



**PennState Law**

Center for Agricultural  
and Shale Law

PENNSYLVANIA DEPARTMENT OF AGRICULTURE  AGRICULTURAL BUSINESS DEVELOPMENT CENTER

*Understanding Agricultural Law Webinar Series*

# ***Understanding Agricultural Law***

## **Webinar Series**

*Understanding the Basics of*

# **Agricultural Conservation Easements**

**April 28, 2023**





# Ag Law Center Website Resources

[aglaw.psu.edu](http://aglaw.psu.edu)

- Agricultural Law Weekly Review
- Agricultural Law Virtual Resource Rooms
- Agricultural Law Tracker
- Shale Law Tracker
- Agricultural Law Podcast
- Social Media
  - Twitter, Facebook, LinkedIn
- Videos/Presentations
- PA Ag Mediation Program



## Agricultural Law Weekly Review

[SEE ALL AGRICULTURAL LAW WEEKLY REVIEWS »](#)

### Agricultural Law Weekly Review—Week Ending November 11, 2022

Agricultural Antitrust: Federal Court Denies Tyson's Motion to Dismiss Poultry Renderers' Antitrust Suit 🌟 On November 8, 2022, the U.S. District Court for the Northern District of Georgia issued an order denying a motion to dismiss filed by River Valley Ingredients, LLC; Tyson Poultry, Inc.; and Tyson Farms, Inc.—the defendants in an antitrust case filed by three southeast poultry rendering companies. *American Proteins, Inc. v. River Valley Ingredients, LLC*, No.

### Tweets from @AgShaleLaw

PSU Ag & Shale ...  
@AgShaleLaw · 2h

Today at noon (ET):  
"Understanding the Basics of Licensing & Regulation of Direct Agricultural Product Sales" 🍷  
1 CLE credit available for PA attorneys  
[Learn more and register:](#)



# Pennsylvania Agricultural Mediation Program

## Who can request mediation?

### USDA-related issues:

- Agricultural Loans
- Wetlands determinations
- Compliance with farm programs, including conservation programs
- National organic program established under the Organic Foods Production Act of 1990
- Agricultural Credit
- Rural water loan programs
- Grazing on National Forest System land
- Pesticides

### Non-USDA issues:

- Land and Equipment Lease issues.
- Family farm transition.
- Farmer-neighbor disputes.
- As approved by PA Secretary of Agriculture



### Contact us:

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329 Innovation Blvd.

University Park, PA 16802

(814) 746-4619

[AgMediation@PennStateLaw.psu.edu](mailto:AgMediation@PennStateLaw.psu.edu)

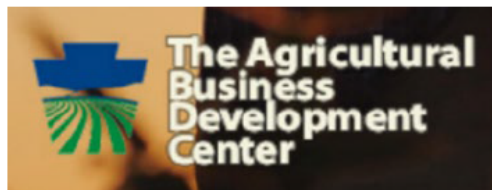
Website: [www.PAAgMediation.com](http://www.PAAgMediation.com)



# ***Understanding Agricultural Law***

**A Legal Educational Series for General Practice Attorneys and  
Business Advisors Representing Agricultural and Rural Clients**

This webinar series is specifically tailored to create subject matter literacy and competence on fundamental issues of agricultural law for attorneys, advisors, and service providers to agricultural producers and agri-businesses.





# ***Understanding Agricultural Law Series:***

## **Past Topics:**

- Agricultural Labor Laws
- Leasing Farmland for Energy Development
- Local Land Use Regulation of Agriculture
- Statutory Protections for Ag Operations
- Agricultural Cooperatives
- Livestock Market Regulation
- Crop Insurance
- Federal & State Conservation Programs
- Licensing & Regulation of Direct Agricultural Product Sales
- Agricultural Finance
- PA's "Clean & Green" Tax Assessment Program
- Animal Confinement Laws



# ***Understanding Agricultural Law Webinar Series***

## **Upcoming Topics:**

**Friday, May 19, 2023, noon–1:00 ET**

*Understanding the Basics of **Landowner Immunity Statutes***

- *Registration available!*

**Friday, June 23, 2023, noon–1:00 ET**

*Understanding the Basics of **the Farm Credit System** (registration available soon)*



# Housekeeping

- This webinar is being recorded.
- Please Use the Q&A feature for questions.
- Please fill out surveys.
- CLE credits:
  - Link to CLE form will be posted in the chat
  - Please fill out form ASAP
  - Listen for code word, enter code word in form



# *Understanding the Basics of* **Agricultural Conservation Easements**

Presented by  
Ross Pifer

Agricultural conservation easement programs are a legal tool that has been used at the local, state, and federal levels to protect farmland and farming viability against development pressures. Through these programs, the government or some other entity purchases the development rights to agricultural land in exchange for the imposition of an agricultural conservation easement upon the land.

