

Recommendations to the Land for Maine's Future Board

from the

Land for Maine's Future Workgroup

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I. Overview

At its July 21, 2020 Board meeting, the Land for Maine's Future Board authorized the establishment of a Workgroup consisting of select LMF Board members, Cooperating Entity representatives, and Designated State Agency (DSA) representatives to develop recommendations that would help ensure the Program and its partners collaborate effectively to conserve natural, recreational, and working lands. This action stemmed from an LMF staff-led process, conducted in partnership with state agencies and project partners, to surface LMF process concerns.

The LMF Board supported this Workgroup discussing the foundational aspects of the relationship between LMF, DSA representatives, and Cooperating Entities, and developing recommendations for consideration by the full LMF Board that would help ensure the Program is accessible, impactful, efficient, and cost-effective while also maintaining the qualities that have engendered strong public support since the Program's establishment in 1987.

At its first meeting on September 11, 2020, the Workgroup agreed it would recommend improvements to the LMF Program that would better enable it to carry out its statutory purpose, that of advancing "the public interest in the future quality and availability for all Maine people of lands for recreation and conservation...best served by significant additions of lands to the public domain," understanding that, by statute, "the State, as the public's trustee, has a responsibility and duty to pursue an aggressive and coordinated policy to assure that this Maine heritage is passed on to future generations."

The Workgroup met four times, once a month from September to December, 2020. The meeting schedule and meeting materials were posted to the LMF website. Meetings were open to the public, with an opportunity for public input provided at each meeting.

What follows are the Workgroup's recommendations for the LMF Board's consideration. Unless otherwise noted, all recommendations represent a consensus of the full Workgroup.

To the degree possible, the recommendations are organized chronologically, following the flow of an application through the LMF application process. Some recommendations are highly specific and immediately actionable, while others suggest a recommended direction or objective that will require more work by Board and Staff to put in place, ideally accomplished by the end of 2021.

The Workgroup respectfully requests that the LMF Board accept this report, and recommends that the Board engage in a process to review and implement these recommendations over the coming year.

II. DSA Sponsorship and LMF Application, Scoring, and Awards

Due to time constraints, the Workgroup did not address the fundamental question of whether the current roles that DSAs play with regard to the LMF Program actually serve as the best and most efficient structure for the Program. **The Workgroup believes this is a question worthy of exploration.** However, for its work, the Workgroup assumed that DSAs would continue to serve in the roles that they currently do - including sponsoring applications from Cooperating Entities - and that the Workgroup would identify efficiencies that could be implemented within this structure.

The Workgroup is concerned about the ongoing capacity of DSAs - with their limited staffing - to take on ever greater review, approval, and stewardship responsibilities associated with LMF projects. Given this, the Workgroup sought opportunities to minimize the long-term or perpetual obligations placed on DSAs, while still ensuring the highest Program integrity, and developed recommendations aligned with this objective.

- Many action items recommended by the Maine Land Conservation Task Force (see [Shaping the Next Generation of Land Conservation in Maine, 2019](#)) specifically reference the LMF Program. Without minimizing the importance of any of the other action items, the LMF Workgroup flags Action Item 3.C as necessary to enable LMF to adequately address current and future Program needs. This states, **“Increase LMF Program staffing and legal assistance (at least to previous levels) and provide related state agency support (from DACF, IF&W, and DMR) in order to eliminate the backlog of acquisition projects now in the pipeline and adequately handle those to be created through new bonding.”**
- LMF should eliminate its requirement that applicants submit 8 paper copies of applications, which can be a considerable expense for smaller organizations. LMF should confirm with Procurement Services that submitting electronic applications is acceptable.
- LMF should establish a more predictable and consistent application schedule, enabling applicants and agency staff to better manage their workloads.
- LMF should develop a process that enables LMF and DSA staff to understand more details about each project at an earlier stage, understanding project complexities upfront, so as to avoid unexpected and time-consuming complications further into the process. The Workgroup considered approaches such as an expanded Inquiry Form, or a pre-application, but had insufficient time to arrive at a specific recommended approach (see further in Section V.2.b.).
- The Workgroup discussed at length the growing desire among Maine residents for accessible lands of local or regional significance, an issue brought into even sharper focus as a result of the pandemic. It recognized there are many approaches LMF could take to place a higher priority on these land categories than they have historically received. The Workgroup does not recommend adopting an approach that requires a certain percentage of funds be allocated to projects of more local or regional significance, thereby constraining LMF from making full use of bond funds if the number and quality of applications does not align with these prescribed allocations (a problem the Program currently faces, with certain “stranded” bond

funds that are unable to be spent). However, it *does* recommend revisiting project scoring criteria or another comparable mechanism that would elevate the importance of these categories in future funding rounds, and potentially help drive the number and quality of applications that address this need. Various approaches have recently been proposed to address this issue in part, such as replacing the categories of local and regional significance with a “community conservation” category. The Workgroup did not have sufficient time to arrive at a specific recommendation to address this issue fully, but it does recommend that LMF develop a system that reduces the sense of competition that has historically existed between projects of state vs. local or regional significance.

