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***CONSERVING TREASURED LANDSCAPES IN  
THE CHESAPEAKE  
Appendix***

***FRIENDS OF THE  
JOHN SMITH CHESAPEAKE TRAIL REPORT***

*Prepared by the  
Environmental Law Institute*

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## **Appendix: Program Descriptions – Selected Conservation Programs**

### **Federal Programs**

Land and Water Conservation Fund  
Forest Legacy Program [Case Study]  
Wetlands Reserve Program  
Coastal and Estuarine Land Conservation Program [Case Study]  
National Heritage Areas  
Dingell-Johnson Act  
Wildlife Action Plans and State Wildlife Grants  
Chesapeake Bay Gateways Network  
National Scenic Byways Program  
National Wildlife Refuge System  
National Trails System  
Qualified Conservation Contribution  
Wild and Scenic Rivers  
Defense Department Buffers Programs  
Clean Water Act §404 Compensatory Mitigation  
Conservation Reserve Enhancement Program  
Conservation Stewardship Program

### **State Programs**

Maryland's Lands Programs: Program Open Space, Rural Legacy, Heritage Conservation  
Maryland Agricultural Lands Preservation  
Maryland Conservation Easements Tax Credits  
Maryland Heritage Areas  
Pennsylvania Conservation Landscape Initiatives  
Pennsylvania Rivers Conservation Program  
Pennsylvania Heritage Areas Program  
Virginia Land Conservation Incentives Act  
Virginia Land Conservation Fund  
Delaware Land Protection Act & Land and Water Conservation Trust Fund  
Great Outdoors Colorado Program (for comparison)

### **Programs not described**

Many other programs support substantial conservation, but are not included in the summaries in this appendix. These include, among others, Wildlife Habitat Incentives Program; Farm and Ranch Lands Protection Program; Healthy Forests Reserve Program; Grasslands Reserve Program; Environmental Quality Incentives Program; Chesapeake Bay Watershed Initiative; National Park System; National Forest System; BLM Eastern

Lands; National Historic Preservation Fund; USFWS Landowner Incentive Program; USFWS Partners for Fish and Wildlife; North American Wetlands Conservation Act; National Coastal Wetland Act; EPA's Healthy Watersheds Initiative; State Farmland Preservation Programs (PA, VA, DE); State Use Value taxation for farm and forest lands; state parks and forests and gamelands; Technical assistance programs; Transportation enhancements. Many state programs address or support local conservation investments, including grant programs, agricultural preservation programs, and local bond issues for conservation. Please consult the Trust for Public Land's *Enhancing Local Funding for Protecting the Forests of the Chesapeake Bay* (Draft Oct. 2008). There are also capacity-building programs for local governments and nonprofits concerned with watersheds and land conservation.

The programs and authorities described in this appendix are primarily those focused on long term land or easement acquisition, or planning and development authorities that complement acquisition strategies. The state programs are drawn mostly from the three states with the most land area in the Bay watershed; however, any complete land conservation strategy will need to draw upon the authority of the District of Columbia, New York, West Virginia, and Delaware, as well as upon Maryland, Virginia and Pennsylvania.

## Land and Water Conservation Fund (LWCF)

**Type of Program:** matching grants, acquisition, development

**Administered by:** Department of the Interior National Park Service (NPS) in cooperation with the states

**Citations:** 16 U.S.C.A. § 460/-4 *et. seq.* (West 2009); 36 C.F.R. pt. 59 (2008); *LWCF Manual*, NPS, Oct. 1, 2008, <http://www.nps.gov/ncrc/programs/lwcf/manual/lwcf.pdf>.

**Program purposes:** The purpose of the program is to preserve, develop, and assure accessibility to all present and future citizens and visitors of the U.S. the quality and quantity of outdoor recreation resources available, necessary, and desirable for individual active recreational participation and to strengthen the health and vitality of U.S. citizens. The program will accomplish these goals by (1) providing Federal assistance funds to the States in planning, acquisition, and development of needed land and water areas and facilities and (2) providing funds for the Federal acquisition and development of certain lands and other areas.<sup>1</sup>

**Program description:** LWCF can be divided in to two components – a Federal side, and a State side. The Federal LWCF program buys lands that are then owned by the Federal government. The State LWCF program provides grants to States and local governments to acquire, develop, and plan outdoor recreation opportunities.<sup>2</sup>

Every year a comprehensive estimate for appropriations from the LWCF fund will be included in the President's Budget. At most, 60% of the appropriations will be available for State LWCF program purposes. Program funds appropriated and available for State purposes for each fiscal year are apportioned to the states by the Secretary of the Interior according to the following formula<sup>3</sup>: a) 40% of the first \$250 million; 30% of the next \$275 million; and 20% of all additional appropriations are apportioned evenly between the states. b) The Secretary may use discretion to apportion the remainder of appropriations to states based on need. Determination of need should consider State population in proportion to the national population, use of recreational opportunities by those outside the State, as well as

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<sup>1</sup> 16 U.S.C.A. § 460/-4.

<sup>2</sup> 16 U.S.C.A. § 460/-8.

<sup>3</sup> 16 U.S.C.A. § 460/-8(b).

Federal programs and resources in the State. c) Allocations to any one state cannot exceed 10% of the total appropriations for all the states in a given year. d) Any amount of apportionment not obligated after three years from the year of notification can be reapportioned by the Secretary to any state without regard to the 10% limitation. The State LWCF side can be considered a matching program. Any payments to the State cannot cover more than 50% of planning, acquisition, or development of State projects.<sup>4</sup>

The Secretary is authorized to provide State financial assistance for comprehensive statewide outdoor recreation plan (SCORP) preparation. [See discussion below.] In addition to assistance for planning projects, the Secretary may also provide financial assistance for other projects in accordance with the SCORP: (1) for the acquisition of land, waters, or interests in land or waters, or wetland areas; (2) for development of basic outdoor recreation facilities to serve the general public, including Federal lands under lease to States for terms of twenty-five years or more.

**Eligibility criteria**<sup>5</sup>: Before a State can receive LWCF grants, it must develop a comprehensive statewide outdoor recreation plan (SCORP) that promotes the purpose of LWCF. The Governor must certify that SCORP allowed ample opportunity for public participation in plan development and revision. The SCORP must contain the following elements<sup>6</sup>: (1) the name of the State agency that will have authority to represent and act for the State in dealing with the Secretary regarding LWCF; (2) an evaluation of the demand for and supply of outdoor recreation resources and facilities in the State; (3) a program for the implementation of the plan; and (4) other necessary information, as may be determined by the Secretary. The SCORP should take into account relevant Federal resources and programs and other State, regional, and local plans. If the State has any plan financed at all by the Housing and Home Finance Agency, the SCORP should be based on the same pertinent factors.

A SCORP must address wetlands as an important outdoor recreation resource. However, if a SCORP is already in place, a wetlands priority plan addendum developed with the State agency responsible for fish and wildlife resources and consistent with the national wetlands priority conservation plan may be approved instead. Before LWCF

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<sup>4</sup> 16 U.S.C.A. § 460f-8(c).

<sup>5</sup> 16 U.S.C.A. § 460f-8(d).

<sup>6</sup> See the LWCF manual guidelines (<http://www.nps.gov/lwcf/manual/lwcf.pdf>), Ch. 2 for complete information about CSORP.

funds can be paid to a State, the state must agree to (1) provide reports to the Secretary that allow him to perform his duties, and (2) provide necessary fiscal control and fund accounting procedures to assure proper disbursement and accounting for the funds.<sup>7</sup> The LWCF manual guidelines describe procedures by which states may receive planning grants to develop a SCORP.<sup>8</sup> After LWCF assistance and funds have been obtained, States are authorized and 36 C.F.R. 59.1-59.4 set out the procedures for converting LWCF-assisted public outdoor recreation areas.

Grants are available for three types of LWCF projects, subject to SCORP and OPSP (see discussion below) approval: acquisition, development, and combination. Acquisition projects include acquisition of land and waters or partial rights to them. Public access may be controlled but not prohibited in these areas. Development projects include development of certain outdoor recreation activities and support facilities needed by the public for recreational use of an area. Finally, states may also submit projects which combine acquisition and development elements. Additionally, other multi-purpose projects may be eligible if it incorporates a viable outdoor recreation area and certain other conditions.<sup>9</sup>

Criteria for receiving LWCF grants for acquisition projects are as follows<sup>10</sup>: Eligible acquisition projects include acquisition of land and waters for public outdoor recreation, such as parks, forests, wildlife areas, beaches, and other similar areas. The concept of 'public outdoor recreation' covers a broad range of activities. Acquisition can be by fee simple or a lesser interest. LWCF assistance may be available to acquire property for which development of outdoor recreation facilities is planned at a future date subject to certain restrictions. Furthermore, the LWCF manual guidelines list types of acquisition projects that are not eligible to receive LWCF grants.

Criteria for receiving LWCF grants for development projects are as follows<sup>11</sup>: A development project may consist of one or a series of related improvements for outdoor recreation, including facilities for access, safety, health, and protection, and those required for outdoor recreation use. A project may consist of complete or partial development of one area or it may consist of multiple sites. Plans for

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<sup>7</sup> 16 U.S.C.A. § 460f-8(f)(4).

<sup>8</sup> See LWCF manual guidelines, Ch. 2, Section C.

<sup>9</sup> LWCF manual guidelines, pg. 3-2.

<sup>10</sup> LWCF manual guidelines Ch. 3, Section B.

<sup>11</sup> LWCF manual guidelines Ch. 3, Section C.

the development of land and/or facilities should be based on the needs of the public, the expected use, and the type and character of the project area. Facilities may be developed on land and waters owned in fee simple or a lesser interest by the participating agency. The LWCF manual guidelines provide a list of criteria for determining whether a development project may be considered to be questionable, elaborate, or borderline with respect to the purposes of LWCF. Conversely, the guidelines also provide a non-exclusive list of eligible development project opportunities.

The following documents comprise a federal application for LWCF grant assistance and should be coordinated by the State and submitted to NPS<sup>12</sup>: a hand-signed Proposal Description and Environmental Screening Form, a Federal Standard Form 424 - Application for Federal Assistance, Project Agreement and General Provisions, a Description and Notification Form, and a Section 6(f) boundary map.

**Priority criteria:** LWCF manual guidelines establish the Open Project Selection Process (OPSP) for states to rank and choose projects according to recreational need priority.<sup>13</sup> States should develop a fair and equitable priority ranking system that: (1) most strongly emphasizes project selection criteria that conforms to priority needs of the SCORP process; (2) encourages public participation of grant proposals; (3) recognizes the need for accessibility of proposed projects to all segments of the public; and (4) requires project conformance to LWCF eligibility and evaluation criteria.

In approving development projects for LWCF grants, the State and the NPS will give special attention to the degree to which the project is in keeping with the original intent of the LWCF Act.<sup>14</sup> To be eligible, one must be able to conclude that LWCF funds are being used "in the public interest" and "in accord with the Statewide Comprehensive Outdoor Recreation Plan" for the development of "basic outdoor recreation facilities to serve the general public."

After project submission, NPS will conduct an independent review of the proposed project for federal assistance to determine how well it accomplishes the purpose of the LWCF Act and meets program requirements<sup>15</sup>. This evaluation includes a consideration of the project's eligibility for assistance, its technical adequacy, and its

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<sup>12</sup> LWCF manual guidelines, pg. 6-3.

<sup>13</sup> See LWCF manual guidelines Ch. 2, Section B.

<sup>14</sup> LWCF manual guidelines, pg. 3-8.

<sup>15</sup> LWCF guidelines Ch. 6 Section C.

financial soundness. As part of this review, the NPS will determine whether: (1) the proposal is in accordance with the SCORP; (2) the proposal has been adequately reviewed according to the Section 106 process of the National Historic Preservation Act and the National Environmental Policy Act so the NPS can make a decision about the potential for significant impacts to the human environment as a result of providing federal assistance for the project; and (3) the project area is adequately described in the 6(f) boundary map and represents an acceptable area.

**Spatial or geographic targeting:** Targeting of funded projects is governed by the adopted SCORP.

**Funding levels**<sup>16</sup>: LWCF is authorized an annual appropriation of \$900 million. Revenues and collections are accumulated from: (a) surplus property sales; (b) motorboat fuels tax; (c) un-appropriated money in the Treasury; and (d) revenues due as miscellaneous receipts under the Outer Continental Shelf Lands Act, payable to the U.S. Treasury. FY 2008 LWCF appropriated funded was \$255 million, with just \$23.1 million in LWCF state-side grants. The FY 2009 appropriation, with carryover funds funded \$27 million in state-side grants.<sup>17</sup>

**Implications for Chesapeake:** LWCF funding is critically important to land conservation. Additional funding, both federal and state-side, will be needed. Congress could provide that additions to the LCWF be targeted on multi-jurisdictional conservation programs, which would benefit an integrated Chesapeake strategy.

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<sup>16</sup> 16 U.S.C.A. § 4601-5.

<sup>17</sup> <http://www.nps.gov/ncrc/programs/lwcf/funding.html>. <http://www.nps.gov/lwcf>

## Forest Legacy Program (FLP)

**Type of Program:** Easements on private forest lands

**Administered by:** USDA Forest Service in cooperation with States.

**Citations:** 16 U.S.C. § 2103c; 7 C.F.R. § 2.20(a)(2)(xvi); 7 C.F.R. §2.6(a)(16) (2008); *Final Forest Legacy Program Implementation Guidelines (Guidelines)*, USDA Forest Service, Jun. 30, 2003, [http://www.fs.fed.us/spf/coop/library/flp\\_guidelines.pdf](http://www.fs.fed.us/spf/coop/library/flp_guidelines.pdf).

**Program purposes:** "Ascertaining and protecting environmentally important forest areas that are threatened by conversion to non-forest uses" and "promoting forest land protection and other conservation opportunities...includ[ing] the protection of important scenic, cultural, fish, wildlife and recreational resources, riparian areas, and other ecological values."<sup>18</sup>

**Program description:** The U.S Forest Service works with the states to acquire perpetual conservation easements from willing owners with private forestland. Land acquisition in a fee simple purchase is also allowed in Forest Legacy Areas. Owners are compensated the fair market value of any property interest acquired. As a cost-sharing measure, the federal government may fund up to 75% of the project costs, with at least 25% coming from private, State, or local sources.<sup>19</sup>

At the request of a participating State, the Forest Service will provide a grant to the State to administer the FLP in the State. If under the state option, states must first work with a State Forest Stewardship Coordinating Committee (SFSCC) and conduct an Assessment of Need (AON) to define the criteria and procedures to be used to identify important forest areas to be proposed as a Forest Legacy Area (FLA). States may also choose to use an existing or new multi-State or regional entity to identify FLA or develop FLP projects that cross State boundaries. The entity must be a government-established organization. However, program implementation must be undertaken by the individual State or by the Forest Service.<sup>20</sup>

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<sup>18</sup> 16 U.S.C.A. § 2103c(a).

<sup>19</sup> 16 U.S.C.A. §2103c(j).

<sup>20</sup> *Guidelines*, USDA FOREST SERVICE, Jun. 30, 2003, [http://www.fs.fed.us/spf/coop/library/flp\\_guidelines.pdf](http://www.fs.fed.us/spf/coop/library/flp_guidelines.pdf), p. 8-12.

Owners of property subject to FLP easements must manage their property in a manner consistent with the purposes of FLP. Owners may allow forest management activities, including timber management, pursuant to the purposes of FLP. Hunting, fishing, hiking, and similar recreational uses are not considered inconsistent with the purposes of the program.<sup>21</sup>

**Eligibility criteria:** In conducting an AON, at a minimum, a State must address the following in relation to the purpose of FLP: forest resources (aesthetic and scenic values, fish and wildlife habitat, minerals resource potential, public recreation opportunities, soil productivity, forest products and timber management opportunities, watershed values including water quality protection, etc.); the present and future threat of conversion of forest areas to non-forest uses; historic uses of forest areas, and trends and projected future uses of forest resources; current ownership patterns and size of tracts, and trends and projected future ownership patterns; cultural resources that can be effectively protected; outstanding geological features; threatened and endangered species; other ecological values; public recreational opportunities; protected land in the State, to the extent practical, including Federal, State, and municipal lands and land trust organizations lands; issues identified by the SFSCC and in the public involvement process.<sup>22</sup>

Based on the AON, the State lead agency and SFSCC identify specific geographic FLA areas. FLA areas must encompass forestlands with significant environmental and other resource-based values or be threatened by present and future conversion to non-forest uses. If a State opts to administer FLP, it is also responsible for determining “threatened” or “environmentally significant” forest areas of the state. However, the latter criterion should contain one or more of the following public values: timber and other forest commodities; scenic resources; public recreation opportunities; riparian areas; fish and wildlife habitat; known threatened and endangered species; known cultural resources; and other ecological values. FLA may also include non-forest areas such as farms and villages if they are an integral part of the landscape and are within logical boundaries.<sup>23</sup>

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<sup>21</sup> 16 U.S.C.A. § 2103c(i).

<sup>22</sup> *Guidelines*, p. 8-9. Of the Chesapeake Bay area states, only Virginia’s AON guidance document is readily available. *VA FLP AON*, VA Dept of Forestry, Sept. 2000, <http://www.dof.virginia.gov/resources/pub-2000-Forest-Legacy-Prog.pdf>; for AON revisions, see also: [http://www.dof.virginia.gov/mgt/resources/2008-08-11\\_Legacy%20Revisions.pdf](http://www.dof.virginia.gov/mgt/resources/2008-08-11_Legacy%20Revisions.pdf).

<sup>23</sup> *Guidelines*, p. 11.

Parcels protected under FLP may include nonforest uses of the land that may be compatible with forest uses “as part of an undeveloped landscape, including cultivated farmland, pasture, grassland, shrubland, open water, and wetlands. These nonforest uses should be less than 25 percent of the total area. Forest Legacy funds should only be used on parcels with forestland as defined in a State’s AON. Other funding sources may be used to protect nonforested areas on those parcels with less than the minimum required forest cover.”<sup>24</sup> For lands held under FLP easements, the landowner must adopt a Forest Stewardship Plan or a multi-resource management plan.<sup>25</sup>

**Priority criteria** The statute broadly states that priority will be given to lands which can be effectively protected and managed, and which have important scenic or recreational values; riparian areas; fish and wildlife values, including threatened and endangered species; or other ecological values. 16 U.S.C. § 2103c(e). These priorities reflect the overall purposes of FLP. Subsection (f) states that if applications exceed the ability to fund, priority will be given to forest areas having the greatest need for protection pursuant to the aforementioned criteria.

After a forest area has been approved and prioritized by a State, the application continues through the project selection process and is forwarded for funding consideration by Forest Service regional and then national review. Each year the national review process results in a prioritized ranking of projects to be funded for the upcoming fiscal year. Projects will be ranked by the following national criteria:

- important (the public benefits gained from the protection and management of the property including environmental values, and the economic and social aspects)
  - threatened (conversion to non-forest uses is likely or imminent and will result in a loss of forest values and public benefits)
  - strategic (fits with a larger conservation plan, strategy, and initiative and enhances previous conservation investments).
- Project readiness will also be considered.<sup>26</sup>

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<sup>24</sup> *Guidelines*, p. 6.

<sup>25</sup> *Guidelines*, p.21. See *Guidelines, Appendix F* for an example of a Forest Stewardship Plan.

<sup>26</sup> *Guidelines*, p. 12-14.

**Spatial or geographic targeting:** Within the Chesapeake Bay area states, the following forest areas have been designated as FLA available for FLP:

- Delaware – White Clay Creek, Blackbird/Blackiston, Redden/Ellendale, and Cypress Swamp
- Maryland: Anne Arundel, Calvert, Cecil, Charles, Harford, Queen Anne’s, and Worcester counties;
- Pennsylvania – Bedford and Fulton counties (may be incomplete list)
- Virginia – the entire Commonwealth;

**Funding levels:** The national FLP FY 2009 budget is \$49.4 million.<sup>27</sup> As of 2/5/08, the acreage protected under FLP for Chesapeake Bay area states are as follows: Delaware – 1,684; Maryland – 1,247; Pennsylvania – 2,918; Virginia – 5,770.<sup>28</sup>

**Implications for Chesapeake:** The Chesapeake Bay area states have all taken the state option and enacted their own FLP. Of the identified FLA areas in the Chesapeake states, only certain areas in Pennsylvania (Fulton County), all of Virginia, and Maryland (Anne Arundel, Calvert, Cecil, and Harford) seem to be relevant to the Chesapeake Bay. Additional areas could be added. In addition, Virginia has incorporated water priorities into its FLP, which allows the program to focus on lands that may be particularly relevant to the Bay and its tributaries.

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<sup>27</sup> *US Forest Service Fiscal Year 2010 President’s Budget Overview*, FOREST SERVICE, <http://www.fs.fed.us/publications/budget-2010/overview-fy-2010-budget-request.pdf>.

<sup>28</sup> *FLP Funded and Completed Projects*, USDA FOREST SERVICE, Feb. 6, 2008, [http://www.fs.fed.us/spf/coop/programs/loa/flp\\_projects.shtml](http://www.fs.fed.us/spf/coop/programs/loa/flp_projects.shtml).

## **VIRGINIA FOREST LEGACY PROGRAM**

The Virginia Forest Legacy Program, which is administered by the Virginia Department of Forestry ("VDOP"), is designed to protect environmentally important forest areas which are threatened by conversion to non-forest uses using conservation easements and land acquisition. Virginia's program operates in conjunction with the national Forest Legacy Program administered by the U.S. Forest Service ("USFS"), which provides the funding to acquire conservation easements or a fee simple purchase, based on nationally applied selection criteria.

Pursuant to the federal legislation, Virginia prepared an Assessment of Need (AON) in 2000, which it updates annually. In 2008 it revised its eligibility criteria to place particular emphasis on the protection of "watershed values", including water quality, wetlands and riparian buffers. Virginia has 15.4 million acres classified as "commercial forest land", in addition to 579,000 acres of parks and wilderness preserves. A substantial part of this is located in the Chesapeake Bay watershed.

Payment for a Forest Legacy conservation easement, or outright purchase, is based on 75% of the fair market value of the easement or property. A tract of land must be at least 80% forested to be eligible, and the donor of a conservation easement must develop a management or stewardship plan to ensure preservation of the forest conditions. Individual landowner applications are reviewed by VDOP and those receiving high rank are submitted to USFS for approval. The Virginia Program Director reported that last year approximately 80 projects were submitted from 40 different states and 24 were funded. Virginia has had one project approved each year since 2003.

VDOP is a qualified holder and manager of conservation easements. It routinely informs landowners of the tax credit benefit to them of granting conservation easements. A recent example of using Forest Legacy funds to conserve resources in the Chesapeake Bay watershed was the acquisition of 1,811 acres within the Dragon Run Watershed, now known as the Dragon Run State Forest, in King and Queen Counties in 2007. The watershed had been designated as a very significant eco-region by the Nature Conservancy, with which VDOP worked in acquiring this land. The property drains into the Timber Branch Swamp, the Dragon Swamp, the Piankatank River, and eventually to the Chesapeake Bay. The water resources on the property are protected by an easement with the Virginia Outdoors Foundation and other restrictive covenants. VDOP is also using funding provided by a state conservation bond issue to acquire an additional 2,400 acres, formerly owned by a paper mill, for this state forest. Negotiations are pending for the acquisition of substantial additional acreage. This acquisition has been coordinated with the Nature Conservancy, which has been using easements and outright purchases to acquire and protect land in the watershed.

This Forest Legacy Program appears to be an excellent tool for the protection of Chesapeake Bay watershed values, even though historically Virginia has only had one project selected per year.

## Wetlands Reserve Program (WRP)

**Type of Program:** easements on private wetlands

**Administered by:** USDA Natural Resources Conservation Service (NRCS)

**Citations:** 16 U.S.C.A. 3837-3837f ; 7 C.F.R. §§ 1467.1-1467.20.<sup>29</sup>

**Program purposes:** “The purposes of the wetlands reserve program are to restore, protect, or enhance wetlands on private or tribal lands”<sup>30</sup> if “enrollment of such land maximizes wildlife benefits and wetland values and functions.”<sup>31</sup>

**Program description:** WRP works as an easement program. Private landowners may enroll in the program through three different ways: permanent easements, 30 year easements, and restoration cost-share agreements. Under the permanent easement option, NRCS will pay the lowest of one of three calculations: market value difference with and without the easement; an established payment cap; or a landowner offer. Under this option, the federal government may pay up to 100% of restoration costs. The second option is a 30 year easement. This option functions similarly to a permanent easement, but the landowner will only be paid 75% of what a permanent easement would be paid, and the government will pay only up to 75% of restoration costs. Finally, landowners may elect for a restoration cost-share agreement with NRCS to reestablish degraded or lost wetland habitat over time. Under a cost-share agreement, no easement is created and the government will pay up to 75% of restoration costs.<sup>32</sup> After enrolling in WRP, participants may lease land for undeveloped recreational activities or compatible uses of the land, such as fishing or hunting. Whatever leased use is chosen, it must not impact restrictions in the warranty easement deed.<sup>33</sup>

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<sup>29</sup> 2002 Farm Bill WRP Fact Sheet, NRCS, Apr. 2007, [http://www.nrcs.usda.gov/programs/wrp/2007\\_ContractInfo/2007WRPFactSheet.pdf](http://www.nrcs.usda.gov/programs/wrp/2007_ContractInfo/2007WRPFactSheet.pdf) ; 2002 Farm Bill WRP Question and Answers Sheet, NRCS, Apr. 2007, [http://www.nrcs.usda.gov/programs/wrp/2007\\_ContractInfo/2007WRPQAs.pdf](http://www.nrcs.usda.gov/programs/wrp/2007_ContractInfo/2007WRPQAs.pdf); 2002 Farm Bill WRP Key Points Sheet, NRCS, Apr. 2007, [http://www.nrcs.usda.gov/programs/wrp/2007\\_ContractInfo/2007WRPKeyPoints.pdf](http://www.nrcs.usda.gov/programs/wrp/2007_ContractInfo/2007WRPKeyPoints.pdf)

<sup>30</sup> 16 U.S.C.A. § 3837(a)(2).

<sup>31</sup> 7 C.F.R. § 1467.4(e)(3)(i).

<sup>32</sup> 7 C.F.R. §§ 1467.8(a), 1467.10(a).

<sup>33</sup> 7 C.F.R. §§ 1467.11(a)(2).

