



PennState Law Center for Agricultural and Shale Law

An Overview of Federal and State Purchase of Agricultural Conservation Easement (PACE) Programs

National Agricultural Law Center Webinar Series
September 15, 2021



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PennState Law Center for Agricultural and Shale Law



Agricultural Law Weekly Review

Agricultural Law Weekly Review - Week Ending June 4, 2021

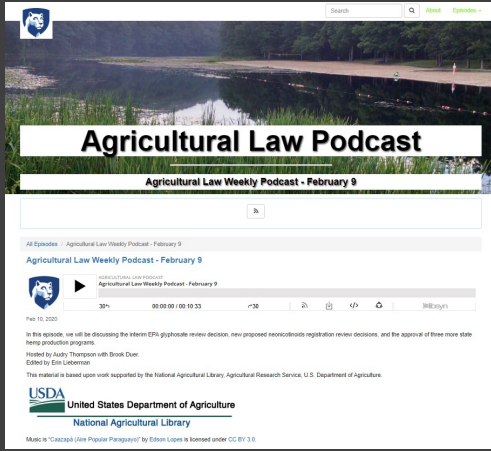
COVID-19: Congressional letter calls for Emergency Temporary Standard and FY 2022 Budget Outlines Intent for Infectious Disease Rulemaking On June 2, 2021, one-hundred and six members of the U.S. House of Representatives sent a letter to President Biden urging the issuance of an OSHA Emergency Temporary Standard (ETS) addressing worker protection from COVID-19 in the workplace. The request cited the March 15, 2021 deadline for such a standard included in January 21, 2021's Executive Order (E.O. 13999) and the Office of Management and Budget's (OMB) delay in reviewing the draft ETS sent to the White House on April 26, 2021. [...]


June 9th, 2021 [Read More >](#)

Agricultural Law Weekly Review - Week Ending May 28, 2021

Pesticides/Herbicides: Federal Court Rejects Bayer's Proposed Partial Glyphosate Settlement, Bayer to Review Roundup Residential Use ¶ On May 26, 2021, the U.S. District Court for the Northern District of California issued an order denying approval of Bayer's \$2 billion proposed class settlement to resolve a portion of current and future claims in the multi-district class action litigation, In re: Roundup Products Liability Litigation, No. 3:16-md-02741. The proposed

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Podcasts

- The Agricultural Law Podcast
 - AgLawPodcast.libsyn.com
- The Shale Law Podcast (soon to be rebranded as Farmland Energy Legal Podcast)
 - ShaleLawPodcast.libsyn.com

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PennState Law Center for Agricultural and Shale Law

Today's Webinar: Overview of PACE Programs

- Big Picture
- History
- Federal Programs
- State Programs
- Legal and Policy Issues Moving Forward

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PACE Programs – Big Picture

- What?
- Where?
- Why?



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PACE Programs – What Are They?

- Easement – property right to use real property of another for a specific purpose
- Negative easement – prohibition on using your own real property in a particular manner

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PACE Programs – What Are They?

- Purchase
 - of Agricultural Conservation Easement
 - by (or funded by) Government
-
- Farmland owner essentially sells the development rights for parcel of farmland to state or local government.
 - Deed restriction that limits future non-agricultural uses; prevents conversion of farmland

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PACE Programs – What Are They Not?

- Conservation Easement donated or sold for income tax benefits
- Conservation Easement imposed on land for no value
- Conservation Easement imposed on land for other reasons (such as to make a residential subdivision more attractive)
- Conservation Programs (such as CRP, EQIP)

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PACE Programs – Where Are They?

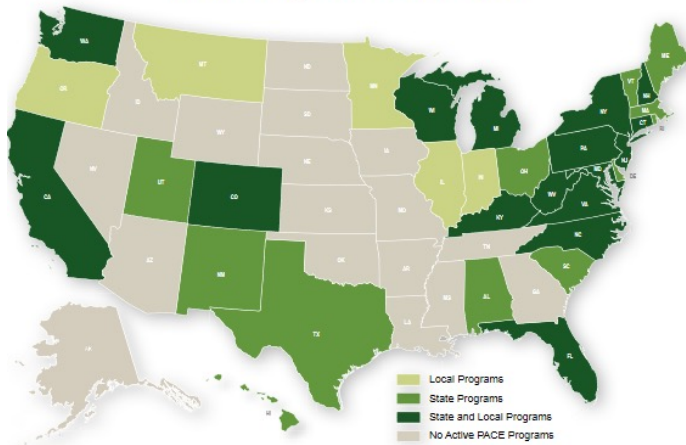
- Federal – Agricultural Conservation Easement Program – Agricultural Lands Easement (ACEP-ALE)
- State Programs
- Local Programs

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PACE Programs – Where Are They?

