



Agricultural Conservation Easement Program:  
Recommendations for 2014 Farm Bill implementation

The National Sustainable Agriculture Coalition (NSAC) engaged extensively in the development of the Agricultural Conservation Easement Program (ACEP) during the multi-year process that became the 2014 Farm Bill. We first proposed a merger of the easement programs in our Farm Bill platform in 2011, and we continued to support a variety of ACEP policy priorities throughout the debate.

The 2014 Farm Bill reflects many, though not all, of the statutory changes NSAC supported, and we look forward to the opportunity to provide comments on the ACEP Interim Final Rule during the upcoming ACEP rulemaking. However, in advance of the rulemaking, as NRCS begins to roll out the program in FY 2014 and 2015, we provide the following recommendations on behalf of our 40 represented member organizations.

I. Wetland easement vs. agricultural land easement allocation

The final 2014 Farm Bill report does not dictate how ACEP funding should be divided between wetland easements (which includes the former WRP and WREP) and agricultural land easements (which includes the former GRP and FRPP). Previous iterations of both the House and Senate bills allocated 60 percent of ACEP funding to wetland easements and 40 percent to agricultural land easements. **NSAC urges NRCS to allocate at least 60 percent of ACEP funds for wetland easements.**

We support the goals of the agricultural land easement component of ACEP. It is critical to conserve our remaining grasslands, especially native grasslands, through long-term and permanent easements. Moreover, it is imperative that working farmland is protected against development. However, the 2014 Farm Bill severely limits the amount of funding available for wetland conservation, relative to the 2008 Farm Bill.

The 2008 Farm Bill provided an average of \$410 million per year for WRP. Annual outlays for WRP often exceeded \$500 million. Even if 60 percent of ACEP funding were to go toward wetland easements, average annual funding would be limited to \$196 million. At 50 percent of total ACEP funding, the wetland conservation allocation would be further limited to \$164 million. Annual acreage enrollment would be limited from 250,000 to just 60,000 acres. Even at a 60/40 division between wetland easements and agricultural land easements, respectively, wetland conservation spending would be cut by roughly 52 percent, while agricultural land easement spending would be cut by roughly 42 percent relative to the 2008 Farm Bill.

## II. Matching requirements for wetland reserve enhancement option

The new farm bill reauthorizes a wetlands reserve enhancement option—formerly known as the Wetlands Reserve Enhancement Program (WREP)—through which NRCS partners with states, non-governmental organizations, or Indian Tribes to protect, restore, and enhance wetlands in state-designated priority areas such as floodplains and riparian areas.

Under the 2008 Farm Bill, NRCS administered WREP primarily as a component of the Cooperative Conservation Partnership Initiative (CCPI). WREP project partners were required to provide:

- In-kind only contributions of at least 20 percent of the restoration costs; or
- Cash only contributions of at least 5 percent of the restoration costs; or
- A combination of in-kind and cash contributions of at least 20 percent of the restoration costs.

The 2014 Farm Bill replaced CPPI with the Regional Conservation Partnership Program (RCPP). NRCS has a goal of securing a 50 percent match, including in-kind contributions, from partners for RCPP projects. While this is not a statutory or administrative requirement, NRCS has determined that it will assign *30 percent* of the RCPP proposal ranking points based upon the extent to which the partner covers the cost of the project.

We are greatly concerned that these same ranking criteria will be applied to wetlands reserve enhancement projects, if NRCS administers the wetlands reserve enhancement option as an adjunct to RCPP. Under that scenario, the wetlands reserve enhancement option would be severely undermined, as very few eligible partners would be able to come up with sufficient matching funds to make their bid competitive.

In implementing the 2014 Farm Bill, **we strongly recommend that NRCS offer the wetlands reserve enhancement option through both ACEP and RCPP, and that the matching rules that applied to the former WREP (as detailed above) also apply to the renewed wetlands reserve enhancement option.**

## III. Technical assistance apportionment

One of the most persistent problems with the former WRP was the shortfall in the technical assistance (TA) dollars needed to restore wetlands. Over the years, the Office of Management and Budget (OMB) has consistently shortchanged NRCS in the amount of TA funding that OMB apportions for WRP. As a result, a very significant wetland restoration backlog developed.