**Eligibility criteria:** To qualify for WRP, a private landowner must hold title to land that maximizes wildlife benefits and wetland values and functions, including the following types of land<sup>34</sup>: wetlands farmed under natural or converted conditions, and adjacent lands functionally dependent on wetlands; Prior converted cropland; farmed wetland pasture; land that has become a wetland as a result of flooding; range land, pasture, or production forest, or other former/degraded wetlands being used to produce food and fiber; land where the hydrology has been significantly degraded and can be restored; riparian areas which link protected wetlands; lands adjacent to protected wetlands that contribute significantly to wetland functions and values; and previously restored wetlands that need long-term protection.

Among ineligible land include the following: wetlands converted after 12/23/85; timberlands or pastureland established by a CRP contract; federal or state-owned lands, except trusts held for Indian Tribes; and lands already afforded protection similar to enrollment in WRP.<sup>35</sup>

Landowners must comply with 7 C.F.R. part 12 "highly erodible land and wetland conservation" provisions and 7 C.F.R. part 1400 subpart F "adjusted gross income limitation provisions." Furthermore, for easement applications, landowners must have had the land for a seven year period prior to the time the land is deemed eligible, subject to certain exceptions.<sup>36</sup>

**Priority criteria:** For permanent easements, 30 year contracts, and restoration cost-share agreements, consideration will be given to the following: the conservation benefits of easement or other interest; the cost effectiveness, to maximize the environmental benefits per dollar expended; whether the landowner or another person is offering to contribute financially to the cost to leverage Federal funds; the extent to which the purposes of the easement program would be achieved on the land; the productivity of the land; and the on-farm and off-farm environmental threats if the land is used for the agricultural production.<sup>37</sup> On a broader level, permanent easements are given priority over shorter term easements; similarly, easements for protecting and enhancing habitat for migratory birds and other wildlife are also given priority.<sup>38</sup>

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<sup>34</sup> 7 C.F.R. §§ 1467.4(e)(3)(i)-(e)(7).

<sup>35</sup> 7 C.F.R. §§ 1467.4(g)(1)-(g)(6).

<sup>36</sup> 7 C.F.R. §§ 1467.4(c).

<sup>37</sup> 7 C.F.R. §§ 1467.6(a)(1)-(a)(6).

<sup>38</sup> 7 C.F.R. §§ 1476.6(b)(1)-(b)(2).

**Spatial or geographic targeting:** NRCS may place higher priority on geographic regions of the State where restoration of wetlands may better achieve State and regional goals and objectives.

**Funding levels:** The WRP FY 2009 budget nationally is \$181 million.<sup>39</sup>

**Implications for Chesapeake:** WRP is well-suited for any lands that may constitute, or be critical to the function of, wetlands. Also note that the 2008 Farm Bill created the Wetlands Reserve Enhancement Program, based on WRP, with the purpose to “target and leverage resources to address high priority wetlands protection, restoration, and enhancement objectives through agreements with States (including a political subdivision or agency of a State), nongovernmental organizations and Indian Tribes.”<sup>40</sup>

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<sup>39</sup> *FY 2009 Budget Summary and Annual Performance Plan*, USDA, <http://www.obpa.usda.gov/budsum/fy09budsum.pdf>.

<sup>40</sup> 7 C.F.R. § 1467.9.

## Coastal and Estuarine Land Conservation Program (CELCP)

**Type of Program:** acquisition, easements, grants/cost-sharing

**Administered by:** National Oceanic and Atmospheric Administration  
(in cooperation with the states)

**Citations:** 16 U.S.C.A. § 1456-1; 68 Fed. Reg. 35,860.

**Program purposes**<sup>41</sup>: The purpose of CELCP is to protect “important coastal and estuarine areas that have significant conservation, recreation, ecological, historical, or aesthetic values, or that are threatened by conversion from their natural, undeveloped, or recreational state to other uses or could be managed or restored to effectively conserve, enhance, or restore ecological function.”

**Program description**<sup>42</sup>: The Secretary of Commerce, acting through NOAA is authorized to provide matching grants to coastal states for the purpose of acquiring property or interests in property to further the goals of (a) an approved coastal zone management program (CZMP)<sup>43</sup>; (b) a National Estuarine Research Reserve (NERR) management plan; (c) a regional or State watershed management/protection plan involving coastal states with approved CZMP; (d) or a state coastal land acquisition plan consistent with an approved CZMP.

Generally, lands acquired with CELCP funds should allow access to the public.

However, access may be limited or controlled in an equitable manner for resource protection, public safety, or for other reasonable causes. User fees should not be charged for access, but if they are, all income or other revenues derived from the fees shall be used for the maintenance or management of the property.<sup>44</sup>

Acquired property should be managed in a manner consistent with CELCP purposes and long-term stewardship. Activities consistent with

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<sup>41</sup> 16 U.S.C.A. § 1456-1(a).

<sup>42</sup> 16 U.S.C.A. § 1456-1(b).

<sup>43</sup> For information about CZMP, see the Coastal Zone Management Act, 16 U.S.C. §1451.

<sup>44</sup> <http://coastalmanagement.noaa.gov/land/media/CELCPfinal02Guidelines.pdf>, § 2.6b.

conservation purposes include<sup>45</sup>: resource protection; restoration and enhancement, such as vegetative erosion control or restoration of natural water flow to the area; recreational activities such as hiking, hunting, and fishing; access for swimming, canoeing, kayaking; and research and educational activities; construction of facilities on a minor scale, such as restrooms or boardwalks, to facilitate these activities and/or for the purpose of minimizing harm to coastal resources due to public access and recreation.

Activities inconsistent with CELCP purposes and long-term stewardship include: active agricultural or aquaculture production; shoreline armoring or other hard erosion control structures; construction or expansion of roads, large buildings or facilities, or active recreation facilities such as sports facilities, water parks, playgrounds, or similar uses.

The Secretary may only grant CELCP funds if these funds are matched 100% by non-Federal funds.<sup>46</sup> However, the Secretary is authorized to waive this requirement for: underserved communities; communities with an inability to raise funding due to small population or low community income; or for other reasons deemed by the Secretary appropriate and consistent with CELCP program purposes. Federal funds received through CELCP do not preclude project funding from other Federal sources; however, these portions may also be subject to applicable match requirements.

Non-federal cost share sources may include<sup>47</sup>: the value of land or an easement acquired by the project applicant, subject to certain conditions; the appraised value of the land or easement at the time of the grant closing subject to certain conditions; and costs associated with land acquisition, land management planning, remediation, restoration, and enhancement subject to certain conditions. If a grant recipient wants to use non-governmental land or interest in land as a non-Federal match, the recipient must demonstrate that such land or interest will satisfy the same requirements as the lands or interests in lands acquired in the program.<sup>48</sup>

CELCP grants may be used to purchase land or an interest in land, such as an easement, only from a voluntary and willing seller.

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<sup>45</sup> <http://coastalmanagement.noaa.gov/land/media/CELCPfinal02Guidelines.pdf>,

§2.6c.

<sup>46</sup> 16 U.S.C.A. § 1456-1(f)(1)-(3).

<sup>47</sup> 16 U.S.C.A. § 1456-1(f)(4).

<sup>48</sup> 16 U.S.C.A. § 1456-1(j).

Participating states or NERR may allocate their grants to local governments or agencies. The Secretary will develop performance measures to evaluate and report program effectiveness in accomplishing its purposes. The Secretary shall submit these evaluations to Congress triennially.<sup>49</sup> Finally, a state lead agency will be responsible for soliciting projects that are consistent with priorities outlined in the state's CZMP, reviewing them for completeness, prioritizing them according to state criteria, and nominating projects to the national selection process. States are encouraged to submit proposals from multiple agencies as a consolidated package for CELCP.<sup>50</sup>

**Eligibility criteria**<sup>51</sup>: The following are CELCP program eligibility criteria<sup>52</sup>: be located in a coastal or estuarine area within a CELCP plan and meet national program criteria; match Federal funds 100% with non-federal funds; be held in public ownership (fee simple or conservation easements) and provide conservation in perpetuity; and provide for access to general public benefit, as appropriate and consistent with resource protection.

The Secretary will allocate funds through a competitive grant process. Before doing so, the Secretary must consult with the state's CZMP, any NERR, and the lead agency for implementation and to ensure that CELCP participation is consistent with relevant approved CZMP, programs, or policies. The participating state must consult with local governmental entities and interested stakeholders to identify priority conservation needs, values to be protected by program participation, and threats to those values that should be avoided. Participating states should ensure, to the extent practicable, that acquisition of land or easements should complement working waterfront needs.

To actually receive CELCP funds, the applicant must submit a CELCP application which should include the following<sup>53</sup>: (a) a map or description of the coastal and estuarine areas for the purposes of CELCP; (b) a description of the types of lands or values to be protected and the need for conservation through acquisition; (c)

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<sup>49</sup> 16 U.S.C.A. § 1456-1(c)(9)-(10).

<sup>50</sup> <http://coastalmanagement.noaa.gov/land/media/CELCPfinal02Guidelines.pdf>, § 2.2.

<sup>51</sup> 16 U.S.C.A. § 1456-1(c)(1)-(6).

<sup>52</sup> <http://coastalmanagement.noaa.gov/land/media/CELCPfinal02Guidelines.pdf>, § 2.3.

<sup>53</sup> <http://coastalmanagement.noaa.gov/land/media/CELCPfinal02Guidelines.pdf>, § 3.1a.

identification of priority areas for conservation; (d) a description of existing plans or elements already incorporated into this plan; (e) a list of state or local agencies eligible to hold title of CELCP lands; (f) a description of the state's process for reviewing and prioritizing proposals for nomination to the national selection process; (g) and a description of public involvement and interagency coordination during development of the plan.

Furthermore, to be considered for the national selection process, the CELCP plan must also address the following national criteria: (a) protects important coastal and estuarine areas that have significant conservation, recreation, ecological, historical, or aesthetic values, or that are threatened by conversion from their natural or recreational state to other uses; (b) gives priority to lands which can be effectively managed and protected and that have significant ecological value; (c) directly advances the goals, objectives, or implementation of the state's CZMP, NERR plan, national CZMA objectives, or a regional or state watershed protection plan involving coastal states with approved coastal management plans; and (d) is consistent with the state's approved coastal management program.

**Priority criteria**<sup>54</sup>: Awards are based on demonstrated need for protection (pursuant to the national program criteria) and ability to successfully leverage funds among participating entities (e.g., Federal programs, regional organizations, State and local governmental units, landowners, corporations, private organizations). Priority will be given to lands that can be effectively managed and protected and that have significant ecological value. Of these projects, additional priority will be given to (a) lands under imminent threat of conversion to a use that will degrade or diminish its natural, undeveloped, or recreational state; and (b) lands that serve to mitigate the adverse impacts caused by coastal population growth in the environment.

**Spatial or geographic targeting**: Only coastal or estuarine lands are eligible for CELCP participation.

**Funding levels**<sup>55</sup>: In FY 2009 CELCP received funding of \$15 million.

**Implications for Chesapeake**: CELCP is targeted on land types that are critical to the health of the Bay and its tidally-influenced waters. Virginia has made substantial use of CELCP in coordination with other

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<sup>54</sup> 16 U.S.C.A. § 1456-1(c)(5); 16 U.S.C.A. § 1456-1(c)(7).

<sup>55</sup> [http://coastalmanagement.noaa.gov/land/celcp\\_fundingop.html](http://coastalmanagement.noaa.gov/land/celcp_fundingop.html).

funding. The anticipated reauthorization of the CZMA makes it possible that CELCP funding might be expanded and targeting could be adjusted to favor Bay-oriented priorities. Delaware, Maryland, Pennsylvania, and Virginia all have draft CELCP plans ready to be considered for CELCP FY 2010 competition. New York's plan has already been approved.<sup>56</sup>

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<sup>56</sup> [http://coastalmanagement.noaa.gov/land/media/CELCPplans\\_web.pdf](http://coastalmanagement.noaa.gov/land/media/CELCPplans_web.pdf)

## **VIRGINIA COASTAL AND ESTUARINE LAND CONSERVATION PROGRAM ("CELCP")**

The Virginia CELCP program is managed by the Virginia Department of Environmental Quality ("DEQ") as part of the state's Virginia Coastal Zone Management Program. Funding is received from the National Oceanic and Atmospheric Administration ("NOAA") under the federal CELCP program and also under the federal Coastal Zone Management Act ("CZMA").

The CELCP program is administered by NOAA's Office of Coastal Resource Management and awards funds through a nationally competitive process to assist in acquiring and preserving coastal and estuarine land with significant ecological values. DEQ has established, as part of this Virginia CZMA program, a "CELCP Plan" which outlines its conservation priorities in the coastal zone as well as its criteria and procedures for evaluating and selecting land purchase or conservation easement opportunities for submission to NOAA. In the plan, Virginia's natural resource protection goals are aligned with the objectives of the 2000 Chesapeake Bay Agreement, including the goals of preserving and protecting coastal wetlands and watershed lands while enhancing public access to the Bay. Funding for easements and acquisitions has included CELCP, CZMA Section 306, U.S. Fish and Wildlife Service, the Virginia Land Conservation Fund, the Virginia Outdoors Fund, the Nature Conservancy, the Virginia Aquatic Resources Trust Fund and others.

A good example of the use of CELCP and CZMA Section 306 funding to preserve ecologically valuable land is the Southern Tip Partnership involving the acquisition and preservation of approximately 491 acres on the southern tip of the Delmarva Peninsula, approximately half of which drains to the Chesapeake and half to the ocean. This includes some 80 acres of salt marsh and nearly 125 acres of coastal forest. The area includes habitat for oyster reefs, terrapins and numerous other aquatic organisms as well as migratory bird habitat. The protection of habitat for migratory song birds has been especially important because of their declining population due to habitat loss.

On this project DEQ has collaborated with the Fish and Wildlife Service, the Nature Conservancy and other agencies to acquire the necessary easements and ownership. According to DEQ during the period 1997-2007 (grant years) a combination of CELCP and CZMA funds totaling approximately \$2.1 million have been used to acquire 156 acres in this area, and this has been used to leverage the acquisition of another 117 acres, for a total of 273 acres.

The CELCP program, coupled with grants obtained under CZMA Section 306, offers the opportunity for the acquisition and preservation of valuable coastal and estuarine resources combined with the ability to partner with other agencies and NGOs so as to increase the areas protected through coordinated efforts.

## National Heritage Areas (NHA)

**Type of Program:** designation, management, technical and financial assistance

**Administered by:** National Park Service (NPS)

**Citations:** 16 U.S.C. § 461; Public Law 109-338; 120 Stat. 1783.\*

**Program purposes**<sup>57</sup>: A NHA is a place designated by Congress where natural, cultural, historic and scenic resources combine to form a cohesive, nationally distinctive landscape arising from patterns of human activity shaped by geography. These patterns make NHA representative of the national experience through the physical features that remain and the traditions that have evolved in them. Continued use of NHA by people whose traditions helped to shape the landscapes enhances their Significance. The term “nationally distinctive landscape” has not been further defined, but should be understood to include places that are characterized by unique cultures, nationally important events, and historic demographic and economic trends and social movements, among others.

**Program description**<sup>58</sup>: Congress designates regions of the country as National Heritage Areas (NHA) through a Congressional Act. Because NPS manages NHA, they frequently testify as to whether the region has the resources and local financial and organizational capacity to carry out the responsibilities that come with designation.

The first step to NHA designation is to conduct a feasibility study. In some cases, Congress directs NPS to conduct this study in conjunction with local participants. However, in most cases, regional supporters develop the study with NPS serving in an advisory capacity. If Congress passes a bill directing NPS to complete a study, funds may be allocated directly by NPS and made available for this process as the budget allows – which can take years. If a bill is introduced in Congress, it will identify a “local coordinating entity.” This body is authorized to manage federal funding allocated to carry out purposes of the legislation. If a feasibility study is undertaken by a different entity, NPS will provide guidance, but not direct material support, for the study.

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\* See “Comments” section.

<sup>57</sup> [http://www.nps.gov/history/heritageareas/FSGUIDE/feasibility\\_guide.html](http://www.nps.gov/history/heritageareas/FSGUIDE/feasibility_guide.html)

<sup>58</sup> <http://www.nps.gov/history/heritageareas/become/index.htm>

If a region is designated an NHA, it must assume new responsibilities, including the development and implementation of a management plan, and operation under performance and accountability standards connected with the receipt of Federal funds.

**Eligibility criteria:** Four options exist for NHA designation, though most result from Congressional feasibility studies special resource studies, or direct Congressional designation.<sup>59</sup>

1. The 1998 Omnibus Parks Management Act (Public Law 105-391) establishes certain requirements for studies of areas for potential addition to the National Park System. Chapter 1 of Management Policies and special directive 92-11 guide studies of potential new NPS units.
2. Congress has independently authorized feasibility studies of potential new heritage areas.
3. Congress has directed funding from the NPS budget to studies of potential heritage areas without any specific authorization.
4. Local sponsors have undertaken NHA feasibility studies.

NPS lists four critical steps and criteria before a site can be designated a NHA by Congressional Act.<sup>60</sup>

1. Completion of a suitability/feasibility study;
2. Public involvement in the suitability/feasibility study;
3. Demonstration of widespread public support among heritage area residents for the proposed designation; and
4. Commitment to the proposal from key constituents (e.g., governments, industry, and private, non-profit organizations, area residents).

NPS identifies 10 criteria that should be addressed in a suitability/feasibility study for potential NHA designation<sup>61</sup>:

1. The area has natural, historic, or cultural resources that represent distinctive aspects of American heritage worthy of recognition, conservation, interpretation, and continuing use, and are best managed as through partnerships among public and private entities, and by combining diverse and sometimes noncontiguous resources and active communities;

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<sup>59</sup> [http://www.nps.gov/history/heritageareas/FSGUIDE/feasibility\\_guide.html](http://www.nps.gov/history/heritageareas/FSGUIDE/feasibility_guide.html)

<sup>60</sup> <http://www.nps.gov/history/heritageareas/REP/criteria.pdf>

<sup>61</sup> <http://www.nps.gov/history/heritageareas/REP/criteria.pdf>

2. The area reflects traditions, customs, beliefs, and folk life that are a valuable part of the national story;
3. The area provides outstanding opportunities to conserve natural, cultural, historic, and/ or scenic features;
4. The area provides outstanding recreational and educational opportunities;
5. Resources that are important to the identified theme or themes of the area retain a degree of integrity capable of supporting interpretation;
6. Residents, business interests, non-profit organizations, and governments that are involved in the planning have developed a conceptual financial plan that outlines the roles for all participants and have demonstrated support for designation of the area;
7. The proposed management entity and units of government supporting the designation are willing to commit to working in partnership to develop the NHA;
8. The proposal is consistent with continued economic activity in the area;
9. A conceptual boundary map is supported by the public; and
10. The management entity proposed to plan and implement the project is described.

For complete, detailed information regarding the steps to a feasibility study as well as sample feasibility reports, see:  
[http://www.nps.gov/history/heritageareas/FSGUIDE/feasibility\\_guide.html](http://www.nps.gov/history/heritageareas/FSGUIDE/feasibility_guide.html).

**Priority or selection ranking:**

N/A

**Spatial or geographic targeting**

Although the National Heritage Areas Act of 2006 first created the National Heritage Area Systems, it does not set forth criteria for designating future Heritage Areas. The National Heritage Partnerships Act (S. 278, S. 3213, Title VIII, Subtitle A) was introduced in 2008 but was not passed. National Heritage Corridors and National Heritage Areas have been individually designated, by decision of Congress, since 1984.

**Funding levels**<sup>6263</sup>: The FY 2007 enacted budget for NHA was \$13.233 million. The FY 2008 enacted budget was \$14.274 million.

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<sup>62</sup> [http://www.doi.gov/budget/2009/data/greenbook/FY2009\\_NPS\\_Greenbook.pdf](http://www.doi.gov/budget/2009/data/greenbook/FY2009_NPS_Greenbook.pdf)

The FY 2009 enacted budget was \$14.718 million. The FY 2010 requested budget is \$14.727 million.

**Implications for Chesapeake:** The Heritage program offers great opportunities to protect cultural landscapes and their associated resource areas, and offers greater breadth than programs focused solely on historic buildings or on natural lands.

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<sup>63</sup> [http://www.doi.gov/budget/2010/data/greenbook/FY2010\\_NPS\\_Greenbook.pdf](http://www.doi.gov/budget/2010/data/greenbook/FY2010_NPS_Greenbook.pdf), NR&P-55.

## Dingell-Johnson Act (aka Federal Aid in Sport Fish Restoration Program)

**Type of Program:** grants; cost-share.

**Administered by:** Secretary of the Interior (U.S. Fish & Wildlife Service) in cooperation with the States

**Citations:** 16 U.S.C. §777-777i; 50 C.F.R. § 80.

**Program purposes**<sup>64</sup>: The purpose of this program is fish restoration and management of all species of fish which have material value in connection with sport or recreation in the marine and/or fresh waters of the United States.

Program description: Dingell-Johnson is funded by excise taxes on fishing equipment, motorboat and small engine fuels, import duties, and interest that are collected and appropriated from the Sport Fish Restoration and Boating Trust Fund. From the total Trust Fund, a number of deductions are made before money is made available for the Sport Fish Restoration Program (SFRP).<sup>65</sup> These deductions include: money for Wildlife and Sport Fish Restoration Program (WSFRP) administration based on the 2000 Improvement Act; \$3 million for the Multistate Conservation Grant Program<sup>66</sup>, another WSFRP program that provides funding for wildlife and sport fish restoration projects identified as priority projects by the Association of Fish and Wildlife Agencies; \$400,000 for the Sport Fishing and Boating Partnership Council; and \$800,000 for the Atlantic States, Gulf States, Pacific States, and Great Lakes States Fisheries Commissions.

After these deductions, 57% of remaining Trust funds are distributed to SFRP. The other 43% of funds are distributed to other programs, including the WSFRP-administered Coastal Wetlands Planning, Protection, and Restoration Program<sup>67</sup> (18.5%), which provides funding for conservation of coastal wetlands by helping States protect and enhance coastal habitats. Of the funds that are reserved for SFRP, they are further distributed to the states based on the following

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<sup>64</sup> 16 U.S.C. § 777(a)-777a.

<sup>65</sup> 16 U.S.C. § 777b;

[http://wsfrprograms.fws.gov/Subpages/GrantPrograms/SFR/SFRA\\_Funding.pdf](http://wsfrprograms.fws.gov/Subpages/GrantPrograms/SFR/SFRA_Funding.pdf).

<sup>66</sup> <http://wsfrprograms.fws.gov/Subpages/GrantPrograms/MultiState/MS.htm>.

<sup>67</sup> <http://wsfrprograms.fws.gov/Subpages/GrantPrograms/CW/CW.htm>.

formula<sup>68</sup>: 40% is apportioned based on each state's land and water area (including inland and coastal waters) in relation to total land and water area of the U.S.; 60% is apportioned based on the number of paid sport fishing license holders in each state in relation to all paid fishing license holders in the U.S. No state may receive more than 5% of total apportionment and no state may receive less than 1%. To ensure proper apportionment, SFRP requires that each State establish a license certification process subject to certain conditions.<sup>69</sup>

SFRP provides grant funds to the states for fishery projects, boating access and aquatic education. SFRP may provide up to 75% federal funding for project costs, with 25% required from non-federal sources. Annual apportionment is available every two years.<sup>70</sup>

Regarding boating access, each state must allocate at least 15% of apportioned SFRP money to pay up to 75% of the costs of the acquisition, development, renovation, or improvement of facilities that create, or add to, public access to waters and improve the suitability of the waters for recreational boating purposes.<sup>71</sup> Priority will be given to projects that<sup>72</sup>: (a) consist of the construction, renovation, or maintenance of facilities for transient nontrailerable recreational vessels; (b) provide for public/private partnership efforts to develop, maintain, and operate facilities for recreational vessels; and (c) propose innovative ways to increase the availability of facilities for recreational vessels.

Regarding aquatic education, the Dingell-Johnson Act authorizes grant funding to states for angler education, developing outdoor ethics, stewardship, and conservation to increase the public understanding of the nation's water resources and associated aquatic life forms.<sup>73</sup> Each state may spend up to 15% of allocated SFRP money to fund up to 75% of the cost of an aquatic resource education, outreach, and communications program. However, the District of Columbia is exempt from this 15% limitation.<sup>74</sup>

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<sup>68</sup> 16 U.S.C. § 777c;

[http://wsfrprograms.fws.gov/Subpages/GrantPrograms/SFR/SFR\\_AppnFormula.pdf](http://wsfrprograms.fws.gov/Subpages/GrantPrograms/SFR/SFR_AppnFormula.pdf).

<sup>69</sup> 50 C.F.R. § 80.10.

<sup>70</sup> 50 C.F.R. § 80.8.

<sup>71</sup> 16 U.S.C. §777g(b)(1); 50 C.F.R. § 80.24.

<sup>72</sup> 16 U.S.C. §777g-1(d)(2).

<sup>73</sup> 16 U.S.C. § 777g(c); 50 C.F.R. § 80.

<sup>74</sup> 50 C.F.R. § 80.15(f)(2).

Real property may be acquired or constructed with WSFRP funds if doing so would serve program purposes.<sup>75</sup> States may finance land acquisition or interests in land – including water rights and the construction of structures and facilities – in two ways<sup>76</sup>: (1) States may finance the entire cost from a non-Federal funding source and claim Federal reimbursement in succeeding apportionment years; (2) States may use an installment purchase or contract and claim periodic Federal reimbursements.

**Eligibility criteria:** To be eligible to participate in SFRP, states are required to assent to the Dingell-Johnson Act and pass laws for the conservation of fish which include a prohibition against the diversion of license fees for any other purpose than the administration of the State Fish Department.<sup>77</sup> Furthermore, SFRP funds are only available to state agencies responsible for managing sport fish resources in that state.

To receive apportioned funds, a State must submit to the Regional Director of the U.S. Fish and Wildlife Service<sup>78</sup>: (1) a comprehensive fish and wildlife management plan which shall insure the perpetuation of these resources for the economic, scientific, and recreational enrichment of the people; or (2) a grant proposal in the form of a fish restoration and management project.

Eligible fish restoration and management projects may include<sup>79</sup>: (1) research into problems of fish management and culture of efficient administration affecting fish resources; (2) acquisition of facts to guide and direct the regulation of fishing by law, including the extent of the fish population, the drain on the fish supply from fishing and/or natural causes, the necessity of legal regulation of fishing, and the effects of any measures of regulation that are applied; (3) adoption of plans of restocking waters with food and game fishes according to natural areas or districts, together with the acquisition of facts necessary to the formulation, execution, and testing the efficacy of such plans; (4) selection, restoration, rehabilitation, and improvement of areas of water or land adaptable as hatching, feeding, resting, or breeding places for fish, including acquisition by purchase, condemnation, lease, or gift of areas, estates, or interests, and the construction of works to make them available for such purposes.

