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Agricultural Conservation Leasing Guide



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Introduction

In Maryland, there are numerous opportunities for increasing conservation practices on leased land.¹ According to the 2012 U.S. Department of Agriculture's (USDA) Census of Agriculture, there were 850,512 acres of leased farmland in Maryland, or 42% of total agricultural acres.² While 66% of Maryland's farmed acres were enrolled in the state cover crop program in 2017,³ as of 2012, less than 4% of Maryland's farmland was enrolled in federal conservation programs.⁴ Further, in 2017, only 23% of Maryland Agricultural Water Quality Cost-Share (MACS) contracts, a state cost-share program for conservation practices, were with tenants.⁵

Conservation practices are not commonly used on leased land for a variety of reasons, including inadequate communication between landowners and farmers, limited understanding of conservation programs and available cost-share funding, and a lack of security in the rental relationship. The obstacles to implementing farm conservation practices on leased land can be addressed by opening communication channels and using simple leasing strategies.

This publication is meant to help farmers and landowners use leases as a tool to not only protect their business interests but also implement stewardship planning and conservation practices on leased land. Many conservation programs described in this guide are accompanied by suggested considerations and/or sample lease provisions to show how they might be incorporated into a lease.

No part of this guide, however, should be viewed as legal advice. There is no substitute for seeking the legal advice of an experienced attorney. A good resource for finding a qualified Maryland lawyer is the Legal Services Directory of the Agriculture Section of the Maryland State Bar Association, available at umaglaw.org

Communication between Landowner and Farmer Is Key

A leased farm is first and foremost a business transaction, which should be documented by a written lease. Parties to a lease can also use the agreement to establish land stewardship standards and encourage investments in conservation practices. There are also environmental benefits from on-farm conservation practices, including enhanced soil health, improved water quality, and decreased soil erosion, which can ultimately make farmland more productive and increase its value.

Some practices, however, take several years to show a return on initial investment. By using simple language in a farm lease, landowners and farmers can establish the necessary foundation to implement conservation practices on leased land in a mutually beneficial way. For a good resource outlining the basic components of a lease and the types of agricultural leases, see *Agricultural Leasing in Maryland*, by Paul Goeringer.⁶

Many members of the agricultural community rent land without using a written lease and are hesitant to change. A lease, however, does not have to be a complex document. It should reflect each party's understanding of the business transaction and prevent future conflict. A farmer who rents ground without a lease is at risk for conflict that could result in lost profits, costly litigation and/or the end of the landlord/tenant relationship. Some landowners, for example, have distinct preferences and opinions about how their land should be farmed (such as the limited use of pesticides). If those stipulations are not in writing and agreed upon by both parties, legal conflict can occur.

To maintain a good working relationship, landowners and farmers need to discuss their farming and conservation goals. At a minimum, the parties to a leasing arrangement should verbally communicate

how the land will be farmed, the basics of the leasing deal (term, rent, termination, etc.), and any concerns about the property. Farmers should not assume that landowners have no preferences regarding farming techniques, and landowners should not assume that farmers will use best management practices. Having a conversation at the beginning of the leasing arrangement will benefit and better inform both parties. After a thorough discussion about farming plans and conservation goals, the parties should put their points of agreement into a written lease. Most lease disputes arise out of a misunderstanding, so having open communication and agreeing about the terms of the lease will help to reduce the likelihood of future legal woes.

Landowners and Farmers Should Evaluate Their Conservation and Leasing Goals

In any leasing arrangement, landowners and farmers need to recognize where their interests align and differ. Both parties may have something to gain from using agricultural conservation practices that safeguard the future health and profitability of farmland. A landowner should start the communication process by considering his or her own stewardship values and priorities, and then consider how they relate to the farmer's. The following is a list of initial considerations for a landowner. A more detailed communication strategy outline is found in Appendix B.

1. How important is farm stewardship, or responsible land and resource management, to you?
2. Is it important that you have a farmer who shares the same stewardship or land and resource management values as you?
3. Do you feel comfortable making agricultural conservation choices for your land independently, or do you want to make conservation practice choices collaboratively with your tenant?
4. If farm stewardship is important to you, is it addressed in your current farm lease?

Understanding the landowner's long-term plan for the land will allow a farmer to consider the conservation practices that will enhance both farming activities and landowner's goals. The following considerations will help start a farmer start a conversation with a landowner.

1. How important is farm stewardship, or responsible land and resource management, to you?
2. Do you have concerns about the land you farm (soil erosion, soil health, surface water runoff, etc.) that could be improved with conservation practices?
3. What short-term impediments exist that prevent you from incorporating conservation practices into your farming operation (examples: indefinite or short lease term, concerns about maintenance costs/responsibilities)?
4. What types of support or resources would make adopting agricultural conservation practice(s) feasible?

Good Husbandry, or Proper Farm Stewardship, is an Important, but Subjective, Standard for Maryland Landowners and Farmers

Landowners and farmers should never assume they share farming values. The best way for landowners and farmers to ensure they agree on what good husbandry means is to first discuss preferred farming methods and then make certain that their lease agreement reflects those preferences.

Although some sources of American common law reference an implied legal covenant of good husbandry,⁷ Maryland courts have not recognized it.⁸ In states that recognize an implied covenant of

good husbandry, a farmer has an obligation to practice good husbandry or care for the land to the same extent as other farmers in the area. A Maryland landowner should incorporate those practices into a lease agreement to ensure that good husbandry is observed.

A lease allows landowners and farmers to create their own definition of good husbandry for the specific land in question. Without a detailed lease, both parties are in a legal gray area that can cause conflict. For example, although no-till farming is a common conservation farming practice in Maryland, unless a lease specifically requires its use, a farmer is under no legal obligation to use no-till and a landowner has no legal authority to demand it. For more on good husbandry in leasing, see *Agricultural Leasing in Maryland*.

Many Federal, State, and Local Agencies Work Together to Help Landowners and Farmers put Conservation into Practice on their Land

Landowners and farmers should consider consulting the following professionals and using their technical expertise to help implement conservation practices. Contact information for the agencies below is found in the Resources section of this guide.