Fortunately, the 2014 Farm Bill transfers TA apportionment authority from OMB to USDA. Rather than OMB making decisions about how much TA funding is adequate for wetland restorations, the Farm Bill now leaves that decision to the Secretary. **We recommend that the Secretary and NRCS use this new authority beginning in FY 2015 to apportion adequate TA dollars for wetland restoration through ACEP.**

#### IV. Impervious surfaces

Between 2003 and 2011, USDA allowed FRPP easements to contain “impervious surfaces, which includes residential buildings, agricultural buildings (with and without flooring), and paved areas, both within and outside the conservation easement’s building envelope(s)” not to exceed 2 percent of the total easement acreage.

Before publishing the FRPP Interim Final Rule in 2009, USDA allowed State Conservationists to waive the 2 percent limitation, allowing up to 6 percent impervious surface, if certain conditions were met (easements had to be located in a densely populated area, contain a large amount of open prime and important soil, and be less than 50 acres in size).

Unfortunately, when published in 2009, the IFR allowed for waivers on a parcel-by-parcel basis up to 6 percent *without* the previous language limiting the exceptions to small farms of less than 50 acres in size located in densely populated areas. NSAC objected to this change.

In 2011, the FRPP Final Rule not only continued to allow State Conservationists to waive the 2 percent impervious surface limitation, up to a 10 rather than 6 percent limit, it also allowed eligible entities to develop and submit their own impervious surface waiver process for review by the State Conservationist. If approved, the waiver process would be applied by the entity on a parcel-by-parcel basis.

Moving even one step further down the road away from a program to preserve farmland, the Final Rule also exempted many animal waste lagoons from the very definition of an impervious surface by excluding “conservation practices identified in the FOTG and in a conservation plan for the subject farm or ranch.” Provided the lagoon or other storage or treatment site is part of the farm’s conservation plan, it will now be outside of the impervious surface limit altogether.

**The ACEP Interim Final Rule should not allow, explicitly or implicitly, the inclusion of animal confinement facilities and waste storage and handling structures for industrial confined animal feeding operations in any agricultural land easement.** The impervious surface waiver provision and definitional change within the FRPP Final Rule was completely contrary to the letter and spirit of the FRPP authorization. This is even truer today under ACEP’s consolidated agricultural land easement component, which includes both grassland protection easements and farmland protection easements.

**The ACEP Interim Final Rule should allow the inclusion of greenhouses and high tunnel structures as part of the easement provided such structures, combined with other impervious surfaces on the farm, do not exceed six percent of the total land area of the farm.**

#### V. Supporting land access and affordability for farmers

NSAC strongly supports the new program purpose within ACEP to protect the agricultural use and viability for future generations by limiting nonagricultural uses of that land [Sec. 1265(b)].

This purpose has the potential to help ensure that agricultural land stays in the hands of farmers and growing food for generations to come. With 33 percent of U.S. farmers over the age of 65<sup>1</sup> and an estimated 70 percent of farmland set to change hands in the next 20 years,<sup>2</sup> it is a critical time to protect our working farms.

Within ACEP, NRCS has an opportunity to shift current land conservation practices and help a new generation of farmers get started. Land is one of the most difficult obstacles to starting a farm in the United States and even conserved land is often too expensive for beginning farmers to purchase. In a 2013 national survey of land trusts, the National Young Farmers' Coalition (NYFC) found that a quarter of land trusts have seen conserved farmland go out of production, as non-farmers out-bid working farmers for land.<sup>3</sup> Even farmland that is protected under a conservation easement is at risk of being left fallow if it is sold to a non-farming landowner. The majority of conserved farmland in the United States is not currently protected against this risk under traditional easements.