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<sup>75</sup> 50 C.F.R. § 80.14.

<sup>76</sup> 16 U.S.C. 777e(d); 50 C.F.R. § 80.25(a).

<sup>77</sup> U.S.C. § 777(a); 50 C.F.R. § 80.3.

<sup>78</sup> 16 U.S.C. §777e; (a)50 C.F.R. § 80.11.

<sup>79</sup> 16 U.S.C. § 777a(1).

Coastal States must allocate apportioned amounts equitably between marine fish projects and freshwater fish projects in the same proportion as the estimated number of resident marine anglers and the estimated number of resident freshwater anglers in the State.<sup>80</sup> Further, the amount allocated by a State for freshwater fish projects should not be less than the amount allocated by the State to such projects for FY 1988, assuming that the amount apportioned is not less than the amount apportioned in 1988.<sup>81</sup> For the purposes of this program, "Coastal State" means Delaware, Maryland, and Virginia.

**Spatial or geographic targeting:**

All states are eligible to participate in SFRP. The amount of money available to a particular State depends on both the State's land and water area and number of paid sport fishing license holders in proportion to the United States as a whole.

**Funding levels:**

- Delaware: \$2.7 million (FY 2003); \$2.6 million (FY 2004); \$2.9 million (FY 2005); \$2.9 million (FY 2006); \$5 million (FY 2007); \$4.0 million (FY 2008); \$1.3 million (FY 2009); \$59.2 million (since 1952)
- District of Columbia: \$884,000 (FY 2003); \$868,423 (FY 2004); \$982,304 (FY 2005); \$969,491 (FY 2006); \$1.2 million (FY 2007); \$1.3 million (FY 2008); \$13.7 million (FY 2009); \$31.5 million (since 1952)
- Maryland: \$2.7 million (FY 2003); \$2.6 million (FY 2004); \$2.9 million (FY 2005); \$2.9 million (FY 2006); \$3.5 million (FY 2007); \$4.0 million (FY 2008); \$13.3 million (FY 2009); \$73.5 million (since 1952)
- Pennsylvania: \$6.6 million (FY 2003); \$6.6 million (FY 2004); 7.5 million (FY 2005); \$7.1 million (FY 2006); \$8.6 million (FY 2007); \$9.1 million (FY 2008); \$4.9 million (FY 2009); \$150 million (since 1952)
- Virginia: \$4.3 million (FY 2003); \$4.3 million (FY 2004); \$4.7 million (FY 2005); \$4.8 million (FY 2006); \$5.8 million (FY 2007); \$6.6 million (FY 2008); \$1.3 million (FY 2009); \$92.6 million (since 1952)

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<sup>80</sup> 16 U.S.C. § 777(b)(1).

<sup>81</sup> 16 U.S.C. § 777(b)(2).

For year by year apportionments for each state starting from 1952 to 2009, see <http://wsfrprograms.fws.gov/Subpages/GrantPrograms/SFR/SFRAppor tionments-1952-2009.pdf>.

**Implications for Chesapeake:** Dingell-Johnson Funding is focused on waters and fisheries, and is particularly helpful for watercraft access. The Pittman-Robertson Act (aka Federal Aid in Wildlife Restoration Act) is a similar program that distributes funds to States for wildlife restoration. These funds are collected from a 10% tax on ammunition and firearms used for sport hunting.

## Wildlife Action Plans and State Wildlife Grants

**Type of Program:** Grants for acquisition, management, restoration

**Administered by:** State Wildlife Agencies, funding via U.S. Fish & Wildlife Service

**Citations:** Fiscal Year 2001 Commerce, Justice, State and Related Agencies Appropriations Act, Pub. L. 106-553, codified at 16 U.S.C. §669c; [www.wildlifeactionplans.org](http://www.wildlifeactionplans.org)

**Program Purpose:** To protect (nongame) wildlife species of special conservation need

**Description of Program:** Congress created the State Wildlife Grants (SWG) program and a related Wildlife Conservation and Restoration Program.<sup>82</sup> The SWG program provides funding to each state and territory for projects and initiatives designed to protect wildlife species before they become imperiled, recognizing that it is difficult and expensive to conserve species only after they become endangered.<sup>83</sup> Congress required that in order to continue to be eligible for funding, each state and territory fish and wildlife agency would need to develop a comprehensive state wildlife conservation strategy by October 2005.<sup>84</sup> These strategies later became known as State Wildlife Action Plans.

All state and territory fish and wildlife agencies developed these plans in coordination with stakeholders including state and federal government agencies, businesses, conservation organizations, local governments, scientists, private landowners, and the general public.<sup>85</sup> All plans were approved by the U.S. Fish & Wildlife Service by early 2007. States were required to identify species of greatest conservation need, their associated habitats, threats to these species, and actions needed to ensure their conservation. During development of the

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<sup>82</sup> Pub. L. 106-553. Federal funding continued only for the State Wildlife Grants program after the first year the programs were established.

<sup>83</sup> Association of Fish and Wildlife Agencies and Teaming with Wildlife, *State Wildlife Grants: The Nation's Core Program for Preventing Wildlife from Becoming Endangered*, [on file with ELI].

<sup>84</sup> Fiscal Year 2001 Commerce, Justice, State and Related Agencies Appropriations Act, Pub. L. 106-553, codified at 16 U.S.C. §669c.

<sup>85</sup> Information on wildlife action plans as well as all 56 plans are available online. See Association of Fish and Wildlife Agencies, *State Wildlife Action Plans*, at <http://www.wildlifeactionplans.org>.

plans, state agencies and their partners analyzed scientific information and existing conservation management plans and programs. In addition to identifying species of conservation need, many states also adopted an ecosystem or landscape-level approach. All of the states also were required to address monitoring, education, and research needs.<sup>86</sup>

The plans are strategic blueprints that will guide wildlife and habitat conservation in each state on public and private lands. Conservation strategies and actions are designed to be implemented by state agencies, as well as their partner agencies, organizations, and other stakeholders.

The state wildlife grants provide a 50 percent cost-share for implementation activities, 75 percent for planning.

SWG money may not be used to fund projects that will specifically initiate, encourage, or enhance wildlife-associated recreation; nor for mitigation for habitat loss.<sup>87</sup>

**Eligibility criteria:** State must have an approved state wildlife action plan. Funding is apportioned to states based on a formula that weights land and freshwater area 1/3 and population 2/3. In addition, Congress authorized additional funding in 2008 and 2009 for a competitive State Wildlife Grant Program to encourage multi-partner projects to implement actions contained in the State Wildlife Action Plans.<sup>88</sup>

**Spatial or geographic targeting:** The State Wildlife Action Plans may be spatially explicit. Targeting of grant funded actions must be consistent with the Plans.

**Funding:** Appropriated funds from the Land and Water Conservation Fund. Under the regular allocation, \$60 million was awarded nationally in the most recent allocation, with Virginia receiving \$1.2 million,

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<sup>86</sup> Association of Fish and Wildlife Agencies, *Teaming with Wildlife, State Wildlife Action Plans: Defining a Vision for Conservation Success*; Association of Fish and Wildlife Agencies, *State Wildlife Action Plans: Eight Required Elements*, available at [http://www.wildlifeactionplan.org/pdfs/eight\\_elements\\_handout.pdf](http://www.wildlifeactionplan.org/pdfs/eight_elements_handout.pdf).

<sup>87</sup> <http://wsfrprograms.fws.gov/Subpages/ToolkitFiles/SWG2007.pdf>

<sup>88</sup> <http://wsfrprograms.fws.gov/Subpages/GrantPrograms/SWG/SWG.htm>

Maryland \$790,000, Pennsylvania \$1.9 million.<sup>89</sup> Under the competitive program \$9 million was awarded nationally under this program in 2009, none of it related to Chesapeake Bay habitats (except a collaborative program to investigate white-nose syndrome in bats).

**Implications for Chesapeake:** The Grant program offers flexibility, with the states determining the priorities for which they seek to use the grants in accordance with their approved plans.

## Chesapeake Bay Gateways Network (CBGN)

**Type of Program:** financial assistance, technical assistance

**Administered by:** Department of the Interior

**Citations:** PL 105-312, 1998 HR 2807 §502

**Program purposes**<sup>90</sup>: The purposes of CBGN are: (1) to identify, conserve, restore, and interpret natural, recreational, historical, and cultural resources within the Chesapeake Bay Watershed; (2) to identify and utilize the collective resources as Chesapeake Bay Gateways sites for enhancing public education of and access to the Chesapeake Bay; (3) to link the Chesapeake Bay Gateways sites with trails, tour roads, scenic byways, and other connections as determined by the Secretary; (4) to develop and establish Chesapeake Bay Watertrails comprising water routes and connections to Chesapeake Bay Gateways sites and other land resources within the Chesapeake Bay Watershed; and (5) to create a network of Chesapeake Bay Gateways sites and Chesapeake Bay Watertrails.

These program purposes may be broadly identified as goals of "interpretation," "orientation & access," and "restoration & conservation."<sup>91</sup>

**Program description:** The Secretary of the Interior and the Administrator of the EPA are authorized to provide technical and financial assistance, in cooperation with other Federal agencies, State and local governments, nonprofit organizations, and the private sector pursuant to the program purposes.<sup>92</sup> Components of the CBGN may include: state or Federal parks or refuges; historic seaports; archaeological, cultural, historical, or recreational sites; other public access and interpretive sites as selected by the Secretary.<sup>93</sup>

The Chesapeake Bay Gateways Grants Assistance Program aids State and local governments, local communities, nonprofit organizations, and the private sector in conserving, restoring, and interpreting important historic, cultural, recreational, and natural resources within the Chesapeake Bay Watershed.<sup>94</sup> Any Federal matching grants

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<sup>90</sup> PL 105-312 § 502(a)(1).

<sup>91</sup> <http://www.baygateways.net/pubs/framework2.pdf>, pg. 13.

<sup>92</sup> PL 105-312 § 502(a)(1).

<sup>93</sup> PL 105-312 § 502(a)(2).

<sup>94</sup> PL 105-312 § 502(b)(1).

pursuant to CBGN may not exceed 50% of the total eligible costs and must be conditioned on non-Federal contributions (e.g., in-kind contributions of services) providing the remainder of project costs. Federal matching funds are also granted on the condition that less than 10% of all eligible project costs are used for administrative purposes. Federally-funded grants range from \$5,000 to \$150,000.

The nomination process<sup>95</sup> begins when the managing institution of a potential site, water trail, or other connector regional information center, or hub proposes a designation to CBGN. Proposals may be submitted by local, state or Federal agencies or non-profit organizations. Within 60 days of receiving a nomination, a CBGN Working Group reviews the nomination and determines whether the proposal should be added to CBGN. Designated Gateways enter in to a Memorandum of Understanding with NPS outlining mutual commitments to foster cohesive development of CBGN.

**Eligibility criteria:** Gateways are added to CBGN through a nomination/designation process and are categorized in to four types by the function they perform. Gateway sites and water trails (& other connections) can be designated throughout the Bay watershed. Regional Information Centers (RIC) and hubs are currently limited to the tidal reaches of the Bay area, below the fall line.<sup>96</sup>

Achieving CBGN goals through site designation necessitates both a geographic and a thematic focus that give shape and cohesiveness to the Network. Geography helps center the locations of places in the Network; themes focus and integrate the range of subjects necessary to address through the Network in order to convey the Bay story. [For discussion of spatial/geographic targeting, see below.] Chesapeake themes are organized in a hierarchical manner – from overarching themes to principle themes to sub-themes or topics. The overarching themes of CBGN include: interconnectedness, interdependence, and knowledge and mystery. Principle themes include: the living, natural Bay; peoples of the Bay; settlement of the Bay; economic resources such as commerce, productivity, and transportation; military and naval presence on the Bay; the Bay as a source of recreation and renewal; and environmental stewardship and sustainability of the Bay. For a complete description of overarching and primary themes, as well as a list of sub-themes/topics, see <http://www.baygateways.net/pubs/framework2.pdf>, pg. 9-13. The

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<sup>95</sup> [http://www.baygateways.net/pubs/Nomination\\_Instructions.pdf](http://www.baygateways.net/pubs/Nomination_Instructions.pdf), pg. 3.

<sup>96</sup> <http://www.bayGateways.net/images/focusmap.gif>

geographic and thematic elements are reflected in the eligibility and the priority criteria.

Gateway sites are primary destinations where people can access, experience, learn about, and contribute to specific Bay-related natural, cultural, historic or recreational resources. They can be parks, wildlife refuges, historic sites, museums or other places representing the diversity of the Bay. In addition to providing a Bay-related experience, sites offer opportunities for volunteers to help restore or conserve Bay resources, and emphasize stewardship of the resources at the site. Sites are open to the public for the maximum number of days per week feasible, given seasonal visitation patterns and operational limitations, but must be publicly accessible at least four days per week, including at least one weekend day, during their high visitation season. For a complete list of defining characteristics, as well as ways in which Gateway sites should achieve CBGN goals of "interpretation," "orientation & access," and "restoration & conservation," see <http://www.bayGateways.net/pubs/sitesdescription.pdf>. Historic districts offer another opportunity for Gateway site designation. Separate criteria complement and supplement the basic criteria and characteristics of Gateway sites. Complete descriptions of these criteria and characteristics can be found at [http://www.bayGateways.net/pubs/Hist\\_Dist\\_designation\\_criteria.pdf](http://www.bayGateways.net/pubs/Hist_Dist_designation_criteria.pdf).

Water trails, land trails and other connections link Gateways through a network of boating, hiking, walking, biking or driving routes that explore the Bay area below the fall line, as well as rivers of the Bay watershed. Connecting routes foster appropriate public access to, and interpretation of, the natural, cultural, historical and recreational resources along the route. Trails and water trails emphasize low-impact use and offer opportunities for volunteers to help restore or conserve Bay resources. Key public access points along the trail or water trail must be open to the public for the maximum number of days per week feasible, given seasonal visitation patterns and operational limitations, but must be publicly accessible at least four days per week, including at least one weekend day, during their high visitation season. For a complete list of defining characteristics, as well as ways in which water trails should achieve CBGN goals of "interpretation," "orientation & access," and "restoration & conservation," see <http://www.bayGateways.net/pubs/watertrailedescription.pdf>. For a complete list of defining characteristics, as well as ways in which land-based trails and byways should achieve CBGN goals of "interpretation,"

“orientation & access,” and “restoration & conservation,” see <http://www.bayGateways.net/pubs/landroutesdescription.pdf>.

RICs orient people to the Gateways within a particular region below the fall line, introducing visitors to, and helping them access, Bay-related resources. Regional information centers have facilities for providing orientation and interpretive information generally 8 hours per day, 7 days per week, year around, with some seasonal variation. They are distinguished from hubs by their primary focus on orienting people to a particular region, location in smaller communities providing visitor services for part of a region, greater number and broader distribution area. For a complete list of defining characteristics, as well as ways in which RIC should achieve CBGN goals of “interpretation,” “orientation & access,” and “restoration & conservation,” see <http://www.bayGateways.net/pubs/RICdescription.pdf>.

Hubs are centers for introducing Bay-wide themes and orienting people to the entire Gateways Network. While hubs are sometimes thought of as whole communities, in practice, they focus on a specified hub facility that provides interpretive and orientation information to visitors; there may be a number of other Gateway sites or connecting routes in the immediate area. Hub facilities are open 8 hours per day, year around. Only six to eight hubs are anticipated in the entire Network, with one, or in a few cases two, per region, all below the fall line. Hubs are distinguished from regional information centers, by their: additional interpretive media, Network-wide focus, location where a large number of visitors are concentrated near a cluster of Bay resources, and proximity to the Bay itself. For a complete list of defining characteristics, as well as ways in which RIC should achieve CBGN goals of “interpretation,” “orientation & access,” and “restoration & conservation,” see <http://www.bayGateways.net/pubs/hubdescription.pdf>.

**Priority criteria**<sup>97</sup>: Nominations will be evaluated for the extent to which they meet these typical minimum qualifying criteria:

- (1) The proposed site consists of one or more natural, cultural, historic or recreational resources related to Chesapeake Bay interpretive themes;
- (2) The proposed site presents an opportunity for place-based interpretation of an important Bay-related resource;

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<sup>97</sup> [http://www.baygateways.net/pubs/Nomination\\_Instructions.pdf](http://www.baygateways.net/pubs/Nomination_Instructions.pdf), pg. 5.

- (3) The proposed site provides public access to its Bay-related resources and visitor activities at the site are primarily focused on those resources. The site is equipped with at least a basic level of visitor facilities commensurate with the type of access provided. Sites shall be open to the public for the maximum number of days per week feasible, given seasonal visitation patterns and operational limitations, but must be publicly accessible at least four days per week, including at least one weekend day, during their high visitation season;
- (4) Resource stewardship is a core element of the proposed site's mission as evidenced by restoration/conservation programs and/or interpretation/education programs;
- (5) There is public support for the proposed Gateway site, as evidenced by support from local governments, key partners and volunteer involvement;
- (6) Based upon experience and resources, the managing organization appears to have the capacity for sustaining long-term management of the proposed site as a Gateway.

Specific review criteria vary slightly according to the type of Gateway being nominated. [See "eligibility criteria" section.]

For the 2009 grant selection process, more competitive applications contained the following characteristics<sup>98</sup>:

- (1) supporting multiple Network goals;
- (2) enhancing the Gateways and Watertrails Network as a whole;
- (3) directly involving citizen volunteers in project development and implementation to build their understanding and appreciation of Chesapeake Bay resources and stewardship.
- (4) including specific objectives to "green" the project, such as developing environmentally sensitive designs, incorporating low impact development approaches (e.g., incorporating green roofs and rain gardens, reducing impervious surfaces, etc.), incorporating eco-friendly materials into structural elements of your project, and using green procurement practices (e.g., buying recycled and recyclable materials and/or recycling existing materials for use in your project).
- (5) offering a significant leveraging of Federal funds in excess of the minimum qualifying requirement of a 1:1 non Federal match

**Spatial or geographic targeting:** Six network regions are identified as the "heart of the bay area": Northern Bay; Eastern Shore; Mouth of

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<sup>98</sup> [http://www.baygateways.net/pubs/2009\\_CBG\\_N\\_Grant\\_Guidelines.pdf](http://www.baygateways.net/pubs/2009_CBG_N_Grant_Guidelines.pdf), pg. 10-11.

the Bay, Hampton Roads, & the James; Northern Neck & Middle Peninsula; Upper Potomac Estuary; and Maryland's Western Shore. These regions have a practical function in CBGN by organizing physical places in the Network, interpretive themes, and the ways that people may want to experience the Bay.

**Funding levels:** CBGN awarded \$1,170,367 in matching grants in 2008.<sup>99</sup> In 2009, only certain types of projects were eligible for grants: projects that promote a broadly applicable stewardship ethic and actively foster citizen stewardship of the Chesapeake; projects that clearly aid in telling a part of the Chesapeake Bay story; and projects to further the development and sustainability of water trails throughout the Chesapeake Bay watershed.

**Implications for Chesapeake:** CBGN provides a superior means for coordinating with state and local heritage programs; it also serves multiple goals on the Bay landscape. Finally it provides a continuous, and potentially consistent, message that could link multiple regions across the Bay watershed.

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<sup>99</sup> <http://www.baygateways.net/recentgrants.cfm?mostrecent=yes>

## National Scenic Byways Program (NSBP)

**Type of Program:** designation, financial and technical assistance, easement acquisition

**Administered by:** U.S. DOT, Federal Highway Administration (FHWA)

**Citations:** 23 U.S.C. § 162; 60 Fed. Reg. 26,759-26,762.

**Program purposes**<sup>100</sup>: NSBP was created to recognize “roads having outstanding scenic, historic, cultural, natural, recreational, and archaeological qualities.”

**Program description:** NSBP allows for three types of road designations: National Scenic Byways (NSB), All-American Roads (AAR), and American Byways (AB). The Secretary may make grants and provide technical assistance to States or Indian tribes to plan, design, and develop a State or Indian tribe scenic byway program and to implement projects to designate NSB, AAR, AB, state scenic byways, or Indian tribe scenic byways.<sup>101</sup> The Federal share of the cost of a project shall be 80%; however, for projects along public roads providing access within Federal or Indian land, a Federal land management agency may use agency funds as the non-Federal share.<sup>102</sup>

Acquisition of rights-of-ways along the byway is permitted when warranted to accommodate access improvements to the byway.<sup>103</sup> Easements may also be purchased for the purpose of resource protection of historical, archeological, and cultural resources in areas adjacent to the highways; however, this option may only be used after it has been determined that all other protection measure are unsuccessful.<sup>104</sup> It is the State’s responsibility to assure NSB and AAR are being properly maintained in accordance with program requirements.<sup>105</sup>

**Eligibility criteria:** To be considered for designation, a road must be nominated by a State, an Indian tribe, or a Federal land management

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<sup>100</sup> 23 U.S.C. § 162(a)(1).

<sup>101</sup> 23 U.S.C. § 162(b).

<sup>102</sup> 23 U.S.C. § 162(f).

<sup>103</sup> 60 Fed. Reg. 26,759-26,762, § 10(c)(4).

<sup>104</sup> 60 Fed. Reg. 26,759-26,762, § 10(c)(5).

<sup>105</sup> 60 Fed. Reg. 26,759-26,762, § 8(d).

agency and must first be designated as a (scenic) byway.<sup>106</sup> To be designated a NSB, a road/highway must significantly meet at least one of six scenic byways intrinsic qualities. To be designated an AAR, the road/highway must meet criteria for at least two of the six scenic byways intrinsic qualities. The road/highway must also be considered a destination unto itself, meaning that it provides an exceptional traveling experience so recognized by travelers that they would make a drive along the road a primary reason for their trip.

The six intrinsic qualities are<sup>107</sup>:

- Scenic Quality: the heightened visual experience derived from the view of natural and manmade elements of the visual environment of the scenic byway corridor.
- Natural Quality: features in the visual environment that are in a relatively undisturbed state.
- Historic Quality: legacies of the past that are distinctly associated with physical elements of the landscape, whether natural or manmade, that are of such historic significance that they educate the viewer and stir an appreciation for the past.
- Cultural Quality: evidence and expressions of the customs or traditions of a distinct group of people. The cultural qualities of the corridor could highlight one or more significant communities and/or ethnic traditions.
- Archeological Quality: characteristics that are physical evidence of historic or prehistoric human life or activity that are visible and capable of being inventoried and interpreted
- Recreational Quality: outdoor recreational activities should be directly associated with and dependent upon the natural and cultural elements of the corridor's landscape. The recreational activities provide opportunities for active and passive recreational experiences. Driving the road itself may qualify as a pleasurable recreational experience.

Potential NSB and AAB projects should also contain a Corridor Management Plan (CMP), which should provide for conservation and enhancement of the byway's intrinsic qualities as well as promotion of tourism and economic development.<sup>108</sup> The CMP should contain the following<sup>109</sup>:

- A map identifying corridor boundaries, location of intrinsic qualities, and different land uses within the corridor

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<sup>106</sup> 23 U.S.C. § 162(a)(3)(A).

<sup>107</sup> 60 Fed. Reg. 26,759-26,762, § 7.

<sup>108</sup> 60 Fed. Reg. 26,759-26,762, § 9(a).

<sup>109</sup> 60 Fed. Reg. 26,759-26,762, § 9(a).

- Assessment of the intrinsic qualities
- A strategy for maintaining and enhancing the intrinsic qualities. Level of protection may vary within a single NSB or AAR.
- A schedule and listing of all agency, group, and individual responsibilities in CMP implementation, enforcement, and review mechanisms.
- A strategy for enhancing current development and accommodating new development while preserving intrinsic qualities of the corridor.
- A plan to assure ongoing public participation in CMP objective implementation.
- A review of the road/highway's safety and accident record.
- A plan to accommodate commerce while maintaining safe and efficient highway service.
- A demonstration that intrusions on the visitor experience have been feasibly minimized and a plan for making improvements to enhance the experience.
- A demonstration of compliance with all relevant laws on control of outdoor advertising.
- A signage plan to make the number and placement of signs more supportive of the visitor experience.
- A narrative describing NSB marketing opportunities.
- A discussion of design standards relating to any proposed modification of the roadway.
- A description of plans to interpret the significant resources of the scenic byway.

Additional CMP requirements for AAR include<sup>110</sup>:

- A narrative on how the AAR would be promoted, interpreted, and marketed in order to attract travelers.
- A plan to encourage the accommodation of increased tourism, if this is projected.
- A plan for addressing multi-lingual information needs.
- A demonstration of the extent to which enforcement mechanisms are being implemented.

Projects eligible for Federal assistance include<sup>111</sup>:

- An activity related to the planning, design, or development of a State or Indian tribe scenic byway program.
- Development and implementation of a corridor management plan (CMP) to maintain the scenic, historical, recreational,

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<sup>110</sup> 60 Fed. Reg. 26,759-26,762, § 9(b).

<sup>111</sup> 23 U.S.C. § 162(c).

- cultural, natural, and archaeological characteristics of a byway corridor while providing for accommodation of increased tourism and development of related amenities.
- Safety improvements to a State scenic byway, Indian tribe scenic byway, NSB, AAR, or AB to the extent that the improvements are necessary to accommodate increased traffic and changes in the types of vehicles using the highway.
  - Construction along a scenic byway for pedestrians and bicyclists, rest area, turnout, highway shoulder improvement, overlook, or interpretive facility.
  - An improvement to a scenic byway that will enhance access to an area for the purpose of recreation, including water-related recreation.
  - Protection of scenic, historical, recreational, cultural, natural, and archaeological resources in an area adjacent to a scenic byway.
  - Development and provision of tourist information to the public.
  - Development and implementation of a scenic byway marketing program.

**Priority or selection ranking:** The Secretary may consult with the Department of Interior, Agriculture, and Commerce before designating a NSB or AAR. A panel of experts designated by FHWA and reflecting a cross-section of the scenic byways community of interests (including intrinsic qualities, tourism, and economic development) may also assist in the designation process.

In making NSBP grants, the Secretary will give priority to<sup>112</sup>: (1) projects that are associated with a highway already designated as a NSB, AAR, AB and is consistent with the CMP for the byway; (2) projects along State or Indian tribe scenic byways that are consistent with the CMP for the byway, or are intended to foster the development of such a plan, and make the byway eligible for NSB, AAR, or AB designation; (3) projects associated with development of a State or Indian tribe scenic byway program.