Maryland's 24 *Soil Conservation Districts* (SCDs) work directly with landowners and farmers to enhance farming operations while helping conserve soil and preserve water quality. SCDs, although a political subdivision of the state, are not regulatory and are self-governed by Boards of Supervisors. Landowners and farmers interested in conservation practices may visit their local SCD for technical assistance in installing a full menu of soil conservation practices that reduce erosion and improve water quality. Additionally, SCDs, by and through the state and federal agencies described below, connect landowners and farmers with financial assistance options to offset the costs of conservation practices.

The *Natural Resources Conservation Service* (NRCS) is an agency of USDA. NRCS has county field offices throughout Maryland and staff to assist with land stewardship by providing technical support and conservation planning. NRCS offers cost-sharing assistance for several of their conservation practices to make them affordable for landowners or farmers to implement. Their programs are available to land users of all types, including farmers, ranchers, and forest owners.

The *Farm Service Agency* (FSA), like the NRCS, is a USDA agency, working in partnership with the NRCS to implement conservation programs, and provide funding for farmers to implement these programs. FSA has offices in each county to provide landowners and farmers with information on these programs and how to enroll.

The *Maryland Department of Agriculture* (MDA) also assists farmers in implementing conservation practices. MDA offers conservation grants and loans through programs such as MACS, cover crop, manure transport and matching service and the Conservation Reserve Enhancement Program (CREP).

The *University of Maryland Extension* (UME) is a collaboration between the University of Maryland College of Agriculture and Natural Resources and the University of Maryland Eastern Shore School of Agricultural and Natural Sciences. UME educates the public and shares information and guidance from research gathered across the state. UME has offices in each of Maryland's counties and Baltimore City. Landowners and farmers may consult their county UME office for guidance on conservation practices. UME can also offer advice on working with federal and state agencies, as well as non-governmental organizations, to enroll in conservation programs.

Numerous non-governmental organizations focused on conservation, such as ShoreRivers and The Nature Conservancy, have programs to encourage implementation of agricultural conservation practices.

Farmers Can Use a Conservation Plan as a Communication and Leasing Tool

Soil Conservation and Water Quality Plans, otherwise known as conservation plans, are farm-specific plans that set natural resource goals and suggest best management practices.⁹ Conservation plans are required by Maryland law for some farmers,¹⁰ but are voluntary for others. Conservation plans are developed free of charge by technical staff working in Maryland's Soil Conservation Districts.

Farmers and landowners who already have conservation plans are in a good position to understand their conservation needs or challenges, and how they might be met. Reviewing, updating, or creating a conservation plan can be a good way to initiate a conversation with your landowner/farmer about conservation practices.¹¹ Further, agreeing in a lease to meet annually or biannually to review a farm conservation plan is a way to ensure conservation goals are met and to assess whether or not farming methods need to be adjusted.

Landowners with preferred farming practices, such as particular conservation methods, should include that information in the lease. For example:

Tenant shall, to the maximum extent possible, implement the best management practices and natural resource strategies outlined in the farm's conservation plan dated _____ and as amended from time to time. Failure to do so shall be considered a breach of the lease. Tenant further agrees to amend the farm's conservation plan either [insert a time interval such as annually] or as recommended by the Soil Conservation District, whichever is sooner. Tenant shall have a continuing obligation to provide Landlord with a copy of the farm's current conservation plan.

Keep in mind that a provision like this may be more effective if there is also a section of the lease outlining what happens in the event of a breach. To alleviate severe consequences from a breach, many leases allow the violating party to fix the breach before the lease may be terminated. Fixing a breach related to farming practices, however, may be impossible if the term of the lease is not long enough for the repair to be made. For examples of breach provisions, see *Agricultural Leasing in Maryland*.

Alternatively, farmers or landowners can reference specific practices from a farm's conservation plan in the lease, as outlined below. Farmers may be hesitant to initiate this type of landowner oversight on a farming operation, but working through these issues early on and putting them in writing can prevent a future dispute based on a misunderstanding of priorities and preferences.

Consider Referencing a Nutrient Management Plan in a Farm Lease

Most Maryland farms are legally required to file and follow a Nutrient Management Plan (NMP) with MDA.¹² NMPs detail how and when crops are fertilized and how animal waste is contained and applied. These plans result in strong conservation outcomes, and have made Maryland's farmers national leaders in managing nutrient use. By state law, NMPs are prepared by certified University of Maryland specialists, certified public and private consultants, and/or trained certified farmers.¹³

Farmers must submit a copy of the NMP to the MDA Nutrient Management Program. A farmer must take soil samples as well as manure samples, if used, every two years, and submit an Annual Implementation Report (AIR) documenting how a NMP was implemented the previous year. A landowner does not, based solely on land ownership, have a right to a copy of the NMP filed by a farmer. If desired, a landowner can specify in a lease that he/she wants to be involved in the NMP process or at least be aware of what is in a plan. If a landowner wants to make noncompliance with a NMP a breach of a lease, he/she must also include that provision in the lease. Making noncompliance with a NMP a breach will be more effective, however, if the consequences of breaching the NMP are spelled out in the lease.

Sample lease provision: *Tenant shall be responsible for compliance with all laws, regulations, and policies related to nutrient management planning, including but not limited to, complying with nutrient application setbacks, if applicable, filing Annual Implementation Reports (AIRs) and ensuring the farm's NMP is current. A copy of the NMP and AIRs shall be provided by Tenant to Landlord within ten (10) days of submission to MDA. A willful violation of the farm's nutrient management plan and/or AIR shall be considered a breach of the lease.*

Landowners and Farmers Contemplating Conservation Practices May Want to Consider Cost-Share Funding Options

The FSA administers the USDA's conservation practice funding programs with NRCS technical assistance. An example of a USDA conservation practice funding program is CREP.¹⁴ CREP is part of the USDA Conservation Reserve Program (CRP). Participants remove cropland and marginal pastureland from agricultural production and convert the land to native grasses, trees, and other vegetation or restore wetlands. In return, participants are eligible to receive state and federal financial assistance, including cost-share for installation costs, incentive payments, annual rental payments, and maintenance payments, depending on the practice installed.¹⁵

Landowners and farmers are eligible for 10-15 year CRP contracts. If a farmer of leased land enters into the contract, receives funding, and is then unable to fulfill the contract's obligations because of lease termination, sale of the land, etc., the farmer is obligated to pay back the funding. Landowners who want to encourage farmers to enter into CRP contracts and install the associated conservation practices may consider offering a farm lease with a term at least as long as the CRP contract, giving a farmer the assurance of knowing he/she will be able to fulfill the CRP contract obligations.