Land held by a farmer is most likely to be used for production and actively managed to maintain its agricultural viability. Innovative land trusts are making their conservation easements stronger to ensure land stays in production and in the hands of working farmers. Because these easements can be 10-40 percent more expensive, it is critical that NRCS support them through ACEP funding. Farmland conservation easements are the vehicle with which we can protect our working farmland, but additional requirements that ensure this land stays in the hands of farmers are the insurance policy we need to protect the public investment. By working to ensure that conserved farmland is sold to farmers, NRCS can fulfill its mandate to protect our agricultural resources.

In order to meet the program purpose of protecting agricultural use and future viability, we recommend that the ACEP Interim Final Rule:

**(1) Add farmland succession and production requirements to the national ranking criteria for farm and ranch land easement projects.**

The national ranking criteria should be adopted to prioritize farm and ranch land easement projects that ensure farm viability and succession by awarding points for easement projects that include the Option to Purchase at Agricultural Value (OPAV) or similar innovations that will keep the land in the hands of farmers and in production.

The FRPP final rule allowed for State Conservationists to add ranking points for easements with succession or transition plans to encourage farm viability and new farming opportunities for future generations. We urge you to retain this criterion in the list of possible state-level criteria for agricultural land easements. We further recommend that additional farmland succession and production requirements be added to the national criteria as well as the list of

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<sup>1</sup> U.S. Department of Agriculture, National Agricultural Statistics Service, *Census of Agriculture: Farm Demographics – U.S. Farmers by Gender, Age, Race, Ethnicity, and More* (Washington, DC: U.S. Department of Agriculture, National Agricultural Statistics Service, 2012).

<sup>2</sup> David Kohn and A. White, "The Challenges of Family Business Transition," *Horizons*, Volume 13, No. 5, September/October 2001.

<sup>3</sup> National Young Farmers Coalition, "Farmland Conservation 2.0: How Land Trusts Can Protect America's Working Farms," September 2013.

possible state- and local-level ranking criteria.

OPAV language provides the easement holder with the option to purchase, or assign the purchase of, the land at its agricultural value when it goes up for sale if it is not being sold to a qualified farmer or family member. In some cases, OPAV language is enforced strictly as an option, which creates a right for the holder to compel the sale of property, while in others it exists as a preemptive right, which gives the right of first refusal to the easement holder but does not allow the holder to force a sale. Within the OPAV agreement, easement-holding entities can structure the language governing agricultural value based on, (1) the agricultural value is set at the time of the easement and adjusted for inflation plus improvements; or (2) an appraisal jointly agreed to by the land trust and landowner. Land trusts have found that OPAV restrictions keep protected farmland in the hands of farmers and in active agricultural use, providing insurance for the public's investment in our agricultural resources.<sup>4</sup>

Other examples of mechanisms entities can incorporate into easements to help keep land in the hands of farmers are: adding affirmative language (which requires the land to be in active use at all times); restricting the square footage of the house on the farm property; and setting a maximum resale price derived from the initial appraisal at the farm's agricultural value plus inflation based on the consumer price index. There are many other examples, and we urge NRCS to be flexible in encouraging easements with these mechanisms by awarding points for innovation in farmland succession and production requirements.

**(2) Make qualified conservation organizations eligible to receive ALE grant funds when those organizations are assisting young farmers to gain access to conserved farmland.**

Currently, conservation land trusts are not eligible to directly receive FRPP funds for the sale of an agricultural land easement. However, land trusts often purchase farms on the open market and then, over a period of years, conserve and transfer those farms to qualified farmers. Land trusts could assist more young farmers if they were able to receive ACEP funds directly, upon the condition that they subsequently sell agricultural land easements early in their period of farm ownership. Not only would this increase the sale of protected land to beginning farmers and ranchers, but early easement sales would enable land trusts to provide longer transition periods for new farmers – for example, through a multi-year lease-purchase arrangement.

In all cases, any such early easement sale by a land trust could be subject to rigorous requirement for a disposition plan focused on new farmer ownership of the conserved farm. It should also be noted that the NRCS right of enforcement written into the easement language is understood by all parties to prevent an effectuation of merger in this case.