**Spatial or geographic targeting:** NSBP applies to roads/highways and right-of-way and easements pursuant to NSBP goals.

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<sup>112</sup> 23 U.S.C. § 162(b)(2).

**Funding levels**<sup>113</sup>: \$26.5 million in FY 2005; \$30 million in FY 2006; \$35 million in FY 2007; \$40 million in FY 2008; and \$43.5 million in FY 2009.

**Implications for Chesapeake:** NSBP provides an opportunity to protect viewsheds, including lands and waters. It is worth noting that the Transportation Enhancements Program administered by DOT also provides funding that can be used to support trails, lands, and facilities. And mitigation needs of DOT can also serve as a source of funds.

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<sup>113</sup> Public Law 109-59 § 1101(a)(12).

## National Trails System

**Type of Program:** designation, consultation, acquisition

**Administered by:** National Park Service (NPS) in conjunction with the Department of Interior (DOI) and Department of Agriculture (DOA), states, etc.

**Citations:** 16 U.S.C. § 1241-51.

**Program purposes**<sup>114</sup>: To provide for the recreation needs and to promote the preservation of, public access to, travel within, and enjoyment and appreciation of open-air, outdoor areas and historic resources, trails should be established (i) primarily, near urban areas, and (ii) secondarily, within scenic areas and along historic travel routes. This program provides the means for attaining these objectives by instituting a national system for designating recreation, scenic and historic trails. Additionally, this program encourages and assists volunteer citizen involvement in the planning, development, maintenance, and management, where appropriate, of trails.

**Program description:** NTS establishes three types of trails<sup>115</sup>: national recreation trails (NRT), national scenic trails (NST), and national historic trails (NHT).

NRT provide outdoor recreation uses in or accessible to urban areas. NST should be extended trails that provide maximum outdoor recreation potential and for the conservation and enjoyment of nationally significant scenic, historic, natural, or cultural qualities of the areas. NST may be located to represent significant characteristics of a physiographic region. NHT should be extended trails which follow as closely as possible original trails or routes of travel of national historic significance. Designation shall be continuous, but the established or developed trail, and the acquisition thereof, need not be continuous onsite. NHT identify and protect historic routes and historic remnants and artifacts for public use and enjoyment. Only Federally-owned land is eligible for Federal protection of a NHT. However, state and local governments and private parties may apply for other lands to be protected segments of a NHT under certain conditions. Additionally, NTS allows for connecting or side trails, which provide additional points of public access to national recreation, national scenic or national

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<sup>114</sup> 16 U.S.C. § 1241(a)-(c).

<sup>115</sup> 16 U.S.C. § 1242(a).

historic trails. For purposes of this program, an extended trail must reach more than 100 miles in length; however, a NHT may be less than 100 miles in length and still be designated an extended trail.

After designation, the appropriate Secretary will select, with consultation from relevant stakeholders, the rights-of-way for NST and NHT, designed to harmonize with and complement any established multiple-use plans for the specific area in order to insure continued maximum benefits from the land.<sup>116</sup> NST and NHT may contain campsites, shelters, and related-public-use facilities. Other uses along the trail, which will not substantially interfere with the nature and purposes of the trail, may be permitted – such as bicycling, cross-country skiing, day hiking, equestrian activities, jogging or similar fitness activities, trail biking, overnight and long-distance backpacking, snowmobiling, and surface water, and underwater activities.<sup>117</sup> Reasonable efforts shall be made to provide sufficient access opportunities to such trails. Use of motor vehicles is not allowed on NST or NHT, except possibly in case of emergencies. The appropriate Secretary is authorized to provide for NST or NHT interpretation sites, in order to present information to the public about the trail. Wherever possible, the sites shall be maintained by a State agency under a cooperative agreement with the appropriate Secretary.<sup>118</sup>

Within the exterior boundaries of areas under their administration that are included in the right-of-way selected for a NRT, NST, or NHT, Federal agencies may use lands for trail purposes and may acquire lands or interests in lands by cooperative agreement, donation, purchase, or exchange. Where the lands included in a NST or NHT right-of-way are outside of the exterior boundaries of Federally-administered areas, States or local governments involved are encouraged to enter into written cooperative agreements for the necessary right-of-way, or to acquire the lands or interests in land.<sup>119</sup> If the Secretary accepts non-Federal property within the right-of-way in exchange for Federally-owned property, the values of the properties exchanged should be approximately equal, or if not, should be equalized by the payment of cash as circumstances require. The Secretary is also authorized to acquire lands outside the area of trail acquisition for purposes of a NST or NHT. Such acquired lands may be

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<sup>116</sup> 16 U.S.C. § 1246(a)(2).

<sup>117</sup> 16 U.S.C. §1246(j).

<sup>118</sup> 16 U.S.C. § 1246(c).

<sup>119</sup> 16 U.S.C. § 1246(e).

exchanged for any non-Federal lands or interests within the trail right-of-way.<sup>120</sup>

A Secretary may enter in to cooperative agreements with stakeholders to operate, develop, and maintain any portion of a designated trail. Such agreements may include provisions for limited financial assistance to encourage participation in the acquisition, protection, operation, development, or maintenance of the trail. The Secretary should also encourage States to develop land practices compatible with the purposes of NTS, for property within or adjacent to trail rights-of-way. The Secretary may also provide assistance for this activity.<sup>121</sup>

**Eligibility criteria:** When no Federal land acquisition is involved, the Secretary of the Interior or the Secretary of Agriculture may designate land under NRT if they meet the following criteria<sup>122</sup>: trails accessible to urban areas, with the consent of appropriate administering agencies; trails within park, forest, or other recreation areas owned/administered by the States, with their permission; and privately owned trails, with permission from the owner.

NST and NHT may only be designated by an Act of Congress. Before a trail is designated as NST or NHT, a desirability/feasibility study is required by Congress of DOI or DOA through an administering agency.<sup>123</sup> At a minimum, the desirability/feasibility studies should include:

- the proposed route of the trail;
- the areas adjacent to the trails, to be utilized for scenic, historic, natural, cultural, or developmental, purposes;
- the characteristics which make the trail worthy of designation as a NST or NHT; if NHT, a recommendation of the Secretary of the Interior's National Park System Advisory Board as to the national historic significance based on the criteria in the Historic Sites Act of 1935 should also be included;
- the current status of land ownership and current and potential use along the designated route;
- the estimated cost of acquisition of lands or interest in lands, if any;
- the plans and costs for developing and maintaining the trail;

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<sup>120</sup> 16 U.S.C. § 1246(f)(1)-(2).

<sup>121</sup> 16 U.S.C. § 1246(h)(1).

<sup>122</sup> 16 U.S.C. § 1243(b).

<sup>123</sup> 16 U.S.C. § 1244(b).

- the proposed Federal administering agency;
  - the extent to which a State, public, or private organizations might be expected to participate;
  - the relative uses of the lands involved;
  - the anticipated impact of public outdoor recreation use on the preservation of a proposed NHT and its related historic and archeological features and settings;
- to qualify for designation as a NHT, a trail must meet all three of the following criteria:
    - a. It must be a trail or route established by historic use and must be historically significant as a result of that use;
    - b. It must be of national significance with respect to any of several broad facets of American history, such as trade and commerce, exploration, migration and settlement, or military campaigns. To qualify as nationally significant, historic use of the trail must have had a far-reaching effect on broad patterns of American culture. Trails significant in the history of Native Americans may be included;
    - c. It must have significant potential for public recreational use or historical interest based on historic interpretation and appreciation. The presence of recreation potential not related to historic appreciation is not sufficient justification for designation under this category.

Feasibility shall be determined on whether or not it is physically possible to develop a trail along a route being studied, and whether the development of a trail would be financially feasible. 16 U.S.C. § 1244(b)(1)-(11) detail specific requirements for NST and NHT desirability/feasibility studies. The Secretary charged with the administration of a trail shall, within one year of the date of the addition of any NST or NHT, establish an advisory council for ten years. The Secretary should consult with the council from time to time with respect to matters relating to the trail.<sup>124</sup> Within two complete fiscal years of the date of enactment of legislation designating a NST or NHT, the responsible Secretary shall, after consultation with affected stakeholders, submit a comprehensive plan for the acquisition, management, development, and use of the trail.<sup>125</sup>

### **Priority or selection ranking**

N/A

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<sup>124</sup> 16 U.S.C. § 1244(d).

<sup>125</sup> 16 U.S.C. § 1244(e)-(f) for more detailed information.

**Spatial or geographic targeting:** Only trails and lands associated with trails are eligible for NTS.

**Funding levels**<sup>126</sup>: FY 2009 funding for NTS was \$10,987,000. Requested FY 2010 funding was \$11,452,000.

**Implications for Chesapeake:** Current trails such as the Captain John Smith Chesapeake Trail and the Star-Spangled Banner Trail offer opportunities for additional related conservation. For example, Pennsylvania recently directed its local governments to adopt zoning and related land use regulations to protect the “natural, scenic, historic, and esthetic values” of the Appalachian Trail and to “conserve and maintain it as a public natural resource.” (Act 24, 2008, as amended HB 263, 2009); the law provides technical and funding support. Consider the opportunities of protecting trails under other programs. The Land and Water Conservation Fund encourages consideration of trails when a State develops its Comprehensive Statewide Outdoor Recreation Plan (SCORP). Trail planning is encouraged under the Comprehensive Urban Planning and Assistance Program and Title VII of the Housing Act of 1961. Trail development is also encouraged under the Railroad Revitalization and Regulatory Reform Act of 1976.

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<sup>126</sup> [http://www.doi.gov/budget/2010/data/greenbook/FY2010\\_NPS\\_Greenbook.pdf](http://www.doi.gov/budget/2010/data/greenbook/FY2010_NPS_Greenbook.pdf), pg. 188.

## Qualified Conservation Contribution (QCC)

**Type of Program:** Tax deductions for charitable contributions of private lands

**Administered by:** Internal Revenue Service

**Citations:** 26 U.S.C. § 170; 26 C.F.R. § 1.170A-14; Guidance Regarding Deductions by Individuals for Qualified Conservation Contributions, 2007-25 I.R.B, Notice 2007-50 at 1430, June 18, 2007; Tax Considerations in Selling or Donating Your Easement at 2, Maryland Agricultural Land Preservation Program, <http://www.malpf.info/facts/fact15.pdf>; 26 U.S.C. § 509(a)(2), (3); Exec. Order No. 13508 (May 2009); 36 C.F.R. § 60.4.

**Program description:** Individuals and corporations may deduct from their taxes Qualified Charitable Contributions (QCCs) made during the taxable year; deductions are generally assessed at the fair market value of the property at the time of the contribution and are capped based on a percentage of the contributor's income.<sup>127</sup> Public Law 110-234 extended until December 2009 the percentage limitations put in place by Public Law 109-280, allowing individuals who make a QCC to deduct the contribution amount up to 50% of their adjusted gross income.<sup>128</sup> If the contribution amount exceeds 50% of their income, the individual may report the contribution and carryover the deduction for up to 15 subsequent years.<sup>129</sup> Qualified individuals who donate property used in agriculture or livestock production may be able to deduct contributions up to 100% of their adjusted gross income.<sup>130</sup>

**Eligibility criteria:** A private landowner may be eligible to claim a federal tax deduction for a charitable contribution if the contribution is (1) a qualified real property interest, (2) given to a qualified

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<sup>127</sup> 26 C.F.R. § 1.170A-14(h). See Guidance Regarding Deductions by Individuals for Qualified Conservation Contributions, 2007-25 I.R.B, Notice 2007-50 at 1430, June 18, 2007.

<sup>128</sup> Food Conservation and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 (2008).

<sup>129</sup> *Id.* If the benefits are not extended beyond December 2009, then donations made in 2010 and beyond will only be deductible up to 30% of the individual's adjusted gross income and, if more, may be deducted over 6 years rather than 15. See Tax Considerations in Selling or Donating Your Easement at 2, Maryland Agricultural Land Preservation Program, <http://www.malpf.info/facts/fact15.pdf>.

<sup>130</sup> 26 U.S.C. § 170(b)(1)(E)(iv)

organization, and (3) designated perpetually for exclusively conservation purposes.<sup>131</sup>

A “qualified real property interest” may be a remainder interest, a perpetual conservation restriction, or the entirety of the donor’s interest other than any qualified mineral interest.<sup>132</sup> A perpetual conservation restriction is granted in perpetuity and may include easements or other interests that are similar to easements under state law.<sup>133</sup> A contribution of property interest must be the entire interest; one which was divided prior to the contribution “in order to enable the donor to retain control of more than a qualified mineral interest or to reduce the real property interest donated” is not considered an entire interest.<sup>134</sup>

A “qualified organization” is generally an organization that is a governmental unit, an organization that receives a substantial part of its funding from a governmental unit, or a charitable 501(c)(3) organization.<sup>135</sup> The organization must be committed to the conservation purposes of the donation and must have resources necessary to enforce any restrictions, but it does not need to set aside funds for enforcement.<sup>136</sup> The instrument of conveyance must prohibit the organization from transferring the interest unless the original conservation purposes are required to be carried out by the subsequent owner.<sup>137</sup>

An adequate “conservation purpose” may be one of four: (1) preservation of land for outdoor recreation or education of the general public; (2) protection of “relatively natural” habitat of fish, wildlife, or plants; (3) preservation of open space; or (4) preservation of historic

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<sup>131</sup> 26 C.F.R. § 1.170A-14(a)

<sup>132</sup> 26 U.S.C. § 170(h)(2)

<sup>133</sup> 26 C.F.R. § 1.170A-14(a)(2)

<sup>134</sup> 26 C.F.R. § 1.170A-14(a)(1)

<sup>135</sup> The organizations are subject to certain limitations. For instance, 501(c)(3) organizations must meet the public support test of section 509(a)(2) and/or the requirements of 509(a)(3). 26 C.F.R. § 1.170A-14(c)(1). An organization meeting the public support test of section 509(a)(2) would normally receive their support from admission or service fees and not much support from gifts and/or grants. See 26 U.S.C. § 509(a)(2); see also Private Foundations Defined IRC 409(a)(2) Exclusion, IRS, [http://www.irs.gov/irm/part7/irm\\_07-026-004.html#d0e47](http://www.irs.gov/irm/part7/irm_07-026-004.html#d0e47). An organization meeting the requirements of 509(a)(3) would be one organized, operated, or controlled by or in connection with another qualified organization. See 26 U.S.C. § 509(a)(3).

<sup>136</sup> *Id.*

<sup>137</sup> 26 C.F.R. § 1.170A-14(c)(2)

land or structures.<sup>138</sup> Each of these purposes has limitations, and for each of them, the IRS requires some level of public accessibility before approving a deduction.<sup>139</sup>

**Priority criteria:** The bulk of the QCC regulations focus on determining whether a donation has an adequate conservation purpose. Donations of property interest for the purpose of recreation and education (purpose 1, above), so long as the areas are accessible for “substantial and regular use of the general public,” will qualify as donations with an acceptable conservation purpose.<sup>140</sup>

Donations with the purpose of protecting an environmental system (purpose 2, above) will likely meet the conservation purposes test if the area is a “significant relatively natural habitat” where fish, wildlife, or plants usually live; a donation may qualify for a deduction even when the habitat has been modified by human activity if the wildlife there is existing in a relatively natural state.<sup>141</sup> Priority will be given to areas with rare, endangered, or threatened species; areas that constitute “high quality examples” of certain types of natural ecosystems; and natural areas within, or contributing to, existing conservation areas.<sup>142</sup> Public access is always preferred, but limitations will not make the donation non-deductible, particularly in situations involving threatened species.<sup>143</sup>

Donations intended to preserve open space (purpose 3, above) will meet the conservation purposes test if the preservation yields a “significant public benefit” and is either pursuant to a government conservation policy or for the “scenic enjoyment” of the general public.<sup>144</sup> Donations made pursuant to a government conservation policy will be deductible if that policy is “clearly delineated.”<sup>145</sup> The donation should be made to further a “specific, identified conservation project;” a legislative body’s general statement recognizing the value of conservation is not sufficient.<sup>146</sup> Acceptance by a government or agency that reviews conservation gifts prior to acceptance will generally establish the requisite “clearly delineated” policy.<sup>147</sup> Public

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<sup>138</sup> 26 C.F.R. § 1.170A-14(d)

<sup>139</sup> *Id.*

<sup>140</sup> 26 C.F.R. § 1.170A-14(d)(3)(i)

<sup>141</sup> *Id.*

<sup>142</sup> 26 C.F.R. § 1.170A-14(d)(3)(ii)

<sup>143</sup> 26 C.F.R. § 1.170A-14(d)(3)(iii)

<sup>144</sup> 26 C.F.R. § 1.170A-14(d)(4)

<sup>145</sup> 26 C.F.R. § 1.170A-14(d)(4)(iii)

<sup>146</sup> *Id.*

<sup>147</sup> 26 C.F.R. § 1.170A-14(d)(4)(iii)(B)

access is required to the extent necessary to maintain the conservation purpose and is never required if access would interfere with the conservation purpose.<sup>148</sup>

Donations made for the scenic enjoyment of the general public are mainly concerned with visual factors and apply if development of the property would impair the "scenic character" or the "scenic panorama."<sup>149</sup> The IRS will consider a number of subjective factors, including the openness of the land and the compatibility of the land with adjoining land, in determining whether the property satisfies the scenic enjoyment requirement.<sup>150</sup> Public access for scenic enjoyment may be visual rather than physical.<sup>151</sup>

Both scenic enjoyment donations and donations pursuant to a government policy must create a significant public benefit, a requirement that is evaluated by the IRS using a wide range of factors "germane to the contribution," such as the uniqueness of the property or the opportunity for the public to use it.<sup>152</sup> If an easement donation allows for future development or intrusion that would interfere with the "essential scenic quality" or the government conservation policy, the donation will not be deductible.<sup>153</sup>

Donations of farmland fall under the umbrella of open space preservation in the IRS regulations and would need to satisfy the same requirements as non-farmland donated for the purpose of preserving open space.<sup>154</sup> If the donor is a qualified farmer or rancher and conveys the property interest subject to a restriction that the property will remain available for agricultural or livestock production uses, the donor will likely be able to deduct the contribution up to 100% of his/her adjusted gross income.<sup>155</sup>

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<sup>148</sup> 26 C.F.R. § 1.170A-14(d)(4)(iii)(C)

<sup>149</sup> 26 C.F.R. § 1.170A-14(d)(4)(ii)(A)

<sup>150</sup> *Id.*

<sup>151</sup> 26 C.F.R. § 1.170A-14(d)(4)(ii)(B)

<sup>152</sup> 26 C.F.R. § 1.170A-14(d)(4)(iv)(A). The government policy and significant public benefit requirements may be related in that one would tend to prove the other, particularly in situations where the government policy is very specific. However, the scenic enjoyment and significant public benefit requirements must be independently established. 26 C.F.R. § 1.170A-14(d)(4)(vi).

<sup>153</sup> 26 C.F.R. § 1.170A-14(d)(4)(v)

<sup>154</sup> 26 C.F.R. § 1.170A-14(d)(4)(i)

<sup>155</sup> A qualified farmer or rancher is one whose gross income from farming is greater than 50% of his/her income. 26 U.S.C. § 170(v). Farming is generally cultivating the soil; raising or harvesting agricultural or horticultural commodities on a farm; handling, packing, etc. agricultural or horticultural commodities in its unmanufactured state if the individual regularly produces over 50% of the

Deductible donations made for the purpose of historic preservation (purpose 4, above) may be intended to preserve either an “historically important land area” or a “certified historic structure.”<sup>156</sup> The donated land must be within a registered historic district, adjacent to a property listed in the National Register of Historic Places and contributing to the integrity of that property, or independently significant and meeting the National Register Criteria for Evaluation.<sup>157</sup> Visual access to the property is required; if visual access is not possible from a roadway or trail, the public must be given the opportunity to view the property on a regular basis.<sup>158</sup>

**Spatial or geographic targeting:** So long as the conservation purposes test is met, there is no special geographic targeting, although often such targeting will be needed in order to meet the acceptance requirements or historical designation.

**Implications for Chesapeake:** Individuals with land adjacent to or affecting the John Smith Chesapeake Water Trail, and other trails and conservation systems in the Bay watershed could probably meet the conservation purpose test in a number of ways. They might be able to satisfy the test for open space preservation by making a property interest donation pursuant to a strategy developed and adopted per the President’s May 12 Executive Order.<sup>159</sup> The Order calls for “renewed commitment to protecting and restoring habitat and living resources, conserving lands, and improving management of natural resources.”<sup>160</sup> Section 701 of the Order calls for expanded public access to the Chesapeake Bay and conservation of Bay landscapes and ecosystems.<sup>161</sup> The Order could constitute a clearly delineated government conservation policy under IRS Regulations, and the specificity of the Order would suggest a presumptive significant public

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commodity; or the planting, cultivating (including preparing for market) of trees. 26 U.S.C. § 2932A(e)(5). IRS Regulations include an example involving donation of an easement on a farm adjacent to a tall grass prairie ecosystem. The easement prevents future development but allows “normal agricultural uses.” The donation is deductible. Example 1, 26 C.F.R. § 1.170A-14(f).

<sup>156</sup> 26 C.F.R. § 1.170A-14(d)(5)

<sup>157</sup> 26 C.F.R. § 1.170A-14(d)(5)(ii). See National Register for Historic Places, Criteria for Evaluation, 36 C.F.R. § 60.4.

<sup>158</sup> 26 C.F.R. § 1.170A-14(d)(5)(iv)

<sup>159</sup> Exec. Order No. 13508 (May 12, 2009).

<sup>160</sup> *Id.*, Part 1.

<sup>161</sup> *Id.*, Sec. 701.

benefit.<sup>162</sup> Lands and property interests donated along the Chesapeake Bay would also be likely to meet the conservation purpose test under preservation for the purpose of public recreation or education and for the purpose of protecting an environmental system. However, the Executive Order so clearly lays out a government policy towards land conservation along the Chesapeake that deduction for donations pursuant to a strategy specifically implementing that Order would likely be approved.

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<sup>162</sup> See 26 C.F.R. § 1.170A-14(d)(4)(iii) ("This requirement will be met by donations that further a specific, identified conservation project, such as...the preservation of a wild or scenic river."); § 1.170A-14(d)(4)(iii) ("The specificity of the legislative mandate to protect the X River...would by itself tend to establish the significant public benefit associated with an open space easement on land fronting the X River."); 26 C.F.R. § 1.170A-14(d)(4)(ii)(A)

## Wild and Scenic Rivers (W&SR)

**Type of Program:** acquisition (federal)

**Administered by:** National Park Service, Bureau of Land Management, U.S. Fish and Wildlife Service, U.S. Forest Service (primary agencies)

**Citations:** 16 U.S.C. §§ 1271-1287; other relevant program documents: <http://www.rivers.gov/publications.html>

**Program purposes**<sup>163</sup>: The purpose of W&SR is to ensure that “certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.” To this end, W&SR will “preserve... selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes.”

**Program description:** The Secretary of the Interior (and the Secretary of Agriculture) may acquire lands and interests in lands pursuant to W&SR.<sup>164</sup> However, the Secretary should not acquire fee title to an average of more than 100 acres per mile on both sides of the river. If a tract of land lies partially inside and outside the boundaries of a component of W&SR, the Secretary is authorized to acquire the land, without counting against the 100 acre limit.<sup>165</sup> Lands owned by a State may be acquired only by donation or by exchange for Federally-owned land in the same state as the land being exchanged. The values of the properties exchanged either shall be approximately equal or shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require. Money appropriated for the Federal-side Land and Water Conservation Fund program may be used for acquisition of property under W&SR.<sup>166</sup>

For inclusion in the W&SR Program, rivers must be<sup>167</sup>: (1) authorized for inclusion by Act of Congress, or (2) be designated as wild, scenic,

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<sup>163</sup> 16 U.S.C. § 1271.

<sup>164</sup> 16 U.S.C. § 1275(a) and (d).

<sup>165</sup> 16 U.S.C. § 1277(a)(2).

<sup>166</sup> 16 U.S.C. § 1277(a)(1).

<sup>167</sup> 16 U.S.C. § 1273.

or recreational by pursuant to an Act by the State(s') legislature(s) through which the river runs; permanently administered as a wild, scenic or recreational river by the state(s) or sub-agency/division; and approved by the Secretary of the Interior, upon application by the State(s') Governor(s).

The Secretary (or the Secretary of Agriculture if dealing with national forest lands, or both Secretaries) must study and submit reports to the President on the suitability or non-suitability of potential additions that Congress has proposed for W&SR.<sup>168</sup> If a potential project is authorized by an Act of Congress, it is protected from FERC construction and from any department/agency construction of water resources projects that would have a direct and adverse effect on the values of the proposed river for up to three fiscal years while the Secretary conducts the study (unless the Congressional Act stipulates a longer period for study).<sup>169</sup> Before submitting to the President, the Secretary (or Secretaries) must also submit copies of the report for comment to the Secretary of the Army, Secretary of Energy, the head of any other affected Federal department/agency, and unless the proposed lands are already owned by the U.S. or authorized for acquisition, the Governor of the State or States in which they are located.

After approving a W&SR application, the Secretary will notify the Federal Energy Regulatory Commission (FERC) and publish the application in the Federal Register.<sup>170</sup> After designation, the states must administer the rivers without federal expense other than administration and management of federally owned lands. However, the federal agency charged with administration of a designated W&SR site may enter in to an agreement with a state to administer the project.<sup>171</sup> Furthermore, the Secretary of the Interior, the Secretary of Agriculture, and other federal agencies shall cooperate with States, landowners, and individuals in managing river resources in the W&SR program.<sup>172</sup> Money made available to states under the Land and Water Conservation Fund does not constitute expenses to the U.S.

If designated, a W&SR river is protected from FERC construction and from any department/agency construction of water resources projects that would have a direct and adverse effect on the values of the

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<sup>168</sup> 16 U.S.C. § 1275(a).

<sup>169</sup> 16 U.S.C. § 1278(b)(i).

<sup>170</sup> 16 U.S.C. § 1275(b)-(c).

<sup>171</sup> 16 U.S.C. § 1281(e).

<sup>172</sup> 16 U.S.C. § 1282(b)(1).

designated river. However, agencies may recommend authorization of projects subject to certain procedural requirements.<sup>173</sup> Administration of a W&SR river should protect the river's values without limiting other uses that do not substantially interfere with public use.<sup>174</sup>

**Eligibility criteria:** Rivers eligible for W&SR inclusion must be a free-flowing stream and the related adjacent land area must possess one or more of the following: scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values. Boundaries of any proposed river should generally comprise the area within ¼ mile from the ordinary high water mark on each side of the river. However, study reports are not necessarily limited to this scope.<sup>175</sup> A river designated in W&SR must fit one of the following categories<sup>176</sup>:

(1) Wild river areas – rivers or sections that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America.

