Testimony before the House Committee on Agriculture

Subcommittee on Conservation and Forestry

Implementation of the Agricultural Act of 2014:

Conservation Programs

Presented by:

Karen L. Martynick
Executive Director
Lancaster Farmland Trust

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INTRODUCTION

Lancaster Farmland Trust appreciates the opportunity to present testimony to the House Committee on Agriculture Subcommittee on Conservation and Forestry regarding the interim final rule for the Agricultural Conservation Easement Program (ACEP) of the Agricultural Act of 2014. As a private, not-for-profit land trust, Lancaster Farmland Trust has utilized funding from the Farm and Ranch Land Protection Program and currently has two projects pending under the ACEP program.

Lancaster County, Pennsylvania, the "Garden Spot" of the United States, has the most productive, non-irrigated soils in the country. The county's 5,500 farms – 99 percent of which are family owned -- contribute $6 billion to the economy each year and provide one out of every five jobs in the county.

In addition to being a leader in agricultural production, Lancaster County is a national leader in farmland preservation. In 2013, the county became the first county in the nation to preserve 100,000 acres of farmland -- a remarkable accomplishment considering that the average sized farm is just 78 acres! Today, there are more than 1,300 farms that have been preserved by Lancaster Farmland Trust and the Lancaster County Agriculture Preserve Board utilizing federal, state, county and private funds.

Lancaster Farmland Trust was established in 1988 to work with Amish farmers to preserve their land. In the 27 years since its founding, the Trust has preserved 28,000 acres on 453 farms. Although reluctant when the program started, the Amish have embraced preservation. Now, approximately 80 percent of the farms preserved by Lancaster Farmland Trust are owned by Amish families.

Lancaster Farmland Trust is accredited by the Land Trust Accreditation Commission having received accreditation in 2008 and renewal of accreditation in 2014. In order to achieve accreditation, a land trust must demonstrate that it upholds the highest operating standards.

GENERAL COMMENTS

Lancaster Farmland Trust is a member of the Land Trust Alliance which represents 1,700 land trusts throughout the country. Collectively, these organizations have protected 47 million acres of land in the United States. More than 140 of the member organizations – including Lancaster Farmland Trust -- are eligible entities under the Farm and Ranchlands Protection Program or the Agricultural Conservation Easement Program. These organizations share the commitment of Congress and the Natural Resource Conservation Service to protect the country's most productive soils and are proud to have been entrusted with the responsibility of ensuring the program's success.

Lancaster Farmland Trust recognizes and appreciates the time that has been spent by NRCS staff in developing the interim final rule and responding to concerns and questions prior to and since its publication. The suggestions and comments contained in this testimony – and those offered by the Land Trust Alliance and other land trusts – are intended to improve the program and increase the ability of Lancaster Farmland Trust and other land trusts to carry out the goals of the program. The comments refer specifically to the rule as well as other NRCS materials including the new policy manual related to the program.

First and foremost, it is important that the program not be overly complicated. While recognizing the need for oversight, rules and procedures that micro-manage the work of land trusts will serve only to make those organizations reluctant to participate. Land trusts have vast experience in protecting the nation's natural resources and the rule should recognize and reflect that experience.

It is also critical that the rule be flexible to accommodate geographic and land use differences but it cannot be uncertain. Obtaining decisions and answers in a timely fashion helps to move projects along. Our experience with FRPP is that a project could take as long as two years to complete while a project using other government funding (state, county or municipal) can be

completed in six months or less. The additional staff time required to complete a federally funded project utilizes resources that would otherwise be used to further our organization's mission.

It is with this as background that Lancaster Farmland Trust respectfully submits the following suggestions to enhance the Agricultural Conservation Easement Program. The comments reflect the experience of Lancaster Farmland Trust as well as other land trusts.

SUGGESTIONS FOR IMPROVEMENT

Minimum Deed Terms

Section 1265B(b)(4)(C) of the statute clearly states under "Minimum Terms and Conditions" that "an eligible entity shall be authorized to use **its own terms and conditions for agricultural land easements** so long as the Secretary determines such terms and conditions (meet certain conditions)." However, Section 1468.20(a)(2) of the interim final rule states that eligible entities "must enter into a cooperative agreement with NRCS and **use the NRCS required minimum deed terms specified therein."**

Further, 1468.25(c) states "The eligible entity may use its own terms and conditions in the agricultural land easement deed, **but the agricultural land easement deed must contain the minimum deed requirements** as specified NRCS in the cooperative agreement, either in the deed or in an addendum that is incorporated therein."