**(3) Allow land trusts to identify the farm property in the NRCS Cooperative Agreements without identifying the farmer who will sell the agricultural easement at the beginning of the process.**

Land trusts frequently target farms for conservation that are on the market or otherwise in transition. However, it may take many months to identify a qualified, successor farmer,

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<sup>4</sup> Land for Good: Farmland Access and Tenure Innovations, 2013.

negotiate an agreement between farm seller and farm buyer, and prepare the farm buyer for a farmland easement sale. While the specific farm can be identified at the time of the Cooperative Agreement, it is often impractical to identify the qualified farm buyer (the ultimate seller of the farmland easement). And while the farm seller could be named in the Cooperative Agreement, that owner may not be willing to sell an easement without a guaranteed farmer/buyer, and it is not easy to later substitute the name of the new farm owner (and easement seller). This rule essentially freezes out new farmers who are transitioning into ownership – if they are not identified when the Cooperative Agreement is signed.

**(4) Clarify eligibility of agricultural land easement funding for easements with succession and production requirements.**

Currently, in order to incorporate succession and production requirements into agricultural land easements receiving ACEP funding, eligible entities must have the easement language approved by NRCS for each application. This process presents a significant time and administrative requirement, acting as a barrier to the adoption of easements that help ensure farmland stays in the hands of farmers and in active agricultural use.

NRCS should streamline the process of approval for easements with succession or production requirements. One way this might be done is by providing a pre-approved template for easements containing succession or production requirements that is adaptable by local jurisdiction. This will streamline the process and encourage eligible entities to write easements that ensure protected farmland stays in production.

A key provision to the template easement should be to allow eligible entities to assign the option to purchase the property at agricultural value to a town, state, qualified farmer, or other entity if they cannot exercise the option themselves. This ensures the greatest potential for the land to stay in agricultural use.

Additionally, we recommend continuing to allow for easement review and flexibility outside of the template provisions to encourage innovation in succession and production requirement language.

**(5) Provide technical assistance to eligible entities implementing succession and production requirements into agricultural land easements.**

We recommend NRCS provide technical assistance to eligible entities implementing succession and production requirements into their easements. This will encourage eligible entities that have not previously used these mechanisms to incorporate them. It will also support entities already using these mechanisms to utilize best practices in upholding and implementing the requirements.

It is also important that NRCS provide support to state NRCS offices to educate staff on OPAV and similar mechanisms. Technical support will help state offices be prepared to facilitate easement projects with these restrictions on them submitted by local eligible entities. Currently, entities are receiving feedback from state NRCS offices that these offices have never heard of OPAV or similar restrictions and are not sure how to proceed with easements containing this language, presenting a barrier to such projects moving forward.

**(6) Identify best practices for appraisals of properties with succession and production requirements in agricultural land easements and encourage the use of in-state or regional review appraisers whenever possible.**

NRCS can make sure that the appraisal process supports OPAV and similar mechanisms by including the valuation of succession and production restrictions in the ALE Appraisal Specification Scope document. NRCS should identify best practices for appraisals separating agricultural value from open space value, including lands with OPAV and similar mechanisms.

Additionally, we recommend that NRCS encourage the use of in-state or regional review appraisers on agricultural land easements to facilitate agreement between the applicant's appraiser and the NRCS review appraiser. Familiarity with the regional context is especially critical in valuation of easements with succession or production requirements. Comments from out of state review appraisers unfamiliar with the regional context may present an administrative barrier to acceptance of these easement applications.

VI. Conservation requirements on agricultural land easements

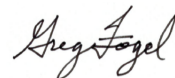
Along with farm and ranch land preservation, conservation must be a focus of the agricultural land easement portion of ACEP. We recommend that NRCS **require all agricultural land easements to have an approved conservation plan that addresses all applicable resource concerns**. At the very least, preference for funding should be given to those ALE-qualified farms that agree to establish an approved comprehensive conservation plan within two years of becoming the operator.

We appreciate your consideration of these recommendations, and we look forward to continued engagement with you to successfully implement the 2014 Farm Bill statutory changes and enhance ACEP program enrollment and delivery.

Sincerely,



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