

NRCS, to purchase conservation easements. In interpreting the statute, NRCS has acquired an interest in the Property in the form of a contingent right. A contingent right in the conservation easement deed provides that all rights conveyed by the landowner under the easement deed shall become vested in the United States should the grantee abandon or attempt to terminate or extinguish the conservation easement. To ensure that the United States property interest is upheld and to ensure that the American taxpayer is acquiring legally sound conservation easement deeds, NRCS and OGC must review all conservation easement templates used by the cooperating entity. In the interest of time, NRCS and OGC try to negotiate standard deed templates with the cooperating entity. Once these standard easement templates meet OGC approval, the cooperating entity may use that template on all easement deeds acquired with FRPP funds.

Several respondents raised issues concerning the contingent right paragraph that is incorporated into every conservation easement deed acquired with FRPP funds. Three respondents requested that NRCS allow for a right of appeal to be granted to eligible entities regarding a determination by the Secretary that the entity has failed to enforce the easement. NRCS' authority is to purchase an interest in land. With this authority, NRCS purchases a contingent right in the land. This contingent right is activated only in cases, where the cooperating entity terminates, extinguishes or fails to uphold the conservation easement. NRCS has determined that it needs to have this absolute right in order to protect the Federal Government's property interest should the Federal Government determine that the Grantee has attempted to terminate, extinguish or fail to uphold the conservation easement. Another respondent objected to the Secretary having sole discretion in the contingent right paragraph and suggested that the contingent right paragraph be relaxed where conservation easements are co-held with State or local funds within the DelMarVa Conservation Corridor. For the reasons mentioned above, NRCS believes that it is in the interest of the Federal government to retain in the final rule, the contingent right that was set forth in the proposed rule. One respondent indicated that a Federal contingent right interest would not be acceptable to many landowners. The Federal contingent right interest may

discourage some landowners from participating in FRPP. However, FRPP is a voluntary program, and landowners are not forced to participate if they find the contingent right paragraph, or other conservation easement provisions unacceptable. One respondent recommended that should the cooperating entity transfer the conservation easement, the landowner should have the right of first refusal for reacquiring the easement interest. The United States' contingent right to hold the conservation easement negates a landowner's right of first refusal. In addition, the right of first refusal by a landowner undermines the purpose of placing a conservation easement on the land.

Currently, NRCS signs the conservation easement deed, accepting NRCS' property interest in the deed of easement. One respondent requested that the requirement that NRCS sign the conservation easement deed be included in the rule, while another respondent recommended that NRCS require that easements be recorded and that the entity provide proof of recordation. NRCS concurs with these recommendations and has included these provisions in the final rule.

One respondent recommended that if NRCS requires implementation of the conservation plan, NRCS should also provide cost-share assistance to the landowner. A majority of farmers and ranchers are already subject to highly erodible land and wetland conservation requirements through participation in other USDA programs. Where financial assistance is needed to help a producer reduce soil erosion on highly erodible lands, cost-share assistance through programs, such as EQIP, is available. Another respondent suggested that a landowner be notified in writing about and consulted regarding conservation measures required on the Property. As indicated previously, this suggestion replicates NRCS' current conservation planning policy which takes into account a landowner's needs and economic situation, as well as local resource conditions.

One respondent raised a concern about the enforcement issues surrounding the conservation plan and the conservation easement, stating "the important matter is a commitment to conservation planning, not to a particular static conservation plan. Enforcement should be about ensuring maintenance of an evolving plan." NRCS believes that the conservation planning process is an evolving and interactive process; however, NRCS has decided that a landowner should not be required to maintain a higher standard

of erosion reduction than the landowner originally agreed to at the time of easement signature. This does not mean however that the landowner is prohibited from achieving a higher standard of resource protection, if the landowner or cooperating entity deem appropriate. Another respondent recommended that if NRCS require an entity to enforce a conservation plan, the entity be required to be involved in conservation planning. NRCS has the responsibility to enforce the conservation plan as it relates to highly erodible land and wetland conservation provisions. If the landowner refuses to comply with these requirements and all the appeal rights and other waivers afforded the landowner in accordance with 7 CFR part 17 and 7 CFR part 614 have been exhausted, NRCS will report to the cooperating entity that the landowner is in violation of the easement. At this time, it becomes the responsibility of the cooperating entity to enforce the terms of the conservation easement.

Section 1491.23 Easement Modifications

Several respondents objected to or requested clarification on this section, which required that easement deed amendments be approved by NRCS. Three respondents requested that the final rule clarify who, within NRCS, is able to approve conservation easement modifications. NRCS has clarified this in the final rule by stating that the State Conservationist, with concurrence from the Office of General Counsel, shall approve or disapprove conservation easement modifications, in the form of deed amendments. One respondent supported NRCS approving easement modifications. They also suggested that NRCS establish a criterion that no amendment will be allowed if it would lower the net benefit of the easement for conservation. NRCS believes that a single criterion, such as lowering the net benefit of the conservation, is difficult to establish on a nationwide basis; therefore, NRCS has chosen to approve amendments on a case-by-case basis. One respondent asserted that the easement modification provisions are inconsistent and incompatible with their program and question NRCS and the Office of General Counsel's authority to accept or reject such modifications. It is not NRCS' intention to supersede the cooperating entity's decision to prohibit an easement amendment. However, where easement amendments are allowed, NRCS' response regarding easement modifications or amendments mirrors its response on easement review—