(2) Scenic river areas – rivers or sections that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.

(3) Recreational river areas – rivers or sections that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.

Potential wild, scenic, and recreational river areas may be eligible for the Land and Water Conservation Fund program (LWCF). The Secretary of the Interior is authorized and encouraged to assist States in formulating and in providing financial assistance for comprehensive statewide outdoor recreation plans and proposals (SCORP) pursuant to LWCF.<sup>177</sup>

**Priority criteria:** When the Secretary of the Interior or Secretary of Agriculture assesses the suitability or non-suitability of a potential addition to W&SR, priority will be given to rivers (1) where the greatest likelihood of developments which, if undertaken, would render

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<sup>173</sup> 16 U.S.C. § 1278(a).

<sup>174</sup> 16 U.S.C. § 1281(a).

<sup>175</sup> 16 U.S.C. § 1273(d).

<sup>176</sup> 16 U.S.C. § 1273(b).

<sup>177</sup> 16 U.S.C. § 1282(a).

the rivers unsuitable for inclusion in W&SR; and (2) which possess the greatest proportion of private lands within their areas. Study plans should be coordinated with any water resources planning involving the same river which is being conducted pursuant to the Water Resources Planning Act.

The study of any potential rivers shall be pursued in as close cooperation with appropriate agencies of the affected State as possible, shall be carried on jointly with the agencies if requested by the State, and shall include a determination of the degree to which the State might participate in the preservation and administration of the project.<sup>178</sup> The report that the Secretary will submit to the president will include maps and illustrations, showing among other things the area included within the report; the characteristics which do or do not make the area a worthy addition to the system; the current status of land ownership and use in the area; the reasonably foreseeable potential uses of the land and water which would be enhanced, foreclosed, or curtailed if the area were included in the W&SR; the Federal agency that would administer the river; the extent to that administration and costs be shared by State and local agencies; and the estimated cost to the U.S. of acquiring necessary lands and interests in land and of administering the area.<sup>179</sup>

**Spatial or geographic targeting:** In acquiring property for W&SR, the Secretary should not acquire fee title to an average of more than 100 acres per mile on both sides of the river. If a tract of land lies partially inside and outside the boundaries of a component of W&SR, the Secretary is authorized to acquire the land, without counting against the 100 acre limit.<sup>180</sup>

**Funding levels**<sup>181</sup>: NPS earmarked funding support for W&SR in FY08 was \$1,476,000. Funds were not requested to be continued in the FY09 budget and available funds were reduced to \$844,000.

**Implications for Chesapeake:** The Nationwide Rivers Inventory<sup>182</sup> (NRI) is a listing of free-flowing river segments that are believed to possess one or more "outstandingly remarkable" natural or cultural values judged to be of more than local or regional significance. All

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<sup>178</sup> 16 U.S.C. § 1276(c).

<sup>179</sup> 16 U.S.C. § 1275(a).

<sup>180</sup> 16 U.S.C. § 1277(a)(2).

<sup>181</sup> [http://data2.itc.nps.gov/budgetweb/downloads/fy\\_2009\\_greenbook.pdf](http://data2.itc.nps.gov/budgetweb/downloads/fy_2009_greenbook.pdf), pg. 55 and 65.

<sup>182</sup> <http://www.nps.gov/ncrc/programs/rtca/nri/>

federal agencies must seek to avoid or mitigate actions that would adversely affect one or more NRI segments. River segments are organized by state with a description of its “outstandingly remarkable” natural or cultural values. Rivers feeding into the Chesapeake Bay are noted as such. The NRI list provides an excellent starting point and opportunity for potential W&SR designations.

Because W&SR allows for administration by a range of agencies, opportunities for different levels of protection/conservation exist if administered by a particular agency. For example, any portion of a W&SR river within the national wilderness preservation system is subject to both the Wilderness Act and the W&SR Act.<sup>183</sup> Any portion of a river administered by the Secretary of the Interior through the National Park Service becomes part of the national park system and any portion administered by the Secretary through the Fish and Wildlife Service becomes a part of the national wildlife refuge system. In case of conflict the more restrictive Act applies.

Regarding public access, hunting and fishing are allowed in W&SR sites under applicable Federal and state law, unless, in the case of hunting, those lands or waters are within a national park or monument. The Secretary has authority to limit these activities under certain conditions.<sup>184</sup>

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<sup>183</sup> 16 U.S.C. § 1281(b).

<sup>184</sup> 16 U.S.C. § 1284(a).

## Defense Department Facilities Buffers Programs

**Type of Program:** Planning and land acquisition

**Administered by:** the armed services within the Department of Defense (DoD).

**Citations:** 10 USC § 2684a. Readiness and Environmental Protection Initiative (REPI); Army Compatible Use Buffer (ACUB); Joint Land Use Study program (JLUS).<sup>185</sup>

**Purpose of Program:** To limit development or use of property adjacent to a military installation “that would be incompatible with the mission of the installation” or to preserve habitat on the adjacent property in a manner that “is compatible with environmental requirements; and may eliminate or relieve current or anticipated environmental restrictions that would or might otherwise restrict, impede, or otherwise interfere, [with]...operations on the installation.”<sup>186</sup>

**Description of Program:** “Congress, in the National Defense Authorization Act for FY 2003, authorized the DoD to enter into agreements with “private conservation organizations or state and local governments to cost-share acquisition of land or interests in land to preserve valuable habitat and limit incompatible land use.” “In FY 2006, the scope of the geographic applicability of the buffer authority was expanded from the original ‘in the vicinity of a military installation’ to ‘in the vicinity of, or ecologically related to, a military installation or military airspace.’ These changes allowed the DoD to work to protect land and habitat of interest even if it is many miles distant from the ‘fence line’ of any military base.”<sup>187</sup>

**Eligibility Criteria:** Facility may enter into agreement with either a State or political subdivision or a private entity that has as its stated principal goal “the conservation, restoration, or preservation of land

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<sup>185</sup> REPI is the land acquisition and agreement authority. ACUB was a predecessor program by the Army that provided the model for REPI. JLUS allows DoD facilities to enter into joint planning with adjacent local governments for land use and development in the vicinity of defense installations.

<sup>186</sup> 10 USC § 2684a(a).

<sup>187</sup> Benton, N., J.D. Ripley, and F. Powledge, eds. *Conserving Biodiversity on Military Lands: A Guide for Natural Resources Managers*. 2008. NatureServe.

<http://www.dodbiodiversity.org>.

and natural resources, or a similar purpose or goal, as determined by the Secretary concerned." The agreement addresses the use or development of real property in the vicinity of, or ecologically related to, a military installation or military airspace. The agreement provides for acquisition from willing sellers "by the entity or entities of all right, title, and interest in and to any real property, or any lesser interest in the property, as may be appropriate for purposes of this section; and the sharing by the United States of the acquisition costs." The cost-share amount is determined by the service involved. Also the U.S. may convey real property in lieu of or in addition to cost-sharing an acquisition. The non-DoD contribution may include federal funds, state funds, in-kind contributions, or other sources.

The agreement must require the participating state or local government or conservation organization "to transfer to the United States, upon the request of the Secretary concerned, all or a portion of the property or interest acquired under the agreement or a lesser interest therein. The Secretary shall limit such transfer request to the minimum property or interests necessary to ensure that the property concerned is developed and used in a manner appropriate for purposes of this section."<sup>188</sup>

**Spatial or geographic targeting:** Funds may be expended for lands near bases with encroachments or where encroachments would impair operations. The conserved buffer lands need not be contiguous to the base or to the other buffer lands.

**Funding.** "In FY 2005, Congress appropriated \$12.5 million to the Deputy Under Secretary of Defense (Installations & Environment) to allocate funds to military service conservation buffer projects at seven DoD installations. In FY 2006, Congress appropriated \$37 million, which was applied towards projects at 22 installations...The FY 2007 appropriation bill provided \$30.1 million for the REPI Program. Of those funds, the DoD provided the Army with \$16.4 million for 17 individual projects. The Navy received \$5.4 million for three separate projects. The Marine Corps received \$6.7 million for three projects while the Air Force received \$2.2 million for three projects."<sup>189</sup>

**Implications for Chesapeake:** These DoD programs provide capacity to work together with other public and private conservation

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<sup>188</sup> 10 USC § 2684a(d)-(f).

<sup>189</sup> Benton, N., J.D. Ripley, and F. Powledge, eds. *Conserving Biodiversity on Military Lands: A Guide for Natural Resources Managers*. 2008. NatureServe. <http://www.dodbiodiversity.org>. Chapter Three.

initiatives and funders. Fort A.P. Hill, one of the largest government land holdings in the Chesapeake Bay watershed at 76,000 acres, has had an active buffer conservation program since 2005, protecting 4200 acres outside the Caroline County, Virginia, base with conservation easements. "Working together over the next 8-10 years, the U.S. Army, the Conservancy, the Trust for Public Land, The Conservation Fund, the U.S. Fish and Wildlife Service and the Virginia Outdoors Foundation are seeking to protect more than 35,000 acres in the vicinity of Fort A.P. Hill, thereby securing both the military's ability to train and key natural habitats and ecological systems."<sup>190</sup> There are numerous military installations within the Chesapeake watershed.

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<sup>190</sup> <http://www.nature.org/partners/commonground/partnership/fortaphill.html>

## Clean Water Act § 404 Compensatory Mitigation

**Type of Program:** restoring, creating, enhancing, or preserving wetlands and aquatic resources to offset permitted wetland losses

**Administered by:** U.S. Army Corps of Engineers ("Corps") and Environmental Protection Agency

**Citations:** 33 U.S.C. § 1344 (statute); 73 Fed. Reg. 19594 (April 10, 2008), codified at 33 CFR Part 332, and 40 CFR Part 230, Subpart J (Compensatory Mitigation Rule)

**Program purposes:** "The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by [§404] permits."<sup>191</sup> The purpose of the rule "is to establish standards and criteria for the use of all types of compensatory mitigation, including onsite and off-site permittee- responsible mitigation, mitigation banks, and in-lieu fee mitigation to offset unavoidable impacts to waters of the United States authorized through the issuance of permits by the U.S. Army Corps of Engineers (Corps) pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344)."<sup>192</sup>

**Program description:** The Federal Clean Water Act Section 404 Program regulates dredge and fill activities in the waters of the United States.<sup>193</sup> Congress assigned authority for issuing permits to the Corps, but assigned EPA responsibility for developing the environmental criteria (the §404(b)(1) Guidelines). In 1980, the §404(b)(1) Guidelines were adopted as regulations. A subsequent memorandum of agreement set out the sequence for mitigation when considering permit issuance: (1) avoidance of impacts, (2) minimization of remaining impacts, and (3) compensation for impacts that cannot be either avoided or minimized.<sup>194</sup> This third step is called "compensatory mitigation." In 2008, the Corps and EPA adopted new compensatory mitigation regulations. The Compensatory Mitigation Rule preserves the mitigation sequence. The Rule confirms that compensatory mitigation may be achieved through the restoration, enhancement, establishment, and "in certain circumstances"

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<sup>191</sup> 33 CFR 332.3, 40 CFR 230.93

<sup>192</sup> 33 CFR 332.1, 40 CFR 230.91

<sup>193</sup> 33 U.S.C. § 1344

<sup>194</sup> Memorandum of Agreement Between the Environmental Protection Agency and the Department of Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines," Feb. 6, 1990.

preservation of similar aquatic resources. It specifies, however, that restoration should generally be the first option considered<sup>195</sup> and that preservation may only be used when five specific criteria are met.<sup>196</sup>

The Rule creates higher standards for measuring compensatory mitigation performance against ecological performance standards and requires mitigation site selection to be carried out using a “watershed approach.” The watershed approach states that the Corps must undertake an assessment of information on the “cumulative impacts of past development activities...”<sup>197</sup> when making decisions about siting compensation projects. The Rule also includes requirements for financial assurances, permanent protection, and other measures intended to ensure the long-term conservation and management of compensatory mitigation sites.

The Compensatory Mitigation Rule establishes a “preference hierarchy” for selecting compensation options that favors off-site mitigation banks and in-lieu fee programs that are designed using a watershed approach, over on-site compensation. Mitigation bank means “a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor.” In-lieu fee program means compensatory mitigation satisfied through funds paid by the permittee “to a governmental or non-profit

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<sup>195</sup> 33 CFR 332.3(a)(2), 40 CFR 230.93(a)(2).

<sup>196</sup> 33 CFR 332.3(h), 40 CFR 230.93(h): “(1) Preservation may be used to provide compensatory mitigation when *all* the following criteria are met: (i) The resources to be preserved provide important physical, chemical, or biological functions for the watershed; (ii) The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability of the watershed, the district engineer must use appropriate quantitative assessment tools, where available; (iii) Preservation is determined by the district engineer to be appropriate and practicable; (iv) The resources are under threat of destruction or adverse modifications; and (v) The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust). (2) Where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. This requirement may be waived by the district engineer where preservation has been identified as a high priority using a watershed approach described in paragraph (c) of this section, but compensation ratios shall be higher.”

<sup>197</sup> 33 CFR §332.3(c)(3)(i), 40 CFR 230.92(c)(3)(i).

natural resources management entity to satisfy compensatory mitigation requirements...Similar to a mitigation bank, an in-lieu fee program sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu program sponsor."<sup>198</sup>

Typically compensatory mitigation credits must be provided at greater than 1:1 ratio to offset permitted losses of aquatic resources. Credits for compensatory mitigation projects on "public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place"<sup>199</sup>

**Eligibility Criteria:** The watershed approach is an "analytical process" for making compensatory mitigation decisions that involves consideration of watershed needs and relies upon a landscape perspective.<sup>200</sup> If an existing, "appropriate" watershed plan is available, it should be used to guide compensatory mitigation decision-making. If such a plan is not available, as will be the case in the vast majority of instances, the watershed approach should be used to determine siting and decisionmaking for use of compensatory mitigation. A watershed approach to compensatory mitigation considers the importance of landscape position and resource type of compensatory mitigation projects for the sustainability of aquatic resource functions within the watershed. It must consider how the types and locations of compensatory mitigation projects will provide the desired aquatic resource functions, and will continue to function over time in a changing landscape. It also considers the habitat requirements of important species, habitat loss or conversion trends, sources of watershed impairment, and current development trends, as well as the requirements of other regulatory and non-regulatory programs that affect the watershed, such as storm water management or habitat conservation programs. It includes the protection and maintenance of terrestrial resources, such as non-wetland riparian areas and uplands, when those resources contribute to or improve the overall ecological functioning of aquatic resources in the watershed. Mitigation decisions should be made in the context of a watershed plan, if one is available, and if one is not, should consider, among other things, "habitat requirements of important species" and "habitat loss or conversion trends."<sup>201</sup> In addition, the rule states that the

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<sup>198</sup> 33 CFR 332.2, 40 CFR 230.92.

<sup>199</sup> 33 CFR 332.3(a)(3), 40 CFR 230.93(a)(3).

<sup>200</sup> 33 CFR §332.2, 40 CFR 230.92.

<sup>201</sup> 33 CFR §332.3(c)(2), 40 CFR 230.93(c)(2)..

watershed approach should consider “the requirements of other regulatory and non-regulatory programs that affect the watershed, such as...habitat conservation programs.”<sup>202</sup>

**Priority criteria:** Compensatory mitigation sites must be located within the same watershed as the impact site, and where they can most successfully replace lost functions and services. Siting decisions should take into account watershed scale features such as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources, land use trends, ecological benefits, and compatibility with adjacent land uses.<sup>203</sup> The approach also acknowledges that the compensatory mitigation program does not focus solely on specific functions of wetlands, such as water quality or habitat for certain species, but rather, “should provide, where practicable, the suite of functions typically provided by the affected aquatic resource.”<sup>204</sup> In other words, the program is meant to take into consideration the full range of ecosystem services provided by wetlands.

The Rule also describes the *type of information* that should be utilized in watershed-based decision-making and suggests that this information may be contained in existing plans. The list of items that should be consulted includes “current trends in habitat loss or conversion; cumulative impacts of past development activities, current development trends, the presence and needs of sensitive species site conditions that favor or hinder the success of compensatory mitigation projects; and chronic environmental problems such as flooding or poor water quality.”<sup>205</sup>

The watershed approach to compensatory mitigation decision-making contemplates the selection of sites that contribute to maintaining habitat diversity, connectivity, and the appropriate proportions of habitat types needed to enhance the long-term stability of watersheds.

**Spatial or geographic targeting:** Mitigation should occur within the same watershed as the permitted impact. Watershed may be defined in various ways, but is best defined in terms of a watershed plan, where one is available.

**Implications for Chesapeake:** Compensatory mitigation can play a role in protection of landscapes important to the Chesapeake Bay, but

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<sup>202</sup> Id.

<sup>203</sup> 33 CFR § 332.3(b), 40 CFR § 230.93(b).

<sup>204</sup> 33 CFR §332.3(c)(2), 40 CFR 230.93(c)(2).

<sup>205</sup> 33 CFR §332.3(c)(3), 40 CFR 230.93(c)(3)

is more likely to do so when public or private mitigation banks and public or nonprofit in-lieu sites are located in areas where they meet Bay goals and, in the context of watershed plans, also meet the needs to offset permitted losses in the same watershed.

## Conservation Reserve Enhancement Program (CREP)

**Type of Program:** Rental payments for conservation, financial incentives; cost-share agreements.

**Administered by:** USDA Farm Service Agency (FSA) in cooperation with the States.

**Citations:** 16 U.S.C. § 3834(f)(4); 63 Fed. Reg. 28,965; 7 C.F.R. pt. 1410.50(b).

**Program purposes**<sup>206</sup>: CREP is an opportunity for Federal and State governments to join resources and address critical environmental issues like soil erosion, water quality degradation, and wildlife habitat loss associated with agricultural activities.

**Program description:** CREP is a voluntary land retirement program that helps agricultural producers protect environmentally sensitive land, decrease erosion, restore wildlife habitat, and safeguard ground and surface water. CREP is a partnership among producers; tribal, state, and federal governments; and private groups. CREP is an offshoot the Conservation Reserve Program (CRP).<sup>207</sup>

CREP projects are joint undertakings between States and the Federal government using CRP contracts and payments to encourage enrollments and practices that may address particularly pressing environmental needs. In order for a State's proposal to be considered for CREP, it should directly relate to mitigation of adverse agriculture-related environmental impacts and should document why program objectives cannot be met through other existing programs.<sup>208</sup>

CREP contracts require a 10- to 15-year commitment to keep lands out of agricultural production. CREP provides payments to participants who offer eligible land. A federal annual rental rate and cost-share of up to 50% are offered for eligible projects. The program generally offers a sign-up incentive for participants to install specific practices. FSA uses CRP funding to pay a portion of the program's cost, while state, tribal governments or other non-federal sources provide the rest.<sup>209</sup>

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<sup>206</sup> 63 Fed. Reg. 28,965.

<sup>207</sup> <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=lown&topic=cep>.

<sup>208</sup> 63 Fed. Reg. 28,965.

<sup>209</sup> <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=lown&topic=cep>.

**Eligibility criteria:** Land must be owned or leased for at least one year prior to enrollment to be eligible, and must be physically and legally capable of being cropped in a normal manner. To ensure proper Federal/State cooperation, each proposal should specify the level of non-federal funding needed to fulfill proposal objectives. Non-federal funding should comprise at least 20% of the overall project costs. Examples of non-federal funding may include contract extensions or easements, cost-share assistance for conservation practices, and program monitoring costs.

A CREP proposal should include<sup>210</sup>: (1) an abstract; (2) a discussion of existing conditions; (3) an analysis of agriculture-related adverse impacts; (4) project objectives; (5) project description; (6) proposals for the monitoring program; (7) a discussion of public support and ongoing public information that will accompany the project; (8) an analysis of the cost-effectiveness of the project; and (9) any additional documentation to ensure compliance with any other laws, including environmental laws. For more details regarding these 9 CREP proposal elements, see 63 Fed. Reg. 28,966.

**Priority criteria:** Successful CREP agreements are the result of State governments, in preparing CREP proposals, working closely with all interested local parties including farm, commodity, conservation, environmental, and landowner groups.<sup>211</sup>

#### Requirements for Maryland CREP<sup>212</sup>

Agricultural land (crop land or pasture) adjacent to perennial or intermittent waterways, certain highly erodible lands within 1,000 feet of a waterway, and prior converted wetlands generally qualify for the program. Participants can also enter the CREP program in conjunction with Rural Legacy, Maryland Agricultural and Preservation Foundation (MALPF) or donated easement programs such as Maryland Environmental Trust (MET). Maryland has enrolled 74,000 acres out of a goal of 100,000 CREP acres, since the program began. Maryland signed a new CREP agreement in April 2009 which provides for up to \$198 million in rental payments, incentive payments, and cost-shares over the next 15 years.<sup>213</sup>

#### Requirements for Virginia CREP<sup>214</sup>

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<sup>210</sup> 63 Fed. Reg. 28,965-28,966.

<sup>211</sup> 63 Fed. Reg. 28,965.

<sup>212</sup> <http://dnr.maryland.gov/wildlife/milo.asp>.

<sup>213</sup> <http://www.mda.state.mdu.us/article.php?i=17317>

<sup>214</sup> [http://www.dcr.virginia.gov/soil\\_and\\_water/crep.shtml#applying](http://www.dcr.virginia.gov/soil_and_water/crep.shtml#applying).

Virginia CREP is divided into two regions. The Chesapeake Bay CREP targets Virginia's entire bay watershed and calls for the planting of 22,000 acres of riparian buffer and filter strips as well as 3,000 acres of wetland restoration. To initiate the CREP application process, the landowner must visit the nearest Farm Service Center. If FSA determines that the land is eligible, a Natural Resources Conservation Service (NRCS) conservationist visits the site with the landowner to determine and design appropriate conservation practices. FSA measures the CREP acreage, and CREP farm conservation plans and contracts are written, approved and signed. Once the landowner finished installing best management practices (BMP) and it is certified, the landowner submits bills for cost-share to FSA. FSA and the local SWCD make the cost-share payments. For a map of approved Virginia CREP areas, see [http://www.dcr.virginia.gov/soil\\_and\\_water/crep\\_areas.shtml](http://www.dcr.virginia.gov/soil_and_water/crep_areas.shtml).

#### Requirements for Pennsylvania CREP<sup>215 216</sup>

Any cropland or marginal pasture within 180 feet of a stream is eligible for Pennsylvania CREP. Highly erodible cropland greater than 180 feet of a stream may also be eligible. In addition, buffer practices, such as contour buffer strips, grassed waterways and wetlands may be enrolled on any cropland. Specialists are available to determine if your land is eligible. A NRCS/PGC CREP Biologist will discuss conservation goals and gather land eligibility information to help FSA generate a CREP rental rate offer. After acceptance, a NRCS/PGC CREP Biologist works with the landowner to develop a site-specific conservation plan. FSA then develops a contract based on the CREP Conservation Plan. The landowner is responsible for installing CREP Conservation Practices and then seeking reimbursement. For a map of approved Pennsylvania CREP areas, see <http://www.creppa.org/region.htm>.

**Spatial or geographic targeting**<sup>217</sup>: Enrollment in a state is limited to specific geographic areas and practices.

**Funding levels:** Nationally, funding for CRP and related FSA conservation programs taken together (including CREP), has been consistent at \$1.9 billion annually.<sup>218</sup> See above for anticipated funding for CREP in Maryland

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<sup>215</sup> <http://www.pgc.state.pa.us/pgc/cwp/view.asp?a=483&q=176711>.

<sup>216</sup> <http://www.creppa.org/abc.htm>.

<sup>217</sup> <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=lown&topic=cep>.

<sup>218</sup> <http://www.obpa.usda.gov/budsum/fy09budsum.pdf>.

**Implications for Chesapeake:** CREP is one of the larger land conservation programs for private agricultural lands available in the Chesapeake watershed. It is heavily dependent on outreach to agricultural landowners.

## Conservation Stewardship Program (CSP)

**Type of Program:** conservation agreements; compensation.

**Administered by:** Department of Agriculture Natural Resources Conservation Service (NRCS); Secretary of Agriculture.

**Citations:** 16 U.S.C. 3838d *et. seq.*

**Program purposes:** CSP is a voluntary conservation program that encourages producers to undertake conservation activities and to improve, maintain, and manage existing conservation activities.<sup>219</sup> CSP replaces the Conservation Security Program from FY 2009 to 2017 but provides funding for all current Conservation Security Program contracts.

**Program description:** CSP is available on private agricultural lands in all 50 states and will enroll 12,769,000 acres for each fiscal year.<sup>220</sup> Acreage for the program will be allotted by each State's or area's eligible acreage proportional to the total number of eligible acres.<sup>221</sup> Contracts cover the entire agricultural operation for five years and are renewable for one additional five-year period upon approval from the Secretary.

CSP payments compensate producers for: installing and adopting additional conservation activities; improving, maintaining, and managing already-existing conservation activities; adopting resource-conserving crop rotations to achieve beneficial crop rotations; engaging in activities related to on-farm conservation research and demonstration activities, and pilot testing of new technologies or innovative conservation practices. Payments to any producer should be determined by costs incurred, income foregone, and expected environmental benefits, but may not exceed \$200,000 for all contracts entered into during any five-year period.<sup>222</sup> The Secretary may also provide additional payments for producers who adopt resource-conserving crop rotations to achieve beneficial crop rotations as appropriate for the producer's land. A resource-conserving crop rotation: includes at least one resource-conserving crop; reduces erosion; improves soil fertility and tilth; interrupts pest cycles; and, in

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<sup>219</sup> 16 U.S.C. § 3838e(a).

<sup>220</sup> 16 U.S.C. § 3838g(d)(1).

<sup>221</sup> 16 U.S.C. § 3838g(b)(1).