- LMF should ensure transparency in regard to funding decisions. The Workgroup recommends LMF accomplish this by committing to funding projects in the order in which they are ranked by score, and by clarifying in advance whether the technique of awarding projects partial funding will be employed to allocate funding more broadly. The Board should consider how to make explicit any considerations it includes in its decision-making process to the extent these are not already incorporated in the scoring process.
- Notwithstanding LMF’s bond-directed fiscal responsibilities, LMF’s funding policy should revert back to its original funding formula, in which 50% of project costs are eligible for award. This may result in increased applicant diversity, and will reduce the degree to which lesser resourced organizations may be discouraged from applying due to the challenge of raising funds for due diligence.
- LMF should determine which state and federal funding programs are a good fit as potential match for the LMF program, and work to eliminate or reduce existing impediments to accessing these matching funds, with an early focus on the Maine Natural Resource Conservation Program.
- LMF should prioritize the processing of certain projects that would clearly benefit from an accelerated timeline (assuming readiness requirements have been met). Working lands projects are one example, as LMF funding is likely to directly impact the financial viability of a business. Further criteria should be identified to clarify other circumstances that merit this level of priority.

III. LMF Appraisal Process and Appraisal Oversight Committee's (AOC) Role

The Workgroup's overarching objective was to develop recommendations that: a) reduce subjectivity, and perceptions of subjectivity, in the appraisal review process, b) require less of LMF Board members who are not themselves certified Appraisers, c) acknowledge the rigorous federal requirements that many LMF projects already must meet with respect to appraisals in order to secure federal funding, and d) actually increase accountability by ensuring the highest quality review of appraisals. The recommended process changes - which are significant - rely heavily on Uniform Standards of Professional Appraisal Practice (USPAP). The recommendations also call for further exploration of whether a tiered approach to project appraisals could be implemented that simplifies the process for projects involving smaller financial commitments. Note: Workgroup member Don Kleiner does not support this proposed approach, preferring the current appraisal review process.

1. Proposed New Purpose Statement for the AOC:

It is the purpose of the AOC to work in cooperation with the Applicant to ensure a property value that provides accountability for the public investment in the proposed project.

2. Proposed New Appraisal Process:

- 1) Applicant submits to LMF Staff an appraisal, following the Revised LMF Appraisal Standards (Appendix F as revised), and an Overview Summary (note: a sample should be included in Appendix F).
- 2) Staff evaluates the appraisal according to the LMF Appraisal Standards and provides a *Staff Summary & Recommendation to AOC* (note: a sample should be included in Appendix F).
- 3) AOC uses the *LMF Appraisal Guide/Checklist* as a guide to evaluate the *Staff Summary & Recommendation* (note: this Guide will need to be revised).

3. Proposed New AOC Evaluation Process:

The AOC evaluates the appraisal, using the *Staff Summary and Recommendation* and its *Appraisal Guide/Checklist*. It then can act in one of four ways:

- 1) For a project requiring federal appraisal standards (Yellow Book, as well as USPAP) and an appraisal is accepted by a federal agency, the Applicant may choose to submit said appraisal (and review, if applicable) and documentation of acceptance in lieu of an LMF appraisal and AOC evaluation. Alternatively, the Applicant may choose to follow the LMF Appraisal Standards and Process; in which case the AOC may either:
 - 2) Accept the appraisal as presented; *or*

3) In the event that the AOC has limited questions or concerns aimed at clarifying the Appraiser’s analysis, it will pose those questions to the Applicant and request they be addressed by the Applicant’s Appraiser, and then evaluate the responses before making a final determination; *or*

4) If the AOC is unable to satisfy itself that it understands the basis for the Appraiser’s conclusion of value, it will commission a review Appraiser, working on behalf of LMFB/AOC, to conduct a Compliance Review of the appraisal (under USPAP Standards 3 and 4 or their successor) to ensure that the appraisal’s methodology is sound and meets LMF Appraisal Standards. A copy of the Compliance Review report will also be provided to the Applicant.