This webinar will provide an overview of, and background for, various state and federal agricultural conservation easement programs, including the recent consolidation of previous federal programs into one single program called the Agricultural Conservation Easement Program. The webinar will also address how land is identified, evaluated, and selected for easement programs as well as review the pros and cons of the various methods employed.





# Today's Webinar: Overview of PACE Programs

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



# PACE Programs – Big Picture

- What?
- Where?
- Why?





# 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



# 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



# 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)



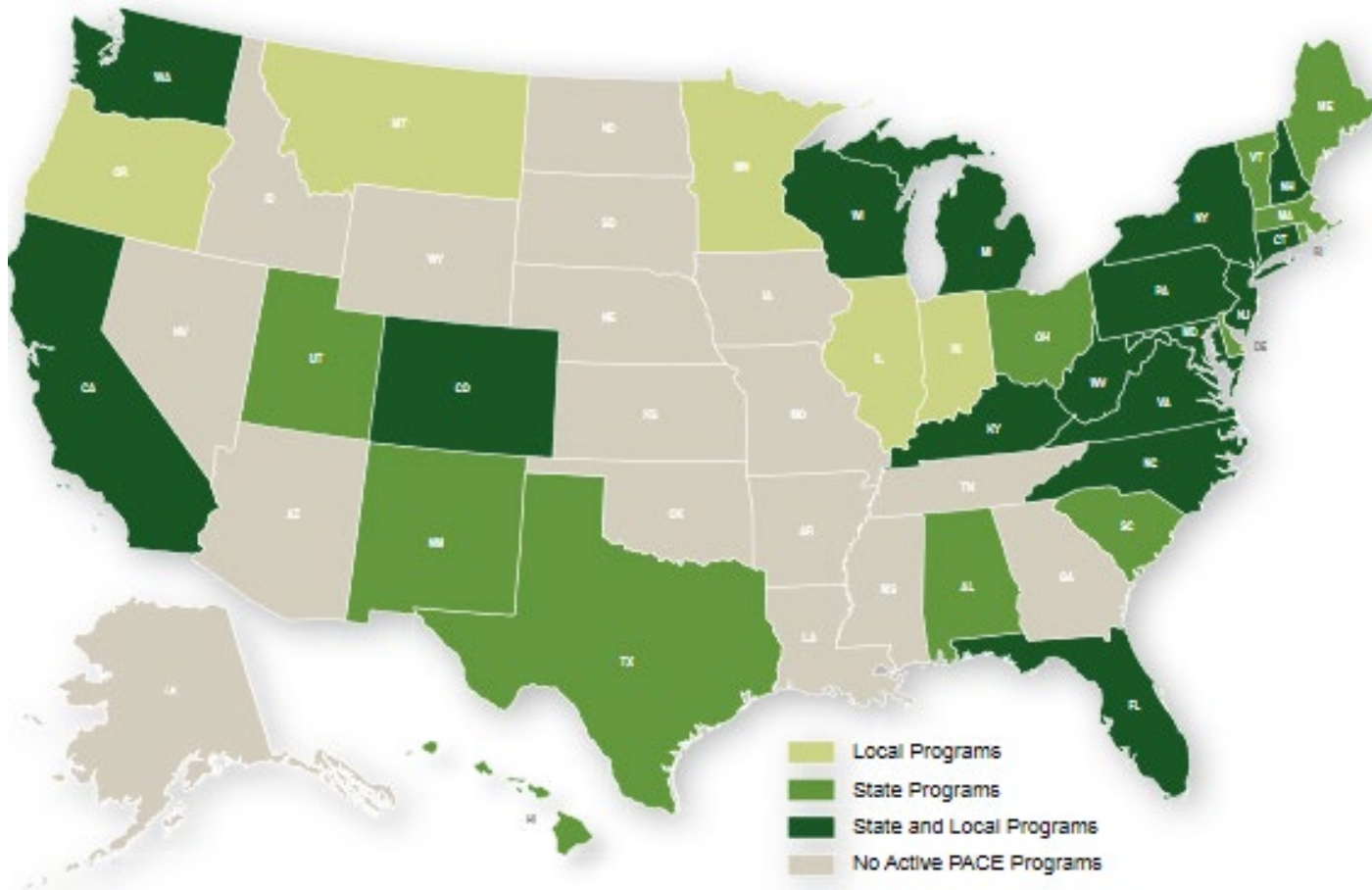
# PACE Programs – Where Are They?

