



March 19, 2020

Matt Lohr
Chief, Natural Resources Conservation Service
U.S. Department of Agriculture
Washington, DC 20250

Re: Agricultural Conservation Easement Program - Interim Final Rule, (Docket No. NRCS-2019-0006)

Dear Chief Lohr:

Missouri Coalition for the Environment is pleased to provide comments on the Agricultural Conservation Easement Program (ACEP) Interim Final Rule (IFR) on behalf of our network of farmers, communities we serve, and our 800 members statewide.

MCE is a non-profit, grassroots, citizen action group committed to clean water, clean air, clean energy, and a healthy environment. Our mission is to educate, organize, and advocate in defense of Missouri's people and their environment. MCE's Water Policy Director and Food and Farm Director both participate in the Missouri State Technical Committee, and we enthusiastically support the work of Missouri's NRCS State Office to enhance and protect our natural resources through Farm Bill Conservation Programs like ACEP.

MCE is deeply concerned about the devastating flooding that has impacted river communities and towns all along our big rivers, and we believe that the Agricultural Conservation Easement Program can be a critical program for future flood disaster mitigation.

Decades of intensive management and development along the Missouri and Mississippi Rivers have stripped them of their natural resources for high-water events -- wetlands and floodplains. Natural infrastructure (such as floodplains, wetlands, and protected areas) is a valuable flood-risk management tool that can not only save lives, but also protect habitat.

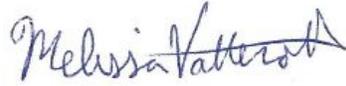
Climate change is increasing the intensity and frequency of extreme weather events and exacerbating the impacts of flooding. For example, in 2019 the Missouri River's spring runoff was the highest ever recorded in over 120 years of record-keeping. ACEP can be instrumental in climate resiliency if certain changes are made, as described below.

Our comments are divided into two sections. The first section deals with a critical program implementation issue. The second section focuses on specific changes we believe are needed to the ACEP rule. We look forward to working with the agency to ensure that ACEP continues to protect

and enhance our nation's farms, grasslands, and wetlands and ensures taxpayer dollars are invested wisely in America's agricultural legacy.

Thank you for considering our views.

Sincerely

A handwritten signature in blue ink that reads "Melissa Vatterott". The signature is written in a cursive style with a large initial 'M'.

Melissa Vatterott, JD
Food & Farm Director

A handwritten signature in black ink that reads "Maisah Khan". The signature is written in a cursive style with a large initial 'M'.

Maisah Khan
Water Policy Director

I. General Implementation Comments

Recommendation: NRCS should maintain the historical division in funding between wetlands easements and agricultural land easements within ACEP. This has, on average, meant that roughly 70 percent of easement funding is dedicated to wetland conservation.

We are pleased that the 2018 Farm Bill restored much needed funding to the Agricultural Conservation Easement Program (ACEP). While not addressed specifically in the rule, this is an important implementation issue that will impact farmer participation and overall conservation benefits across the program. We therefore urge NRCS to ensure that the funding split between agricultural land easements and wetland reserve easements continues to be split based on demand for the two components of ACEP.

Missouri is home to two great rivers -- the Mississippi River forms our Eastern border and the Missouri River transects the state from Kansas City to just north of St. Louis. Over 80% of the naturally-occurring wetlands in Missouri have been lost to development, waterways navigation, and big agriculture. Missouri's precious remaining wetlands continue to serve critical environmental and public health benefits including flood water storage, pollution filtration, and critical wildlife habitat. Missouri had 835 acres enrolled in ACEP in FY18, and 25 restoration easements were completed on over 3,200 acres in our state.

We also are pleased that the Wetland Reserve Easement (WRE) portion of the rule continues to prioritize permanent easements over temporary ones, and urge you to maintain this priority in the final rule. Permanent easements have greater conservation benefits for marginal lands and wildlife, as they are less likely to be returned to agricultural production than temporary easements.

II. Comment Options Directly Related to the Rule

A. Wetland Reserve Enhancement Partnerships

Recommendation: Restore the 5 percent match requirement for Wetland Reserve Enhancement Partnership (WREP) participants.

