



## Questions Posed During ACEP and RCPP Implementation Webinar Held January 8, 2019

*Many of the questions below involve program details that are subject to interpretation by USDA Natural Resources Conservation Service (NRCS) and will be addressed in program rules. The rulemaking process provides a valuable avenue for stakeholders to make the case for particular interpretations of the statutory language. For updates on the rulemaking process and to learn more about how to submit comments, please visit [our 2018 Farm Bill implementation page](#) on the Farmland Information Center website.*

### Agricultural Conservation Easement Program-Agricultural Land Easements

Q: Will the change in the ACEP purposes clause around non-agricultural uses make it easier to have agritourism and things like weddings on protected farms?

- According to the Joint Explanatory Statement of the Committee of Conference, this change was intended to narrow the existing limitation on agricultural uses to those that negatively affect agricultural and conservation values. What type of additional activities may be allowed on protected land as a result of this change will likely be addressed through rulemaking. AFT believes there are certain agritourism and agri-entertainment activities that would be consistent with this revised purpose of the program.

Q: Can a private land trust be considered an eligible entity for ALE or do we need to have the funds provided through a government entity?

- A land trust may be considered an eligible entity for ALE. See this [2017 fact sheet](#) from our Farmland Information Center for further details.

Q: Does “donation” mean bargain sale as match?  
*and*

Q: Can the bargain sale account for the entire match or only a certain percentage?

- The cash match requirement has been modified to broaden the options for cost-share assistance from eligible entities. These options may now include cash resources, a landowner charitable donation (“bargain sale”), costs associated with securing a deed to the easement, including the cost of survey, appraisal, inspection and title, and other costs as determined by the Secretary. This provision is subject to further interpretation by NRCS, and will be guided by language that the Farm Bill conferees included in the Joint Explanatory Statement. This language states:

“The Managers’ intent behind allowing flexibility and additional options in the non-federal share of cost share assistance (matching funds) is to broaden the ability of entities to participate in ALE, including for grasslands of special environmental significance, across a more diverse geography. The intention of the language is to provide better access to the program to states where farm and ranchland preservation funding is not readily available like South Dakota, Texas, and Alabama. The Managers do not believe the program should be limited only to entities that can provide cash match. It is important to acknowledge other expenses that an entity must take on, such as the long-term expense of monitoring an easement or other additional upfront costs. The Managers believe that the long-term strength of the program is derived from making the program available as broadly and equitably as possible across diverse regions of the country. The Managers do not intend for USDA to reject cash match entirely but to broaden the options available to eligible entities.”

Q: Will NRCS apply the buy-protect-sell provision to pre-acquisitions of easements so land trusts will again be able to bridge gaps between when landowners may need to close and when funding is available?

- Congress defined the term 'buy-protect-sell transaction' as a legal arrangement between an eligible entity and the Secretary relating to land that an eligible entity owns or is going to purchase prior to acquisition of an agricultural land easement. Whether this definition could be read to include the pre-acquisition of an agricultural land easement is unclear; AFT would be interested in exploring with partners possible ways to address this issue.

Q: Can you explain more how funds can be used for development of a conservation plan? Is that money the entity can use to hire qualified conservation planners to do the work, rather than rely on NRCS capacity?

- The statutory language states that "[t]he Secretary shall facilitate and provide funding for...(2) technical assistance to implement the program, including technical assistance for the development of a conservation plan under subsection (b)(4)(C)(iv)..." It would appear that this technical assistance could be provided in a number of different ways; we assume NRCS will provide further clarity on this during rulemaking.

Q: When does the switch from the ALE plan go into effect? If something hasn't closed yet but is on a Cooperative Agreement will the new change apply?

- We do not know how NRCS will treat projects that are included in a FY18 or earlier Cooperative Agreement but have not yet closed. We expect that NRCS will provide guidance on this question later this year.

Q: Is the \$900,000 AGI limit still in effect?

- Yes; however, the Secretary has authority to waive the limitation on a case-by-case basis if s/he determines that environmentally sensitive land of special significance would be protected as a result of the waiver.

Q: Does the [language on mineral development] open farmland up to fracking?

