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CONSERVATION, REGIONALITY, AND THE FARM BILL

Jess R. Phelps

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ABSTRACT

Over the past several Farm Bills, there has been a somewhat subtle shift in program design to better incorporate regional perspectives/localized areas of conservation concern into national conservation program delivery. The purpose of this Article is to specifically explore the various roles that regional considerations play in existing Farm Bill conservation programs and also consider whether further developments in this direction could result in more flexible program delivery, more effective partnerships, and ultimately, better conservation outcomes.

To this end, section II will provide an overview of the history of the Farm Bill, from its origins to the emergence of a distinct conservation title, and will examine how regional goals and objectives factor into federal agri-environmental policy. Section III will provide an extended discussion of the contemporary conservation title with the goal of providing the necessary context to understand USDA's current mix of conservation programs. Section IV will evaluate and consider the different ways regional conservation goals are incorporated into national farm policy, including the relatively newly authorized Regional Conservation Partnership Program, which is at the forefront of these efforts. Last, section V, will provide policy recommendations for moving forward with further expansion of regionalized program delivery. Ultimately, regionality can play an important role in targeting the delivery of conservation programs to better address localized conservation concerns, but to do this effectively will require considerable investments in time and organizational learning in order to successfully fulfill this intended role.

> *We turn to the country on the north. Here lies a grove of trees, marked as the "Ragged Shaw," and on the farther side stretches a great rolling moor, Lower Gill Moor, extending for ten miles, and sloping gradually upwards . . . It is a particularly desolate plain. A few moor farmers have small holdings, where they rear sheep and cattle. Except these, the plover and curlew are the only inhabitants . . . .*
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> - Arthur Conan Doyle[1]

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* Attorney, Dinse P.C., Burlington, Vermont. Author's Note: This article was written prior to the enactment of the 2018 Farm Bill, so primarily references the 2014 Bill authorities (as rulemaking under the new Act is still underway), but does provide some initial data on the new legislation, when available and appropriate.

1. ARTHUR C. DOYLE, *The Adventure of the Priory School, in* II THE ANNOTATED SHERLOCK HOLMES, at 607, 616-17 (William S. Baring-Gould, ed., Clarkson N. Potter 1967) (1904).

I. INTRODUCTION

One of the challenges of the Farm Bill is how to allocate resources among the competing policy objectives that this omnibus legislation supports.[2] The conservation title (Title 2), although the largest single federal investment in private land conservation,[3] is not the predominant target of these appropriated funds.[4] The Farm Bill also supports nutrition spending (Title 4) and provides crop insurance and commodity subsidies to farmers (Titles 1 and 11); these three titles together account for over ninety percent of Farm Bill spending.[5] Increasingly, the strong tension between food/nutrition objectives and more traditionally agricultural business interests embedded within the Farm Bill could lead one to the conclusion that the next version will not be more supportive of conservation objectives or, at the very least, will not be radically more expansive.[6] Putting together the alliance of interests needed to enact this legislation has never been easy, and growing policy divides may further complicate an already complex legislative process.[7]

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2. *See, e.g.,* Ron Nixon, *Senate Passes Long-Stalled Farm Bill, with Clear Winners and Losers,* N.Y. TIMES (Feb. 4, 2004), https://www.nytimes.com/2014/02/05/us/politics/senate-passes-long-stalled-farm-bill.html [https://perma.cc/9V8H-DTQX] (profiling the political realities surrounding the 2014 Farm Bill's ultimate passage). For more information about the Farm Bill's legislative structure, see generally MARK A. MCMINIMY, CONG. RESEARCH SERV., R44913, FARM BILL PRIMER SERIES: A GUIDE TO AGRICULTURE AND FOOD PROGRAMS IN THE 2014 FARM BILL (2019) (providing overview and links to primers on various farm bill related topics).

3. *See, e.g.*, *Farm Bill Conservation Programs*, LAND TRUST ALL., https://www.landtrustalliance.org/topics/federal-programs/farm-bill-conservation-programs [https://perma.cc/Q4T9-6H9Z] (noting that "[t]he Farm Bill conservation programs, taken in total, are the largest single source of funding for private land conservation").

4. *See* ECON. RESEARCH SERV., USDA, PROJECTED SPENDING UNDER THE 2014 FARM BILL (2018), https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/projected-spending-under-the-2014-farm-bill [https://perma.cc/AZ2R-2LFM].