- If the appraisal review finds no major issues that would have a significant impact on the Appraiser’s conclusion of value, the AOC will accept the appraisal.
- If the appraisal review finds significant problems with the appraisal, the AOC can elect to either:
 - give the Applicant the opportunity to request that its Appraiser correct the deficiencies, *or*
 - reject the appraisal.

4. Proposed Revised Appendix F: Appraisal Standards/Instructions for Applicants and Appraisers

NOTE: This is a proposed simplification of how the LMF Appraisal Standards are presented. The base requirement is USPAP, with no need to repeat those standards in Appendix F, and adding to that standard a list of LMF-specific requirements (listed below as 1-14). This is not a “Track Changes” of the current Appendix F.

General Requirements

The Land for Maine’s Future Program requires that all appraisal reports comply with the most recent edition of the USPAP and Appraisal Standards required by LMF. For proposals using other sources of funding (e.g. federal), additional appraisal standards may be required for those programs (e.g. Yellow Book). Any appraisal submitted to LMF must be conducted by a Maine Certified General Appraiser with no conflicts.

Appraisal Standards

For LMF's purposes, an acceptable appraisal must:

- 1) Be in the form of an Appraisal Report. A Restricted Appraisal Report or "form" appraisal is not acceptable. The Appraisal Report shall be clearly written and reasoned and contain sufficient narrative to describe the data collection and analysis so that non-Appraisers can understand how the valuation conclusion was derived.
- 2) Comply with ALL applicable standards. LMF will accept appraisals that comply with USPAP as well as any additional standards appropriate for a given transaction, e.g., Treasury Regulations for gifts/bargain sales and/or the Uniform Appraisal Standards for Federal Land Acquisitions ("UASFLA" a.k.a. "Yellow Book").
- 3) Appropriately identify the property and address any enhancement or larger parcel identification issues pursuant to the relevant standards. Any added value accruing to reserved lots, abutting land or lands in the same neighborhood under related ownership as a result of the conservation acquisition must be considered.
- 4) Address the appropriate Client. The appraisal must identify the "Client" as the purchaser of the property, another project partner that does not have an ownership interest in the property being acquired, or the seller and the purchaser jointly.
- 5) Intended User. The State of Maine must be identified as an additional Intended User (also satisfactory is LMF, DACF, DIFW, DMR or Maine Historic Preservation Commission).
- 6) Review. The appraisal *may* be subject to Compliance Review by a third-party Appraiser.
- 7) Sales between Private Entities. LMF requires that the direct sales comparison approaches to valuation be accomplished primarily through comparison with sales between private parties. Sales to nonprofit conservation organizations or to government agencies must be limited to a supplementary role in the analysis. If any comparison sales are employed that involve governmental or nonprofit conservation owners, the use of the sale must conform to the UASFLA.
- 8) Hypothetical Conditions. In the unusual instance when an appraisal analysis includes Extraordinary Assumptions or Hypothetical Conditions, the applicants and Appraiser should discuss the approach taken with the LMF project manager and Director prior to finalizing the appraisal. This does not apply in the case of conservation easement appraisals where the "after" situation is generally considered a hypothetical condition.
- 9) Appraisal Report Presentation. Applicants may submit electronic PDF-format appraisals.
- 10) Subject Property Sales History. The appraisal report must include a ten-year history and analysis of conveyances of the subject property, and must include and analyze the last deed of conveyance in an addendum.

11) Value Conclusion. The Appraiser shall state a single value in the reconciliation, not a range of value.

12) LMF Standards Met. The appraisal must include a statement that the appraisal meets LMF Appraisal Standards.

13) Public Availability. The appraisal shall not contain statements limiting public availability. (*note: this requires further elaboration*)

14) Conservation Easements – Additional Requirements.

- The proposed conservation easement or other similar protection agreement must be included in an addendum. **In order to ensure an accurate valuation, the draft easement must be complete enough that it clearly states what rights are being retained and what rights are being conveyed and restricted.** This easement should be reviewed with the LMF project manager before being used for the appraisal. Appraisers may include an extraordinary assumption, stating that “assignment results may be affected if the recorded deed differs from the draft deed of conservation easement that was appraised, and I reserve the right to prepare a new appraisal if necessary.”
- A careful discussion of the proposed restrictions should be included in the after-value analysis.
- Any improvements, including reserved building rights and their envelopes allowed in restrictions, must be discussed in the appraisal and shown on the map of encumbered land.