In this rule, NRCS requires those enrolling in WREP to provide 25 percent of the restoration costs associated with the easement, while in the past NRCS has only required a 5 percent match. That difference of 20 percent will present a significant obstacle to some landowners seeking to place an easement on their lands, making it likely that land which should be conserved rather than cultivated, will instead continue in agricultural production. Additionally, as many small and medium-sized farms operate on tight profit margins and lack significant reserves, this change will limit enrollment in WREP to only larger, highly capitalized landowners.

We see this specifically in our network of over 200 farmers; many of them are small-scale without an abundance of resources. Increasing the match requirement to 25 percent would hinder many of

them from making use of this important program. As variability in our weather patterns are expected to continue, it is critical to protect these ecologically important lands to help retain floodwaters and prevent degradation of wetland habitat for important species.

B. Strengthen Focus on Historically Underserved Farmers

Recommendation: Retain the focus on historically underserved farmers both in the administrative purpose and implementation of the program.

Land access is one of the biggest challenges for young and beginning farmers all across the country – especially in Missouri, in both urban and rural communities. Over the last decade, farmland prices have doubled nationwide and risen far higher in areas with pressure due to real estate development or commodity prices. The Agriculture Land Easement (ALE) portion of ACEP is a critical tool in helping to both protect and conserve farm, ranch, and grasslands, while also maintaining future agricultural viability and farmland affordability for the next generation.

Unfortunately, many beginning and socially disadvantaged farmers we work with in and around St. Louis have shared with us how daunting and sometimes unwelcoming the process of applying for NRCS programs can be at the local level. In order for this important program to remain true to its focus of serving historically underserved farmers, it is imperative that NRCS as a whole critically consider how to make its outreach, education, and overall engagement much more accessible to farmers who are unfamiliar with their offices and processes. We urge you to consider diversifying the staff of state NRCS offices in order to better support and address the needs of farmers of color.

Recommendation: Expand ALE state ranking criterion to specifically include a priority for increasing opportunities for historically underserved farmers.

We are pleased that the 2018 Farm Bill includes a new priority for the purchase of agricultural land easements that maintain agricultural viability, and support its inclusion as both a national and state ranking criteria for ALE. However, the state ranking criterion, as currently written, does not specifically mention or prioritize support for those easements that will best create opportunities for beginning and other underserved farmers. In St. Louis, where MCE is headquartered, we are connected to over a dozen historically underserved farmers who have the skills and determination to produce food with land conservation techniques but struggle to obtain the land and other resources needed to make their farming dreams a reality. The vitality of our country's agriculture sector relies on the success of the next generation of farmers and those who have been historically underserved, given the aging of today's farmers and many of them not having families to take over their farms.

We therefore urge NRCS to modify the state ranking criterion to make explicit the linkage between new, beginning and other underserved farmers in ensuring long-term agricultural viability.

Recommendation: Include guidance and clarity on how priority will be given within ACEP to land that is enrolled in the Conservation Reserve Program (CRP) Transition Incentives Program (TIP).

Section 2208(a) of the 2018 Farm Bill establishes a new provision that directs USDA to give priority to the enrollment of land enrolled in a CRP TIP contract in ACEP. However, the IFR is silent on this new provision, and questions remain how NRCS will work with FSA to coordinate across the two programs.

Both TIP and ACEP are conservation programs that, while administered by different agencies, can assist new and beginning farmers in finding farmland and connecting with agricultural landowners. However, beginning and socially disadvantaged farmers and ranchers often are not familiar with the government programs or government processes that can benefit them, such as CRP TIP, ACEP, and FSA loans. It is critical for the future of our country's agriculture sector that NRCS and FSA work to coordinate across these programs to ensure maximum utilization by beginning and socially disadvantaged farmers and ranchers.

C. Strengthen Focus on Agricultural Viability & Succession Planning

Recommendation: Provide further clarity on the use of the terms “future viability,” “agricultural viability,” and “long-term viability”.

Whereas the Interim Final Rule uses the terms “future viability,” “agricultural viability” and “long-term viability” interchangeably, the Final Rule should be more consistent and specific in its terminology and use the term “agricultural viability” as referenced in statute.¹ Further, nowhere in the IFR is “agricultural viability” defined.