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



# 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





# 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?





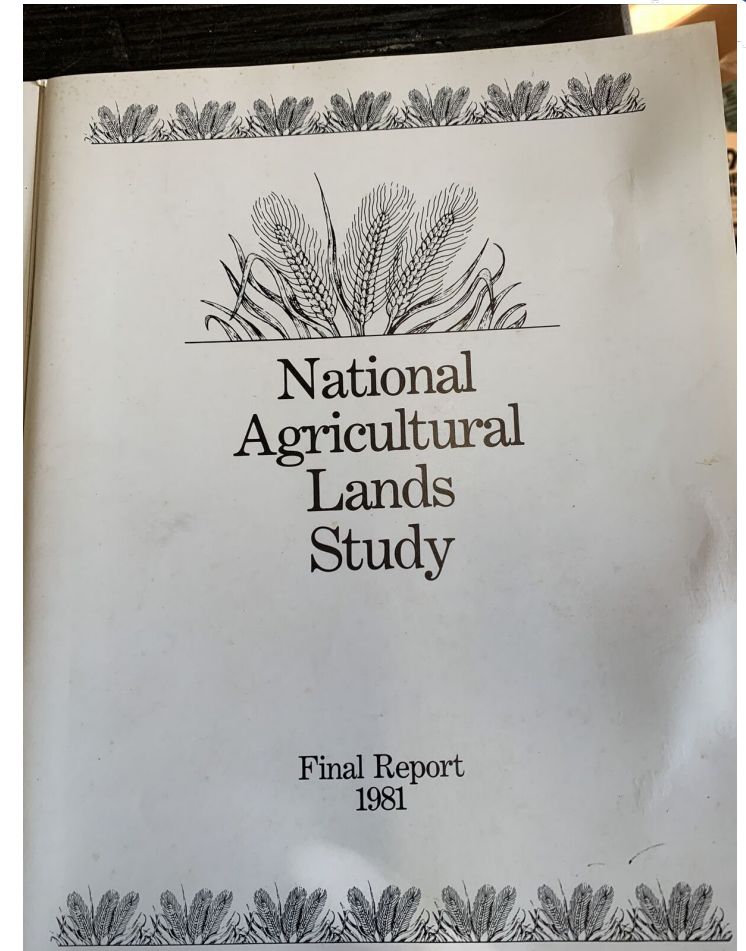
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- **History**
- Federal Programs
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# National Agricultural Lands Study

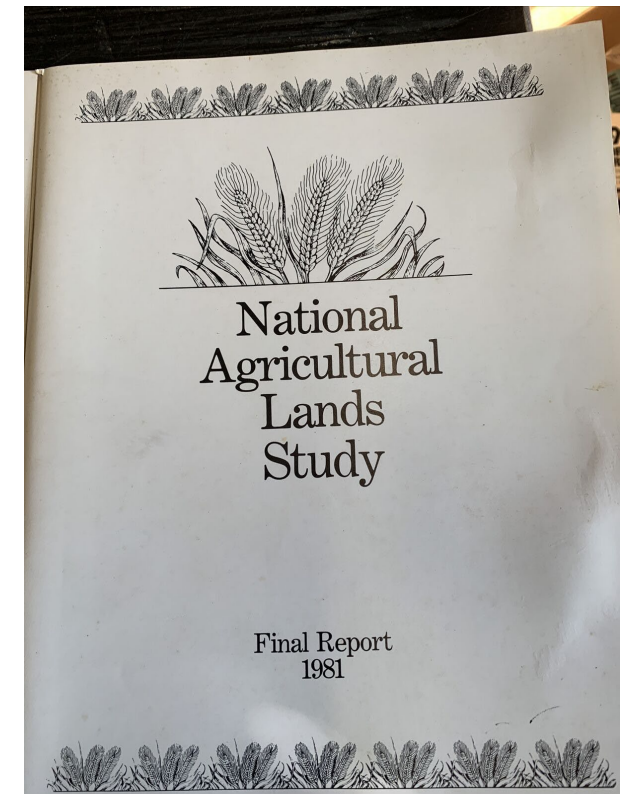
- Initiated by USDA and President's Council on Environmental Quality in 1979





