

Comments of the Izaak Walton League of America
on the U.S. Department of Agriculture Natural Resources Conservation Service
Programmatic Environmental Assessment of the Agricultural Conservation Easement
Program and Finding of No Significant Impact

February 5, 2020

We appreciate the opportunity to provide comments on the USDA Natural Resources Conservation Service Programmatic Environmental Assessment for the Agricultural Conservation Easement Program, notice at 85 FR 558-590, January 6, 2020, and the Finding of No Significant Impact based on that Environmental Assessment. The USDA has important discretionary decisions to make concerning implementation of the changes made by Congress to the Agricultural Conservation Easement Program in the 2018 Farm Bill. The Programmatic Environmental Assessment should be a document that identifies alternative approaches to implement discretionary changes available in implementing the program, and one that provides analyses to help the USDA and the public understand the environmental implications of those alternatives as the agency makes those decisions.

Unfortunately, it is not. The Programmatic Environmental Assessment (PEA) only identifies one viable alternative. It fails to identify a range of alternatives available to implement the provisions where USDA has substantial discretion to act, and it fails to provide meaningful analyses of the differing impacts of those alternatives on the affected environment. These failures should be corrected before the programmatic environmental assessment is finalized. As a result of these deficiencies, we believe the Finding of No Significant Impact based on the PEA is faulty as well.

USDA implementation of the changes made to the Agricultural Conservation Easement Program (ACEP) could have a significant impact on the environment, in both positive and in negative ways. Congress made substantial changes to the statutes governing ACEP in the 2018 Farm Bill, including authorizing a Buy-Protect-Sell option for eligible entities, allowing USDA to adjust the program's selection criteria to account for geographic differences and to prioritize applications that maintain agricultural viability, providing for State technical committee input in evaluating compatible uses, authorizing the use of alternative plant communities in wetland easements, and changing the requirements for conservation plans. In implementing the program USDA also makes discretionary decisions about the relative balance of wetland easements versus agricultural land easements, and whether and how rare native prairie will be ranked and prioritized versus other grasslands and cropped agricultural land.

USDA has alternatives available in implementing these changes, and the Environmental Assessment should provide an evaluation of the impact of those alternatives. There are very foreseeable outcomes stemming directly from these NRCS discretionary decisions, and they warrant more careful analysis by NRCS of the impacts of those alternatives.

A foundation of National Environmental Policy Act environmental review is the requirement that agencies identify a range of reasonable alternatives in the decisions the agency proposes to make, carry out an analysis comparing the likely impact of those alternatives, and give the public an opportunity to comment on the alternatives and agency analyses. The process is designed to inform the final agency decision and provide for public input. By failing to develop or assess meaningful alternatives, we believe the ACEP PEA fails to meet the guidance provided by the Council for Environmental Quality and the legal requirements under the National Environmental Policy Act.

Guidance provided by the Council for Environmental Quality on the effective use of programmatic NEPA reviews notes that “NEPA requires Federal agencies to consider the effects of a proposed action *and any reasonable alternatives* on the human environment¹” (emphasis added). The guidance goes on to say:

“The purpose and need statement is key to developing the NEPA review, as it establishes the scope of the analyses, range of reasonable alternatives, and frames the decision to be made. The purpose and need for a programmatic review will differ from the purpose and need for a project- or site-specific EA or EIS. The purpose and need for a PEA or a PEIS should be written to avoid eliminating reasonable alternatives and focused enough for the agency to conduct a rational analysis of the impacts and allow for the public to provide meaningful comment on the programmatic proposal.²”

We believe the Council on Environmental Quality (CEQ) guidance can support the use of recent program implementation (i.e., pre-2018 Farm Bill) as a “no action alternative,” but only when it serves only as a baseline for comparison purposes or when it serves as a viable alternative. Where USDA chooses to use the past law as a baseline, it must still provide **more than one viable alternative** for its analysis. USDA cannot meet this requirement by offering only two alternatives, one of which (the pre-2018 Farm Bill) is not a legally viable or defensible alternative that USDA could actually implement.