5. *See* Brad Plumer, *The $956 Billion Farm Fill, in One Graph*, WASH. POST (Jan. 28, 2014), https://www.washingtonpost.com/news/wonk/the-950-billion-farm-bill-in-one-chart [] (providing overview of all Farm Bill spending under the Agricultural Act of 2014).

6. Ron Nixon, *House Rejects Farm Bill as Food Stamp Cuts Prove Divisive*, N.Y. TIMES (June 20, 2013), https://www.nytimes.com/2013/06/21/us/politics/house-defeats-a-farm-bill-with-big-food-stamp-cuts.html [https://perma.cc/K3WT-NVMX] (describing this issue within the run-up to the 2014 Farm Bill). Over the past few decades, there has been a political compromise between more urban constituencies focused on the protection or expansion of SNAP and rural constituencies focused on other types of farm programming that has helped to pass this omnibus legislation. In the negotiations over the 2014 Farm Bill, this fragile political compromise repeatedly came under strain and, while in the end the food assistance provisions were not stripped out of the 2014 bill, the very real tension showcases some of the allocative challenges associated with passing legislation in this area and the varied constituencies which come to bear. *See* Neil Hamilton, *Lessons in Patience, Politics and Persuasion*, 19 DRAKE J. AGRIC. L. 1, 11-14 (2014) (discussing the battle over the linkage between the nutrition title and other farm bill titles in the lead up to the 2014 Farm Bill).

7. *See, e.g.*, *National Farmers Union Sees Challenges Ahead for 2018 Farm Bill*, IOWA FARMER TODAY (Feb. 9, 2018), http://www.agupdate.com/iowafarmertoday/news/state-and-regional/national-farmers-union-sees-challenges-ahead-for-farm-bill/article_ad696158-0c57-11e8-bb73-ff1dfc3882e4.html [https://perma.cc/MD7G-EW3P]; *see also* Erica Hunzinger, *Which Side Are You On? When It Comes to Farm Bill Politics, the Lines Blur*, HARVEST PUB. MEDIA (Jan. 31, 2018), http://harvestpublicmedia.org/post/which-side-are-you-when-it-comes-farm-bill-politics-lines-blur [https://perma.cc/T85B-H8KG] (profiling the often-unusual alliances that the farm bill fosters in either support or opposition).

Beyond these programmatic tensions, another challenge to developing a Farm Bill is that it is national legislation and establishes programs that apply to farms regardless of size and productive activity.[8] Not surprisingly, conservation priorities can vary substantially depending on whether the focus is on a large Midwestern farm consisting of thousands of acres for commodity markets or a small Maine farm raising heritage livestock.[9] The diversity of American agriculture is a comparative strength, but it makes enacting national policy more complex.[10] This is particularly true within the conservation context as the range and types of conservation issues confronting farmers and working lands also range widely.[11] Farming on the Great Plains, with its heavy reliance on irrigation, presents different conservation challenges than, say, in the middle of the Corn Belt, where controlling nutrient runoff is the larger concern.[12] Even within the relatively limited confines of a small state, the environmental and conservation challenges can also vary. To take a Maine example, the environmental issues that dairies face are very different than the soil erosion challenges farmers encounter throughout the state.[13] The range of farming activities and the correlated environmental impacts at the national, state, and local levels present material challenges to creating a national conservation policy.

Agricultural policy theorists have long recognized this challenge and have attempted to adapt and refine policy and programs in an attempt to better tailor policies to specific and definable local contexts and resource concerns.[14] As a result, some degree of regionality has always been a component of federal conservation programming.[15] For example, many of the programs under the conservation title are

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8. *See, e.g.*, Scott Neuman, *Why the Farm Bill's Provisions Will Matter to You*, NPR (June 13, 2012, 4:29 AM), https://www.npr.org/2012/06/13/154862017/why-the-farm-bills-provisions-will-matter-to-you [https://perma.cc/8TVU-RXUW] (summarizing the Farm Bill's national impacts).

9. *See* J.R. Sullivan, *America's Farmers Are in Crisis, and They're Looking to Trump for Relief*, NEW YORKER (Jan. 23, 2018), https://www.newyorker.com/news/news-desk/americas-farmers-are-in-crisis-and-theyre-looking-to-trump-for-relief [https://perma.cc/8RAT-YJ4H] (describing the concerns of smaller farmers within the farm bill debate); *see also* Stephen Carpenter, *A New Higher Calling in Agricultural Law*, 18 DRAKE J. AGRIC. L. 13, 16-21 (2013) (discussing the disconnect between traditional agriculture and newer food movements).

