

# FARM BILL 2023 PRIORITIES FOR ACEP BUY-PROTECT-SELL TRANSACTIONS

## Title II: Conservation

### Agricultural Conservation Easement Program (ACEP)

- **Fix Buy-Protect-Sell Transactions (BPS):** The ACEP statute must be fixed to ensure that Congressional intent to authorize Buy-Protect-Sell transactions for Agricultural Land Easements (ALE) can be realized and these transactions can actually be executed. While the 2018 Farm Bill authorized Buy-Protect-Sell (BPS) ACEP-ALE transactions (16 USC 3865a(2)), the text of the statute and subsequent ACEP regulations (7 CFR 1468.27) have made such transactions functionally unworkable. The goals of “Buy-Protect-Sell” are to prevent development or conversion of agricultural land; protect the agricultural land; and provide opportunities for more farmers and ranchers to purchase land at an affordable price. An entity, often a non-governmental organization (NGO), will facilitate “Buy-Protect-Sell” with the following approach: (1) The NGO will **buy** agricultural lands facing threats of development or conversion, as a temporary landowner; (2) The NGO will sell a permanent conservation easement to an eligible entity (another entity besides the NGO landowner) that will **protect** the agricultural nature of the parcel; and (3) the NGO will **sell** the protected land to another owner, who acquires it at the reduced “eased fee” price, based on fair market value, rather than the full fee price.
  - **Allow the Eligible Entity Easement Holder to be Different from the Eligible Entity Landowner:** For the BPS statutory authority to function, the statute must specify that the eligible entity landowner may be different from the eligible entity acquiring the easement. The current statute and resulting ACEP regulations require the same eligible entity who owns the land to also purchase the easement on that land. That is problematic, as easement law often prohibits an entity from granting themselves an easement on land they own. Unfortunately, NRCS dealt with this statutory requirement in its ACEP regulations by only allowing Buy-SELL-Protect transactions (which were already allowed), rather than establishing Buy-Protect-Sell authorities, as intended.
  - **Allow Multiple Eligible Entities for ACEP-ALE Transactions, Including BPS Transactions:** For ACEP-ALE transactions, one eligible entity should be allowed to acquire the easement while another eligible entity is allowed to perform all the pre-closing activities. In many instances, the eligible entity that applies and does all the up-front work (negotiating with landowner; deed easement drafting; etc.) is NOT the same entity that is best suited to be the long-term easement holder and enforcer. The current process requires one eligible entity to be both the applicant and deed holder, then necessitating the conservation easement deed to be transferred from one eligible entity to another at a later date. The proposed co-eligibility option will be more efficient, as it only requires one real estate transaction/closing. In the specific cases where one NGO owns the land and also participates as a co-eligible entity, the other co-eligible entity will purchase the easement. Complex BPS transactions will be more streamlined and efficient if multiple eligible entities could participate in the process.

- **Eliminate Restrictions on BPS Sale Price:** Other ACEP-ALE transactions do not dictate that a landowner sell its encumbered fee land for a reduced price, and the same practice should apply for BPS transactions. The sale of the encumbered fee land will be subject to an at will contract between the eligible entity landowner and the farmer or rancher and, as such, should not have price limitations imposed by Congress or NRCS. The 2018 Farm bill requires that the sale of the encumbered fee from an NGO to a farmer does not exceed the agricultural value of the land, plus any reasonable holding and transaction costs (16 USC 3865a(2)(A)(ii)II). Nationally, and within ACEP-ALE, agricultural value is not the means for establishing the purchase price of easements and eased fee lands – fair market value is the standard. The fair market value of the encumbered land will reflect the reduced value resulting from the sale of the conservation easement. Agricultural value is problematic because it could force a land trust to sell the encumbered land for less than the fair market value. ACEP regulations (7 CFR 1468.27(c)(3)) go even further to mandate a reduced sale price by capping the sale price at the original purchase price of the parcel, if that is less than agricultural value. Basing the sale price of the land being sold to the farmer on the price for which it was originally purchased is problematic, as it disregards cost savings from larger purchases, donated land, natural market increases, and improvements to the land.