<sup>222</sup> 16 U.S.C. § 3838g(e)(2); 16 U.S.C. § 3838g(g).

applicable areas, reduces depletion of soil moisture or otherwise reduces need for irrigation.<sup>223</sup>

**Eligibility criteria:** Lands eligible for CSP include: private agricultural land (including cropland, grassland, prairie land, improved pastureland, rangeland, and land used for agro-forestry); forested land incidental to agricultural operation; and other private agricultural land (including cropped woodland, marshes, and agricultural land used for the production of livestock) on which resource concerns related to agricultural production could be addressed by CSP enrollment. 10% of total enrolled acreage may also include nonindustrial private forest land.<sup>224</sup> Lands that are not eligible for CSP include: Conservation Reserve Program lands; Wetlands Reserve Program lands; and Grasslands Reserve Program lands.<sup>225</sup>

To be eligible to participate in CSP, a producer must submit a stewardship contract/conservation stewardship plan to the Secretary of Agriculture that: demonstrates that the producer meets the stewardship threshold for at least one resource concern; and addresses at least one additional priority resource concern by the end of the conservation stewardship contract. The producer may address an additional priority resource concern by: installing and adopting additional conservation activities; and improving, maintaining, and managing already-existing conservation activities.<sup>226</sup> The State Conservationist, in consultation with the State Technical Committee and local work groups, should identify between 3 to 5 priority resource concerns in a particular watershed or appropriate region/area within a State to evaluate stewardship contracts/plans.<sup>227</sup>

**Priority or selection ranking<sup>228</sup>:** In evaluating contracts, the Secretary will rank applications based on: (a) the level of conservation treatment on all applicable priority resource concerns;(b) the degree to which the proposed conservation treatment effectively increases conservation performance; (c) the number of priority resource concerns proposed to be treated to meet or exceed the stewardship threshold by the end of the contract; (d) the extent to which other resource concerns will be addressed to meet or exceed the stewardship threshold by the end of the contract period; and (e) the

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<sup>223</sup> 16 U.S.C. § 3838g(f)(4).

<sup>224</sup> 16 U.S.C. § 3838e(b)(1); 16 U.S.C. 3838e(b)(2).

<sup>225</sup> 16 U.S.C. § 3838e(c).

<sup>226</sup> 16 U.S.C. § 3838f(a).

<sup>227</sup> 16 U.S.C. § 3838g(a)(2).

<sup>228</sup> 16 U.S.C. § 3838f(b).

extent to which environmental benefits are provided at the least cost relative to other contract offers. The Secretary is authorized to develop additional program criteria.

**Spatial or geographic targeting:** Only agricultural lands (with few exceptions) are allowed for CSP.

**Funding levels:** The estimate FY 2009 budget for CSP nationally is \$230 million. The FY 2010 budget is \$447 million.<sup>229</sup>

**Implications for Chesapeake:** As of July 13, 2009, specific information regarding CSP implementation in a number of Chesapeake states (Maryland, Virginia, Pennsylvania) was not available on their respective NRCS websites.<sup>230</sup> The agreements – five years – are substantially less than under most other conservation programs available in the Chesapeake Watershed, and certainly less than easement-based programs for private farmlands.

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<sup>229</sup> <http://www.obpa.usda.gov/budsum/FY10budsum.pdf>, pg. 72.

<sup>230</sup> <http://www.md.nrcs.usda.gov/programs/>;  
<http://www.pa.nrcs.usda.gov/programs/>; <http://www.va.nrcs.usda.gov/programs/>.

## Maryland's Conservation Lands Programs – Program Open Space, Rural Legacy, Heritage Conservation

**Type of Program:** Land and easement acquisition

**Administered by:** Maryland Department of Natural Resources

**Citations:** Md. Code Ann., Tax-Property §§ 13-201 - 209 (real estate transfer tax); Md. Code Ann., Nat. Resources §§ 5-901 et seq. (Program Open Space); Md. Code Ann. §5-9A-01 et seq. (Rural Legacy); Md. Code Ann., Nat. Resources § 5-1501 et seq. (Heritage Conservation).

**Program Purposes:** The Maryland DNR recently realigned its land planning and acquisition efforts to make more efficient use of program created under different authorities, as well as to coordinate with the state's green infrastructure program.

Program Open Space is intended to "Expedite acquisition of outdoor recreation and open space areas before escalating cost of land prevents its purchase for public use and before potential areas are devoted to some other use; and accelerate development and capital renewal of needed outdoor recreation facilities" The program is "to provide funds to the State and its subdivisions to enable them to acquire land for outdoor public recreation and open space use and develop the land for public recreation."<sup>231</sup>

The Rural Legacy Program's goal is "to protect large, contiguous tracts of Maryland's most precious cultural and natural resource lands through grants made to local applicants" in identified approved rural legacy areas.<sup>232</sup>

The Heritage Conservation Fund's goal is to protect forestlands, unique ecological areas, areas characterized by significant natural scenic beauty, tidal and nontidal wetlands, lands in the Chesapeake Bay Critical Area, land designated as a unique ecological area under the Natural Heritage Program, any wilderness area that remains relatively undisturbed by human encroachment, lands supporting rare, threatened, or endangered plants or animals or diverse ecological communities of plants or animals, any land whose conversion to development would significantly affect water quality or unique natural

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<sup>231</sup> Md. Code Ann., Nat. Resources, § 5-902(a), (b).

<sup>232</sup> <http://www.dnr.state.md.us/land/rurallegacy/allrurallegacyareas.asp>

habitat, and natural areas designated by the state or submitted by a county for designation as areas of critical state concern.<sup>233</sup>

**Program Description:** Land conservation is funded by the Maryland real estate transfer tax of 0.5 percent. Revenues go to Program Open Space, the Maryland Agricultural Lands Preservation Foundation, Rural Legacy, and the Heritage Conservation Fund. After allocation of revenues for administration and up to 3 percent for administration of Program Open Space, the funds are allocated as follows: (1) 75.15% for the purposes specified in Program Open Space; and an additional 1% for Program Open Space, for land acquisition purposes as specified in § [5-903\(a\)](#)(2) of the [Natural Resources Article](#); (2) 17.05% for the Agricultural Land Preservation Fund established under § [2-505 of the Agriculture Article](#); (3) 5% for the Rural Legacy Program established under § 5-9A-01 of the [Natural Resources Article](#); and (4) 1.8% for the Heritage Conservation Fund established under § [5-1501 of the Natural Resources Article](#).<sup>234</sup>

Program Open Space funds may be used as matching funds and to supplement federal, local, and land trust funds. Of the Program Open Space monies, up to \$3,000,000 may be transferred by the state budget to the separate Maryland Heritage Areas Authority Financing Fund for use in that program.<sup>235</sup>

**Eligibility criteria/priority criteria:** Program Open Space: "Each year the Department [of Natural Resources], in consultation with the Department of Planning, shall prepare a list of recommended State projects for funding under this program for the next fiscal year."<sup>236</sup> Local governments also prepare local land preservation and recreation plans, revised every six years, and identify proposed acquisitions each year.<sup>237</sup> A formula determines the local allocations each year.

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<sup>233</sup> Md. Code Ann., Nat. Resources, §5-1502.

<sup>234</sup> Md. Code Ann., Tax-Property, § 13-209. The agricultural lands program administered by MALPF and Maryland counties is described in a separate summary.

<sup>235</sup> Md. Code Ann., Nat. Resources, § 5-903. The Maryland Heritage Areas Authority provides matching grants to non-profit organizations and governments for capital and non-capital projects located within a Maryland Certified Heritage Area. This program is described in a separate summary.

<sup>236</sup> Md. Code Ann., Nat. Resources, § 5-904.

<sup>237</sup> Md. Code Ann., Nat. Resources, § 5-905. An additional authority for local governments to prepare local preservation plans with technical assistance from the DNR, and requests for state funding assistance for acquisition is provided by Md. Code Ann., Nat. Resources, § 5-9B-01 – 06.

There is a "Bay Access Areas Fund" with a preference to purchase sites that are "directly on the bay" or are "on a tributary and are near the bay," are near a population center, are readily accessible by the public, and would fulfill an identified need for public water access in a state or local land preservation and recreation plan.<sup>238</sup> The Bay Access Areas Fund expenditures must be approved by the Board of Public Works.

Rural Legacy: Funding occurs only within designated Rural Legacy Areas. The criteria for designating these areas are:

- 1) The significance of the agricultural, forestry, and natural resources proposed for protection, including: (i) The degree to which proposed fee or easement purchases will protect the location, proximity, and size of contiguous blocks of lands, green belts or greenways, or agricultural, forestry, or natural resource corridors; (ii) The nature, size, and importance of the land area to be protected, such as farmland, forests, wetlands, wildlife habitat and plant species, vegetative buffers, or bay or waterfront access; and (iii) The quality and public or economic value of the land;
- 2) The degree of threat to the resources and character of the area proposed for preservation, as reflected by patterns and trends of development and landscape modifications in and surrounding the proposed Rural Legacy Area;
- 3) The significance and extent of the cultural resources proposed for protection through fee simple purchases, including the importance of historic sites and significant archaeological areas;
- 4) The economic value of the resource-based industries or services proposed for protection through land conservation, such as agriculture, forestry, recreation, and tourism;
- 5) The overall quality and completeness of the Rural Legacy Plan, including: (i) The degree to which existing planning, zoning, and growth management policies contribute to land conservation and the protection of cultural resources; (ii) The degree to which the proposed plan is consistent with the applicable local comprehensive plan, including protection of sensitive areas and mineral resources; (iii) How well existing or new conservation programs are coordinated with the proposed acquisition plan; (iv) How well the plan will maximize acquisition of real property interests in contiguous blocks of land within the Rural Legacy Area while providing for protection of isolated acquisitions important to the plan; (v) Provisions for protection of resources, such as voluntarily granted or purchased easements, fee estate purchases, or gifts of lands; (vi) How the sponsor plans to manage, prioritize, and sequence easement and land acquisitions; (vii)

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<sup>238</sup> Md. Code Ann., Nat. Resources, § 5-904.

Methodology for prioritizing and valuing or appraising easements; (viii) Proposed titleholders for easement or fee estate acquisitions; and (ix) The quality of the proposed stewardship program for holding and monitoring of easement restrictions in perpetuity;<sup>239</sup>

The criteria also include consideration of “the strength and quality of partnerships created for land conservation among federal, State, and local governments and land trusts for implementing the plan....the extent to which federal or other grant programs will serve as a funding match; and a sponsor's ability to carry out the proposed Rural Legacy Plan and the goals and objectives of the Program.”<sup>240</sup>

Heritage conservation fund priority criteria consider: the “ecological uniqueness” of the land; presence of rare, threatened, or endangered plants or animals or diverse communities of plants or animals; the threat to the land by development; whether the land is in the Chesapeake Bay Critical Area; whether development of the land will adversely impact water quality or unique natural habitat; whether a natural area has been designated by the State or submitted by a county for designation as an area of critical State concern; and whether the land is forestland, nontidal wetlands, or tidal wetlands.<sup>241</sup> The DNR must consult with counties concerning suggested acquisitions. The Board of Public Works must approve acquisitions.

**Spatial or geographic targeting:** Program Open Space funds are available throughout Maryland, but must be expended in accordance with approved plans.

Rural Legacy funding is in approved rural legacy areas. “Applications are reviewed by the Rural Legacy Advisory Committee, a panel of eleven volunteers appointed by the Governor. Their recommendations are then forwarded to the Rural Legacy Board which is comprised of the Secretaries of the Departments of Natural Resources, Agriculture, and Planning. Their recommendations are, in turn, reviewed and approved by the Maryland Board of Public Works.”<sup>242</sup> Many of the designated areas are along waterways, tributaries, and greenways.<sup>243</sup>

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<sup>239</sup> Md. Code Ann., §5-9A-05(c)(1)-(5).

<sup>240</sup> Md. Code Ann., §5-9A-05(c)(6)-(8). See also

[http://www.dnr.state.md.us/land/rurallegacy/evaluation\\_criteria.asp](http://www.dnr.state.md.us/land/rurallegacy/evaluation_criteria.asp)

<sup>241</sup> Md. Code Ann., Nat. Resources, § 5-1503(b).

<sup>242</sup> <http://www.dnr.state.md.us/land/rurallegacy/allrurallegacyareas.asp>

<sup>243</sup> Maps are available at

<http://www.dnr.state.md.us/land/rurallegacy/mapoptions.asp>

Heritage conservation funding is available throughout Maryland.

**Funding:** Open space funding \$160 million in FY2008, \$70 million in 2009.<sup>244</sup>

**Implications for Chesapeake:** The Rural Legacy designation criteria, including consideration of contiguous blocks and coordination of matching funding and management, offer substantial opportunity to target funding to areas important to the Bay.

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<sup>244</sup> According to Outdoor Resources Review Group, Great Outdoors America (July 2009), p. 23.

## Maryland Agricultural Lands Preservation

**Type of Program:** Permanent easement acquisition on farm and forest land

**Administered by:** Maryland Agricultural Lands Preservation Foundation (MALPF) and counties

**Citations:** Md. Code Ann., Tax Property 13-303, 13-306 (agricultural lands transfer tax)  
Md. Code Ann., Agric. 2-501 to -518 (agricultural preservation)

**Purposes:** "to preserve agricultural land and woodland in order to: provide sources of agricultural products within the State for the citizens of the State; control the urban expansion which is consuming the agricultural land and woodland of the State; curb the spread of urban blight and deterioration; and protect agricultural land and woodland as open-space land."<sup>245</sup>

**Program Description:** The program acquires perpetual conservation easements on agricultural lands (including wooded parcels). Agricultural lands preservation is carried out by the Maryland Agricultural Land Preservation Foundation and county programs working with MALPF. It is funded in substantial part by Maryland's agricultural lands transfer tax.<sup>246</sup> The tax applies to agricultural lands that have benefited from lower annual real property taxes because they have been assessed using their agricultural use value rather than fair market value. This transfer tax is collected on lands that are sold and taken out of agricultural use. The tax rate is 5 percent for transfers of 20 or more acres (4 percent for less than 20 acres in agricultural use, 3 percent for transfers less than 20 acres assessed as improved agricultural land or agricultural land with site improvements), with an additional surcharge since July 2008 of 25 percent on the tax (viz. resulting in 6.25 percent as the typical rate). The surcharge goes directly to the state. Counties remit to the state all funds collected on woodland parcels. Counties with certified agricultural lands preservation programs remit one quarter of the balance of the revenues from transfer taxes on agricultural lands (Montgomery County 1/3), and the counties use the remaining funds for their local farmland preservation. At the state level, the first

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<sup>245</sup> Md. Code Ann., Agric. 2-501.

<sup>246</sup> See generally, Environmental Law Institute, *Maryland Farmland Conservation: Supporting Sustainable Use of Land through Tax Policy* (2008).

\$200,000 from forest lands goes to the state's Woodland Incentives Fund, a cost-share program; the next \$2.5 million to MALPF; up to \$4 million to MALPF for the Next Generation Farmland Acquisition Program; then \$4 million for installment easement purchases by MARBIDCO approved by MALPF; and finally the remaining state funds, if any, go to MALPF.<sup>247</sup> The program is further funded by the transfer tax on non-agricultural properties,<sup>248</sup> and from other sources. The program is designed to fund acquisition of easements on working agricultural lands by MALPF and by counties administering agricultural preservation programs.

**Eligibility Criteria:** The minimum property size is 50 contiguous acres of working agricultural lands. Adjacent owners can apply to aggregate 50 contiguous acres, subject to MALPF Board approval. Lands contiguous to existing preserved acreage may apply to sell an easement to the MALPF regardless of the acreage.<sup>249</sup> Applications are accepted on land that is currently being used for producing food or fiber or has the capability to do so. A key eligibility criterion is the productivity of the soil as measured by the USDA's Soil Conservation Service Land Classification System: at least 50 per cent of the land shall classify as Class I, II or III soils; or, if the land is wooded, 50 per cent of the land must be classified as Woodland Group 1 or 2 soils; or if the reason the land cannot meet the above conditions is because of floodplain or wetland soils, those areas could be excluded as a percentage of land; or, if there is an insufficient percentage of Class I, II or III soils alone and there is an insufficient percentage of Woodland Groups 1 and 2 soils alone, the land would qualify if the combination of the two exceeded 60 per cent; or, land with lower soil capabilities may qualify if the USDA determines that similar criteria can be met. Land within the boundaries of a 10-year water and sewer service area plan is generally not eligible for the program unless it has extraordinary productive capability and is of significant size.<sup>250</sup> Landowners must have a current soil conservation plan approved by the local soil conservation district and/or a forest stewardship plan demonstrating proper forest management techniques on the forested acreage. Local county programs may include additional or more stringent criteria than the state criteria.

Since 1977, agricultural preservation districts were a prerequisite for landowners to apply for sale of an easement to MALPF. Landowners

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<sup>247</sup> Md. Code Ann., Tax Property 13-306.

<sup>248</sup> Md. Code Ann., Tax-Property §§ 13-201 – 209.

<sup>249</sup> <http://www.malpf.info/facts/fact01.pdf>

<sup>250</sup> <http://www.malpf.info/facts/fact01.pdf>

agreed to a five-year restriction on development of an eligible farming property in return for the ability to offer to sell an easement MALPF. This requirement was removed effective July 1, 2007, no new districts are being created, and all districts will end in 2012. MALPF may purchase an easement on any eligible land, whether or not within an existing district. However, individual counties retain the right to require that property within the county be in a county agricultural land preservation district as a prerequisite.<sup>251</sup>

**Priority Criteria:** Counties may designate priority preservation areas in their comprehensive plans.<sup>252</sup> Each county prioritizes acquisitions using its own criteria based on state guidelines, which include “location in a priority preservation area of the county; soil and other land characteristics associated with agricultural productivity; agricultural production and contribution to the agricultural economy; and any other unique county considerations that support the goals of the program.” The state ranks purchases, again within each county based on “The relative productive capacity of the land; the extent to which the easement acquisition will contribute to the continued availability of agricultural suppliers and markets for agricultural goods; and the priority recommendations of the local governing bodies.”<sup>253</sup>

MALPF purchases are made in all 23 counties, and programs are primarily based on offers from landowners and available funding. MALPF notes that, for example, “because funding fell from \$60 million to \$25 million from FY 2008 to FY 2009” it “chose to limit the number of applications to sixteen per county.”<sup>254</sup>

The Critical Farms portion of the program is designed “to provide interim or emergency financing for the acquisition of agricultural preservation easements on critical farms that would otherwise be sold for nonagricultural uses.” The criteria include: the qualifying strategic characteristics of the property, including location and productivity; the circumstances creating the risk of the property being sold for nonagricultural purposes; characteristics of the purchaser of strategic farmland; consistency of the proposed acquisition with county goals and priorities and the county's priority preservation area; and evaluation of the property as a priority easement acquisition.”<sup>255</sup>

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<sup>251</sup> <http://www.malpf.info/facts/fact14.pdf>

<sup>252</sup> Md. Code Ann., Agric. 2-518.

<sup>253</sup> Md. Code Ann., Agric., § 2-510(e), (f).

<sup>254</sup> <http://www.malpf.info/facts/fact02.pdf>

<sup>255</sup> Md. Code Ann., Agric. 2-517.

**Spatial or geographic targeting:** Designated priority preservation areas.

**Funding:** In the last ten years funding for the program has ranged from \$23 million/year to as high as \$90 million in 2007, and \$65 million in 2008. Annual revenues from the agricultural lands transfer tax have ranged from \$10-23 million/year; additional funding is from the real estate transfer tax on non-agricultural properties (described in another summary) and other sources. MALPF reports that it has since 1980 helped to acquire easements on more than 275,000 acres on more than 2,000 farms, representing \$555 million in permanently preserved lands.<sup>256</sup>

**Implications for Chesapeake:** This is a robust preservation scheme, second only to Pennsylvania's agricultural lands program in acreage protected. Virginia also has an agricultural lands preservation scheme, but without the dedicated funding levels of Maryland's. Maryland also funds forest land protection, but at a lower level of acquisition. Chesapeake Bay lands protection could be enhanced if the criteria for agricultural lands were adjusted and if the acceptance of easements offered were preferentially accepted based on conformance to Bay landscape protection strategies as well as farmland protection.

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<sup>256</sup> <http://www.malpf.info/tables/2008Acreage.pdf> and <http://www.malpf.info/tables/HistoricalData.pdf>

## Maryland Conservation Easements Tax Credits

**Type of Program:** Tax credits for preservation and conservation easements

**Administered by:** Maryland Department of Assessment and Taxation in coordination with the Maryland Environmental Trust and the Maryland Agricultural Land Preservation Foundation

**Citations:** MD Code, Tax-General § 10-723; Maryland Environmental Trust, <http://www.dnr.state.md.us/met/>; Maryland Agricultural Land Preservation Foundation, <http://www.malpf.info/>; Maryland Environmental Trust's Land Conservation Center, <http://www.conservemd.org/index.cfm>; Md. Code Ann. Tax-Property 9-10.

**Program purposes:** "Preserving open space, natural resources, agriculture, forest land, watersheds, significant ecosystems, viewsheds, or historic properties."<sup>257</sup>

**Program description:** Individuals may claim tax credits against their state income tax for easements conveyed for less than their full value to the Maryland Environmental Trust, which accepts donated easements, or the Maryland Agricultural Land Preservation Foundation, which purchases easements at below market price.<sup>258</sup> The allowable credit for a donated easement is the difference between the fair market value of the property before and after the conveyance of the easement.<sup>259</sup> The allowable credit for an easement conveyed at a discounted price is the uncompensated portion of the value of the easement.<sup>260</sup> In either case, the credit cannot exceed either the state income tax for the taxable year or \$5,000.<sup>261</sup> If the credit exceeds

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<sup>257</sup> MD Code, Tax-General § 10-723(a)(1).

<sup>258</sup> *Id.* The Maryland Environmental Trust accepts donated easements whereas the Maryland Agricultural Land Preservation Foundation purchases easements at a reduced price.

<sup>259</sup> MD Code, Tax-General § 10-723(b).

<sup>260</sup> Tax Considerations in Selling or Donating Your Easement at 2, Maryland Agricultural Land Program, <http://www.malpf.info/facts/fact15.pdf>. For instance, if the value of the easement is appraised at \$100,000, and the taxpayer sells the easement to MALPF for \$75,000, the taxpayer would then claim a credit for the uncompensated portion of the easement value - \$25,000.

<sup>261</sup> MD Code, Tax-General § 10-723(c).

either of these limits, the excess can be credited in subsequent years for up to 15 years, creating a maximum credit allowable of \$80,000.<sup>262</sup>

**Eligibility criteria:** A state tax credit will be allowable if (1) the purpose of the easement is the preservation of open space, natural resources, agriculture, forest land, watersheds, significant ecosystems, viewsheds, or historic properties, (2) the easement is perpetual, and (3) the Board of Public Works accepts and approves the easement.<sup>263</sup> The credit may not be claimed if the easement was required in order to fulfill density requirements in conjunction with subdivision or building permits.<sup>264</sup> The Maryland Environmental Trust (MET) and the Maryland Agricultural Land Preservation Foundation (MALPF) make the final decisions about whether to accept a conservation easement on a case-by-case basis.<sup>265</sup> The actual value of the easement must be determined by an independent appraiser before a deduction will be approved.<sup>266</sup> Multiple individuals, such as a husband and wife, conveying a single easement may each claim the \$5,000 tax credit.<sup>267</sup>

**Priority Criteria:** The MALPF Program is an easement *purchasing* program and is administrated at the county level, meaning that property chosen for an agricultural easement is determined by a county first and then submitted to the state.<sup>268</sup> The county submits its top 80% of applicants to the state for approval, and the process is quite competitive.<sup>269</sup> Each seller submits an asking price with its application and gets an appraisal of the value of the easement. The easement value is determined by subtracting the agricultural value from the fair market value.<sup>270</sup> Those landowners whose property is offered at a higher discount, based on the easement value versus the asking price, have a competitive advantage.<sup>271</sup> A county's purchasing power is based on the amount of funds available to it from the state

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<sup>262</sup> MD Code, Tax-General § 10-723(c). See Tax Benefits of Donating a Conservation Easement, Maryland Environmental Trust, <http://www.dnr.state.md.us/met/taxbenefits.html>.

<sup>263</sup> MD Code, Tax-General § 10-723(a)(1).

<sup>264</sup> MD Code, Tax-General § 10-723(d).

<sup>265</sup> How Does It Work? Commonly Asked Questions About Conservation Easements, Maryland Environmental Trust, <http://www.dnr.state.md.us/met/ce.html>.

<sup>266</sup> Tax Considerations in Selling or Donating Your Easement at 2, Maryland Agricultural Land Program, <http://www.malpf.info/facts/fact15.pdf>.

<sup>267</sup> *Id.* at 3.

<sup>268</sup> MALPF Information Sheet, Maryland Environmental Trust's Land Conservation Center, <http://www.conservemd.org/purchased/malpf.cfm>.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

legislature, and purchasing decisions can take up to a year and a half.<sup>272</sup> Before applying to sell an easement to MALPF, an individual must determine whether his/her property meets MALPF's easement criteria. MALPF accepts properties no smaller than fifty contiguous acres.<sup>273</sup> The land must at least have the capability to be used for producing food or fiber if it is not currently being used to do so, and it must meet certain soil productivity guidelines based on the USDA's Soil Conservation Service Land Classification System.<sup>274</sup> Generally the land must not be within the boundaries of a 10-year water and sewer service area plan.<sup>275</sup> The property must have a soil management plan and, if there is over 25 acres of contiguous forest, a forest stewardship plan.<sup>276</sup> State criteria do not require that purchased land be within an agricultural district; however, each county retains the right to accept easements only within agricultural districts.<sup>277</sup>

The process for *donating* an easement to MET, versus *selling* an easement to MALPF, is shorter and less competitive.<sup>278</sup> MET is administered by its independent Board of Trustees but is funded by the Maryland Department of Conservation and Recreation.<sup>279</sup> MET often co-holds easements with local land trusts, allowing landowners who are more comfortable dealing with individuals and organizations within their own communities to reap the tax benefits of working with MET.<sup>280</sup> These local land trusts often accept smaller parcels of land than MET.<sup>281</sup> Upon contacting MET or a local trust, an individual from the organization will visit the property to document and research any

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<sup>272</sup> *Id.*

<sup>273</sup> Eligibility for the Easement Acquisition Program at 2, Maryland Agricultural Land Preservation Foundation, <http://www.malpf.info/facts/fact01.pdf>. Individuals with property less than 50 contiguous acres may be able to sell an easement to MALPF if their property is adjacent to an existing easement and/or has "extraordinary agricultural capability." Small Properties in the Land Acquisition Program, Maryland Agricultural Land Preservation Foundation, <http://www.malpf.info/facts/fact12.pdf>.

<sup>274</sup> *Id.* Generally at least 50% of the land must be Class I, II, or III soil, or, if wooded, at least 50% must be Woodland Group 1 or 2 soils.

<sup>275</sup> *Id.* at 3.

<sup>276</sup> *Id.* at 3.

<sup>277</sup> *Id.* at 3-4.