Landowners might also consider including a provision in the lease in which the landowner agrees to reimburse the farmer for CRP funding if the tenant is unable to fulfill the CRP contractual obligations because the lease is terminated, the land is sold, etc. Alternatively, a landowner may enter into a CRP contract on his/her own or with a farmer and agree to split the CRP contract payments. A landowner and farmer may contractually agree to share CRP payments to compensate the farmer for maintaining the practice and/or for the loss of land in production. A landowner who does not contractually agree to share CRP payments may consider one of the other strategies in this guide to compensate the farmer for maintaining the practice and/or for the loss of land in production. The USDA also offers conservation practice funding assistance to farmers through the Conservation Stewardship Program (CSP) and the Environmental Quality Incentives Program (EQIP).¹⁶

A Maryland landowner may also sign an agreement with MDA and the county SCD office for MACS cost-share funding to install conservation practices.¹⁷ A landowner who does so may assign a cost-share payment to the farmer. A farmer of leased land may also apply for the MACS program, but must have the landowner sign the MACS agreement and agree to be bound by its terms. MACS funding exceeding \$5,000 must also be secured by a lien on the property.

Landowners and farmers interested in installing conservation practices on leased farmland should consider state and federal funding assistance. If a landowner and/or farmer agree to pursue conservation funding, each party should consider how they will receive funding (received by one party, shared, etc.), whether the lease reflects the terms of the funding agreement and each party's responsibilities related to the conservation practice.

Landowners and Farmers Can Use Lease Provisions to Encourage Conservation Practices

Before beginning a conservation practice, landowners and farmers should consider how much the practice will cost over the short- and long-term, including initial investments, potential effect on yields, and the cost of maintenance. The term of the lease, rental payments, proration of costs, and options to buy the land can be used to allocate risk and encourage implementation of practices.

The Terms of the Lease can Impact Types of Farming Practices Used

A short-term lease gives a farmer little motivation to examine the sustainable management and long-term health of natural resources on the farm.¹⁸ A longer-term lease gives a farmer more security to make a return on his/her investment in the property. A lease term can also be extended to match the life of a conservation practice, or for how long a conservation practice continues to provide the intended benefits.

Landowner and Farmer Must Determine how to Allocate Costs of Conservation Practices

After estimating the costs of a conservation practice, it can be difficult for the farmer and landowner to decide how to share the costs. Should the landowner or the farmer pay for the costs of a farm conservation practice? What if the costs are divided and the lease is later terminated? Should the costs be prorated over time? Both parties should consider such questions and address them in the lease.

Flexible or Reduced Rental Rates may Help Compensate for Inherent Risk to Farm Productivity and Profit of Implementing Conservation Practices

For leasing parties accustomed to using fixed cash rent, one way to allocate risk is to consider a flexible cash lease or a crop share lease.¹⁹ A flexible cash lease allows the landowner to receive a rate based on acreage, but the rate may fluctuate based on crop yields or market prices. A flexible cash lease may be appropriate when the parties to a lease fear adopting a conservation practice will reduce yields.²⁰

In contrast, a crop share lease provides the landowner with a percentage of harvested crop profits for land use, though the farmer must also share the cost of inputs. With a crop share lease, the landowner may be classified as self-employed for tax purposes, which could lead to higher taxes. Anyone with concerns about tax consequences should consult their accountant.

An alternative to choosing a different form of lease is to reduce cash rent by the amount the farmer initially spent on the conservation practice. Rent can also be adjusted to compensate a farmer for yield losses or increased input costs in a single year. Rent reductions can be done in a number of different ways, but the lease should clearly state each provision in the lease to reduce the risk of future conflict. To reduce rent for a single year, state the reason why in the lease.

Sample lease provision: *To compensate Tenant for the time and expenses contributed towards the creation of a _____, rent in year one of the lease shall be reduced by \$_____ or %_____.²¹ An example of a graduated rent provision is: The rent for the first year of the term will be reduced by 15% and the reduction shall diminish by 5% each year until the full rental amount is due and owing.²²*

Adding a Depreciation Schedule to a Lease Prorates Costs and Encourages Farmer Investment in Conservation Practices on Leased Land

A depreciation schedule helps safeguard the farmer's investment in a conservation practice in case the lease ends before the practice is fully developed. A depreciation calculation of the investment should

account for the farmer’s initial investment (after cost-share and any landowner-supplied capital), the annual rate of depreciation of the conservation practice, and the date the depreciation schedule begins (Table 1). The purpose of the depreciation calculation is to allow a farmer “to be reimbursed by the landlord when the practice, measure, or improvement is completed, or will be compensated for its unexhausted value when the farmer leaves the farm” (see Table 1)²³

Table 1. Depreciation Schedule Safeguards Farmer’s Investment in Conservation Practice

Conservation practice	Tenant’s net cost of installation	Annual rate of depreciation	Date depreciation begins
Grassed Waterway	\$1,250	10%	8/1/2017

Landowner May Offer a Tenant a Right of First Offer or Right of First Refusal

If adjusting the terms of a lease or the rent is not feasible, a landowner who intends to sell farmland may consider negotiating a right of first offer or refusal with a farmer. A right of first offer gives the farmer (holder of the right) the first opportunity to purchase the property according to the landowner’s terms and conditions. The farmer will have a limited amount of time to exercise the right to purchase the farm before the landowner may offer it to third parties. In contrast, a right of first refusal gives the farmer (holder of the right) the opportunity to match an offer made to purchase the farm. Both options help ensure that a landowner does not sell the land “out from under” a farmer.

When presented with an offer, a farmer must be ready to respond in the agreed upon time period, which typically means acting quickly. Rights of first offer and refusal encourage good stewardship because a farmer works the land which he/she might one day own. Providing a farmer with first rights of offer and refusal can also help maintain the leasing relationship. Landowners and farmers interested in these types of options should seek the assistance of an experienced real estate attorney.