Given that many beginning and socially disadvantaged farmers are unfamiliar and often intimidated by government programs and processes, clearly defining “agricultural viability” and consistently only using that phrase will aid in supporting these farmers in understanding and feeling comfortable with the ACEP program.

While the term “future viability” is defined, there is no mention of how future viability is interconnected with the next generation who will continue to farm and steward the land for generations to come. Given the importance of this component in fulfilling the program's purpose to support future agricultural use while simultaneously supporting opportunities for future generations of farmers, NRCS should explicitly define agricultural viability in the final rule as follows:

~~Future~~ Agricultural viability means the legal, physical, and financial conditions under which the land itself will remain capable and available for continued sustained productive agricultural or grassland uses while protecting related conservation values such as management of the agricultural land easement area consistent with an agricultural land easement plan; its accessibility to beginning farmers and ranchers; and its continuing affordability for working farmers and ranchers for generations to come

¹ Section 1265B(b)(3)(D) [16 U.S.C 3865b] of the Food Security Act of 1985

Recommendation: Modify the definition of a “farm or ranch succession plan” to specifically allow transfers to non-related successors as well as deed terms that ensure long-term agricultural productivity. In addition, further expand the ALE national ranking criteria to specifically include affordability mechanisms, such as the Option to Purchase at Agricultural Value (OPAV) or preemptive purchase rights.

We commend NRCS for giving succession planning increased attention in the ACEP IFR, and strongly support its inclusion in both the ALE national and state ranking criteria. However, as currently written, the definition of a “farm or ranch succession plan” is currently restricted to intra-family succession. While the majority of farm transitions occur between family members, we are seeing in our own community, more interest – and the necessity – to expand succession planning to include business and land transfers to unrelated successors.

Many farmers we know are above sixty years old and do not have family members who can take over their farms, which is why some of them continue to farm at 77 years old, for example. They do not want to see their farm cease operating but do not have a plan in place to ensure it continues after them. Supporting successful transition plans that include transition to non-family members will greatly support the continuation of farms in Missouri and the nation.

In addition, neither the definition nor ALE state ranking criterion specifically mention deed terms that could be incorporated into a succession plan to ensure the land remains in agricultural production. Examples include the Option to Purchase at Agricultural Value (OPAV) and preemptive purchase rights.

It is critically important for the future of farming in Missouri and the country that farm or ranch succession plans be included in future ACEP and other easement transactions to ensure farms stay in farming and easements create opportunities for new farmers to transition onto that land.

We therefore recommend that the definition of “farm and ranch succession plan” be modified to address these two points:

Farm or ranch succession plan means a ~~general written~~ general written plan to address the continuation of some type of agricultural business on the enrolled land, including Option to Purchase at Agricultural Value or pre-emptive purchase rights deed terms. The farm or ranch succession plans may include specific ~~legal intra-family succession~~ legal intra-family succession agreements or business ~~asset transfer~~ asset transfer strategies to transfer farm and ranch assets and/or management to related or unrelated successors and that to create opportunities for new or beginning farmers or ranchers, veteran farmers or ranchers, or other historically underserved landowners.

We also urge NRCS to modify the ALE national ranking criteria to reflect these issues as well:

- (7) Existence of a farm or ranch succession plan, ~~or~~ or similar plan, or deed terms established to address agricultural viability for future generations, such as Option to Purchase at Agricultural Value or pre-emptive purchase rights;

D. Provide Flexibility for Entities to Meet the Cash Match Requirements

Recommendation: Eliminate the extent to which a landowner and /or eligible entity can provide a cash match as a national ranking criterion.

We applaud the changes made in the most recent farm bill to increase the flexibility for landowners and other eligible entities in meeting the 50 percent match requirement for all land easements. We believe these new flexibilities will help increase participation in the program, expand the program's utility to regions previously underutilizing ACEP, and allow land trusts and other entities to prioritize protecting the most important farms, ranches, and grasslands.