10. ECON. RESEARCH SERV., USDA, AG AND FOOD SECTORS AND THE ECONOMY (2018) https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/ [https://perma.cc/JJC8-VA8L] (profiling the US agricultural economy generally).

11. *See* Mary J. Angelo, *Small, Slow, and Local: Essays on Building a More Sustainable and Local Food System,* 12 VT. J. ENVTL. L. 354, 357-66 (2011) (profiling impacts of modern agriculture, including on water quality, biodiversity, and climate).

12. Mary J. Angelo & Jon Morris, *Maintaining a Healthy Water Supply While Growing a Healthy Food Supply: Legal Tools for Cleaning Up Agricultural Water Pollution*, 62 U. KAN. L. REV. 1003, 1003-05 (2014) (exploring the impacts of agricultural production on surface and ground water); Shannon L. Ferrell et al., *The Future of Agricultural Law: A Generational Shift*, 18 DRAKE J. AGRIC. L. 107, 126-27 (2013) (same).

13. *See, e.g.*, Amanda Beal & John Jemison, *Resource, Environment and Energy Considerations for Maine Food Security in 2050 and Beyond*, 20 ME. POL'Y REV., Jan. 2011, at 172 (discussing these challenges in the food security context).

14. *See, e.g.*, William S. Eubanks, *The Sustainable Farm Bill: A Proposal for Permanent Environmental Change*, 39 ENVTL. L. REP. 10493, 10493 (2009) (discussing regional issues/contexts).

15. Shawn Johnson, *Building a Large Landscape Conservation Community of Practice* 13-15 (Lincoln Inst. of Land Policy, Working Paper WP17SJ1, 2017), https://www.lincolninst.edu/sites/default/files/pubfiles/johnson_wp17sj1.pdf [https://perma.cc/PW3A-

already shaped by statewide technical committees who play an important role in the administration of these programs at the state and local level.[16] Additionally, the Farm Bill often expressly allocates certain pools of funding for targeted performance in addressing specified environmental and conservation objectives, identified by either the executive branch or Congress.[17] Last and relatedly, one recent program, the Regional Conservation Partnership Program ("RCPP") expressly seeks to allow for regional flexibility to adapt to specific issues of environmental concern at a localized level; for example, in addressing the phosphorus pollution within Lake Champlain.[18]

The purpose of this Article is to specifically explore the degree, types, and layers of regional considerations that are currently embedded within the conservation title. All types of regionalism potentially impact the functionality of the various farm bill programs, but perhaps differently and even unintentionally. As we review the recently enacted 2018 Farm Bill,[19] it may prove helpful to examine level of regionalism embedded in the Farm Bill to allow policymakers to better bridge gaps in our protective scheme through rulemaking. It may also prove beneficial to focus funding on the localized issues that matter most within the geographic context of the various areas in which the program is actually operating. If this is the case, a careful understanding of how regional factors are addressed through farm policy will be critical to the legislative design and ultimate implementation of this regional consideration if the desired conservation benefits are to be actually attained.

To this end, Section II will provide an overview of the history of the Farm Bill, from its origins to the development of a distinct conservation title, and will examine how regional goals and objectives have factored into private lands conservation policy over time. Section III will provide an extended discussion of the contemporary conservation title with the goal of providing the necessary context to understand USDA's current conservation programs. Section IV will evaluate and

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TREY] (exploring regionalism within the 2014 Farm Bill and opportunities for other cross-governmental collaborations).

16. *See generally* Adam Reimer & Linda Prokopy, *One Federal Policy, Four Different Policy Contexts: An Examination of Agri-Environmental Policy Implementation in the Midwestern United States*, 38 LAND USE POL'Y 605 (May 2014) (exploring the role of state technical committees in delivering EQIP and noting that program delivery has remained consistent, states have focused on different strategies/partnerships to be effective in their respective regions).

17. *See, e.g.,* Nicole Heslip, *Coalition Calling for Great Lakes Support in Farm Bill*, BROWNFIELD (Feb. 7, 2018), https://brownfieldagnews.com/news/coalition-calling-great-lakes-support-farm-bill [https://perma.cc/H6HE-S2SQ].