Considerations and Sample Lease Provisions for Popular Conservation Practices Include Vegetative, Management and Structural

The conservation practices, leasing considerations and sample lease provisions below are not exhaustive but rather provide an overview of how farmers and landowners can use a lease to encourage these practices. Lease terms should be simple and document the parties’ points of agreement on issues such as how a practice will be installed, utilized, and maintained. Farmers and landowners should change the lease provision to fit each individual situation.

Vegetative Conservation Practices Utilize Vegetation to Reduce Erosion and Excess Nutrients

Cover crops can reduce wind and water erosion, preserve or improve soil health, use excess nutrients that could otherwise pollute waterways, and suppress weeds or pests. MDA manages a cover crop program, providing grants to offset costs. Farmers may consult with their SCD to determine which crop or combinations of crops are eligible to plant as cover crops.

Considerations for farmers and landowners contemplating cover crops:

1. Who will file the appropriate paperwork to enroll in the cover crop financial assistance program? What varieties of cover crops will be planted?
2. Who receives the cover crop payment?

3. Who pays for cover crop seed, labor, and equipment if state/federal payments are inadequate to cover costs? If the farmer and landowner plan to share payments, at what percentage will they be divided?
4. When cover crops are done growing will they be destroyed, suppressed, or used for livestock? Who pays any costs associated with terminating a cover crop?

Sample lease provision: *To the maximum extent possible, Tenant shall plant a fall cover crop on all fields that have been planted during the previous cropping season. Tenant is encouraged to participate in the state or federal cover crop program for each year of the lease. If Tenant is awarded state or federal cover crop funding, he shall have the right to all funding. If payments from a state or federal source do not completely cover the cost of the planting, maintaining and harvesting or suppressing cover crops, Tenant shall be responsible for all overages. (Alternative provision) If cover crop program payments are received from a state or federal source and do not completely cover the cost of the planting, maintaining and harvesting or suppressing of cover crops, Landlord and Tenant shall contribute, in near equal shares, the amount funding necessary to cover the deficit.*

Critical Area and Pasture Planting are similar vegetative conservation practices. Maryland's Critical Areas are land within 1,000 feet of the tidal area of the Chesapeake Bay.²⁴ In addition to preventing erosion, critical area plantings provide water quality benefits and habitat for small birds and animals. Pasture planting also filters surface runoff and provides forage for livestock.²⁵

Considerations for parties considering Critical Area and pasture planting:

1. What are the dimensions of the proposed planting area?
2. What is the purpose of the planting: soil erosion control, wildlife habitat, livestock grazing, etc.?
3. Will the area be free from grazing animals for the first year after planting?
4. Will the planted area be fenced to protect it from wildlife/livestock?
5. Will the farmer provide needed maintenance and/or weed control? If so, how will the farmer be compensated?

Sample lease provision: *Tenant shall maintain the [Critical Area] or [Pasture Planting] area to NRCS standards [include description of planting area if not previously defined in the lease]. Landlord shall be responsible for the costs of all fencing and maintenance of fencing needed to protect the [Critical Area] or [Pasture Planting] area. Landlord and Tenant agree to visually observe or "walk" the planting area annually to ensure the area is the proper size and is in good repair.*

Riparian buffers are herbaceous and/or forested areas planted along rivers, streams, or drainage ditches to filter water runoff and limit soil erosion. Vegetation in buffers can slow water flow and trap sediment, pesticides, and nutrients.²⁶ The maintenance of conservation practices, such as riparian buffers, can present a challenge for parties to a lease. Landowners and farmers should discuss and agree on who will bear the maintenance responsibilities and how that person will be compensated. The details of the agreement should be included in the lease.

Considerations for parties contemplating riparian buffers:

1. If applicable, will the landowner and farmer share in state and/or federal rental payments and/or cost-share funding?
2. Who will be responsible for maintaining the riparian buffer?
3. If the farmer is responsible, how should he/she be compensated? Examples include: percentage of program (e.g. CRP) payments, reduction in rent, longer guaranteed lease term, increase in tillable acres, etc.

Sample lease provision: *Landlord has established a vegetative buffer(s) _____ feet from the banks of _____ river. Tenant shall not plant, harvest, plow, disc or use fertilizers or pesticides within the vegetative buffer area(s). Fencing shall be erected by Landlord to keep livestock out the buffer area. Tenant shall maintain the vegetative buffer, in accordance with SCD and NRCS standards, by mowing and/or applying recommended herbicides to control noxious weeds and/or invasive species. To compensate Tenant for the buffer maintenance, Tenant shall receive ____ % of the annual CRP rental payment received by Landlord. (Optional provision) If a state or federal conservation program inspector finds the buffer has not been properly maintained and as a penalty orders a refund of program payments, Tenant shall be solely responsible for said refund.*

Structural Conservation Practices Include Woodchip Bioreactors, Diversion, Grassed Waterways, Terraces, Two-Stage Ditches, Manure Storage and Agrichemical Structures

Woodchip bioreactors reduce nitrogen in runoff and groundwater by catching field runoff in a subsurface trench filled with wood chips.²⁷ Carbon from the wood chips interacts with nitrogen in the water to cause denitrification, which reduces nitrogen pollution into adjacent waterways.²⁸

Land does not have to be taken out of production for a bioreactor because it has no impact on drainage, requires very little maintenance, and can last for up to 20 years.²⁹ Landowners may need to pay the bioreactor because the structure is placed in a field for decades, and will probably be used for much longer than the length of a farm lease. Designed to prevent excess nutrients from reaching waterways, bioreactors do not directly benefit the land they are placed on.

Sample lease provision: *Tenant acknowledges that Landlord has established a woodchip bioreactor at [insert location] in the field. Landlord has assumed all costs associated with the installation of the bioreactor; however, the Tenant shall pay for any repair in the event agricultural operations or equipment cause damage to the bioreactor.*

Diversions, grassed waterways, and terraces are structures that can improve water flow through land, reduce erosion and formation of gullies on slopes, and allow for better crop growth on bottomland soils. Diversions are often built on hill slopes near the peak to intercept runoff and reduce erosion from the field. Vegetation growing in the channel processes the water and removes nutrients.