<sup>278</sup> Donation vs. Sale of an Easement, Maryland Environmental Trust's Land Conservation Center, <http://www.conservemd.org/Conserve-Ease/donatedvssale.cfm>.

<sup>279</sup> Maryland Environmental Trust, Maryland Environmental Trust's Land Conservation Center, <http://www.conservemd.org/donated/met.cfm>.

<sup>280</sup> Local Land Trusts, Maryland Environmental Trust's Land Conservation Center, <http://www.conservemd.org/donated/locallandtrusts.cfm>.

<sup>281</sup> *Id.*

conservation features.<sup>282</sup> A deed of conservation easement will then be submitted to the board of the trust for approval and recorded in the local land records office.<sup>283</sup>

**Spatial or geographic targeting:** Governed by the underlying preservation program.

**Funding levels:** In 2008, MALPF purchased approximately 6400 acres for approximately \$44 million.<sup>284</sup> As of July 2008, MET had protected approximately 91,500 acres of Maryland land.<sup>285</sup> These state tax credits can be claimed in addition to federal tax deductions under the Qualified Conservation Contributions program.<sup>286</sup> However, easement valuation may be different under Maryland law than under Federal law.<sup>287</sup> In addition to the state tax credits and federal tax deductions that an individual would receive after making an easement donation to the Maryland Environmental Trust, that individual would also receive a waiver of property taxes against that "conservation property" for fifteen years from the date of the donation.<sup>288</sup>

**Implications for Chesapeake:** Favorable state tax treatment combines with other financing tools to encourage easement preservation. Criteria could be adjusted to focus on Bay lands.

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<sup>282</sup> Easement Donation Process, Maryland Environmental Trust's Land Conservation Center, <http://www.conservemd.org/donated/easementdonation.cfm>.

<sup>283</sup> *Id.* Deeds submitted to MET must also be ratified by the Board of Public Works. Deeds must be approved by the Board of Public Works in order for the donating party to receive the state tax credit.

<sup>284</sup> Settlements on Easement Properties Using FY 2008 Funds, Maryland Agricultural Land Preservation Foundation, <http://www.malpf.info/tables/2008Settlements.pdf>. FY 2009 data is not yet available.

<sup>285</sup> Maryland Protected Lands Reporting, Maryland Department of Natural Resources, <http://dnrweb.dnr.state.md.us/gis/plreports/currenttotals.as>.

<sup>286</sup> Tax Benefits of Donating a Conservation Easement, Maryland Environmental Trust, <http://www.dnr.state.md.us/met/taxbenefits.html>.

<sup>287</sup> Tax Considerations in Selling or Donating Your Easement at 2, Maryland Agricultural Land Program, <http://www.malpf.info/facts/fact15.pdf>.

<sup>288</sup> Md. Code Ann. Tax-Property 9-107.

## Maryland Heritage Areas

**Type of Program:** Planning, funding assistance, matching grants.

**Administered by:** Maryland Heritage Areas Authority

**Citations:** Md. Code Ann., Tax-Property §§ 13-201 - 209 (real estate transfer tax); Md. Code Ann., Financial Inst., §13-1101 et seq. (Heritage Areas Authority).

**Program Purposes:**

The Maryland Heritage Areas Program is intended to “reflect the cultural themes of the State's development; and provide educational, inspirational, economic, and recreational benefits for present and future generations.”<sup>289</sup> Housed in the Department of Planning, it provides cooperation, financial support, and technical assistance to support heritage tourism and economic development.

**Program Description:** “The Maryland Heritage Areas program is governed by the 17 member Maryland Heritage Areas Authority (MHAA), which includes representatives from 7 state agencies including the Departments of Planning, Natural Resources, Business & Economic Development, Transportation, Housing and Community Development, the Maryland Higher Education Commission, and the State Historic Preservation Office to encourage collaborative work and cooperation in the diverse interests of history, culture, natural resources, agriculture, recreation, economic development, tourism, and education. An additional ten members with expertise in heritage-related fields are appointed by the Governor with the advice and consent of the Senate.”<sup>290</sup> MHAA is an independent unit within the Executive branch of State government, and is administered by the Maryland Historical Trust, an agency of the Maryland Department of Planning. The Authority may issue bonds. Of the Maryland real estate transfer tax funds distributed to Program Open Space up to \$3,000,000 may be transferred by the state budget to the Maryland Heritage Areas Authority Financing Fund and may be used for debt service on bonds issued by the Authority.<sup>291</sup> Becoming a Maryland Certified Heritage Area is a two-stage process. First, communities prepare an application to the MHAA to become a Recognized Heritage

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<sup>289</sup> Md. Code Ann., Financial Inst, §13-1109.

<sup>290</sup> [http://mht.maryland.gov/heritageareas\\_program.html](http://mht.maryland.gov/heritageareas_program.html)

<sup>291</sup> Md. Code Ann., Financial Inst, §13-1114.

Area.<sup>292</sup> Recognized heritage areas are eligible for matching grant assistance to prepare a Management Plan “a comprehensive statement in words, maps, illustrations, or other media of communication of the objectives, policies, and standards to guide public and private action for the preservation, interpretation, development, and use of the cultural, historic, natural, and architectural resources of a heritage area.”<sup>293</sup> Approved management plans allow consideration and approval by the MHAA as a “Certified Heritage Area.”<sup>294</sup> “Certified” heritage areas are eligible for:

- Matching grants of up to 50% to local jurisdictions and non-profit organizations for planning, design, interpretation, and programming.
- Matching grants of up to 50% to the certified heritage area management entity to provide operating assistance for up to the first ten years following certification.
- Matching grants of up to 50% to the certified heritage area management entity and heritage area destination marketing organizations to assist with heritage area-wide marketing activities.
- Broad program support from state government.<sup>295</sup>

Target Investment Zones (TIZs) are smaller zones within the heritage area where “the community has identified locations of high heritage tourism development potential, and within which it wishes to attract and focus significant interest and capital investment for rapid results. TIZs must overlap to the optimal extent with existing local, state, and federal revitalization designations, and local governments, in partnership with private interests, must be prepared to commit resources to development within the zones. MHAA funds for capital projects are focused on these TIZ areas.” In 2007 the legislature approved an extension of capital funding eligibility from five to ten years.”<sup>296</sup> Capital grants tend to be for signage, exhibits, structure construction and rehabilitation, rather than for land acquisition, but have included trails/greenways and small critical land acquisitions.

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<sup>292</sup> COMAR 14.29.01.01

<sup>293</sup> COMAR 14.29.01.02.

<sup>294</sup> COMAR 14.29.03.01.

<sup>295</sup> [http://mht.maryland.gov/heritageareas\\_program.html](http://mht.maryland.gov/heritageareas_program.html)

<sup>296</sup> MHAA, 2007 Annual Report.

[http://mht.maryland.gov/documents/PDF/MHAA\\_AnnualReport\\_2007.pdf](http://mht.maryland.gov/documents/PDF/MHAA_AnnualReport_2007.pdf)

## Eligibility Criteria/Priority Criteria:

The Maryland Heritage Areas program provides one-to-one matching funds within certified heritage areas. The MHAA “may not designate a heritage area as a recognized heritage area unless the Authority finds that: 1) The heritage area contains resources of statewide significance that have retained integrity of setting and a cohesive character; 2) The heritage area contains at least one or more (i) Historic districts either listed in, or determined to be eligible for listing in, the Maryland Register of Historic Properties...; or (ii) Natural or recreational resources determined by the Secretary of Natural Resources to be of statewide significance; and 3) Public assistance for the heritage area is reasonably expected to produce additional private investments, job creation, and tourism revenues.”<sup>297</sup> All local governments must support the application for recognition, and for certification of any area.

**Spatial or geographic targeting:** Heritage areas funding is available only within “certified heritage areas” with management plans, which must be within previously “recognized” heritage areas. There are eleven certified areas, ten of which abut the Bay and its tributaries:<sup>298</sup>

- Anacostia Trails Heritage Area in Prince George’s County
- “Four Rivers” Heritage Area of Annapolis, London Town, and South Anne Arundel County
- Baltimore Heritage Area in Baltimore City
- Heart of Chesapeake Country Heritage Area in Dorchester County
- Heart of the Civil War Heritage Area in Carroll, Frederick, and Washington Counties
- Lower Eastern Shore Heritage Area in Somerset, Worcester, and Wicomico Counties
- Lower Susquehanna Heritage Greenway Heritage Area in Harford and Cecil Counties
- Montgomery County Heritage Area
- Southern Maryland Heritage Area in Calvert, Charles and St. Mary’s Counties
- Stories of the Chesapeake Heritage Area in Kent, Queen Anne’s, Caroline, and Talbot Counties

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<sup>297</sup> Md. Code Ann., Financial Inst., § 13-1110(c).

<sup>298</sup> <http://mht.maryland.gov/heritageareas.html> One does not: Canal Place Heritage Area in Allegany County. There are two additional “recognized” heritage areas, one of which, the Patapsco, is a Bay tributary, and the other of which in Garrett County is not.

The program contemplates, and indeed depends upon public access to the facilities, properties and areas supported.

**Funding:** Up to \$3 million per year, which must be matched at least 1:1.

**Implications for Chesapeake:** Heritage areas offer ways to connect Bay access, tourism, and conservation with a historic, cultural focus.

## Pennsylvania Conservation Landscape Initiatives

**Type of Program:** Planning and acquisition (varies by region)

**Administered by:** Pennsylvania Department of Conservation and Natural Resources

**Citation:** <http://www.dcnr.state.pa.us/cli/index.aspx>

**Program Purpose:** Pennsylvania's Conservation Landscape Initiatives are regional partnerships established in key landscapes across the state to identify and preserve natural assets at a landscape scale while revitalizing local communities, engaging local and regional partners in economic development, and promoting significant recreational opportunities in the region.

**Program Description:** Conservation Landscape Initiatives (CLIs) are regional partnerships among state agencies, local governments, funders, and non-profits established by the Pennsylvania Department of Conservation and Natural Resources "to drive strategic investment and actions around sustainability, conservation, community revitalization, and recreational projects."<sup>299</sup> Conservation Landscape Initiatives are operating in seven regions of the state, where there are important natural and cultural assets, local readiness and buy-in, state level investment, and ongoing community economic revitalization efforts.

The seven CLIs include Pennsylvania Wilds, Laurel Highlands, Pocono Forests and Waters, Lower Susquehanna, South Mountain, Lehigh Valley Greenways, and Schuylkill Highlands, four of which are at least in part in the Chesapeake watershed.<sup>300</sup> Each CLI is guided by a set of goals tailored to the conservation and economic development needs/opportunities of the region.

**Eligibility Criteria:** Some of the criteria that make a region eligible to establish a Conservation Landscape Initiative include:<sup>301</sup>

- Presence of PADCNR-owned lands
- A Sense of Place and Identity

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<sup>299</sup> Pennsylvania Department of Natural Resources, Conservation Landscape Initiatives, <http://www.dcnr.state.pa.us/cli/index.aspx>

<sup>300</sup> See Map: [http://www.dcnr.state.pa.us/cli/images/Regional\\_MapandCLI.pdf](http://www.dcnr.state.pa.us/cli/images/Regional_MapandCLI.pdf).

<sup>301</sup> Pennsylvania Department of Natural Resources, Conservation Landscape Initiatives, <http://www.dcnr.state.pa.us/cli/index.aspx>

- Local Readiness (i.e., local opportunities for conservation exist or changes in the economic base, depopulation, or sprawl threaten landscape conservation)
- Civic Engagement
- Strategic Investments by State Agencies (e.g., leadership, financial support, or technical assistance)

### **Priority Criteria:**

The Pocono Forests and Waters covers Pike, Monroe, Lackawanna, Luzerne, Wayne and Carbon counties in Northeast Pennsylvania. The CLI's plan for this region includes protecting the area's natural resources and the recreational opportunities they provide; providing development opportunities for local communities by increasing recreation and tourism opportunities, providing education and outreach to local communities, and facilitating economic and workforce development; and building a constituency for sustainability.<sup>302</sup> The Pocono Forests and Waters Initiative was established by the PDCNR in 2007.<sup>303</sup>

The Lower Susquehanna Riverlands Initiative is located in Lancaster and York counties and is working to recognize, protect, and enhance the natural assets along the Susquehanna River. The goals of this Initiative are to: improve public access to the river and enhance other recreational opportunities in the area; preserve the forested river landscape and other sensitive areas; improve water quality; and revitalize the Rivertown communities of the region. The program description notes that protecting the river means protecting "approximately 13,000 acres including many islands in the river. The area known as the Conejohela Flats provides important feeding and resting areas for migratory birds and habitat for wildlife species including bald eagle, black tern, osprey, and many shorebirds. The conservation of this land also supports Chesapeake Bay restoration initiatives, as the Susquehanna River contributes nearly half of the freshwater flow to the Chesapeake Bay."<sup>304</sup>

Pennsylvania Wilds is the largest of the seven Conservation Landscapes Initiatives - spanning a 12-county forested region in north central and northwestern Pennsylvania. The Initiative focuses on the

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<sup>302</sup> <http://www.dcnr.state.pa.us/cli/pocono.aspx>

<sup>303</sup> Pocono conservation land initiative unveiled by DCNR secretary, <http://www.riverreporter.com/issues/07-11-08/briefs.html>

<sup>304</sup> <http://www.dcnr.state.pa.us/cli/LowerSusquehanna.aspx>

significant recreational opportunities available in the region, while also working to protect the region's natural resources.<sup>305</sup>

The South Mountain Initiative is focused on the natural resources and communities of the South Mountain region – a large, linear corridor that is approximately seven miles wide and about 40 miles long, connecting Adams, Cumberland, Franklin and York counties. The goals of this Initiative are to: advance land acquisition and protection in the South Mountain area; improve the effectiveness of land use planning and regulation in the area; and enhance education, communication and information sharing in the South Mountain area.<sup>306</sup>

**Spatial or geographic targeting:** Four of the seven Conservation Landscape Initiatives fall wholly or in large part within the Chesapeake Bay Watershed: Pocono Forests and Waters, PA Wilds, Lower Susquehanna Riverlands, and South Mountain.

**Funding:** Funding comes from existing sources including Pennsylvania's Growing Greener II bond program, Key 93, and other funds, including economic development and conservation funds that become available.

**Implications for Chesapeake:** The CLI is a way to target state efforts on lands and waters where the conservation identity is also a significant source of the local identity, an opportunity for community revitalization, tourism, or conservation-based sustainable development.

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<sup>305</sup> <http://www.dcnr.state.pa.us/cli/Pennsylvaniawilds.aspx>

<sup>306</sup> <http://www.dcnr.state.pa.us/cli/SouthMountain.aspx>

## Pennsylvania Rivers Conservation Program

**Type of Program:** River conservation planning, technical assistance, development and acquisition grants

**Administered by:** Pennsylvania DCNR

**Citations:** <http://www.dcnr.state.pa.us/brc/rivers/riversconservation/>

**Program purposes:** To conserve and enhance river resources through preparation and accomplishment of locally initiated plans. The program provides technical and financial assistance to municipalities and river support groups to carry out planning, implementation, acquisition, and development activities.

**Program description:** The program provides matching funding to enable groups and municipalities to plan and implement river corridor conservation, access, and development activities. *Planning grants* support development of a Rivers Conservation Plan that inventories natural, recreational, and cultural resources, identifies threats, and determines policies and activities needed to conserve, enhance, and restore the river corridor. *Technical assistance* is provided to support these planning efforts and implementation activities. The state maintains a rivers registry of those rivers that have completed plans and are hence eligible *for implementation, development, and acquisition* grant funds. The final plan should include resolutions of support from participating municipalities, and only municipalities that have adopted such resolutions are eligible for grant funding. *Implementation Grants* support resource studies identified in the Rivers Conservation Plan, such as "water quality monitoring, river use and access, riparian buffer status, water trail feasibility studies, greenways studies." *Development Grants* support construction recommended in the Plan, and may include "trails, river access points, playgrounds and parks, stream bank fencing, etc." *Acquisition Grants* "assist municipalities and local organizations with the purchase of lands in fee title or easements for conservation or recreational purposes."<sup>307</sup> Access is one emphasis of the program, which helps promote and publicize locally-supported river "sojourns" for many of the rivers, at least annually.

**Eligibility criteria:** Any municipality, county, or nonprofit "river support group" is eligible to prepare River Conservation Plan. The

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<sup>307</sup> <http://www.dcnr.state.pa.us/brc/rivers/riversconservation/>

plans must include specific elements including: project area characteristics; issues, concerns, constraints and opportunities; land resources; water resources (including wetlands, floodplain, water quality, water supply); biological resources; cultural resources (recreational, archaeological/historical); and management options/recommended actions. These elements are all necessary in order for the Plan to meet the requirements and support further grants and implementation activities.

**Priority criteria:** Explicit priority criteria are not laid out, but the application forms indicate the importance of participation by municipalities, availability of access if a property interest is to be acquired, and other issues.<sup>308</sup>

**Spatial or geographic targeting:** Many of Pennsylvania's rivers and streams and surrounding lands are the subject of River Conservation Plans. The Commonwealth has a map listing the Plans (120) and numerous implementation, development, and acquisition project activities.<sup>309</sup> The plans are spatially explicit.

**Funding levels:** Approximately \$1.5 million/year is available for planning/technical assistance. Funding for acquisitions and other implementation activities may come from other sources, including Growing Greener II and Community Conservation funds.

**Implications for Chesapeake:** The River Conservation Plans provide already-prepared plans, ratified by local government units, which can connect treasured Chesapeake riverine landscapes. In addition to this collection of recently prepared, spatially explicit plans, which provide organized approaches and strategies for many stream reaches, Pennsylvania in 2009 completed its first "State Water Plan" in 25 years, including a state Water Atlas. The State Water Plan includes broad goals and principles for the Upper and Lower Susquehanna, and Potomac, both relevant to actions affecting the Bay.

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<sup>308</sup> <http://www.dcnr.state.pa.us/brc/grants/indexmanual09NWord.aspx>

<sup>309</sup> <http://www.dcnr.state.pa.us/brc/rivers/riversconservation/planningprojects/images/2007RiverConservation.pdf>

## Pennsylvania Heritage Areas Program

**Type of Program:** Planning, technical assistance, development, acquisition grants

**Administered by:** Pennsylvania Department of Conservation and Natural Resources

**Citations:** <http://www.dcnr.state.pa.us/brc/heritageparks/>

**Program Purposes:** The program is guided by five interrelated goals: economic development, partnerships, cultural conservation, recreation and open space, and education and interpretation. Within these goals are purposes of supporting "partnerships and projects which link community conservation activities with sound economic development objectives" and "use of greenways to link the significant natural, recreational and historic sites within regions," to protect "natural areas, especially those of significant ecological value, and scenic landscapes" and "distinctive and varied cultural resources including the preservation of the historical infrastructure and industrial context."

<sup>310</sup>

**Program Description:** Launched in 1989 and funded by the legislature from various sources in the ensuing decades, the Heritage Areas program provides grants to plan and implement projects in areas that contain cultural, historic, recreation, natural, and scenic resources of state or national interest. "Program Grants are awarded on a competitive basis each year to designated State Heritage Areas for both planning and implementation type projects, which carry out the heritage development strategies identified in their regional plans."<sup>311</sup> Implementation grants must be matched at least 1:1 from other sources, and are capped at \$500,000; a private (nongovernmental) contribution is required and must constitute no less than 5 percent of the Pennsylvania state heritage grant.

**Eligibility Criteria:** Matching grants will be made in *existing* heritage areas. "Pennsylvania's Heritage Areas System is fundamentally complete. Major themes have been addressed through designated areas. Therefore, the main focus of the Pennsylvania Heritage Areas

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<sup>310</sup> Pennsylvania DCNR, Heritage Areas Program Manual (13<sup>th</sup> edition)(2009), [http://www.dcnr.state.pa.us/brc/heritageparks/Heritage\\_Manual.doc](http://www.dcnr.state.pa.us/brc/heritageparks/Heritage_Manual.doc)

<sup>311</sup> Pennsylvania DCNR, Heritage Areas Program Manual (13<sup>th</sup> edition)(2009), [http://www.dcnr.state.pa.us/brc/heritageparks/Heritage\\_Manual.doc](http://www.dcnr.state.pa.us/brc/heritageparks/Heritage_Manual.doc)

Program over the next several years will be to continue to support activities and projects that are integral to the implementation of the heritage development, conservation and promotion strategies crafted and refined by the regional coalitions within each heritage area."<sup>312</sup>

Implementation Projects funded by grants "are non-planning projects that implement recommendations of the Management Action Plan and Special Purpose Studies. Eligible project activities would include the development, rehabilitation, restoration, preservation and acquisition of sites and buildings, interpretive/educational exhibits and materials, and promotional/marketing products and creation of Revolving Loan Fund programs."<sup>313</sup>

Management actions grants are also available.

**Spatial or geographic targeting:** The state has 12 designated heritage areas, of which several are relevant to the Chesapeake Bay watershed – particularly the Lancaster-York Heritage Region, the Lumber Heritage Region (including the west Branch of the Susquehanna), and the Endless Mountains (including the northern Susquehanna).

**Funding:** Over a 20-year period the legislature has appropriated over \$42 million to fund heritage areas.<sup>314</sup>

**Implications for Chesapeake:** The Pennsylvania Heritage Program offers a way to connect landscape conservation to outreach. Where designated areas overlap with Pennsylvania's Conservation Landscape Initiatives, the programs can be complementary.

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<sup>312</sup> Pennsylvania DCNR, Heritage Areas Program Manual (13<sup>th</sup> edition)(2009), [http://www.dcnr.state.pa.us/brc/heritageparks/Heritage\\_Manual.doc](http://www.dcnr.state.pa.us/brc/heritageparks/Heritage_Manual.doc)

<sup>313</sup> Pennsylvania DCNR, Heritage Areas Program Manual (13<sup>th</sup> edition)(2009), [http://www.dcnr.state.pa.us/brc/heritageparks/Heritage\\_Manual.doc](http://www.dcnr.state.pa.us/brc/heritageparks/Heritage_Manual.doc)

<sup>314</sup> Pennsylvania DCNR, Heritage Areas Program Manual (13<sup>th</sup> edition)(2009), [http://www.dcnr.state.pa.us/brc/heritageparks/Heritage\\_Manual.doc](http://www.dcnr.state.pa.us/brc/heritageparks/Heritage_Manual.doc)

## Virginia Land Conservation Incentives Act

**Type of Program:** Tax credits for contributions of private lands, restrictions, and easements

**Administered by:** Virginia Department of Taxation and Virginia Department of Conservation and Recreation

**Citations:** Va. Code Ann. § 51.1-512; Va. Code Ann. § 51.1-513; 26 C.F.R. § 1.170A-14; 26 U.S.C. § 170(h); Virginia's Land Preservation Tax Credit, Virginia Department of Conservation and Recreation, [http://www.dcr.virginia.gov/land\\_conservation/documents/1miltxcredits.pdf](http://www.dcr.virginia.gov/land_conservation/documents/1miltxcredits.pdf); Conservation Value Review Criteria, Virginia Land Conservation Foundation, [http://www.dcr.virginia.gov/virginia\\_land\\_conservation\\_foundation/documents/lptccrit08.pdf](http://www.dcr.virginia.gov/virginia_land_conservation_foundation/documents/lptccrit08.pdf)

**Program purposes:** Preservation of land for "agricultural and forestal use, open space, natural resource, and/or biodiversity conservation, or land, agricultural, watershed and/or historic preservation."

**Program description:** An individual may claim a tax credit of 40% of the fair market value of land or an interest in land in the state of Virginia conveyed for conservation purposes to a public or private conservation agency.<sup>315</sup> The fair market value must be determined by a qualified appraiser who is licensed in the Commonwealth of Virginia.<sup>316</sup> Credit claimed for the 2009 and 2010 taxable years may not exceed \$50,000; credit claimed for the 2011 taxable year and years thereafter may not exceed \$100,000.<sup>317</sup> The amount of credit claimed also may not exceed the amount of income tax due; however, unused portions of the credit may be carried over for a maximum of 12 consecutive years.<sup>318</sup> Thus, assuming the individual's credit does not exceed income tax due in any taxable year, the maximum possible tax credit available beginning with a 2009 claim is \$1,200,000. Tax

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<sup>315</sup> Va. Code Ann. § 58.1-512.A. A conveyance includes both a donation and an interest sold at a "bargain" rate. See Conservation Value Review Criteria at 1, Virginia Land Conservation Foundation, [http://www.dcr.virginia.gov/virginia\\_land\\_conservation\\_foundation/documents/lptccrit08.pdf](http://www.dcr.virginia.gov/virginia_land_conservation_foundation/documents/lptccrit08.pdf).

<sup>316</sup> Va. Code Ann. § 58.1-512.B

<sup>317</sup> Va. Code Ann. § 58.1-512.C

<sup>318</sup> *Id.*

credits of \$1 million or more are subject to value review by the Virginia Department of Conservation and Recreation.<sup>319</sup>

**Eligibility criteria:** A qualified donation may consist of conveyance of the entire interest in real property or of a less-than-entire perpetual interest, such as a "conservation restriction, preservation restriction, agricultural preservation restriction, or watershed preservation restriction."<sup>320</sup> A restriction must meet the criteria for a charitable deduction under the IRS's Qualified Charitable Contribution (QCC) Program.<sup>321</sup> Tax credits will not be allowed for open space donations made as part of residential or commercial development, a real estate development plan, or density requirements for zoning or building approvals.<sup>322</sup> Tax credits will also not be allowed for donations made by tax-exempt charitable organizations currently holding conservation easements.<sup>323</sup>

A qualified donation must be made for a valid conservation purpose. Valid conservation purposes under the program are preservation of land for "agricultural and forestal use, open space, natural resource, and/or biodiversity conservation, or land, agricultural, watershed, and/or historic preservation."<sup>324</sup> A qualified donation must also be made to an acceptable organization, including the Commonwealth of Virginia, an instrumentality of the Commonwealth, or a charitable organization as defined under the IRS's QCC Program.<sup>325</sup>

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<sup>319</sup> Va. Code Ann. § 58.1-512.D.1. See Virginia's Land Preservation Tax Credit, Virginia Department of Conservation and Recreation, [http://www.dcr.virginia.gov/land\\_conservation/documents/1miltxcredfs.pdf](http://www.dcr.virginia.gov/land_conservation/documents/1miltxcredfs.pdf).

<sup>320</sup> Va. Code Ann. § 58.1-512.C.2

<sup>321</sup> *Id.* A restriction will qualify as a charitable deduction under the IRS's program if the restriction is given to a qualified organization and is designated perpetually for exclusively conservation purposes. 26 C.F.R. § 1.170A-14(a); 26 U.S.C. § 170(h).

