The USDA NRCS published the Interim Final Rule (IFR) for the Agricultural Conservation Easement Program (ACEP) on January 6, 2020. This will guide implementation of the 2018 Farm Bill ACEP enrollment components—Agricultural Land Easements (ACEP-ALE) and Wetland Reserve Easements (ACEP-WRE)—until the agency publishes a final rule. Comments on the IFR must be submitted on or before March 6, 2020.

The Land Trust Alliance attended and delivered comments during the USDA public input session on February 26, 2019. We followed up with written comments on March 1, 2019. Due to concerns with the NRCS FY19 ACEP guidance as it pertained to ACEP-ALE, we submitted supplemental comments on April 16, 2019. Over the course of the last year, we engaged in numerous meetings with senior NRCS staff to discuss the rulemaking process. Overall the IFR reflects the majority of our input. Thanks to everyone who participated on calls and provided input into our process— it really helps to have our community on the same page.

This is an overview of the IFR as it relates to our priorities.

**Overall ACEP (both WRE and ALE)**

**Adjusted Gross Income**

*Background:* The 2018 Farm Bill retained the Adjusted Gross Income (AGI) limitation at $900,000 and granted the Secretary the authority to waive the limitation for lands of special environmental significance for all conservation programs.

*Interim Final Rule:* The IFR delegates implementation of the regulations to the NRCS Chief. This includes the authority to waive the AGI limitation on a case-by-case basis, if environmentally sensitive land of special significance would be protected as a result of such waiver.

**Environmental Services Markets**

*Background:* The 2018 Farm Bill allows entities participating in any conservation program administered by the Secretary to participate in and receive compensation from an environmental services market if there are additional conservation benefits that are consistent with the purposes of the conservation program.

*Interim Final Rule:* Allows landowners with an ACEP easement to enter into an environmental credit agreement with third parties as long as it does not interfere with the rights of the United States or eligible entity and does not violate the terms of the easement. Clarifies that such an agreement must include the facilitation of additional conservation benefits consistent with the conservation purposes of the easement.
ACEP-ALE

Matching Funds

Background: The 2018 Farm Bill amended requirements for the 50% ACEP-ALE non-Federal match to allow landowner donations and expenses to satisfy the match requirement.

Rather than implement this provision in the FY19 ACEP-ALE guidance, NRCS limited the provision to a list of eight states/territories and created a special fund to assist with meeting the cash match in those locales. The Alliance expressed concerns with setting aside funds and urged the NRCS to ensure this decision not be geographically limited. We also argued against making the cash match a ranking factor.

Interim Final Rule: The IFR does not limit the scope of this provision geographically and did not establish a special fund. It does, however, make the cash match a national ranking factor. In addition, the costs for things such as appraisals, boundary surveys and closing costs may be considered as meeting the non-Federal cost share. Other costs such as stewardship expenses could be considered on a very limited basis. NRCS will provide information regarding the required documentation for calculating these costs.

For transactions in which the eligible entity provides less than 10% of the fair market value of the agricultural land easement in cash, the eligible entity must provide documentation to prove it has the resources on hand to manage, monitor and enforce the easement.

ALE Plans

Background: The 2018 Farm Bill eliminated the ALE plan requirement.

The NRCS FY19 ACEP-ALE guidance eliminated the ALE plan requirement except for grasslands of special environmental significance. Some State Conservationists made ALE plans a state ranking factor. The Alliance urged NRCS to adhere to Congressional intent and not make ALE plans mandatory for any part of ALE. We also argued against making ALE plans a ranking factor.

Interim Final Rule: The IFR eliminates the ALE plan requirement but does require a conservation plan for highly erodible lands as it always did. It allows State Conservationists, in consultation with the State Technical Committees, to make ALE plans a state ranking factor.

Certification of Eligible Entities

Background: The 2018 Farm Bill clarified that eligible entities can write their own minimum deed terms. It also created a new path to allow accredited land trusts and State Departments of Agriculture to be recognized as certified entities if they meet certain criteria and meet NRCS eligible entity responsibilities. The criteria includes the acquisition of at least 10 agricultural conservation easements through ACEP-ALE or predecessor programs.