Terraces are constructed differently, but they have a similar objective as diversions. They hold and guide water making its way down a slope, slowing the water to reduce the amount of soil erosion.³⁰ Each diversion or terrace system must have an outlet, such as a grassed waterway, grade stabilizing structure, or underground outlet. If a diversion is planned for a high-erosion area, the farmer or landowner may need to add other soil protection practices to prevent the diversion from filling with sediment. A lease should clearly outline the responsibility for maintaining diversions or terraces. Maintenance includes keeping the terrace or diversion free of built-up sediment or burrowing animals, as well as providing any fertilizer needed to support healthy vegetation.³¹

Two-stage ditches have benches which act as floodplains throughout the ditch, improving drainage and water infiltration, and reducing flood and erosion risk. Ditch banks are removed a few feet from the bottom to widen the overall ditch and create more space for water to flow.³²

Grassed waterways and diversions require a certain amount of dedicated land. The acres removed from production will decrease the total number of farmable acres, which potentially reduces rental rates.

Sample lease provision: *Tenant agrees to maintain all diversions, terraces, and/or grassed waterways, including management of noxious weeds and built up sediment. If any inputs such as fertilizer or herbicide are required to support vegetation, the cost shall be the responsibility of Tenant.*

Manure storage structures hold livestock manure until it can be applied to fields or transported. The structures prevent nutrient loss through runoff and protect waterways.³³ Storage of manure for field application can also reduce synthetic fertilizer costs. If manure is transported to another farm, the farmer should clean up any spills and scrub equipment before or after use at a different facility.

Agrichemical handling facilities have tightly sealed walls and floors to hold agrichemicals used on the farm.³⁴ These facilities are constructed to prevent runoff or leaks into the surrounding environment by preventing chemicals stored, mixed, or loaded into equipment from entering the air, soil, or waterways.

Though they may provide benefits to a farmer, the expense and permanence of the structures may mean that the landowner should assume the cost of these projects.

Considerations for parties contemplating a manure storage facility or agrichemical structure:

1. If this is a new structure, who will be responsible for construction costs?
2. Is it being built exclusively for this tenant?

Sample lease provision³⁵ : *Landlord shall be responsible for the costs of construction of manure and/or agrichemical structures. Tenant shall be responsible for any damage caused by Tenant, his agents, or employees to farm structures. Tenant, his agents, and employees must have current certification for handling and applying all chemicals used on the farm. Tenant may store manure and/or agrichemicals in farm structures. Tenant shall apply manure in compliance with all state laws, regulations, and policies. In no instance shall Landlord be held liable for damage caused by the storage, use, spillage or application of manure or agrichemicals stored by Tenant in farm structures.*

Farmers and Landowners Can Use Leases to Encourage Management Conservation Practices

Contour farming is tilling and planting a crop in a way that orients the rows parallel to the contour of the slope and perpendicular to the flow of water, on or near the contour of a field, taking advantage of its natural shape to reduce erosion and hold onto water. This practice may be used in conjunction with strip cropping to slow runoff and trap sediment, as well as retain nutrients in the soil.³⁶

Considerations for parties contemplating contour farming:

1. How many acres will be planted using this practice?
2. Will it just be contours, or will strip cropping be implemented? If strip cropping is used, what crops will be paired?
3. What are the measurements of strips? Will they be kept consistent from year to year?

Sample lease provision: *The Tenant shall use contour farming on [insert number] sloped acres located [insert location] in combination with strip cropping. Sloped acres are those with a grade above 10%. The Tenant may independently choose which crops to plant or may consult with SCD or NRCS. Strips shall be sized at _____ feet wide, and the size shall be kept consistent from year to year. However, if the Tenant changes crops and it requires an equipment change, the size of contours may be adjusted to accommodate the new equipment.*

Crop rotation, as its name suggests, is a method of planting different types of crops, such as grains and legumes in sequential seasons in the same field. When the correct crop combinations are used for the right soil types, crop rotation maintains soil productivity and may require fewer fertilizer or pesticide inputs in the future. Table 2 is an example of a simple crop rotation schedule for a field.³⁷

Table 2. Alternating grains and legumes is one example of a helpful practice for reducing nitrogen

Field:	1	2	3	4	5	6
Year 1	Corn					
Year 2	Soybeans					
Year 3	Corn					
Year 4	Double crop wheat and soybeans					
Year 5	Corn					

needs

Sample lease provision: *Tenant shall maintain the crop rotation schedule in this lease as may be amended from time to time. The schedule shall account for nutrient levels in the soil and how crops will impact these levels. The schedule shall also consider previously used herbicides or pesticides and the potential impact on new crop plantings. Landlord and Tenant shall review the crop rotation schedule every three years to ensure it meets the conservation goals established in this lease.*

Integrated Pest Management (IPM) is a conservation technique used to reduce wide-scale pesticide application. IPM involves using field scouting to evaluate the impact of insects, weeds, and diseases on crops. Farmers evaluate pest control options for their costs, results, and environmental impacts. The goal of IPM is to address pests in a financially responsible manner while preventing pesticide leaching, runoff, or drift.³⁸

Considerations for parties contemplating IPM:

1. Are there specific pesticides or pesticide application methods the landowner does not want the tenant to use?
2. What alternative pest control methods, if any, should be considered or utilized before pesticides are used?
3. Who will pay for the IPM techniques used?
4. Is there a desired time to have pesticides applied to minimize runoff/drift?
5. What will happen if the crop fails because IPM methods were not correctly implemented?

If a landowner prefers that a farmer use particular pest-control methods, those preferences should be included in the lease. If a landowner’s preferred methods increase the farmer’s costs or decrease yields, the landowner should consider adjusting the rent accordingly.