<sup>322</sup> Va. Code Ann. § 58.1-512.C.5

<sup>323</sup> Va. Code Ann. § 58.1-512.C.2.

<sup>324</sup> Va. Code Ann. § 58.1-512.A

<sup>325</sup> Va. Code Ann. § 58.1-512.C.4. According to the IRS, charitable 501(c)(3) organizations must meet the public support test of section 509(a)(2) and/or the requirements of 509(a)(3). 26 C.F.R. § 1.170A-14(c)(1). An organization meeting the public support test of section 509(a)(2) would normally receive their support from admission or service fees and not much support from gifts and/or grants. See 26 U.S.C. § 509(a)(2); see also Private Foundations Defined IRC 409(a)(2) Exclusion, IRS, [http://www.irs.gov/irm/part7/irm\\_07-026-004.html#d0e47](http://www.irs.gov/irm/part7/irm_07-026-004.html#d0e47). An organization meeting the requirements of 509(a)(3) would be one organized, operated, or controlled by or in connection with another qualified organization, such as the Government. See 26 U.S.C. § 509(a)(3).

Procedurally, a donor applying for a tax credit must submit an application to the Department of Taxation, including (1) a description of the conservation purpose, (2) the fair market value of the land (not including current easements or restrictions), (3) the public benefit of the donation, (4) any water quality best management practices being implanted on the property, and (5) whether the land is forested and a forest management plan is included in the conveyance.<sup>326</sup> If the donated interest is less than an entire interest in the property, then the donor must also submit an affidavit detailing how the interest meets the requirements of the IRS's QCC Program.<sup>327</sup> An individual seeking to claim a credit of \$1 million or more must also submit his/her application to the Department of Conservation and Recreation for review.<sup>328</sup> Multiple donations from the same recorded parcel of land within the preceding 11 years will be aggregated with the current donation.<sup>329</sup>

If a donor claims a tax credit under the Virginia Land Conservation Incentives Act, that individual may not claim a tax credit under other similar Virginia laws for costs associated with the same project, including gains on the sale of open space land donations or open space easements, for three years following the year the credit is taken.<sup>330</sup> Donors may transfer unused credits to another taxpayer so long as they file a notification of the transfer with the Department of Taxation.<sup>331</sup>

**Priority criteria:** For donations of conservation easements that involve tax credit applications for \$1 million or more, the Department of Conservation and Recreation performs a review of the conservation purpose, the public benefit, and the general water quality and forest management.<sup>332</sup> Under certain circumstances, the land use of the

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<sup>326</sup> Va. Code Ann. § 58.1-512D.1.

<sup>327</sup> Va. Code Ann. § 58.1-512.D.2. The QCC Program requires that a less-than-entire interest have a perpetual conservation restriction, be designated perpetually for exclusively conservation purposes, and be given to a qualified organization. 26 C.F.R. § 1.170A-14(a).

<sup>328</sup> Va. Code Ann. § 58.1-512.D.1.

<sup>329</sup> Va. Code Ann. § 58.1-512.D.3.b.

<sup>330</sup> Va. Code Ann. § 58.1-513.A. If a land donation is made by a "pass-through tax entity" such as a trust, estate, partnership, etc., tax credits that arise may not be claimed by both the entity and the member, manager, partner, etc. Va. Code Ann. § 58.1-513.B.

<sup>331</sup> Va. Code Ann. § 58.1-513.C.1. There is a transaction fee associated with the sale of tax credits – the lesser of 2% of the value of the donated interest or \$10,000. Va. Code Ann. § 58.1-513.C.2.

<sup>332</sup> Conservation Value Review Criteria at 1.

donation will automatically meet the conservation purpose test; these circumstances often include a local or state government's recognition of the purpose of the land or its location in a particular government-recognized land use district.<sup>333</sup> For instance, land donated for watershed preservation will automatically meet the conservation purpose test if (1) the land contains "significant wetland acreage" mapped on the U.S. Fish & Wildlife Service's National Wetland Inventory or has other wetland acreage approved by the U.S. Army Corps of Engineers and/or the Virginia Department of Environmental Quality; (2) the land contains vegetated buffers at least 100 feet wide that substantially front streams, rivers, etc; (3) the land is adjacent to reservoirs that supply public drinking water and have a vegetated buffer at least 100 feet wide; or (4) the land is within 1,000 feet of a public drinking water well.<sup>334</sup>

Conservation easements must ensure a continuing public benefit; a conveyance must include terms that prohibit "intentional destruction or significant alteration of the conservation values of the protected property" and must ensure that no future division or development of the property adversely affects the conservation value.<sup>335</sup> In addition, the conveyance must ensure that water quality and forest resources are protected by including language requiring vegetated buffers, prohibitions on soil disturbance, water quality protection plans, and forest management plans as necessary.<sup>336</sup>

**Spatial or geographic targeting:** The tax credits may be used wherever an eligible donation can be made, which includes areas throughout Virginia. 26 localities in Virginia have currently designated agricultural/forestal districts.<sup>337</sup>

**Funding levels:** For any calendar year, the Department of Taxation will issue credits equal to \$100 million plus \$100 million multiplied by the percentage that the U.S. Department of Labor's consumer price index (CPI-U) for the 12-month period ending August 31 of the preceding year exceeds the CPI-U for the 12-month period ending August 31, 2006.<sup>338</sup> The Virginia Department of Taxation's records

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<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 6.

<sup>335</sup> Conservation Value Review Criteria at 8.

<sup>336</sup> *Id.* at 9-11.

<sup>337</sup>Valley Conservation Council,  
[http://www.valleyconservation.org/agforestal\\_more.html](http://www.valleyconservation.org/agforestal_more.html).

<sup>338</sup> Va. Code Ann. § 58.1-512.D.4.b. Credits = \$100 mil + (\$100 mil x |100 - (100 x CPI<sub>Year</sub>) / CPI<sub>2006</sub>)|)

indicate that as of December 15, 2008, "399,078 acres, appraised at slightly over \$1.9 billion, had been protected through 1,952 donations represented by \$907.2 million in tax credits."<sup>339</sup>

**Implications for Chesapeake:** The conservation purpose most likely to satisfy the conservation purpose test for individuals along the Chesapeake Bay would be watershed preservation. Land donated for the purpose of watershed preservation is generally adjacent to rivers, streams, or other waterways and would serve to protect the "water quality and/or quantity, hydrological integrity, riparian and/or aquatic habitat, or public drinking-water supplies."<sup>340</sup> As noted above, if the individual is seeking a tax credit of \$1 million or more and needs acceptance by the Department of Conservation and Recreation, there are numerous circumstances under which the land would automatically meet the conservation purpose test.<sup>341</sup> An individual may claim both a federal tax deduction under the IRS's QCC program and a state tax credit under Virginia's Land Conservation Incentives Act.<sup>342</sup>

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[http://www.dcr.virginia.gov/virginia\\_land\\_conservation\\_foundation/documents/bienrpt0708.pdf](http://www.dcr.virginia.gov/virginia_land_conservation_foundation/documents/bienrpt0708.pdf)

<sup>340</sup> Conservation Value Review Criteria at 5.

<sup>341</sup> *Id.* at 6.

<sup>342</sup> Tax Advantages, other incentives related to land conservation, Virginia Department of Conservation and Recreation, [http://www.dcr.virginia.gov/land\\_conservation/tools03.shtml](http://www.dcr.virginia.gov/land_conservation/tools03.shtml).

## Virginia Land Conservation Fund

**Type of Program:** Acquisition of easements or fee title to conservation lands

**Administered by:** Virginia Land Conservation Foundation, housed in the Department of Conservation and Recreation

**Citations:** Va. Code § 10.1-1017 to -1026

**Program Purpose:** The purpose of the foundation is to provide matching state funding to acquire and conserve land and easements for open spaces and parks, natural areas, historic areas, and farmland and forest preservation.

**Program Description:** In 1999, the General Assembly and the governor established the Virginia Land Conservation Foundation. The Foundation makes matching grants to purchase easements or property for the preservation of ecological, cultural or historical resources. A portion of the fund may be used for developing properties for public use. State agencies, local governments, public bodies and nonprofit groups are eligible to receive matching grants from the foundation. The money comes from the Virginia Land Conservation Fund, managed by the Foundation.<sup>343</sup> State law provides that each year 25 percent of available funds are granted to the Virginia Outdoors Foundation's Open-Space Lands Preservation Trust Fund while the remaining 75 percent is available for grants by the VLCF.<sup>344</sup>

The Virginia Department of Conservation and Recreation provides staff support. An Interagency Taskforce reviews and recommends grant applications to the Virginia Land Conservation Foundation. Grant awards are based on applications for 50 percent or less of total project costs pursuant to specific criteria defined in each category.<sup>345</sup> The Foundation and Department also track and oversee eligibility for and use of Virginia's conservation lands tax credit.<sup>346</sup>

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<sup>343</sup> [http://www.dcr.virginia.gov/virginia\\_land\\_conservation\\_foundation/](http://www.dcr.virginia.gov/virginia_land_conservation_foundation/)

<sup>344</sup> Va. Code § 10.1-1020. That program provides funding "to aid localities acquiring open-space easements or persons conveying conservation or open-space easements with the costs associated with the conveyance of the easements, which may include legal costs, appraisal costs or all or part of the value of the easement." Va. Code § [10.1-1801.1](#) These are perpetual easements held by the VOF or by the VOF with the local government.

<sup>345</sup> [http://www.dcr.virginia.gov/virginia\\_land\\_conservation\\_foundation/](http://www.dcr.virginia.gov/virginia_land_conservation_foundation/)

<sup>346</sup> Va. Code §58.1-512.C.2; §58.1-512.D.4.a.

In January 2009 the Foundation reported: "To date, state funding to the Foundation has been leveraged to help protect over 55,000 acres across Virginia. This includes an estimated 30,697 acres from direct Foundation matching grants and 24,476 additional acres that have been protected with Foundation funds that were required to be transferred to the Virginia Outdoors Foundation. A small percentage of the accrued interest in the Fund also has allowed the Department of Conservation and Recreation to develop the Commonwealth's most comprehensive conserved lands database and other mapping tools."<sup>347</sup>

**Eligibility Criteria:** Applications can be submitted by agencies, localities, public bodies, and registered (tax-exempt) nonprofit organizations. Four application categories each have their own criteria:

- Open Spaces and Parks
- Natural Area Protection
- Historic Area Preservation
- Farmlands and Forest Preservation

State law requires the Foundation to develop a strategic plan for the expenditure of unrestricted moneys; develop an inventory of those properties in which the Commonwealth holds a legal interest "for the protection or preservation of ecological, cultural or historical resources, lands for recreational purposes, state forest lands, and lands for threatened or endangered species, fish and wildlife habitat, natural areas, agricultural and forestal lands and open space"; and 3) develop a needs assessment for the future.<sup>348</sup> The 2007 Virginia Outdoors Plan serves as the "state's official plan for the protection and conservation of Virginia's important natural, outdoor recreational and open space resources." The Virginia Natural Area Preserves Act directs the Department of Conservation and Recreation to develop a Natural Heritage Plan to guide the preservation of habitat for rare plants, animals and significant natural communities.<sup>349</sup> The 2003 Plan identifies conservation sites. The Department also maintains a conservation lands database. The Natural Heritage Program has also

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[http://www.dcr.virginia.gov/virginia\\_land\\_conservation\\_foundation/documents/bienrpt0708.pdf](http://www.dcr.virginia.gov/virginia_land_conservation_foundation/documents/bienrpt0708.pdf)

<sup>348</sup> Va. Code § 10.1-1021

<sup>349</sup> Va. Code § 10.1-209 *et seq.*

developed the Virginia Conservation Lands Needs Assessment - a suite of seven statewide GIS models intended to guide conservation decisions: Ecological, Cultural, Recreational, Forest Economics, Agricultural, and Watershed Integrity and Vulnerability.

The Foundation notes that "most land protected by the Foundation requires public access to the lands. This helps to address the public's growing desire for publicly available lands and is a significant difference between VLCF and conservation easements or purchase of development rights (PDR) programs which do not generally allow for public utilization."<sup>350</sup>

**Priority Criteria:** State law directs the Virginia Land Conservation Foundation to develop a strategic plan to guide its funding priorities for unrestricted funds.<sup>351</sup>

**Spatial and geographic targeting:** Targeting is in part guided by the Commonwealth's plans, and lands conservation is tracked by the Conservation Lands Database, which identifies park land and other protected lands, and "includes parcel-level boundaries and attributes for protected lands in Virginia that have potential significance for serving a variety of conservation, recreation, and open-space roles."<sup>352</sup> Under an amendment enacted in 2000, the law now provides that "The Foundation shall seek to achieve a fair distribution of land protected throughout the Commonwealth, based upon...1.The importance of conserving land in all regions of the Commonwealth; 2.The importance of protecting specific properties that can benefit all Virginia citizens; and 3.The importance of addressing the particular land conservation needs of areas of the state where Fund moneys are generated."<sup>353</sup>

**Funding:** In 2009 the Foundation awarded \$4.3 million in matching grants, to support conservation of 8,390 acres of land in the four categories.<sup>354</sup> The 2007-08 biennial report noted that: "Total funds appropriated to the Foundation have exceeded \$40.5 million since FY2000. Of this amount, approximately \$26.3 million has been

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[http://www.dcr.virginia.gov/virginia\\_land\\_conservation\\_foundation/documents/bienrpt0708.pdf](http://www.dcr.virginia.gov/virginia_land_conservation_foundation/documents/bienrpt0708.pdf)

<sup>351</sup> Va. Code §10.1-1021 subsection 1a.

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[http://www.dcr.virginia.gov/virginia\\_land\\_conservation\\_foundation/documents/bienrpt0708.pdf](http://www.dcr.virginia.gov/virginia_land_conservation_foundation/documents/bienrpt0708.pdf)

<sup>353</sup> Va. Code § 10.1-1021.1

<sup>354</sup> <http://www.governor.virginia.gov/mediarelations/NewsReleases/viewRelease-print.cfm?id=858>

allocated to VLCF matching grant program with an additional \$4.3 million pending distribution at a January 2009 Board meeting. An additional \$8.8 million has been allocated to the Virginia Outdoors Foundation in accordance with state law."<sup>355</sup>

**Implications for Chesapeake:** The 2007-08 Biennial report notes: "The Foundation, if properly funded, will continue to be one of the primary tools through which Virginia will achieve its conservation targets, especially the Chesapeake Bay 2010 goal [to protect 20 % of the Bay watershed] and the [Virginia] Governor's 400,000-acre preservation goal by 2010."

## **Delaware Land Protection Act & Land and Water Conservation Trust Fund**

**Type of Program:** Land and easement acquisition, local ordinances.

**Administered by:** Department of Natural Resources and Environmental Conservation; Open Space Council.

**Citations:** Del. Code Ann. Tit. 7 §7501 et seq.; Tit. 30 §5421 et seq.

**Purpose:** To protect and conserve all forms of natural and cultural resources; protect and conserve the biological diversity of plants and animals and their habitats; protect existing or planned parks, forests, wildlife areas, nature preserves or other recreation, conservation or cultural sites by controlling the use of contiguous or nearby lands; and allow or water quality conservation.<sup>356</sup>

**Program Description:** The Delaware Land Protection Act, enacted in 1990, authorizes acquisition of lands and interests in land to protect conservation and cultural values. Funding for acquisitions is provided by income from the Delaware Land and Water Conservation Trust Fund, with an endowment account supported by the realty transfer tax.<sup>357</sup>

In 1990 the Delaware Land Protection Act established an Open Space Program, which identifies and protects designated State Resource Areas. "These areas are permanently protected through the buying of various state lands including parks, fish and wildlife areas, forests, nature preserves and cultural sites. Many SRAs are not protected through acquisition...Rather, the purpose of the SRAs is to guide state acquisition of open space from willing sellers and to be incorporated by counties in their land use plans."<sup>358</sup> Counties must adopt laws and ordinances to protect the SRAs and their values.<sup>359</sup>

The Delaware Land and Water Conservation Trust Fund has an endowment account, earnings account, project account, and a stewardship account. Property acquired or improved with funds from the project account "shall remain in public outdoor recreation and

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<sup>356</sup> Del. Code Ann. Tit. 7, §7503.

<sup>357</sup> Del. Code Ann. Tit. 30, §5421 et seq.

<sup>358</sup> <http://www.dnrec.delaware.gov/OpenSpaces/Pages/OpenSpaceProgram.aspx>

<sup>359</sup> Del. Code Ann. Tit. 7, §7508.

conservation use in perpetuity."<sup>360</sup> In addition to public expenditures for parks and designated lands at the state level, the annual \$1.5 million grant program assists local governments and park districts by providing "matching grants for the planning, acquisition, and development of parks, greenways and trails."<sup>361</sup>

**Eligibility criteria:** Only county and municipal governments and park districts may receive grant assistance. Projects sponsored by municipalities and counties are cost shared up to fifty percent, park districts up to seventy-five percent.<sup>362</sup>

**Priority criteria:** The DNREC creates maps depicting State Resource Areas, updated every five years in consultation with county governments, and with advice of the Open Space Council.<sup>363</sup> Among its duties, the Open Space Council:

- Reviews and recommends to the Department for adoption, after a public hearing, criteria for delineation, and dedication of open space
- Reviews and recommends to the Department for adoption, after public hearing, state resource area maps
- Reviews and recommends to the Department for approval lands for permanent protection according to the adopted state resource area maps
- Promotes and assists, in conjunction with state agencies, the development and establishment of creative and innovative methods to secure the permanent protection of open space
- Analyzes, in conjunction with the Department of Finance, the state and local tax codes and formulates incentives to encourage landowners and developers to donate or retain ownership of their lands in an undeveloped state.<sup>364</sup>

**Spatial or geographic targeting:** The SRAs have served as an important state and local guide to conservation objectives, as well as focusing both acquisition and land use planning.

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<sup>360</sup> Del. Code Ann. Tit. 30, § 5423(c)(2).

<sup>361</sup>

<http://www.destateparks.com/greenway/newsletter/documents/2006GWGuidance2.pdf>

<sup>362</sup>

<http://www.destateparks.com/greenway/newsletter/documents/2006GWGuidance2.pdf>

<sup>363</sup> Del. Code Ann. Tit. 7, §7507.

<sup>364</sup> <http://www.dnrec.delaware.gov/OpenSpaces/Pages/OpenSpaceProgram.aspx>

**Funding:** Trust Fund interest generates \$1.5 million annually, divided between park projects and greenway and trail projects.<sup>365</sup>

**Implications for Chesapeake:** Targeting SRAs provides a clear guide to state agencies and allows protective efforts by local governments to support state objectives. The funding program also offers a useful model for the Bay.

## **Great Outdoors Colorado Program (GOCO)** (Offered for comparison)

**Type of Program:** Grants for conservation acquisition, planning, support

**Administered by:** Colorado GOCO Trust Fund (established in the Colorado State Treasury Department)

**Citations:** Colorado State Constitution, Article XXVII

**Program purposes:** GOCO grants funds for conservation land acquisition, park improvements, wildlife conservation, and conservation planning in Colorado using a portion of state lottery proceeds.

**Program description:** GOCO was created by amendment to the state constitution by voters in 1992. 50% of lottery proceeds – up to \$35 million in 1992 dollars – go to the GOCO Trust Fund, which makes awards to state agencies, local governments, and conservation organizations.<sup>366</sup> Funding is awarded equally over time in four categories: (1) funding through the Colorado Division of Wildlife to acquire and enhance habitat through land, lease, or easement, to develop wildlife watching, to implement wildlife educational programs, and to provide programs for maintaining diverse wildlife<sup>367</sup>; (2) outdoor recreation funding through Colorado State Parks for trails to enhance state parks and recreation areas, to develop public education resources on natural resources at state parks and recreation areas, to acquire and maintain trails and river greenways, and to provide water for recreational purposes through water rights acquisition or other agreements<sup>368</sup>; (3) competitive open space grants to local governments, land trusts, state parks, and the Division of Wildlife for fee title and conservation easement purchase<sup>369</sup>; (4) and a competitive grants matching program for local governments to acquire, develop, or manage open lands and parks.<sup>370</sup>

Under the four category mandate, GOCO has developed a number of grant programs: Open Space Land Conservation (Open Space) Grants; Local Government Park, Outdoor Recreation and Environmental

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<sup>366</sup> Colorado Constitution, Art. XXVII, §3(1)(b)(III).

<sup>367</sup> Colorado Constitution, Art. XXVII, §1(1) (a).

<sup>368</sup> Colorado Constitution, Art. XXVII, §1(1) (b).

<sup>369</sup> Colorado Constitution, Art. XXVII, §1(1) (c).

<sup>370</sup> Colorado Constitution, Art. XXVII, §1(1) (d).

Education Facilities (LPOR) Grants; Trail Grants; Planning and Capacity Building (Planning) Grants; Conservation Excellence Grants; Outdoor Recreation Investments through Colorado State Parks; Wildlife Investments through the Colorado Division of Wildlife; and Legacy Grants. Of these programs, Legacy Grants, Trails Grants, and Colorado State Parks/Division of Wildlife grant schedules for fall 2009 have not yet been generated.

**Eligibility criteria:** Open Space Grants eligibility criteria<sup>371</sup>: The purpose of the Open Space program is to maintain Colorado's open space in the midst of areas of development through land acquisition and conservation easements. Eligible applicants include municipalities, counties, political subdivisions, non-profit land conservation organizations, Colorado Division of Wildlife or Division of Parks and Outdoor Recreation, and special districts focused on land conservation; participants should function as land trusts in the Open Space program. A proposed open space project may not be used for developed recreation. Land acquisitions for low-impact, passive recreation uses with very limited facilities – such as walking, running, hiking, environmental education, interpretive signage, fishing, and (in certain circumstances) bicycling – are appropriate for Open Space Grants. Construction, road/trail, and mining activities may be approved under certain conditions. An open space project must fit one of the following types: (1) buffer/inholding within a public land area; (2) greenways/stream corridors that connect communities along river or stream corridors, railroad and utility easements, or link outside edges of urban development and activity to outlying recreational facilities, parks, and open space; (3) community separators that provide physical and visual open space buffers between cities, towns, and developed areas that may help retain the unique identity of a developed community; (4) agricultural land used for the production of food or fiber; or (5) natural areas and non-game wildlife habitat. GOCO itself does not hold interests in land and cannot hold any conservation easements.

LPOR Grants (and Mini Grants) eligibility criteria<sup>372</sup>: The LPOR program provides funds for Colorado governmental entities to expand and improve local parks, outdoor recreation facilities and environmental education facilities. Only municipalities, counties, parks, and special recreation districts are eligible to apply for LPOR and Mini Grant funds. LPOR and Mini Grant projects must fit one of the following categories:

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<sup>371</sup> 2009 Instructions for GOCO's Open Space Application

<sup>372</sup> Fall 2009 Local Government Application and Fall 2009 Mini-Grant Application

new park development; enhancement of existing facilities; fairground development; or parkland acquisition. GOCO will fund up to 70% of LPOR project costs. Land acquisitions for high impact, active recreation uses with significant facilities are appropriate for LPOR grants. All GOCO-funded property must be under control of the applicant for at least 25 years without encumbrances. GOCO will fund up to 75% of LPOR Mini Grant costs.

Conservation Excellence Grants eligibility criteria<sup>373</sup>: Conservation Excellence Grants are meant for conservation planning, staff training, open space assessment, expansion of services in underserved regions, planning for public access and education, and other activities that improve the capacity of an organization to achieve quality land conservation. Entities eligible to receive Open Space Grants are eligible to receive Conservation Excellence Grants. GOCO will fund up to 75% of project costs, capped at \$75,000. A non-exclusive list of eligible projects includes: development of new or improved conservation policies; creating or updating a strategic plan; developing a marketing and outreach program; attending known effective trainings covering relevant topics; bringing landowners and conservation organizations together for regional meetings; increasing capacity in geographically underserved and priority areas of the state; creating a detailed conservation plan for work in an underserved geographic area; creating a regional open space plan; and creating a pilot program for improving access and education for children.

Planning Grants criteria<sup>374</sup>: Only municipalities, counties, parks, and special recreation districts are eligible to apply for Planning Grant funds. Eligible Planning Grant projects include: acquiring local park lands; master planning to include parks, recreation, and trails; Regional Trail Plans; Site Specific Plans; updates to plans older than five years. GOCO will fund up to 75% of Planning Grant projects.

**Priority or selection ranking:**

Open Space Grants selection ranking<sup>375</sup>: GOCO prefers to award grants to projects that: (1) can be completed quickly and to the most urgent projects; (2) facilitate compatible current and proposed uses; and (3) facilitate public access.

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<sup>373</sup> 2009 Instructions for GOCO's Conservation Excellence Application

<sup>374</sup> 2009 LPOR Planning Grant Application

<sup>375</sup> 2009 Instructions for GOCO's Open Space Application

LPOR Grants (and Mini Grants) selection criteria<sup>376</sup>: LPOR and Mini Grant applications are judged on a 100 point scale from the following criteria: characteristics of the project (25 points); need and timeliness (30 points); public process and planning (15 points); matching funds and partnerships (25 points); non-cash support letters (5 points). LPOR land acquisition applications (for LPOR or Mini Grant projects) are judged on a 100 point scale from the following criteria<sup>377</sup>: characteristics, property description, and quality (20 points); current and proposed uses (20 points); project need and urgency (20 points); public process and plan (10 points); matching and leveraging funds (25 points); partnership and support (5 points).

Conservation Excellence Grants selection ranking: N/A

Planning Grants selection criteria<sup>378</sup>: Planning Grant applications are judged on a 100 point scale from the following criteria: project scope and work plan (25 points); needs, benefits, and timeliness (25 points); objectives and end products/deliverables (20 points); project implementation (15 points); partnerships and financial support (10 points); support (5 points).

**Spatial or geographic targeting**: Applies to land in Colorado.

**Funding levels**: In FY 2008, the GOCO Trust Fund received \$53 million. GOCO has committed \$650 million to projects since 1994.

**Implications for Chesapeake**: The Colorado program provides an interesting model with elements of value for the Bay watershed. It demonstrates an approach using dedicated funding; it allocates funding across both state priorities and locally defined conservation objectives; and it supports planning and technical support that makes the conservation system more sustainable.

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<sup>376</sup> 2009 Eligibility Information and Application for LPOR

<sup>377</sup> Fall 2009 LPOR Land Acquisition Application

<sup>378</sup> 2009 LPOR Planning Grant Application