# National Agricultural Lands Study – Charge

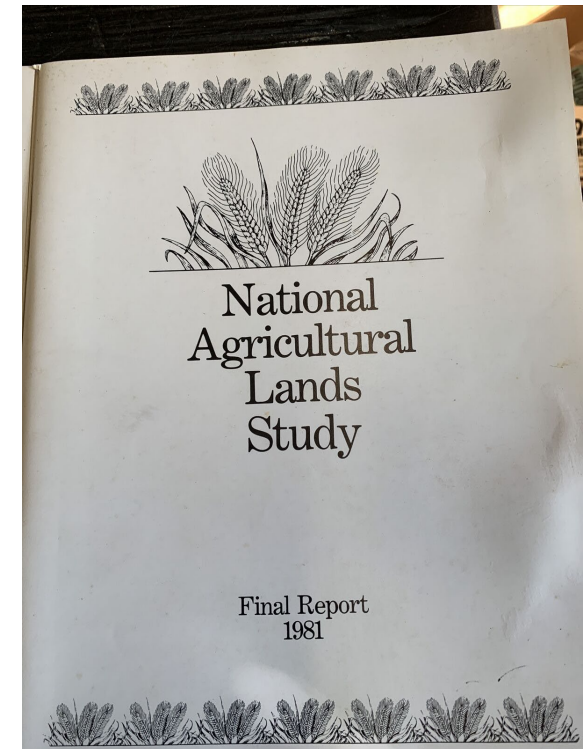
- Determining the nature, rate, extent, and causes of conversion of agricultural land to nonagricultural uses.
- Evaluating the economic, environmental, and social consequences of agricultural land conversion and methods used to attempt to restrain and retard conversion.
- Recommending administrative 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.





# National Agricultural Lands Study

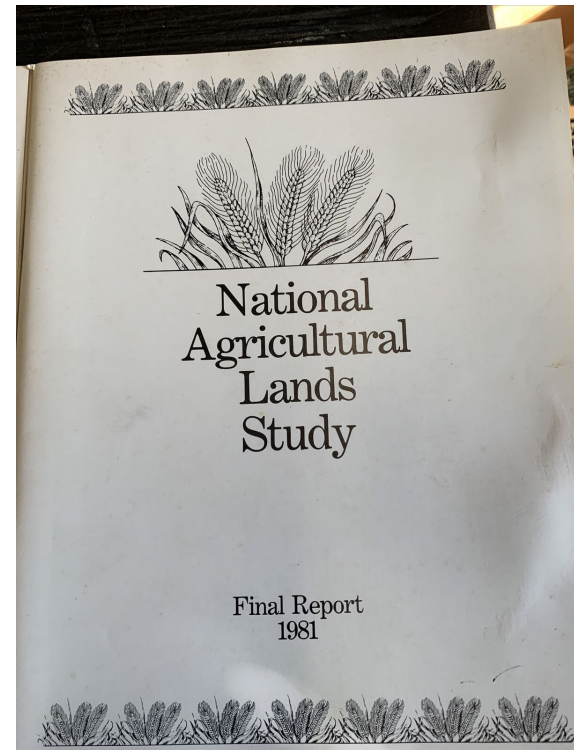
- Concluded that “agricultural land is converted to other uses in an incremental piece-by-piece fashion.”
- Noted that “the conversion of agricultural land [had] caused little concern at the national level.”
- Recognized impact of “impermanence syndrome” that caused a lack of investment in capital improvements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





# National Agricultural Lands Study

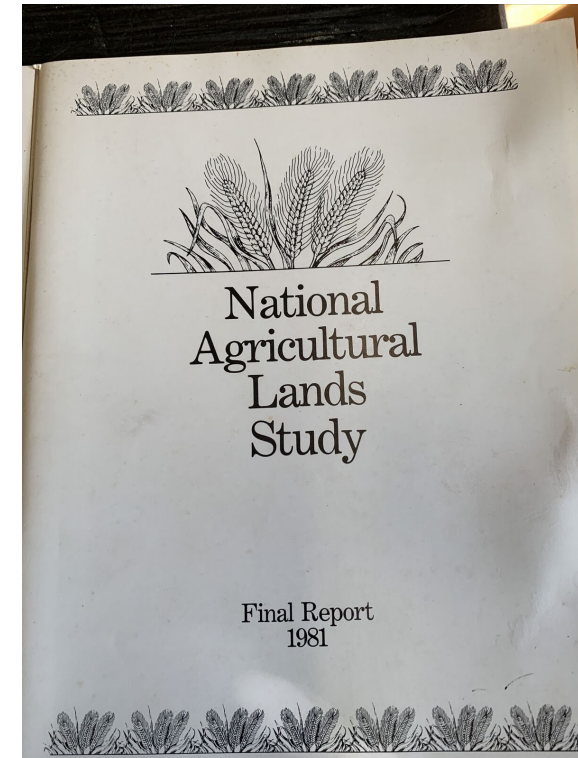
- Projections showed an increased demand for agricultural products due to:
  - International trade
  - Increased population and domestic use
  - Ethanol production