PACE Programs as of 2020



Local Programs only – 5 states
 State Program only – 12 states
 State and Local Programs – 16 states

Totals:
 28 active state programs
 21 states with active local programs



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PACE Programs – Why?

- Prevent the loss of agricultural land
 - Preserve landscape?
 - Preserve agrarian heritage?
 - Encourage local economic development?
 - Ensure domestic food security? (and energy security?)
 - Promote local food system?

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Today's Webinar:

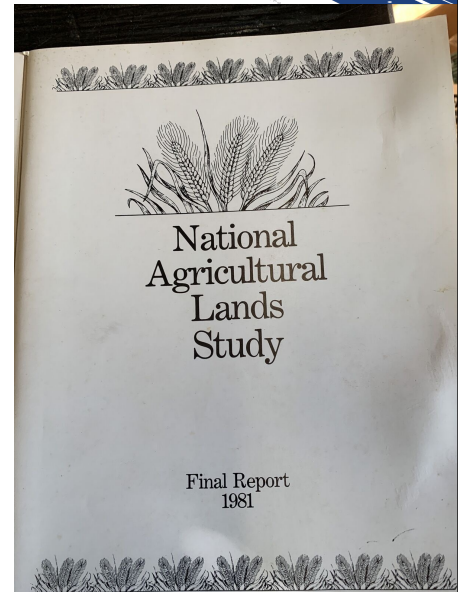
- Big Picture
- **History**
- Federal Programs
- State Programs
- Legal and Policy Issues Moving Forward

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National Agricultural Lands Study

- Initiated by USDA and President's Council on Environmental Quality in 1979

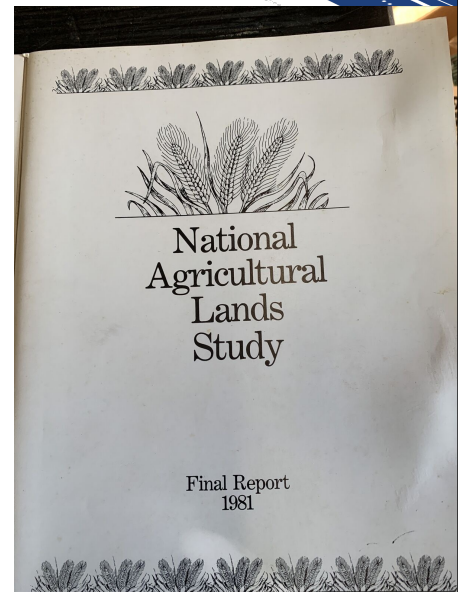


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National Agricultural Lands Study – Charge

- Determining the nature, rate, extent, and causes of conversion of agricultural land to nonagricultural uses.
- Evaluating the economic, environmental, and social consequences of agricultural land conversion and methods used to attempt to restrain and retard conversion.
- Recommending administrative and legislative actions, if found necessary, to reduce potential losses to the nation that might result from continued conversion of agricultural land to nonagricultural uses.
- Presenting a final report on findings and recommendations in January 1981.

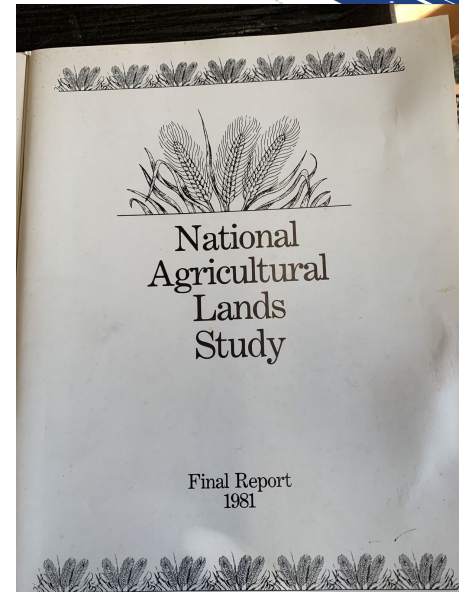


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National Agricultural Lands Study

- Concluded that “agricultural land is converted to other uses in an incremental piece-by-piece fashion.”
- Noted that “the conversion of agricultural land [had] caused little concern at the national level.”
- Recognized impact of “impermanence syndrome” that caused a lack of investment in capital improvements or conservation practices.