The Tiered System Appraisal Approach And Procedures

NOTE: The Workgroup did not fully tackle this tiered system concept referenced in the current Appendix F: LMF Appraisal Standards, aside from noting that a higher dollar threshold for a more simplified appraisal approach might be appropriate. It is recommended that a follow-up discussion explore this to come up with a workable approach that still meets LMF’s high standards.

The issue is that according to qualified Appraisers, USPAP no longer sanctions a shorter/cheaper appraisal approach as intended by LMF’s tiered approach. A “short approach” such as a Restricted Report may not be appropriate as the information that forms the basis of the appraisal is not included within the document itself, and there may be limitations on Intended Users. Those types of reports are generally for situations in which a minimal disclosure of the support and rationale for the Appraiser’s opinions and conclusions is appropriate, which may not satisfy LMF. This type of report is often appropriate for uses such as loan servicing or portfolio monitoring, although it can be used in other situations as well. Residential form appraisals generally do not include the analysis and all the information found in a USPAP appraisal.

IV. Easements - Development, Review, and Use of Models

The Workgroup's overarching objective was to develop recommendations that direct LMF's easement-related focus to the public values that an easement seeks to protect. These recommendations aim to: a) create a clear distinction between the drafting and review process for State-held easements vs. Cooperating Entity-held easements, b) consolidate and update all LMF easement expectations (including aligning these with Maine Climate Action Plan recommendations) for ease of understanding by applicants and ease of review by LMF, c) explore the option of a tiered approach to LMF-funded forest easements, based on project complexity, and d) eliminate the LMF easement template. Noted elsewhere (see Section V, subsection 1) is also a recommendation that Project Agreements no longer be required for LMF-funded easements.

1. Distinguish the review process for State-held easements and Cooperating Entity-held easements.

While the State would continue its process for easement development and review of State-held easements, a clear and preferably simpler review process (to assure compliance with LMF requirements) would be undertaken for easements held by Cooperating Entities. For easements held by Cooperating Entities, attorneys and other representatives for LMF and the State would only review the draft easement language to be sure that the LMF-required public values are addressed in the easement and would not be otherwise involved in negotiating the easement terms.

2. Update and consolidate LMF expectations for forest and agriculture easements in the LMF workbook.

It would be extremely helpful to have the LMF program requirements clearly set forth in one place. This would give the Board a chance to review what is there now, centralize, and update if appropriate. This could be addressed through the Board's on-going review of conservation priorities.

3. Consider the concept of two tiers of easements for forest conservation easements.

Tier 1 easements would be those that meet baseline requirements determined by the LMF Board. Tier 2 easements would incorporate protection of multiple conservation values and include stronger protections of those values.

Appendix H currently has both required terms and optional easement terms and this could evolve to the Tier 1 and Tier 2 approach. Cooperating Entities with landowners could choose the Tier 1 or Tier 2 type easement. Tier 1 easements might receive a smaller award (perhaps a smaller percentage of the purchase price) in return for simplicity and fewer protections. The current LMF "required" forest easement terms are (in summarized form):

1. No additional (or very limited and clearly defined) additional non-forestry or non-recreation related development, and prohibition of commercial, industrial, and residential uses except for forestry and recreational uses.
2. Strict limits on division of the property, with the goal of maintaining large enough parcels to be cost-effective to manage for timber production and recreation, and cost effective for the holder to monitor compliance with easement terms.

3. Rights for the public to use the property for traditional pedestrian recreational uses, extinguishing the landowner's right to enjoy or provide exclusive, private use.
4. An enforceable commitment to maintain (or enhance) the property's potential (though not requirement) to provide a perpetual yield of fiber and timber, including clearly defining sustainable management, and how it will be measured, verified, and enforced.

Note that the concept of Tier 1 and Tier 2 easements may not apply to agricultural easements, as protecting agricultural land from non-farm development is the central objective. More discussion will be beneficial.

4. Eliminate the LMF easement template.

The last significant update appears to be in 2002. There are a number of provisions that are outdated (e.g. carbon credit provisions), and guidance from LTA and court rulings that are incorporated over time by land trusts and monitored by the MLCAN group have not been incorporated into the LMF easement template. Rather than having LMF attempt to do this, the process outlined in 1 and 2 above would be the appropriate path to follow.