# National Agricultural Lands Study – Recommendations

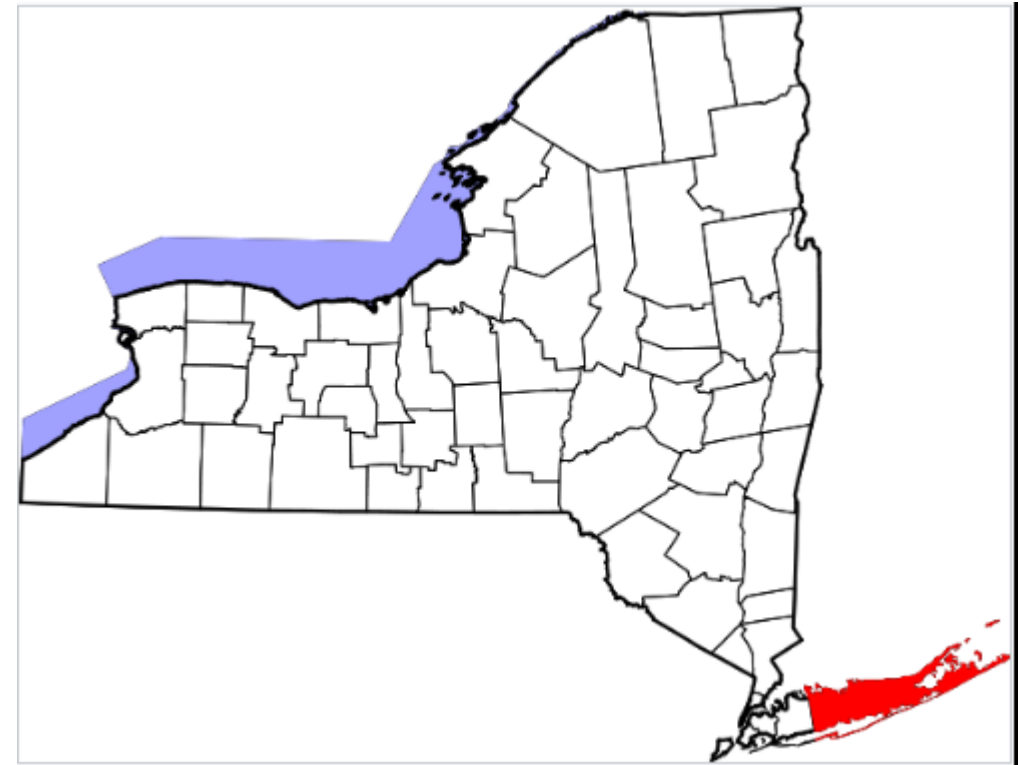
- “The federal government should begin by putting its own house in order.”
  - Focus on minimizing developing good agricultural land in federal projects
  - Support state and local efforts through technical and financial assistance
- “These recommendations **emphasize the primacy of state and local governments**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





# PACE Programs – History

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





# 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



# 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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# 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)