In the case of minimum deed terms, there is a contradiction between the statute and the final interim rule. Clearly the intent of Congress was to recognize a land trust's ability to structure an easement to meet the terms and conditions intended by NRCS without using specific language prescribed by the agency. This has the effect of forcing an eligible entity to use language that may not fit its program, may not recognize characteristics specific to its

geographic location and land use, and may not provide the eligible entity with the ability to make an easement more restrictive than the minimum deed terms specified by NRCS.

Allowing eligible entities the flexibility to use their own easement language will not only fulfill the intent of the statute, it will strengthen the program by reflecting regional and organizational differences and ensure adoption by eligible entities responsible for accomplishing the goals of the program.

Minimum Deed Terms – Enforcement

Section 1265B9b)(4) of the statute states that the terms and conditions of an easement must "include a right of enforcement for the Secretary that may be used **only** if the terms of the easement are not enforced by the holder of the easement." While providing a right of enforcement is understandable, the interim rule goes further by defining the right of enforcement as "the right of the United States to inspect the easement area and to enforce the easement entered into under this part in those instances in which the grantee of the easement does not fully protect the interests provided to the grantee under this easement."

The statute is clear that it is the responsibility of the eligible entity to monitor and enforce the easement and that NRCS may only step in "if the terms of the easement are not enforced by the holder of the easement." The construction of the rule could easily be interpreted to mean there is a right to inspect independent of the easement not being enforced.

Additionally, in Section 1468.28(c), the interim rule states:
"NRCS … reserves the right to enter upon the easement area if the annual monitoring report provided by the eligible entity documenting compliance with the agricultural land easement and agricultural land easement plan is insufficient or is not provided annually, the United States has evidence of an unaddressed violation or to remedy deficiencies or easement violations."

Lancaster Farmland Trust believes that the eligible entities' failure to file a report or the filing of an incomplete report should not be sufficient to trigger NRCS's right to enter the easement area and that a failure to file a report or filing an incomplete report could be a procedural failure and should be handled between the eligible entity and NRCS and should not involve the landowner. Further evidence of a violation – other than the lack of a monitoring report – should be required before the "right to enter the easement area" is exercised.

Cash Match Availability

The interim rule (Section 1468.20 (b)(1)(iv)) requires "sufficient evidence of . . . the availability of funds at the time of application sufficient to meet the eligible entity's contribution requirements for each parcel proposed for funding;" while the program manual states that entities must "document or certify that, at the time of application, … the required funds (are) available for each parcel". While NRCS staff has acknowledged it is not their intent to require that the eligible entity have the funds in its possession at the time of application, the language in the program manual seems to suggest that requirement.

Requiring the availability of funds at the time of application places an unnecessary burden on eligible entities and fails to recognize that other sources of funding utilized for project may have different requirements and timelines but would be available in sufficient time to complete the project.

To resolve the inconsistency in language between the rule and the manual, it is recommended that the rule language be used in the program manual. Further, it is recommended that "sufficient evidence" include a successful history of obtaining matching funds from public and private sources.

Agricultural Land Easement Plans

What is an Agricultural Land Easement Plan? Lancaster Farmland Trust has asked this question of NRCS staff who have acknowledged they do not yet know. This raises questions about what will be required of the eligible entity and the landowner.

NRCS has a long and successful tradition of voluntary conservation planning in which NRCS provides technical assistance and, in partnership with the landowner, decides what is reasonable to improve their operation. Given the success of conservation planning and the familiarity landowners have with that process, we believe inventing a new plan is unnecessary and will place an unreasonable burden on the eligible entity to monitor and enforce.

In addition, we have concerns that, eligible entities may not have the authority to "enforce" the elements of the plan nor the expertise to assist the landowner with compliance.