18. *See Regional Conservation Partnership Program*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/farmbill/rcpp [https://perma.cc/2LAQ-RCBU]. For more information on the agricultural water pollution issues in the Lake Champlain basin, *see generally* Chuck Ross & Marli Rupe, *Agricultural Sources of Water Pollution: How Our History Informs Current Debate*, 17 VT. J. ENVTL. L. 811 (2016).

19. *See, e.g.,* RENEE JOHNSON, CONG. RESEARCH SERV., R44784, PREVIEWING A 2018 FARM BILL (Mar. 15, 2017) http://nationalaglawcenter.org/wp-content/uploads//assets/crs/R44784.pdf [https://perma.cc/X546-NHLB]. This Article was drafted prior to the adoption of the 2018 Farm Bill. With its relatively recent adoption, rulemaking has yet to occur to bring these statutory changes into full effect and policy specialists are still reviewing its effects and impacts on the working landscape (the early consensus is that the 2018 Farm Bill, as far as conservation programs are concerned, provided increased funding for this initiatives, but did not constitute a radical reordering or reorganization of these policy initiatives. As a result, this Article continues to primarily focus on the 2014 Farm Bill, as its impacts have been more fully explored.

consider the different ways that regional conservation goals and perspectives can be incorporated into the larger context of national farm policy. Last, Section V will provide some general policy suggestions and considerations moving forward. Over the past several Farm Bills, there has been a somewhat subtle shift in program design to better incorporate regional perspectives and localized areas of conservation concern, and further developments in this direction could result in more flexible program delivery, more effective partnerships, and ultimately, better conservation outcomes. Failure to continue down this path, however, will result in suboptimal conservation outcomes and continuing frustration with both the pace and scale of implementation of targeted beneficial practices across the working landscape.

II. THE BACKGROUND/EVOLUTION/OPERATION OF FEDERAL FARM POLICY

To understand the role of regionalism within the Farm Bill, an understanding of the current role of the structure and configuration of this legislation is critical. This section will provide an overview of the Farm Bill, the growth of the conservation title, the history and evolution of the USDA's efforts to promote environmental stewardship on working lands, and a short summary of the two primary USDA agencies involved in working lands issues—the Natural Resources Conservation Service (NRCS) and the Farm Services Agency (FSA).

A. The Farm Bill

The Farm Bill is simply the omnibus legislation that provides the funding for the majority of the USDA's programming across the agencies within the department.[20] Titles included in the 2014 Farm Bill include "farm commodity price and income supports, agricultural conservation, farm credit, trade, research, rural development, bioenergy, foreign food aid, and domestic nutrition assistance."[21] Since the 1930s, Farm Bills have been enacted roughly every five years and provide a cyclical, although uneven, opportunity for Congress to examine and reconsider

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20. *See* Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (codified as amended in scattered sections of 7 and 16 U.S.C.). While the Farm Bill is the primary funding stream for the agencies, other legislation can and does both authorize and appropriate funding for farm, rural, and USDA programs. *See, e.g.*, *Hearing Concerning President's Fiscal Year 2018 Proposed Budget for the USDA Forest Service Before the Subcomm. on Interior, Env't, and Related Agencies of the H. Comm. on Appropriations*, 115th Cong. (May 25, 2017) (statement of Tom Tidwell, Chief of the USDA Forest Service), http://docs.house.gov/meetings/AP/AP06/20170525/106011/HHRG-115-AP06-Wstate-TidwellT-20170525.pdf [https://perma.cc/HU59-4L8F] (testimony indicating the majority of the Forest Service's budget comes outside of the Farm Bill and with Department of Interior's appropriations). For an overview of the USDA and its various program agencies, see *About the U.S. Dep't of Agric.*, USDA, https://www.usda.gov/our-agency/about-usda [https://perma.cc/2J78-YEE7].