However, we are concerned that NRCS intends to prioritize those easements that are able to provide a cash match over those that are not. We do not feel this regulatory change is in line with the 2018 Farm Bill as written, whose intent was to expand the scope of the program and prioritize the most sensitive agricultural lands and conservation values, and believe this new national ranking criterion should be eliminated.

Farms and grasslands should be prioritized based on the specific circumstances inherent to that land and landowner. The farms and grasslands should not be penalized for not having robust resources at the local level to contribute towards farmland protection. Doing so would make it more difficult for small-scale, less resourced land trusts, programs, and farmers to benefit from the program.

E. Engage State Technical Committees

Recommendation: Require state conservationists to consult with State Technical Committees (STCs) on the identification of lands of statewide importance, development of ranking criteria, and related technical matters.

As mentioned previously, MCE's Food & Farm Director and Water Policy Director sit on Missouri's State Technical Committee. This committee has a wealth of knowledge to share with the Missouri NRCS staff and supports the use of important NRCS funding to address localized concerns. We urge that state conservationists be required to consult with the State Technical Committees in steering the direction of USDA programs like ACEP to ensure local concerns are met.

F. Exclude Confined Animal Feeding Operations from Program Eligibility

Recommendation: The final rule should make Confined Animal Feeding Operations (CAFOs) ineligible for ACEP funding by: 1) adding CAFOs to Section 1468.20(e), "ineligible land" and 2) limiting allowable impervious surface area for agricultural land easements.

Missouri has 507 CAFOs. We have seen efforts over the last several years to prioritize the interests of CAFOs over the health and environmental concerns of local communities in Missouri by our state legislature and state agencies. Missouri desperately needs support from the USDA to ensure that resources for conservation are focused toward the local, independent, small to mid scale

producers and not to industrial agricultural interests like CAFOs. The way CAFOs operate is in direct contradiction to the purpose of ACEP and we feel ACEP and other easement programs should be used to support land trusts, programs, and farms that are committed to the goals of farmland conservation and environmental protection.

Given the limited availability of funding for this highly popular program, ACEP-ALE dollars should be used to protect farm and ranch land, not industrial CAFOs, which are highly detrimental to air, land, and water.

While the IFR maintains the 2% limitation on impervious surfaces eligible for ACEP funding, it also continues to exempt animal waste lagoons and other NRCS-approved conservation practices from this limit. This exemption should be modified in the final rule to ensure that ACEP funding is meeting the Congressional intent of this program to protect agricultural lands and grasslands while also protecting our nation's natural resources. Waste storage and treatment should count toward the limit, regardless of whether NRCS provides cost share for such practices on the easement.

G. Expand Flexibility for Buy-Protect-Sell Transactions

Recommendation: Utilize Buy-Protect-Sell to help get new and beginning farmers on the land while simultaneously ensuring critical farmland is protected in agriculture for perpetuity.

Access to land is a major challenge for beginning farmers and ranchers. At the same time as these farmers struggle to access land, prime farmland is being left unprotected because it is challenging to find an eligible buyer who can enter into a purchase agreement in the timeframe currently involved through ACEP. We are pleased that the farm bill includes the “Buy-Protect-Sell” (BPS) provision, as it is an innovative tool to help support getting new farmers on the land while simultaneously ensuring critical farmland is protected in agriculture for perpetuity.

In executing Buy-Protect-Sell scenarios, we urge NRCS to provide flexibility to entities that are working to create pathways to ownership for incoming farmers – such as through lease-to-own agreements, which may require more than three years for the farmer to purchase the property. While the interim rule does allow a single, 12-month extension, the proposed three-year timeline for BPS transactions is a highly optimistic deadline for a transition of ownership – especially to a new farmer. We therefore strongly recommend that the rule address a liberal allowance for waivers of the three-year timeline for post-closing BPS transfers, including the opportunity to extend that timeline beyond an additional 12 month period, so long as the eligible entity can provide documentation of a good-faith and active effort to identify a buyer and transition the protected property to private ownership.

In addition, NRCS should encourage eligible entities to include OPAV or other affordability protections within BPS agreements to prioritize those transactions that best create opportunities for the next generation of farmers.