Interim Final Rule: The IFR opens eligible entity certification to accredited land trusts and State Departments of Agriculture who have acquired at least 10 agricultural land easements under ACEP-ALE or predecessor programs. It requires eligible entities to hold, manage and monitor at least 25 agricultural land conservation easements (10 of which must have been acquired under ACEP-ALE or
It increases the minimum number of ACEP-ALE easements from five to 10 for all eligible entities to become certified. It outlines required documentation to become a certified entity.

Certified entities may enter into an ALE agreement with the NRCS for a period of up to five years and permits certified entities to purchase easements without NRCS approval of the easement deed, baseline report, title or appraisal before purchase of the easement. The terms of these documents will be spelled out in the ALE agreement.

**Mineral Rights Development**

*Background:* The 2018 Farm Bill clarified that subsurface mineral rights may be developed on lands subject to an ALE easement provided that the subsurface mineral development has a limited and localized impact, does not harm the conservation or agricultural values of the land, does not alter the existing topography of the land and that there is a mineral development plan in place that includes a plan for the remediation and restoration of the land.

*Interim Final Rule:* The IFR specifies the terms and conditions outlined in the 2018 Farm Bill to allow subsurface mineral rights development on lands with an ACEP-ALE easement. The rule does note that in some cases the changes made by Congress might actually make the criteria more restrictive.

**Buy-Protect-Sell**

*Background:* The 2018 Farm Bill specifically allowed the NRCS to permit participating entities to apply for ACEP-ALE funding for land under the Buy-Protect-Sell (BPS) provision. In written comments to the USDA, the Alliance urged the agency to allow two eligible entities to participate in one project as part of a BPS transaction. This provision was not implemented as part of the FY19 ACEP guidance.

*Interim Final Rule:* The IFR permits the NRCS to enter into an ALE agreement with an eligible entity for a BPS transaction to “purchase an agricultural land easement on eligible private or Tribal agricultural land that an eligible entity owns or is in the process of purchasing for the purposes of securing long-term protection of natural resources and the agricultural nature of the land and ensuring timely transfer to a qualified farmer or rancher.”

It requires the eligible entity to identify the type of BPS transaction:

1. Pre-closing transfer where the eligible entity transfers fee title ownership to a farmer or rancher at or prior to closing on the easement. The eligible entity holds the easement prior to receiving the Federal share; or
2. Post-closing transfer where the eligible entity will transfer fee title to a farmer or rancher within three years after closing on the easement. An eligible entity may seek an extension of the timeline under extenuating circumstances.

The sales price of the land to a farmer or rancher must not exceed the lesser of 1) the original purchase price of the land paid by the eligible entity; or 2) the agricultural value as determined by an appraiser. Transaction costs incurred by the eligible entity may not exceed more than 10 percent of the agricultural value.
Geographic Differences

*Background:* The 2018 Farm Bill allows the Secretary to adjust evaluation and ranking criteria to account for geographic nuances as long as they meet the purposes of the program and continue to maximize the benefits of the underlying Federal investment.

*Interim Final Rule:* Provides flexibility to allow adjustments to address geographic differences.

Administration of Easement Terms

*Background:* The 2018 Farm Bill modernized language regarding the subordination, exchange, modification or termination of an ALE easement to clarify requirements for each to occur. All require landowner and eligible entity consent.

*Interim Final Rule:* Incorporates the modernized language into NRCS regulations and limits the impact of the easement administrative action to no more than 10% of the easement unless the NRCS determines it is impracticable to achieve program purposes on the original easement area. It also places a preference on easement subordination or modification over exchanges involving non-adjacent lands. Furthermore, it underscores that any administrative action must result in equal or greater conservation and economic values for the United States.

Right of Enforcement

*Background:* The 2018 Farm Bill clarified that the Secretary’s right of enforcement only extends to inspection when the eligible entity fails to provide monitoring reports on time or if there is a “reasonable and articulable belief” that the easement terms and conditions have been violated. It requires the Secretary to give advance notice to the landowner and eligible entity so they may participate in the inspection.

*Interim Final Rule:* The IFR incorporates these provisions into the regulation.