Sample lease provision³⁹: *The Tenant agrees to implement Integrated Pest Management (IPM). Landlord and Tenant shall annually discuss, prior to the growing season, the IPM techniques the Tenant plans to use on the farm. If Tenant is unable to effectively control pests using IPM, Landlord shall not unreasonably deny Tenant the right to use pesticides.*

Rotational grazing involves grazing a portion of pasture while the remainder is allowed to “rest.”⁴⁰ To use rotational grazing, pastures need to be divided into two or more paddocks with fencing to retain livestock in an intended area.⁴¹ The livestock is moved from one area to another on a regular

schedule, which provides the livestock with new and continuous foraging areas and allows the field they were previously in to recover and develop new vegetation.

Livestock should not graze plants below a specific height or vegetation may not fully recover for the next cycle. SCD or NRCS can help design grazing practices. Given the many factors involved in a rotational grazing system, parties to a lease can either agree to a general provision referencing grazing (as described below) or to a more detailed plan created on an annual basis.

Considerations for parties contemplating rotational grazing:

1. How many paddocks will the pasture be divided into?
2. How often will livestock be moved?
3. What is the minimum time a pasture needs to recover?
4. Will the tenant be responsible for the cost and application of lime and/or fertilizer?
5. Will the tenant be responsible for weed control?
6. How will the livestock access water?
7. Are there natural water access areas that need to be restricted to protect soil and water quality?⁴²
8. Will livestock need any supplemental feeding, and if so, at whose expense?

Sample lease provision⁴³ : *Tenant agrees to consult with the county SCD and NRCS about rotational grazing practices before commencing grazing. Tenant also agrees to implement rotational grazing practices in accordance with NRCS standards. Tenant shall be responsible for all costs associated with grazing including the cost of lime, fertilizer, weed control, and fencing.*

Alternative sample lease provision⁴⁴ : *Landlord and Tenant agree to meet annually, prior to the commencement of grazing, to agree on a written rotational grazing plan which will be signed by both parties, dated and made a part of this lease. Tenant shall be responsible for all costs associated with grazing including the cost of lime, fertilizer, weed control, and fencing.*

Well protection requires maintaining proper use of farm input products to improve the quality of water sources.⁴⁵ Such maintenance includes mixing farm chemicals and rinsing containers a minimum of 100 feet from a well, even if it is abandoned, and making sure all well casings or grass filter strips are properly maintained.⁴⁶

Considerations for parties contemplating well protection:

1. Are all unused wells nearby properly sealed?
2. Have markers been placed around a water source and at the 100 foot barrier?
3. Are filter strips needed around the farmstead or well?

Sample lease provision: *Tenant shall mix and rinse all farm chemical containers at least 100 feet away from a well and/or water source. The 100-foot distance should be marked with flags or other visible signage. Tenant shall report any spills or accidents involving farm chemicals to Landlord and shall inform Landlord if any well cases or chemical mixing areas are in need of repair.*

Conservation tillage (residue and tillage management, reduced-till, no-till) is used to manage the components of crop and other plant residue on the soil surface.⁴⁷ Limiting soil-disturbing activities, like tilling, increases organic matter, allowing the soil to hold more moisture, maintain better microbial life, and provide more nutrients to crops. Crop residue management is a component of reduced tillage

or no-till practices. Crop residue from a previous planting is typically left on the soil to protect it from weather elements like rain, wind, and sun until a new planting becomes established enough to protect the soil.⁴⁸

Considerations for parties contemplating conservation tillage:

1. Is the farmer willing to consider adopting reduced-till or no-till management? If so, does the farmer have the necessary equipment?
2. Is the field more suitable for reduced-till or no-till?
3. Would starting as reduced-till while phasing to no-till be beneficial?
4. Will it be necessary to change other practices to reduce weed growth?
5. What are the disease and weed management challenges and implications in a reduced-till and no-till system?

Sample lease provision: *Tenant, in consultation with SCD, NRCS, and/or MDA, shall reduce tillage as much as possible in accordance with the farm conservation plan. Tenant shall maintain at least [insert percentage such 30] % residue cover on the ground surface at planting.*

Spotting Leasing Problems before They Start

Anticipating problems relating to establishing and maintaining conservation practices is the first step to a successful conservation leasing agreement. Maintaining the practices over the long term can be a challenge. To ensure success, consider a lease that clearly outlines responsibilities and includes compensation for maintaining a practice.

Regular maintenance of conservation practices ensures the effectiveness of conservation practices and prevents costly repairs. If the farmer does not keep the buffer strip along a field at the required width, for example, NRCS could make the party on the FSA contract pay to reestablish the buffer. If the buffer area has been planted, the farmer will need to remove the crop.

The lease should include the terms for responsibility for maintaining a conservation practice. This will ensure that a landowner does not enter into a contract for a conservation practice without the farmer's knowledge of these new responsibilities. A landowner also needs to inform a farmer of the dimensions of the area in question and what operations may damage the conservation practice, such as drifting herbicides or mowing. To prevent problems, a landowner and farmer can add an annual inspection of the farm's conservation areas into the lease,

Maintaining Landowner/Farmer Communication throughout the lease term is the best way to ensure a leasing arrangement remains mutually beneficial.⁴⁹ A good lease represents the understanding of the parties even though circumstances affecting the lease may change over time. Parties can and should amend a lease when necessary. A landowner who wants to understand the practices used on the farm should have a conversation with the farmer.

A landowner may also use other tools to stay informed, such as the farm's nutrient management plan, soil test results, and/or conservation plan. Landowners who want to do their own soil testing need to reserve that right in a lease because a right to re-enter the land is not implied in a commercial lease agreement. Alternatively, a landowner may include in the lease a requirement that the farmer conducts periodic soil testing, shares the test results and, if needed, undertakes methods or practices to address excess nutrient levels and/or improve soil health.

A farmer should be made aware of all easements on leased farmland and the restrictions those easements might have on farming. For example, conservation easements may restrict agricultural production in certain areas, thereby reducing the amount of land that can be farmed. To avoid confusion, all easements should be referenced in the farm's lease, a copy of the easements should be attached to the lease, and compliance with the easements should be documented in the lease. Fully informing a farmer about restrictions on use at the beginning of the leasing relationship will prevent future conflict.