# 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



# 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



# 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.





# 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.



# 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

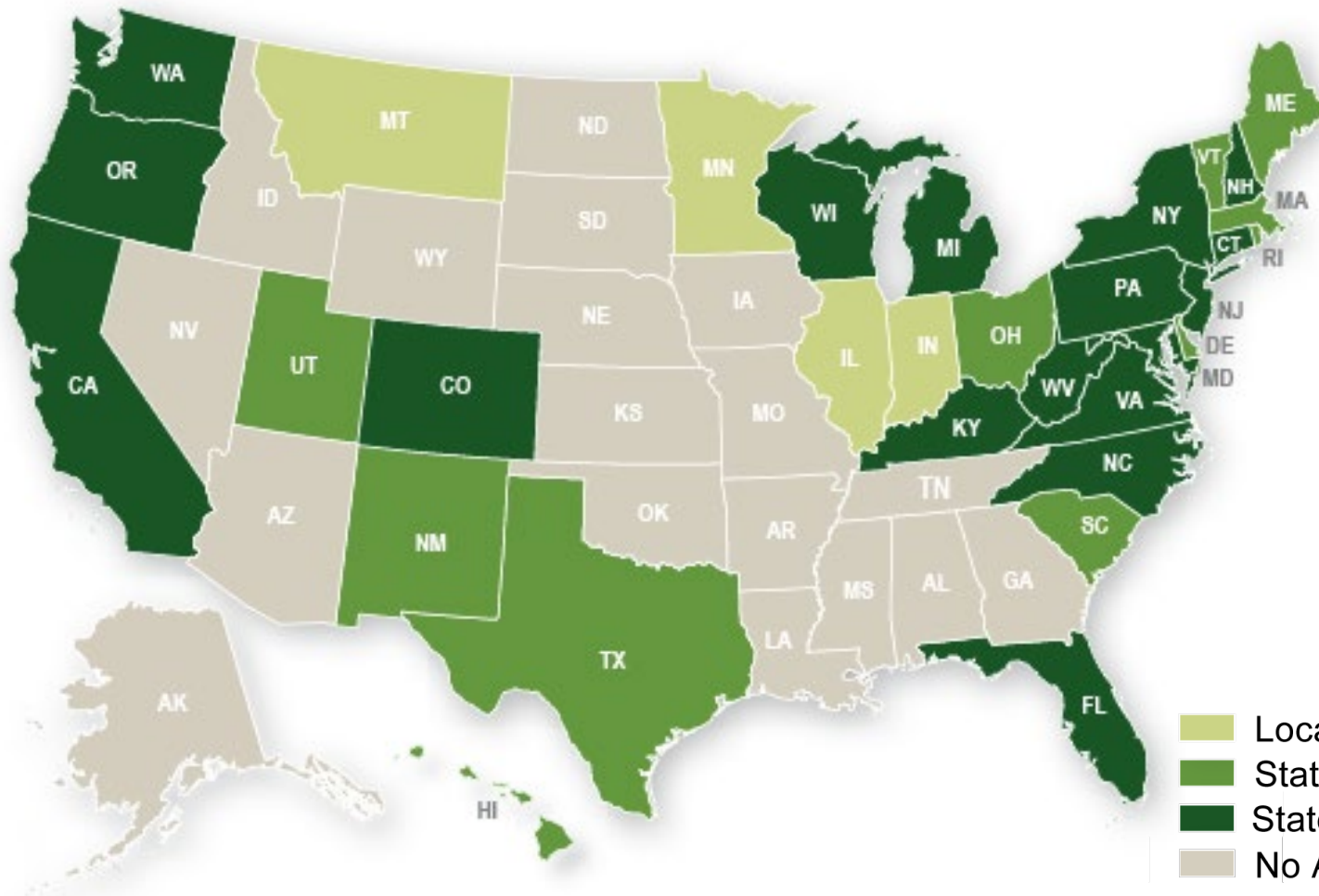


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# PACE Programs – Where Are They?