5. Update LMF policies and scoring criteria to reflect current state policy initiatives related to climate resilience and carbon sequestration. With Maine's recently completed Climate Action Plan recommending increased conservation of natural and working lands to help achieve the State's carbon neutrality and greenhouse gas emissions reduction goals,* LMF should ensure the Program advances relevant Climate Action Plan policy objectives. See examples of updates below (**) for how Climate Action Plan recommendations could be incorporated.

*Excerpt from the Maine Climate Action Plan: "Conserving forests and farmland through conservation easements is one of the more cost-effective strategies to help reach carbon neutrality by maintaining forest cover and ensuring the lands will be available for future forest and farmland ecosystem services."

** Examples of possible updates for working forest conservation easements:

Appendix H -- revise #4 required term (addition in green):

4. An enforceable commitment to maintain (or enhance) the property's potential to provide a perpetual yield of fiber and timber **and to sequester and store forest carbon.** Recognizing the duration (forever) of an easement and the inability to predict the future of current forest uses, the emphasis here is on *potential* to provide, not a requirement to provide. Clear language must be included that defines sustainable management (taking into account forest history, productivity, and potential for natural catastrophe), stipulates specifically how it shall be measured, and provides for independent review to determine if ongoing forest management meets these requirements. Remedies for non-compliance should be clear, stringent, and easily enforceable.

Possible addition (in green) to #1 and #2 in the Optional section of Appendix H:

1. The Board recognizes that protection of ecological sustainability **and habitat connectivity** is very important. Additional protection of sensitive, rare, or representative ecological features may be desirable. As part of the LMF proposal process, the potential holder will have assessed the ecological values of the property. Grantor and grantee should consider fee acquisition of areas of high ecological value in addition to the easement, or more stringent protections of certain natural communities, habitats, or ecological health.

2. Requirements to include additional protections of visual quality, recreational features, riparian zones, **and/or other habitat connectivity features**, or restrictions on intensive forest management practices such as herbicides and plantations.

V. Project Agreements and Management Plans

The Workgroup's overarching objective was to identify opportunities for streamlining project agreement (PA) and management plan requirements for LMF-funded fee and conservation easement projects conducted by Cooperating Entities. The Workgroup believes that PAs on fee projects have become more detailed and prescriptive over time and that this imposes an unnecessary workload on both State and Cooperating Entity staff, increasing these entities' perpetual obligations beyond what realistic staffing levels can reasonably and effectively fulfill. In addition, the emergence of "multi-resource management plans" in fee PAs seems to have its source in DSA practice, not LMF requirements. Specifically, the model appears to have migrated in from the Plum Creek easements. With these recommendations, the Workgroup seeks to better allocate scarce resources and advance sound stewardship of LMF projects.

1. **Eliminate the requirement for Project Agreements for LMF-funded easements.**

LMF and DSAs should explore whether key PA terms can be incorporated into LMF-funded easements. The State should determine whether it needs to be a third-party holder to the easement to ensure PA-type terms are sufficiently enforceable or if there is another mechanism to accomplish this.

2. **Project Agreements for fee acquisition projects should be streamlined with a goal of reducing workload on both State and Cooperating Entity staff and minimizing prescriptive language in the PA. If this can be achieved, the participating DSAs suggest eliminating or significantly reducing the requirements for ongoing review and approval of Cooperating Entity management decisions. Specific suggestions include:**

- a. Provide a robust "Scope of Project" description grounded in and referencing representations made in the application. This would effectively provide the performance standards by which project performance could be evaluated over time without the routine need for a management plan with ongoing review and approval.
- b. Encourage DSA and Applicant to meet much earlier in the process (perhaps a pre-application?) to develop project goals and objectives and the substance necessary to draft a clear Scope of Project.
- c. Consider a provision in the annual project report (currently to both LMF and DSA) that includes a brief description of anticipated management actions in the coming year. This would be a way of keeping the State informed without requiring an approved management plan with detailed review and approval requirements.
- d. Broad conservation objectives should be clear and well described in the PA with opportunities for communication between DSAs and Cooperating Entities on a regular basis (perhaps less frequently than annually). In place of annual monitoring, the State should consider an audit process to serve the ultimate accountability goal shared by all.

3. **Management Plans should not be routinely required in the Project Agreement.**

LMF and DSA staff suggest that DSAs should retain the ability to require a management plan if necessary, for example in unusual situations such as special wildlife habitat needs, complex public access arrangements, etc. NOTE: As a separate matter, concern was raised about the applicability of management plans in the context of agricultural conservation easements – this issue requires more attention even if the PA requirement is eliminated for LMF-funded agricultural farm conservation easements.