- Hydraulic fracturing, or fracking, was not previously banned under ACEP-ALE. In that sense, this language does not open ACEP-ALE up to something that was not allowed previously. As explained in the report language: "It is not the intention of the Managers to have a massive expansion of mineral rights exploration on ALE lands but it is intended to provide clarity, especially on lands where mineral rights are severed and not owned by the landowner. This language is not intended to require States that have specific prohibitions against mineral development on eased lands to allow mineral rights development on eased lands."

By way of additional explanation, the existing alternative oil and gas language from the 2015 deed template from NRCS is below:

"Oil and gas exploration and extraction on the Protected Property is permitted in accordance with this Paragraph (F), if approved by Grantee and NRCS. Grantee and Grantor must demonstrate that such exploration and extraction of oil and gas is—

- not accomplished by any surface mining method;
- accomplished by a method of extraction, production, and transport that has no more than a limited and localized impact that does not harm the agricultural use or conservation value of the Protected Property;
- within the impervious surface limits of the ALE; and
- subject to a plan that includes provisions for oil and gas exploration and extraction."

Q: What does "further the practical administration of the program" mean [in the language on subordination, modification, exchange and termination]?

- NRCS will likely further define that phrase during rulemaking.

Q: Should we assume that NRCS has to adopt new rules to implement all of these changes before they can be implemented? Will there be an interim rule?

- NRCS was given authority to use the regulations currently in place to carry out conservation programs in FY19, to the extent that the terms and conditions of those regulations are consistent with the changes made in the conservation title. While much of ACEP remains the same from the 2014 Farm Bill, some changes represent a significant departure. As a result, it is unclear whether there will need to be an interim rule for FY19; we expect that NRCS will provide clarity on this issue soon.

Q: Is a County eligible to become an entity or only a non-profit and state government?

- A county may be an eligible entity. See this [2017 fact sheet](#) from our Farmland Information Center for details. A county may also become a certified entity; the statutory requirements for it to do so remain the same as under the 2014 Farm Bill.

Q: Regarding certification, am I right to assume that a land trust must complete 10 transactions to be eligible, and then must actually apply to become a certified entity? What does that process look like?

*and*

Q: Does this mean that Accredited Land Trusts may automatically become certified entities if they have completed 10 transactions?

*and*

Q: Does a land trust have to be accredited to be certified and participate in the program?

- The bill retained the 2014 Farm Bill's certification provision enabling any eligible entity to be certified if it demonstrates to the Secretary certain capabilities around acquiring, administering and enforcing agricultural land easements. A non-accredited land trust may therefore still be eligible for certification if it can demonstrate these capabilities. The bill added two other pathways for certification, one of which allows a land trust to become certified if it is accredited by the Land Trust Accreditation Commission or equivalent accreditation body, has acquired not less than 10 agricultural land easements under ACEP or a predecessor program, and has successfully met its responsibilities under any applicable agreements with the Secretary. This language suggests that an accredited land trust will not be automatically certified if it has completed 10 transactions but will need to show that it has also met its responsibilities through any current or past cooperative agreements with USDA. NRCS will likely provide additional clarity on this point through rulemaking.

Q: Can an organization that does not currently hold any federal easements be eligible for the program?

- Yes, an organization may be an eligible entity if it demonstrates certain qualifications. but does not need to currently hold easements that have been purchased through a federal program. See this [2017 fact sheet](#) from our Farmland Information Center for more information about entity qualifications.

Q: Am I correct that a non-accredited land trust can qualify as an eligible entity if it meets the requirements of the 2014 Farm Bill?

- Yes, that is correct. A non-accredited land trust may also become a certified entity, under the bill's retained certification provision from the 2014 Farm Bill.

Q: Could a land trust apply directly to ACEP-ALE to get around the lack of legislation in their state allowing Options to Purchase at Agricultural Value (OPAV)?

- A land trust may apply directly to ACEP-ALE without going through a state or county PACE program, and the 2018 Farm Bill added a provision specifically allowing the inclusion of easement deed terms such as OPAV. How such an easement deed term would be treated under state law that does not authorize OPAVs would be a question for a land conservation attorney in your state.

Q: Are ALE Plans no longer required prior to the grant of the conservation easement?

- The bill eliminates the requirement for ALE Plans, returning to prior law that requires a conservation plan for any portion of the easement land that contains highly erodible cropland. However, ALE Plans may still be needed for any easements that have obligated funding from prior fiscal years (i.e., listed in a cooperative agreement signed in FY18 or earlier) but have not yet closed; we expect that NRCS will provide additional guidance on this issue later this year.