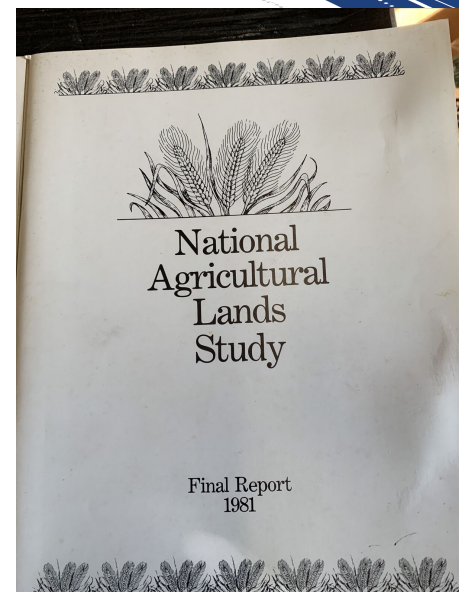


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National Agricultural Lands Study

- Projections showed an increased demand for agricultural products due to:
 - International trade
 - Increased population and domestic use
 - Ethanol production

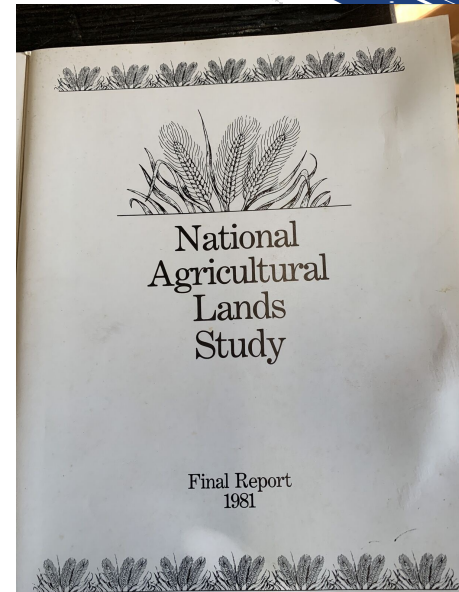


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National Agricultural Lands Study – Recommendations

- “The federal government should begin by putting its own house in order.”
 - Focus on minimizing developing good agricultural land in federal projects
 - Support state and local efforts through technical and financial assistance
- “These recommendations **emphasize the primacy of state and local governments** in the protection of agricultural land and the supporting roles which should be played by federal agencies.”

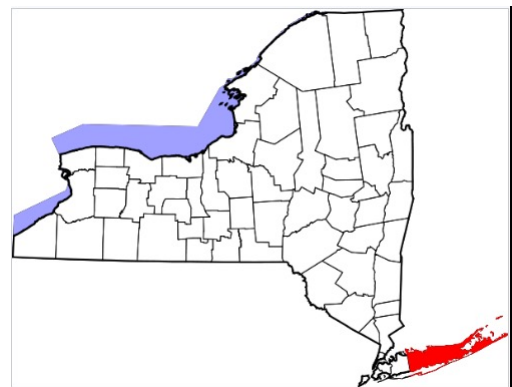


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PACE Programs – History

- 1974 – Suffolk County, New York
- 1977 – Maryland
- 1977 – Massachusetts
- 1978 – Connecticut
- 1979 – New Hampshire



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Other “Farmland Preservation” Programs

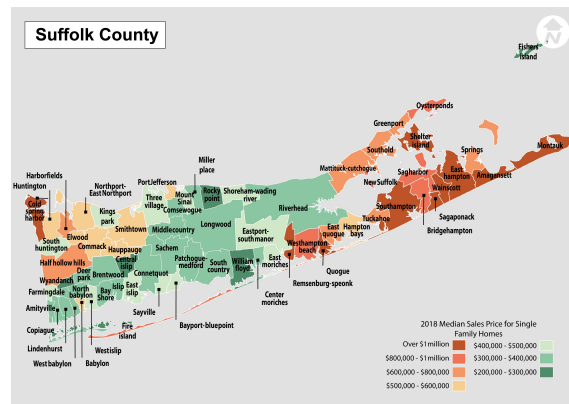
- Agricultural Districts
- Preferential Tax Assessment
- Right to Farm Laws
- Real Estate Planning
 - Comprehensive Plan
 - Zoning
- Transfer of Development Rights

- Technical Assistance Programs (Focus on the farmer rather than the farmland)



Pressures Upon Agricultural Land

- Residential development
- Nuisance complaints
- Higher real estate taxes
- Overall, incentives to exit agricultural production and convert land to non-agricultural use





PACE Programs – How Do They Work?