Conflict resolution may be necessary, the MDA offers low-cost mediation for agricultural disputes. The Maryland Agricultural Conflict Resolution Service is a USDA-certified agricultural mediation program hosted by MDA. Mediation is a confidential, non-adversarial process where an impartial neutral individual attempts to bring the parties to a resolution. Both parties can benefit from having a neutral third-party involved in dispute resolution. A section on pursuing mediation before litigation can be written into a lease so, in the case of a conflict, the parties must first try to settle any dispute through mediation before initiating litigation.

Incorporating conservation practices on leased farmland is complex and must be addressed by both parties to the leasing relationship. When parties to a lease take the time to communicate about their goals for the leasing arrangement and stewardship, a written lease can serve to protect both parties by documenting points of agreement and consequences for not complying with the lease.

Appendix A: Resources and Contacts

Federal Agencies:

USDA–Farm Service Agency, 339 Busch’s Frontage Rd, Suite 104, Annapolis MD 21409, 443-482-2760

USDA–Natural Resource Conservation Service, Maryland Office Locator: <https://offices.sc.egov.usda.gov/locator/app?service=page/CountyMap&state=MD&stateName=Maryland&stateCode=24>

Maryland State Agencies:

Soil Conservation Districts:

http://mda.maryland.gov/resource_conservation/Pages/technical_assistance.aspx.

Maryland Extension Offices- in all counties and Baltimore City. See extension.umd.edu for office location information.

Maryland Department of Agriculture, 50 Harry S. Truman Parkway, Annapolis, MD 21401, 410-841-5700

Maryland Department of the Environment, 1800 Washington Blvd., Baltimore, MD 21230, 410-537-3000

Maryland Forest Service, 580 Taylor Ave, Annapolis MD 21401, 877-620-8367

Non-profit Organizations:

Chesapeake Bay Foundation, 6 Herndon Ave., Annapolis, MD 21403, 410-268-8816

ShoreRivers, 114 S. Washington Street, Ste. 301, Easton, MD 21601, 443-385-0511

The Nature Conservancy, 425 Barlow Place, Ste. 100, Bethesda, MD 20814, 301-897-8570

Mountains to Bay Grazing Alliance, Michael Heller, MD Grazers Network, 410-549-7878

Appendix B: Landowner/Farmer Communication Worksheet

In addition to the major considerations discussed in this guide, the following questions are designed for you to answer to evaluate how important future conservation practices are for land you own or land you may want to rent as a farmer.⁵⁰ If you do not currently engage in conservation practices on agricultural land, these questions may help you decide how some practices may be implemented to reach new goals.

Questions to Ask Yourself (Landowner)	Questions to Ask Yourself (Farmer)
<ol style="list-style-type: none"> 1. Do you have a written lease with your farmer? <ol style="list-style-type: none"> a. If no, are you willing to enter into a written lease? b. If yes, does your lease address stewardship or conservation practices? 2. Have you considered the ways that conservation practices can increase the value of your farm? 3. What are your concerns related to the long-term environmental health of your farm and/or the impact of your farm on the surrounding environment? 4. What characteristics of the property might impact conservation choices (e.g. highly erodible soils, poor drainage, etc.)? 5. Are you willing to work with your farmer to implement conservation practices to improve the value of your farm and lessen negative environmental impacts? 6. If implementing a conservation practice will cost the farmer time or money, are you willing to compensate the farmer through a temporary reduction in rent? 7. Are you willing to consider a longer-term lease to ensure the maintenance of a conservation practice? 8. How will you monitor the effectiveness of conservation practices during the term of the lease? 	<ol style="list-style-type: none"> 1. Do you have a written lease with the landowner? <ol style="list-style-type: none"> a. If no, are you willing to enter into a written lease? b. If yes, does your lease address stewardship or conservation practices? 2. Have you had a conversation with the landowner about the farming practices you use? 3. Have you had a conversation with the landowner about agricultural conservation practice options? 4. Is there a current conservation plan for the farm? <ol style="list-style-type: none"> a. If no, are you willing to work with the local SCD/ NRCS office to create one? b. If yes, does it need to be updated? c. If yes (assuming it is up to date) is it something you have reviewed with the landowner? Is it referenced in your lease? 5. Are there characteristics of the farm that could be improved with conservation practices (soil erosion, surface water runoff, excess nutrient levels in soil, etc.)? 6. What is holding you back from putting the conservation practices in place? <ol style="list-style-type: none"> a. Lack of written lease b. Lack of stability in lease term (example-year-to-year lease) c. Lack of funding d. Impact on yields e. Lack of communication with landowner

Appendix B: Landowner/Farmer Communication Worksheet

Questions to Ask Your Farmer	Questions to Ask Your Landowner
<ol style="list-style-type: none"> 1. Can you create a conservation plan for the farm so we can review and discuss it? 2. Would you be interested in leading the implementation of a specific conservation practice such as _____? 3. Would you be interested in working with me to apply for cost-share programs? 4. What time or financial investments would you be willing to contribute to establish this practice? 5. What impact do you think the practice will have on your bottom line (increased input costs, reduced yields, etc.)? 6. How can we work together to make the implementation and maintenance of conservation practices equitable? 	<ol style="list-style-type: none"> 1. Would you be interested in implementing a specific conservation practice such as _____ on the land? 2. Would you be interested in applying for cost-share programs? 3. Would you be willing to use leasing strategies, such as a graduated rent, to compensate me for a period of decreased yields, or a depreciation schedule to reimburse me, if you terminate the lease before I see the return on my investment in on-farm conservation practices? 4. If no, would you be willing to extend my lease term or negotiate a right of first offer or refusal for the land? 5. How much, if any, time or financial investments would you be willing to contribute? 6. How can we work together to make the implementation and maintenance of conservation practices equitable?