Eligible Entity Certification

The Eligible Entity Certification is critical to streamlining the ACEP process. We believe that NRCS is committed to making this element of the program successful so that both NRCS and the eligible entity can save time and conserve their resources. We agree that this is critical to the success of the program and hope that agreement can be reached on what is required to become "certified".

The provisions of one section of the manual (528.75(I)) may deter eligible entities from seeking certification. This section states that "NRCS may require the entity to return any financial assistance provided by NRCS for easements that fail a quality assurance review and are not remedied to NRCS's satisfaction."

The manual does not provide criteria for or a definition of a "quality assurance review." There are sufficient checks and balances throughout the process to provide NRCS opportunities to remedy any concerns it may have with an easement prior to closing or withdraw the offer of funding. Additionally, NRCS retains the right of enforcement if the entity fails to enforce the easement, thereby ensuring that the easement would not "fail" once executed.

Requiring the return of funds would present a tremendous hardship for any organization and would seem to be an unreasonably harsh penalty. This provision presents sufficient financial risk to make it unlikely that an eligible entity would apply for certification. Therefore, defining clear standards about when such a "nuclear option" would be used (i.e., fraud, enrollment of an ineligible property) is absolutely necessary.

Ineligible Lands – Rights of Way

Section 1468.20(e)(5) of the rule designates land ineligible for the ACEP program "where the purposes of the program would be undermined due to onsite or offsite conditions, such as risk of hazardous substances, proposed or existing rights of way, infrastructure development, or adjacent land uses …."

The manual goes into more detail (528.34) which may, in some cases, be interpreted too broadly resulting in lands being determined as ineligible when they should be eligible. The prohibition in subsection (3)(ii) cites as disqualifying circumstances "proposed or existing rights of way, either onsite or offsite, such as transmission lines, highways, pipelines or other existing or proposed infrastructure that introduce disturbances of risks that undermine the purpose of the easement."

Depending on how this is executed, Lancaster County, Pennsylvania – with some of the best farmland in the country – could be largely ineligible to access ACEP funds. Lancaster County lies

between Pennsylvania's Marcellus Shale region and markets and export facilities to the south. Currently three pipeline projects that traverse more than 60 preserved farms are either approved or proposed for Lancaster County. Others are anticipated. Lancaster County's success in preserving farmland makes it impossible to cite a large-scale utility project without impacting a preserved farm.

We believe that NRCS should more clearly define "proposed" and would suggest that a parcel not be deemed "ineligible" unless it lies along a route included in a preliminary or final application to the Federal Energy Regulatory Commission or appropriate state agency and, then, only if the right of way would materially affect the conservation purpose of the proposed easement.

Appraisal Review

If you ask any land trust that participated in the FRPP program what step in the process caused the most delays, they would most likely say the appraisal review process. Therefore, we were surprised that the appraisal review of ACEP easements was barely mentioned in either the rule or the manual.

We believe that more attention should be paid to improving the review process and recommend that the Chief work with eligible entities to review the current contract for review appraisers and the agency's instructions to those reviewers with the goal of improving and streamlining the process. Specifically, we would suggest that the appraisal be reviewed only to determine if all criteria has been met and not to determine value since the reviewing appraisers are unfamiliar with the particular situations relevant to that appraisal. If the reviewer does not need to establish value – but certifies that the value presented appears to be valid – the time taken by the review could be shortened.

CONCLUSION

Lancaster Farmland Trust appreciates the opportunity to comment on the interim final rule on the Agricultural Conservation Easement Program and is grateful to have the opportunity to participate in the program. The funds provided to us by the program help farm families realize their dream of protecting their land so that their children and grandchildren will have the opportunity to farm as they do. They are – above all else – committed to protecting the land and we are proud to be able to help them do so.

We hope that the comments we have offered in this testimony improve the program and help ensure that it achieves the goals intended by Congress and NRCS.

Finally, Lancaster Farmland Trust appreciates the efforts of the Land Trust Alliance to represent our interests and those of other land trusts who protect working lands. Specifically, we are grateful for the efforts of Russ Shay and his staff who have spent countless hours working to improve the Agricultural Conservation Easement Program and who provided assistance in the preparation of this testimony. Their work contributes to our success and ensures the success of the program.