- Remove incentive to convert farmland to non-agricultural use
- Provide revenue for farmland owner
- Farmland owner can continue to farm as before
- Farmland owner retains ability to sell or transfer real estate
- Any subsequent owner of farmland must comply with terms of easement
- Ensures farmland will remain in agricultural production

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PACE Programs – How Do They Work?

- By separating development rights from agricultural use, imposition of conservation easement can reduce the barrier to entry for new and beginning farmers

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Today's Webinar:

- Big Picture
- History
- **Federal Programs**
- State Programs
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Federal Conservation Easement Programs

- 1996 Farm Bill – established Farmland Protection Program
 - Later renamed as Farm and Ranchlands Protection Program (FRPP)
- 2014 Farm Bill – established Agricultural Conservation Easement Program (ACEP)
 - Successor to FRPP, Grassland Reserve Program (GRP), and Wetland Reserve Program (WRP)
 - Provides for Agricultural Land Easements (ALE) and Wetland Reserve Easements (WRE)

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ACEP-ALE

- USDA enters into cooperative agreement with qualified entity (government or NGO) to acquire and manage easement
- USDA will pay up to 50% of FMV of easement (up to 75% for certain grasslands)
- Easement limits non-agricultural uses on working agricultural lands

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ACEP-ALE – Applications

- Applications are to be accepted continuously
- NRCS can establish application cut-off dates
- NRCS State Conservationist can update ranking criteria each year
 - Comprised of national factors and state factors

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ACEP-ALE – Ranking Factors

C. Ranking Criteria

- (1) At least 50 percent of the weight of the ranking factors must be based on the national criteria comprising 200 points out of 400 points. The national criteria are as follows:
- (i) Percent of prime, unique, and important farmland soils in the parcel to be protected.
 - (ii) Percent of cropland, rangeland, grassland, historic grassland, pastureland, or nonindustrial private forest land in the parcel to be protected.
 - (iii) Ratio of the total acres of land in the parcel to be protected to average farm size in the county according to the most recent USDA Census of Agriculture (<http://www.agcensus.usda.gov>).
 - (iv) Decrease in the percentage of acreage of farm and ranch land in the county in which the parcel is located between the last two USDA Censuses of Agriculture (<http://www.agcensus.usda.gov>).
 - (v) Percent population growth in the county as documented by the U.S. Census (<http://www.census.gov>).
 - (vi) Population density (population per square mile) as documented by the most recent U.S. Census (<http://www.census.gov>).
 - (vii) Existence of a farm or ranch succession plan or similar plan established to address agricultural viability for future generations.
 - (viii) Proximity of the parcel to other protected land, such as compatible military installations; land owned in fee title by the United States or an Indian Tribe, State or local government, or by a nongovernmental organization whose purpose is to protect agricultural use and related conservation values; or land that is already subject to an easement or deed restriction that limits the conversion of the land to nonagricultural use or protects grazing uses and related conservation values.
 - (ix) Proximity of the parcel to other agricultural operations and agricultural infrastructure.
 - (x) Maximizing the protection of contiguous or proximal acres devoted to agricultural use.
 - (xi) Whether the land is currently enrolled in Conservation Reserve Program (CRP) in a contract that is set to expire within 1 year and is grassland that would benefit from protection under a long-term easement.
 - (xii) Whether the land is grassland of special environmental significance that would benefit from protection under a long-term easement.
 - (xiii) Decrease in the percentage of acreage of permanent grassland, pasture, and rangeland, other than cropland and woodland pasture, in the county in which the parcel is located between the last two USDA Censuses of Agriculture.
 - (xiv) Percent of the fair market value of the agricultural land easement that is the eligible entity's own cash resources for payment of easement compensation to the landowner and comes from sources other than the landowner.