- ¹ The author would like to acknowledge the contributions of Hannah Catt and Melissa Stefun to this publication.
- ² 2012 Census of Agriculture, Volume 1, Chapter 1: State Level Data , Maryland, Table 11: Selected Characteristics of Irrigated and Non-irrigated Farms: 2012 and 2007, USDA National Agricultural Statistic Service (2012), https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maryland/st24_1_011_011.pdf.
- ³ Maryland Agricultural Water Quality Cost-Share Program 2017 Annual Report, Maryland Department of Agriculture, http://mda.maryland.gov/resource_conservation/counties/MACs2017.pdf.
- ⁴ 2012 Census of Agriculture, Volume 1, Chapter 1 *supra* note 2.
- ⁵ Figure from Maryland Agricultural Water Quality Cost-Share 2017 Data, MDA.
- ⁶ The publication can be found at http://extension.umd.edu/sites/extension.umd.edu/files/_images/locations/talbot/Published%20Leasing%20Booklet.pdf.
- ⁷ 49 AM. JUR. 2D, *Landlord and Tenant* § 420 (2018 update).
- ⁸ States that have recognized an implied covenant of good husbandry, see, e.g., *Turner v. McNutt*, 197 S.W.2d 143,144 (Tex. App. 1946); *Schultz v. Ramey*, 328 P.2d 937, 940 (N.M. 1958); *Newberry v. McLaren*, 575 S.W.2d 438, 440-41 (Ark. 1979); and *Olson v. Bedke*, 555 P.2d 156, 161-62 (Idaho 1976).
- ⁹ *Conservation Choices for Maryland Farmers: A Guide to Best Management Practices for Farms in the Chesapeake Bay Watershed, Coastal Zone and Western Region*, Maryland Department of Agriculture Office of Resource Conservation, July 15, 2016, Pg. 1, http://mda.maryland.gov/resource_conservation/counties/ConservationChoices_2012_FINAL%20%281%29.pdf
- ¹⁰ Conservation plans must be implemented on all farmland enrolled in the Maryland Agricultural Land Preservation Program and on farms located in the Chesapeake and Atlantic Coastal Bays Critical Area. The Maryland Department of the Environment requires certain livestock and poultry farmers to implement farm plans as part of the Confined Animal Feeding Operation (CAFO) permitting process. See *id.*
- ¹¹ See Edward Cox, *A Lease-Based Approach to Sustainable Farming, Part II: Farm Tenancy Trends and the Outlook for Sustainability on Rented Land*, 16 Drake J. Agric. L. 5, 26-27 (2011).
- ¹² Md. Code Ann., Agric. § 8-803.1 (2018). For more information and resources related to Nutrient Management Planning, see MDA's Nutrient Management Program webpage: http://mda.maryland.gov/resource_conservation/Pages/nutrient_management.aspx.
- ¹³ Md. Code Ann., Agric. § 8-802 (2018); Md. Code Regs., 15.20.04.03-15.20.04.04 (2018). Farms with less than \$2,500 in gross income or fewer than eight animal units as defined in the statute are not required to file a NMP.
- ¹⁴ USDA NRCS-Maryland, Conservation Reserve Enhancement Program, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/md/programs/?cid=nrcs144p2_025631.
- ¹⁵ *Id.*
- ¹⁶ For more information on USDA conservation funding see, <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/cig/>
- ¹⁷ For more information on MACS see, http://mda.maryland.gov/resource_conservation/Pages/macs.aspx
- ¹⁸ See Edward Cox, *supra* note 11, at 13.
- ¹⁹ *Id.* at 14-15.
- ²⁰ *Id.* at 23.
- ²¹ Edward Cox, *The Landowner's Guide to Sustainable Farm Leasing*, Drake University Agricultural Law Center, 2010, Pg. 43, <http://sustainablefarmlease.org/wp-content/uploads/2010/08/The-Guide2.pdf>.
- ²² *Id.*
- ²³ *Sustainable Farm Leasing Quick Reference Guide*, 2010, Pg. 4, <http://sustainableaglandtenure.com/wp-content/uploads/2010/11/Quick-Reference-PDF.pdf>.
- ²⁴ Md. Code Ann., Nat. Res., § 8-1807 (2018).
- ²⁵ *Conservation Choices for Maryland Farmers, supra* note 9, at 4-5.
- ²⁶ *Id.* at 7.
- ²⁷ Woodchip Bioreactors, Purdue University Engineering, <https://engineering.purdue.edu/watersheds/conservationdrainage/bioreactors.html>.
- ²⁸ *Id.*
- ²⁹ *Id.*
- ³⁰ *Conservation Choices for Maryland Farmers, supra* note 9, at 21.
- ³¹ *Id.*
- ³² The Nature Conservancy, *The Two-Stage Ditch is a Win-Win for Agriculture and Conservation*, <https://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/indiana/howwework/two-stage-ditches.xml>.
- ³³ *Conservation Choices for Maryland Farmers, supra* note 9, at 18.
- ³⁴ *Id.* at 9.
- ³⁵ Edward Cox, *supra* note 21, at 48.
- ³⁶ *Conservation Choices for Maryland Farmers, supra* note 9, at 24.
- ³⁷ Drake Agricultural Law Center, *Sustainable Farm Leasing Quick Reference Guide*, 2010, <http://sustainableaglandtenure.com/wp-content/uploads/2010/11/Quick-Reference-PDF.pdf>.
- ³⁸ *Conservation Choices for Maryland Farmers, supra* note 9, at 27.
- ³⁹ Edward Cox, *supra* note 21, at 48.
- ⁴⁰ Dan Undersander, Beth Albert, Dennis Cosgrove, Dennis Johnson, and Paul Peterson, *Pastures for Profit: A Guide to Rotational Grazing (A3529)*, 2002, Pg. 1, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1097378.pdf.
- ⁴¹ *Conservation Choices for Maryland Farmers, supra* note 9, at 31.

⁴² See Edward Cox, Drake Agricultural Law Center, *Rotational Grazing on Leased Land*, <http://wfan.org/wp-content/uploads/2016/01/leasing-for-MIG.pdf>.

⁴³ See *id.* See also NRCS, *Balancing Your Animals With Your Forage, Small Scale Solutions for Your Farm*, January 2009, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1097070.pdf.

⁴⁴ *Id.*

⁴⁵ *Conservation Choices for Maryland Farmers*, *supra* note 9, at 31.

⁴⁶ *Id.*

⁴⁷ USDA, *Conservation Practice Overview*, September 2016, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_025852.pdf.

⁴⁸ *Conservation Choices for Maryland Farmers*, *supra* note 9, at 25.

⁴⁹ Edward Cox, *supra* note 11, at 21.

⁵⁰ See Edward Cox, *supra* note 21, at 17-18.

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