Both of these existing sale price restrictions would provide a benefit to a small class of beneficiaries – farmers and ranchers utilizing the ALE BPS tool – that wouldn't be provided to other buyers, which could cause the non-profit NGO selling the land to violate private benefit rules, threatening their non-profit status with the IRS. BPS is meant to be a tool for ensuring agricultural lands stay as agricultural land and allow entry into the market by beginning, socially disadvantaged, and other farmers and ranchers that face entry barriers. Dictating a further reduction in sale price (beyond the reduction due to the conservation easement) could result in financial losses for land trusts and threaten their non-profit status, which will prevent BPS from being utilized.

- **Lengthen Time to Execute BPS Transactions:** Eligible entities should be allowed at least three years to encumber the land with a conservation easement in BPS transactions. ACEP regulations following the 2018 Farm (7 CFR 1468.27(e)(4)(ii)) require an eligible entity to place an easement on the land within two years of entering an ALE agreement with NRCS. Lengthening this window to at least three years will make BPS consistent with the wider ALE program (16 USC 3865b(b)(4)(B)) and give eligible entities enough time to adhere to NRCS process and successfully execute BPS transactions. *[For the subsequent step, the timeline for the sale of the encumbered land is reasonable. Per the ACEP statute (16 USC 3865a(2)(B)), once the land in a BPS transaction is encumbered with a conservation easement, it must be sold within three years to a farmer or rancher—unless the Secretary determines an extension is justified.]*
- **Allow for Advance Payment, not Solely Reimbursement:** Creating the option for NRCS to provide the federal share 30 days in advance of the easement closing will align with the payment options allowed for other ACEP-ALE transactions (440-CPM, Part 528, Subpart I, Section 528.82B(3)(iii)) and will help ensure eligible entities can execute BPS transactions. ACEP regulations only allow the federal share to be provided as

reimbursement for some types of BPS transactions, meaning the eligible entity needs to provide the cash to purchase the easement and then wait to get reimbursed by NRCS (7 CFR 1468.27(d)(2))—that is an insurmountable financial burden for many eligible entities seeking to fulfill the goals of ACEP-ALE.

- **Eliminate Additional Restrictions on Land Eligibility:** NRCS should not impose additional restrictions on land eligibility for BPS transactions beyond what is in statute. ACEP regulations (7 CFR 1468.20(f)(1)(ii)) require that land be under “imminent threat” to be eligible for a BPS transaction. Additionally, NRCS’s BPS national instruction dictates that land may only be owned by an NGO for a maximum of 3 years to be eligible for a BPS transaction (300-NI, Part 308, Section 308.2B(3)(i)). These restrictive criteria, which were not included in statute, should be eliminated. They further discourage the use of BPS and ACEP-ALE.
- **Allow Local Governmental Entities to Be Eligible Landowners When Protecting Water Rights:** Local governmental entities should be eligible landowners when using BPS transactions to protect water rights in states utilizing prior appropriation doctrine, or a hybrid that includes prior appropriation components. Under prior appropriation, water rights are not tied to the land, which can lead to water rights being taken away from working agricultural land. Conservation easements can be an important tool for tying water rights to agricultural land, ensuring that working agricultural lands have access to water. Because water rights have become extremely expensive in the West, due to the water crisis, local governments may be the only purchasers able to front the capital required to tie water rights to working agricultural lands before then selling the encumbered land to a farmer or rancher. Allowing this flexibility under BPS would help Western states permanently protect agricultural land, while ensuring those working lands have adequate access to water.
- **Allow Buy-SELL-Protect Transactions, Without Further Restrictions or Paperwork Requirements:** Buy-SELL-protect transactions should be allowed to proceed the same as any other ACEP-ALE transaction involving privately owned land, as was the practice prior to the enactment of the 2018 Farm Bill and the BPS language. NRCS should not impose additional paperwork or restrictions on this long-standing ACEP-ALE practice simply because BPS transactions are now also allowed.
- **Allow Lease-to-Own Transactions, Without Further Restrictions or Paperwork Requirements:** ACEP-ALE transactions where an NGO landowner has a “lease-to-own” contract with a farmer or rancher at the time of submitting an ALE application should be allowed to proceed the same as any other ACEP-ALE transaction. Lease-to-own agreements allow a farmer or rancher to gradually purchase farmland they are actively farming on a predetermined timetable. NRCS should not impose additional paperwork or restrictions on land under lease-to-own contract that guarantees the transfer of the land to a farmer or rancher.