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ACEP-ALE – Ranking Factors

- (2) The remaining weight (up to 200 points out of 400 points) of the ranking factors will be applied to NRCS State criteria approved by the State conservationist, with advice from the State technical committee. Such criteria may include only the following:
- (i) The location of a parcel in an area zoned for agricultural use.
 - (ii) The eligible entity's performance in managing and enforcing easements. The measure of performance is the efficiency of easement transactions completion or percentage of parcels monitored annually and the percentage of monitoring results reported annually. For noncertified eligible entities, this may also include the eligible entity's election to attach the ALE minimum deed terms addendum as written or the use of an existing EPD-approved entity-specific ALE deed template.
 - (iii) Multifunctional conservation values or benefits of farm or ranch land protection, including—
 - Social, economic, historic, and archaeological benefits.
 - Enhancing carbon sequestration.
 - Improving climate change resiliency.
 - At-risk species protection.
 - Reducing nutrient runoff and improving water quality.
 - Other related conservation benefits.
 - (iv) Geographic regions where the enrollment of particular lands may help achieve national, State, and regional agricultural or conservation goals and objectives or enhance existing government or private conservation projects.
 - (v) Diversity of natural resources to be protected or improved.
 - (vi) Score in the land evaluation and site assessment system or equivalent measure for grassland enrollments. This score serves as a measure of agricultural viability (access to markets and infrastructure). (See 7 CFR Part 658 for additional information.)
 - (vii) Measures that will be used to maintain or increase agricultural viability, such as succession plans, agricultural land easement plans (not including required highly erodible land (HEL) conservation plans), or entity deed terms that specifically address long-term agricultural viability.
 - (viii) Criteria specific to ranking pools that will facilitate the prioritization of parcels within designated ranking pools that will best achieve ACEP-ALE purposes and maximize the benefit of the Federal investment under the program for which the ranking pools were designated.

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ACEP-ALE – Manner of Acquisition

- Standard
 - Purchase of easement from landowner
- Buy-Protect-Sell (BPS)
 - Purchase of land and then transfer of land subject to easement to qualified purchaser

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ACEP Funding

Backlog/Interest	<p><i>Agricultural Land Easements (ALE)</i>—In FY2019, ALE applications were received for over 248,000 acres, including applications for grasslands of special environmental significance. Approximately 36% of applications were enrolled.</p> <p><i>Wetland Reserve Easements (WRE)</i>—In FY2019, WRE applications were received for over 408,800 acres. Approximately 9% of applications were enrolled.</p>
Funding authority	Mandatory and subject to sequestration. \$450 million annually for FY2019-FY2023.
FY2020 funding	\$414 million (authorized \$450 million is reduced by sequestration and by a transfer to the Farm Production and Conservation Business Center).
FY2021 Administration request	<p>\$450 million (authorization to be reduced by an unknown amount of sequestration). Requests an annual funding reduction of \$40 million beginning in FY2021 and a transfer of \$8.3 million to the Farm Production and Conservation Business Center in FY2021.</p>



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USDA Conservation Funding

Conservation Reserve Program (CRP)

FY2020 est. funding	\$1.9 billion (based on the estimated number of acres that will be enrolled, including technical assistance).
FY2021 est. Administration request	\$2.0 billion (based on the estimated number of acres that will be enrolled, including technical assistance).




Agricultural Conservation: A Guide to Programs
Updated August 19, 2020

Conservation Stewardship Program (CSP)

FY2020 est. funding	\$2.4 billion total, including \$1.7 billion for contracts enrolled prior to the 2018 farm bill and \$676.2 million for contracts enrolled under the 2018 farm bill (authorization reduced by sequestration and a transfer to the Farm Production and Conservation Business Center).
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USDA Conservation Funding

Environmental Quality Incentives Program (EQIP)

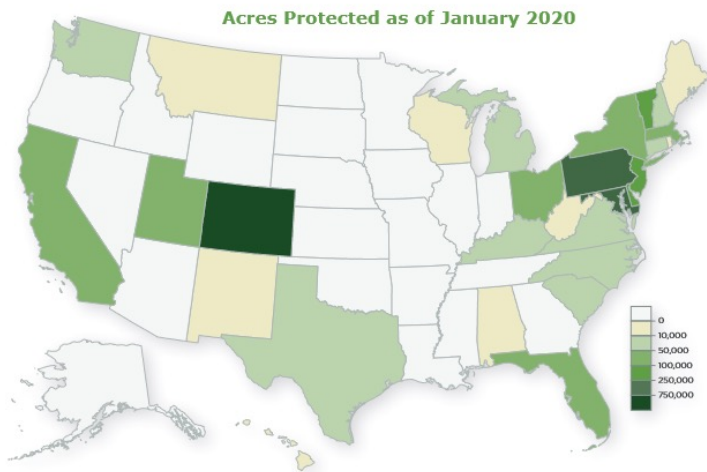
Funding authority	Mandatory and subject to sequestration. FY2019—\$1.75 billion, FY2020—\$1.75 billion, FY2021—\$1.8 billion, FY2022—\$1.85 billion, and FY2023—\$2.025 billion.
FY2020 funding	\$1.6 billion (authorized \$1.75 billion reduced by sequestration and a transfer to the Farm Production and Conservation Business Center).
FY2021 Administration request	\$1.8 billion (authorization to be reduced by an unknown amount of sequestration). Requests a transfer of \$30.7 million to the Farm Production and Conservation Business Center in FY2021.