Q: Are accredited land trusts given preference to funding?

- The statutory language authorizes the Secretary to establish evaluation and ranking criteria to maximize the benefit of Federal investment under the program. There is nothing in the statutory language that gives funding preference to certified entities of any kind, including accredited land trusts.

Q: When can we anticipate our local/state NRCS offices will be prepared to receive applications for certification?

- Given the changes to certification in the 2018 Farm Bill, NRCS will likely need to provide additional guidance to state and local NRCS offices first; we anticipate that NRCS will provide additional clarity on this issue later this year.

Q: Do we know the timing of the next round of ACEP-ALE grants?

- At this time, we do not know the timing for the next round of ACEP-ALE grants. There are still questions about how NRCS might be able to incorporate some or all of the legislative changes from the 2018 Farm Bill in the next round of funding. We were advised that we would have more definitive guidance this spring, although we might find out more information sooner.

Q: Do you know if NRCS will be producing new “minimum deed terms” for projects funded under ACEP-ALE pursuant to the 2018 Farm Bill? If so, when and how can we expect to see them?

- Since the minimum deed terms section of the legislation was changed, and since there is a new additional permitted terms section, we assume that NRCS will produce a new deed template for new projects. We are waiting for more detailed information about when and how NRCS will move ahead with the regulatory process that would lay out these changes.

#### Regional Conservation Partnership Program

Q: Does the 5-year renewal option for RCPP include additional funding in the same amounts as the original award?

*and*

Q: is there verbiage regarding Technical Assistance/Financial Assistance allocations when a renewal occurs?

- The statutory language allowing renewals of RCPP projects does not specify how and at what amount renewals should be funded, nor how renewal funding might be allocated between technical assistance and financial assistance. The Joint Explanatory Statement states that the Managers expect the renewal

process to be separate and noncompetitive, that only the most successful projects should qualify for renewal, and that the Managers do not intend for renewals to use a majority of funding available each fiscal year. We expect that NRCS will provide additional guidance on this topic.

Q: Will current RCPP agreements still utilize ACEP-ALE and other covered programs?

*and*

Q: If we are operating under a current RCPP selected during the 2014 Farm Bill that includes ACEP-ALE support funds, will a new farmland protection project (ACEP-ALE) started this year under the 2018 Farm Bill follow 2014 or 2018 rules regarding match funding, etc.?

- We do not know the answer to these questions and expect that NRCS will provide additional guidance on this at some point. Presumably, RCPP agreements signed under the 2014 Farm Bill would continue to utilize ACEP-ALE and other covered programs. This will not be required for new RCPP agreements. Whether new ACEP-ALE projects contained in a current RCPP agreement will be required to adhere to the 2014 rules or will be covered by any new rules promulgated in FY19 or beyond is unclear.

Q: Are there match requirements for RCPP funding?

- Yes. The match requirements are unchanged from the 2014 language requiring a “significant contribution”, which NRCS has defined as a 1:1 match in rulemaking. However, the partner contribution requirements have been modified to allow a combination of financial or in-kind contributions, and to allow time spent between the announcement of the project award and the signing of the partnership agreement to be counted toward the partner contribution.

Q: Can you share some insights on what you see as the most successful RCPP projects thus far? Are they multi state initiatives? What kind of resources (water, habitat, forested lands, etc.) are getting the most funding awarded?

- We have not seen a funding breakdown of RCPP projects by resource type but will ask NRCS if such a breakdown has been done. As part of the National Agricultural Land Network that we will be launching this year, we plan to host webinars and teleconferences on issues of value to agricultural land protection partners and will be organizing one around the use of RCPP for farm and ranch land protection.

Q: Can you expand on the "simplified application process"?

- The 2018 Farm Bill specifies this change by adding the word “simplified” to describe the competitive application process. We expect that NRCS will provide guidance on this in the rulemaking process later this year, and are interested in hearing feedback from past applicants to RCPP on the application process.

Q: Are there any changes to state-level RCPP maximum funding levels? I believe 2014 max was \$1M.

- The cap on funding for an individual project is not a legislative requirement, and therefore subject to change in future grant funding rounds. Note that the state funding pool is now a state and multistate funding pool, which accounts for 50% of RCPP funds annually.