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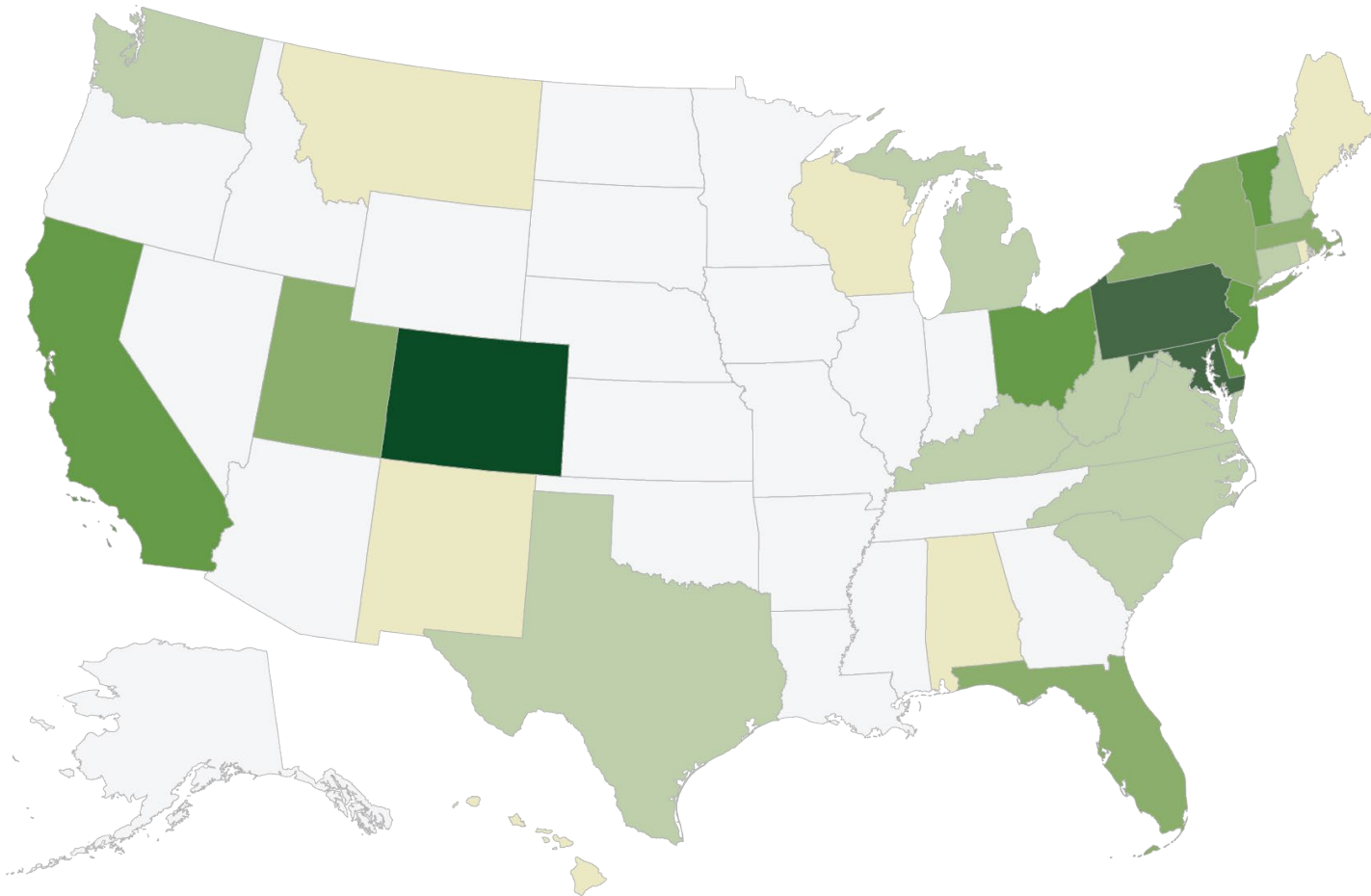
Totals:  
28 active state programs  
21 states with active local programs

- Local Programs
- State Programs
- State and Local Programs
- No Active PACE Programs



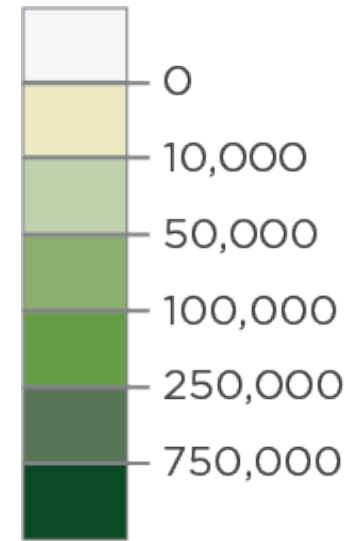


# State PACE Program Activity Acres Protected as of January 2022



Pennsylvania – 606,216 acres  
Maryland – 457,355 acres  
New Jersey – 243,056 acres  
Vermont – 168,407 acres  
Delaware – 140,512 acres