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PACE Programs – Leading States



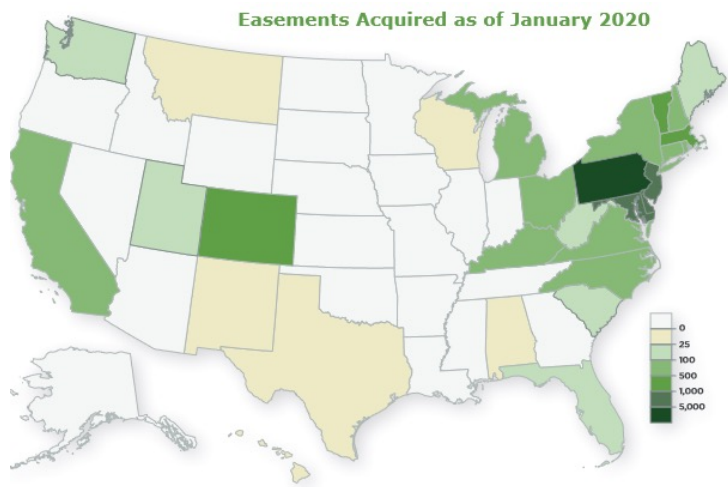
Pennsylvania – 577,092 acres
Maryland – 425,035 acres
New Jersey – 236,571 acres
Vermont – 164,250 acres
Delaware – 136,682 acres

TOTAL U.S. – 3,129,113 acres



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PACE Programs – Leading States



Pennsylvania – 5,636 easements
Maryland – 3,126 easements
New Jersey – 2,648 easements
Delaware – 1,039 easements
Massachusetts – 924 easements
Vermont – 746 easements

TOTAL U.S. – 17,264 easements



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PACE State Programs – Provisions

- How are easements funded?
 - general appropriations, private contributions,
 - federal government (ACEP-ALE), local government,
 - environmental funds, cap and trade auction proceeds [CA], litigation settlement funds,
 - real estate transfer tax, deed recording fees, preferential tax assessment program penalties,
 - sales tax, cigarette tax, license plate fees,

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PACE State Programs – Provisions

- Length
 - Generally perpetual
 - May provide for termination due to change in circumstances
- Valuation
 - Fair Market Value of land unrestricted – FMV with restrictions = payment to landowner
 - Average cost per acre of easement was \$3,100 in Pennsylvania during 2020

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PACE State Programs – Provisions

- How are properties ranked?
 - Agricultural properties of land
 - (Are soil characteristics always relevant for long-term viable agricultural operation?)
 - Long-term economic viability
 - Strategic location, proximity to other preserved farms
 - Environmental benefits

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PACE State Programs – Provisions

- Additional residences
 - Often allow carve-out of 1-2 small building lots
- Additional “commercial” development
 - What structures are allowed to be constructed?

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PACE State Programs – Provisions

- Conservation plans
 - Frequently require landowner to be in compliance with various conservation-type plans
- Interaction with other “farmland preservation” programs
 - Inclusion within agricultural district
 - Eligibility for preferential tax assessment

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PACE State Programs – Provisions

- Additional potential benefits:
 - Protection from local regulations
 - Protection from eminent domain

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PACE Programs – Summary

- Compared to other “farmland preservation” programs:
 - Pros
 - Provide permanence
 - Most directly impact conversion of farmland to non-agricultural uses

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PACE Programs – Summary

- Compared to other “farmland preservation” programs:
 - Cons
 - Are more costly
 - May provide a financial windfall to agricultural landowners where there is low likelihood of conversion of land to non-agricultural use
 - May provide a financial windfall to agricultural landowners where there is a strong demand for agricultural land

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PACE Programs – Issues to Consider Moving Forward

- What is agriculture?
 - Different production methods?
 - Different business operations? Agritourism?
 - Energy production?
- Should we favor or restrict certain types of agricultural operations?

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PACE Programs – Issues to Consider Moving Forward

- How much dead-hand control is too much?
 - Perpetuity is a pretty long time.
 - How do we deal with evolving goals?
 - How do we deal with evolving conceptions of agricultural production?
- Are we preserving the right farmland?
 - What about isolated preserved farms?

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