable energy production, energy conservation, mitigating the effects of climate change, facilitating climate change adaptation, or reducing net carbon emissions. Maryland's land preservation agencies and other interested parties are in the middle of developing policy on the commercial production of renewable energy and natural gas on lands in which the State has an interest, whether fee or easement. This discussion took place last year in the General Assembly, but is currently under the direction of the Office of the Governor seeking to coordinate a position among State agencies. Discussion on policies on climate change mitigation, climate change adaptation, and the reduction of net carbon emissions on preserved land are also just starting to take place. MDA does not have any current comment on these issues, but notes that FRPP policies are currently more restrictive in these areas than MALPF policies.

To summarize, MDA recommends NRCS review the impact of the reinterpretation of the contingent right of enforcement and the legislative intent of the Farm Bill on both rules and procedures. Further, MDA recommends the adoption of a meaningful certification program that allows participation in FRPP by State programs without having to compromise State statute, rules, policies, and procedures, as intended by the changes in statutory language in the recent Farm Bill. MDA would like to see NRCS use the rule-making process to recreate FRPP in a way that MALPF can again participate to the mutual benefit of Maryland and the federal government and not as a way to reintroduce the problems of the last few years.

Thank you very much for the opportunity to comment on the final interim rule. If you have any questions or would like to discuss these comments, please contact Jim Conrad, Executive Director, Maryland Agricultural Land Preservation Foundation, at 410-841-5860 or conradja@mda.state.md.us. Many of these comments are equally valid for other Maryland State and county farmland preservation programs that have found FRPP to be unworkable given their programs' operations.

Sincerely,



James A. Conrad
Executive Director

cc: David White, Chief, NRCS, USDA
Earl F. Hance, Maryland Secretary of Agriculture
Vera Mae Schultz, Acting Chair, Board of Trustees, Maryland Agricultural Land Preservation Foundation
Mark Rose, Assistant State Conservationist for Programs, NRCS, USDA, Maryland State Office