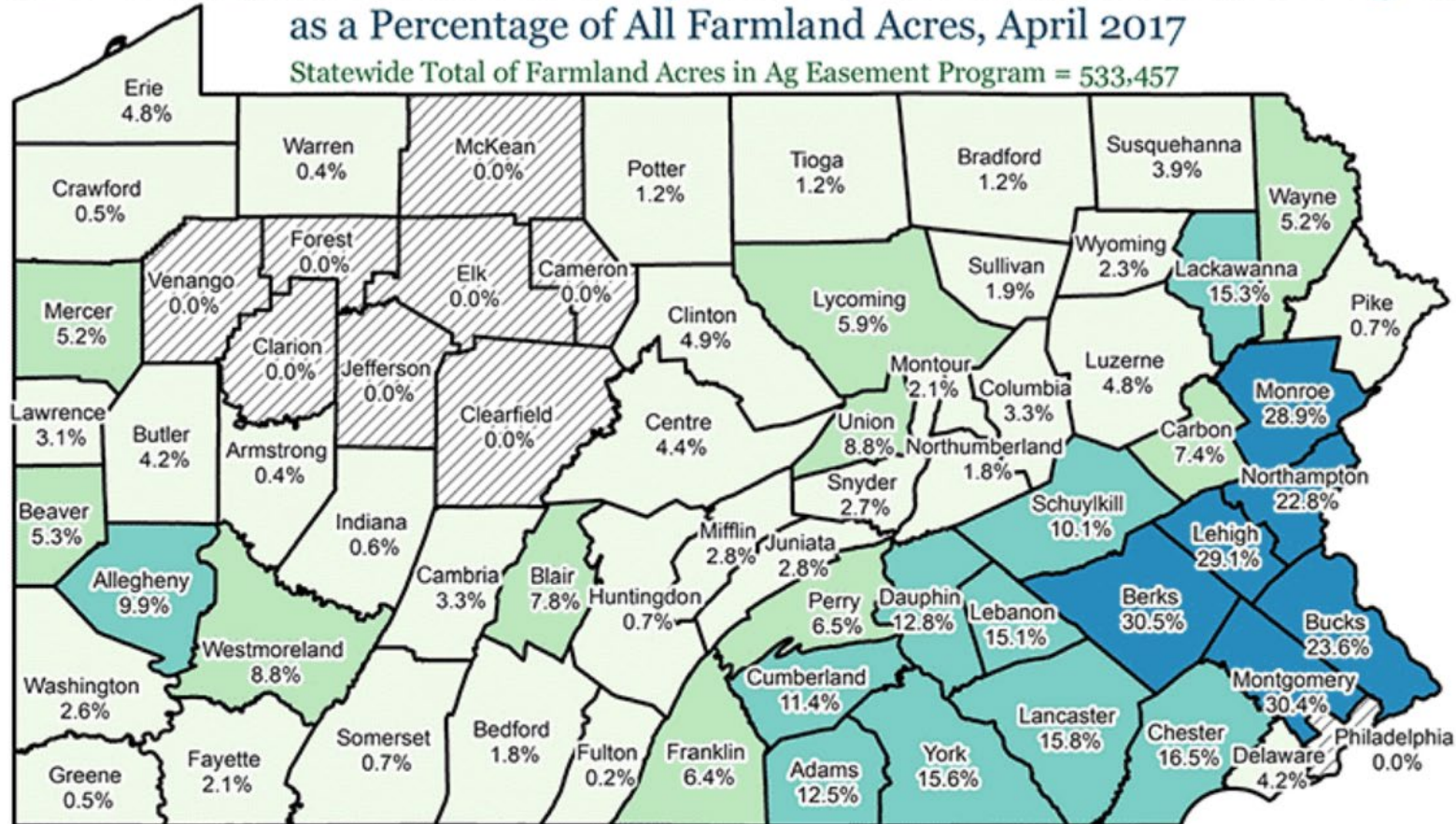
TOTAL U.S. – 3,403,110 acres





## Acres of Farmland Enrolled in the Ag Conservation Easement Purchase Program as a Percentage of All Farmland Acres, April 2017

Statewide Total of Farmland Acres in Ag Easement Program = 533,457



- No Farmland Enrolled in Easement Purchase Program
- 0.1% to 4.9% Acres of Total Farmland Enrolled
- 5.0% to 9.9% of Total Farmland Enrolled
- 10.0% to 19.9% Acres of Total Farmland Enrolled
- 20.0%+ Acres of Total Farmland Enrolled

*Data sources: Farms in Easement Purchase Program, Pennsylvania Department of Agriculture, Bureau of Farmland Preservation; Number of Farms, 2012 Census of Agriculture, National Agricultural Statistics Service. Prepared by the Center for Rural Pennsylvania.*



# PACE State Programs – Provisions

- Who holds the easement?
  - Government entity
    - State or local
  - Non-governmental organization



# 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,





# 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



# 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



# 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?



# 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



# PACE State Programs – Provisions

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



# Pennsylvania – Purchase of Agricultural Conservation Easements

- Authority:
  - Agricultural Area Security Law, 3 P.S. sections 901-915
  - Agricultural Conservation Easement Purchase Program, 7 Pa. Code, Chapter 138e
- Resource:
  - Pennsylvania Department of Agriculture, Bureau of Farmland Preservation



# Pennsylvania – Purchase of Agricultural Conservation Easements

- History:
  - Program established in 1988
  - First easements were purchased in 1989
  - 58 county programs receive state funding



# Pennsylvania – Purchase of Agricultural Conservation Easements

- Specific Provisions
  - Easement is perpetual – 914.1(c)(1)
  - Easement does not prevent oil, gas, or underground coal removal – 914.1(c)(6)(i)
  - Easement does not prevent utility rights of way – 914.1(c)(6)(ii)
  - Construction of one residence on no more than 2 acres is permitted – 914.1(c)(6)(iv)
  - Land cannot be subdivided for purpose that will harm economic viability of agricultural production – 914.1(c)(7)





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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



# 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



# 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?



## 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?

# Thank You!

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