The ACEP PEA uses the law prior to passage of the 2018 Farm Bill as the No Action Alternative. As is clear from the discussion of this alternative on page 9 of the Environmental Assessment, this alternative is based on the 2014 Farm Bill and USDA admits that it is not a viable alternative but intended to serve only as a baseline. Because Alternative 1 could not be legally implemented, the alternative can only serve as a baseline for purposes of the Environmental Assessment. Therefore, it cannot be used as one of the required alternatives.

¹ Executive Office of the President, Council on Environmental Quality, *Memorandum for Heads of Federal Departments and Agencies; Subject: Effective Use of Programmatic NEPA Reviews*, Washington, DC, December 18, 2014, p. 5.

² *Ibid*, p. 18-19.

Alternative 2, the Proposed Action described on page 9, is the only legally implementable alternative offered. Alternative 2 includes both non-discretionary changes required by Congress (such as the increase in overall funding) and changes that require USDA discretionary action. Unfortunately, the Environmental Assessment does not use this opportunity to identify some of the options available with respect to those discretionary actions, and thus it fails to assess the relative difference in environmental benefits and economic impacts of those choices.

The type of assessment done in the EA – of the bill as passed versus the 2014 Farm Bill -- might have been helpful to Congress in enacting the legislation, but without identifying alternatives it is not useful in helping USDA or the public assess the likely impacts of discretionary decisions to be made by the agency in implementing the legislation. We believe the CEQ guidance and the NEPA law clearly requires that USDA develop reasonable alternatives beyond the one viable “Proposed Action” presented, and those alternatives should reflect the major discretionary decisions USDA can make to implement the revised program.

The Environmental Assessment does provide some very interesting and useful information on the easements and conservation practices put in place over the years from the ACEP and its precursors. The acres of land protected and restored, and the examples of fish and wildlife that have benefitted – in some cases, removed from or kept off of the list of threatened or endangered species – is very impressive. As impressive as the past results have been, USDA faces some important discretionary decisions in implementing the program in the future and those decisions should be the focus of the Environmental Assessment.

The Council on Environmental Quality Guidance clearly contemplates the development and analysis of alternatives to the agency’s proposed action, and it specifically notes that “the standard NEPA requirements for alternatives apply.”³ Key discretionary decisions facing the U.S. Department of Agriculture in implementing the ACEP provisions include how to implement the Buy-Protect-Sell provision, what kinds of conservation plans to require or prioritize through its scoring of applications, whether and how to adjust the program’s selection criteria to account for geographic differences and to prioritize applications that maintain agricultural viability, and the balance of wetland versus native prairie versus other agricultural land in allocating funding to states and evaluating applications. In each of these decisions, USDA has considerable discretion, and multiple options it could consider in implementing the changes made in the new Farm Bill. Such an assessment of alternatives, as required under the National Environmental Policy Act, would inform the public about USDA’s decision-making analyses and would inform the agency in making these important decisions.

³ Executive Office of the President, *Ibid*, p. 21.

Each of these decisions could have a substantial impact on the environmental benefits of the program. In each case, information and data should be available that would allow USDA to evaluate the benefits, costs, and feasibility of implementing various options. Although USDA cannot control which landowners apply for ACEP agreements, USDA does have decades of experience in managing conservation programs and in the environmental benefits and costs likely to result from alternatives to implementing the program.

In summary, the Draft PEA as written does not provide adequate NEPA coverage. The Final PEA should identify a range of alternatives for implementing the discretionary decisions to be made by USDA, provide an evaluation of the likely impact of those alternatives, and give the public transparency and a reasonable opportunity to comment on the alternatives and the USDA evaluation of those alternatives.

As part of the environmental review, USDA should develop and assess those reasonable alternatives for each major decision needed to implement the program moving forward, reflecting the areas where the agency has been given substantial discretionary authority by Congress.

We appreciate the opportunity to provide comments on the USDA Natural Resource Conservation Service Programmatic Environmental Assessment for the Agricultural Conservation Easement Program, and the resulting Finding of No Significant Impact. The USDA has important decisions to make concerning implementation of the significant changes made by Congress to the program in the 2018 Farm Bill. This environmental assessment process under the National Environmental Policy Act should provide transparency and an opportunity for the public to comment, and it should be structured to provide valuable information to the agency as it decides how to implement those provisions. We ask you to correct these deficiencies before issuing a final ACEP Programmatic Environmental Assessment.

We would be pleased to provide further information or to discuss these comments.

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