21. RENEE JOHNSON & JIM MONKE, *Summary* to CONG. RESEARCH SERV., RS22131, WHAT IS THE FARM BILL? (Apr. 26, 2018), https://fas.org/sgp/crs/misc/RS22131.pdf [https://perma.cc/N6PA-AQGY]. Titles rotate and adjust to adapt to changing policy or administrative reform issues. *See* Jacqui Fatka, *Farm Bill Provisions Unlikely to Fly in the Senate*, FARM FUTURES (Apr. 20, 2018) http://www.farmfutures.com/farm-bill/farm-bill-provisions-unlikely-fly-senate [https://perma.cc/7SLH-WG6L] (noting proposed omission of the Energy Title from the House bill (2018 Farm Bill) and proposal to remove this program from mandatory funding)

farm and rural development policy.[22] It often requires deadline pressure to propel this legislation forward.[23] "Potential expiration and the consequences of the expired law may [be required to] motivate legislative action."[24] This does not always mean that passage is assured as the 2014 Farm Bill's path to becoming law took several false starts—resulting in several continuing authorizations and considerable angst—before its ultimate enactment.[25]

The 2014 Farm Bill's cost has been estimated by the Congressional Budget Office (CBO) at roughly $489 billion over five years.[26] As noted in the introduction, the largest title, by far, is the nutrition title, which provides food assistance at a projected cost of $390 billion, or nearly 80% of total Farm Bill expenditures.[27] Crop insurance, Title XI of the Farm Bill, accounts for another $39.5 billion, or 8.5% of total Farm Bill outlays.[28] Title II, the Conservation Title, comes in third at $28 billion, or nearly 5.8% of the total Farm Bill expenditures.[29] Title I, the commodities and disaster assistance title, is fourth with $29 billion, or 4.8% of the total budget.[30] All told, these four largest titles absorb ninety-nine percent of Farm Bill spending, with the remaining eight titles allocated the remaining one percent.[31]

The Farm Bill is principally drafted by the House Committee on Agriculture and

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22. D. Lee Miller, *A Seat at the Table: New Voices Urge Farm Bill Reform*, 127 YALE L.J. F. 395, 395 (2017-2018); *see also* William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health With Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 216-20 (2009) (providing overview of the history of the Farm Bill).

23. *See, e.g.*, Brad Plumer, *Congress Just Let the Farm Bill Expire. It's Not the End of the World . . . Yet*, WASH. POST (Oct. 1, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/10/01/congress-just-let-the-farm-bill-expire-its-not-the-end-of-the-world-yet/?utm_term=.2c0d54569353 [https://perma.cc/UC3W-SA3A].

24. JOHNSON & MONKE, *supra* note 21, at 1. For example, before the passage of the 2014 Farm Bill, failure to pass new legislation had the potential to cause milk prices to skyrocket as the application of a 1950s era law would have required the USDA to purchase prices at more than double the going market rate. *See* Ron Nixon, *With Farm Bill Stalled, Consumers May Face Soaring Milk Prices*, N.Y. TIMES (Dec. 20, 2012), http://www.nytimes.com/2012/12/21/us/milk-prices-could-double-as-farm-bill-stalls.html [https://perma.cc/C694-A2M2].

25. Hamilton, *supra* note 6, at 11-35 (providing comprehensive recounting of the leadup to and impacts of the 2014 Farm Bill).

26. Philip Brasher, *Lesson #2: The Farm Bill 'Math' is Complicated and Ever-Changing,* AGRI-PULSE (Feb. 17, 2017), https://www.agri-pulse.com/articles/8934-lesson-2-the-farm-bill-math-is-complicated-and-ever-changing [https://perma.cc/8TRL-7FB9] (charting the complicated and fluidity of farm bill cost accounting). The cost of the 2018 farm bill, enacted in December 2018, is estimated at $428 billion dollars. *See Reviewing the 2018 Farm Bill Baseline*, FARM BUREAU, https://www.fb.org/market-intel/reviewing-the-2018-farm-bill-baseline [https://perma.cc/M6R8-PWQA].

27. CONG. RESEARCH SERV., IF10663, FARM BILL PRIMER: SNAP AND OTHER NUTRITION TITLE PROGRAMS (June 2, 2017), http://nationalaglawcenter.org/wp-content/uploads//assets/crs/IF10663.pdf [https://perma.cc/TN5T-7CQ3].

28. CONG. RESEARCH SERV., 7-5700, THE 2014 FARM BILL (AGRICULTURAL ACT OF 2014, P.L. 113-79) (2014), http://nationalaglawcenter.org/wp-content/uploads/assets/In%20Focus/IF00014.pdf [https://perma.cc/N2W7-XA65].

29. CONG. RESEARCH. SERV., IF10679, FARM BILL PRIMER: THE CONSERVATION TITLE (June 21, 2017), http://nationalaglawcenter.org/wp-content/uploads//assets/crs/IF10679.pdf [https://perma.cc/2GFA-SU5T].

30. CONG. RESEARCH SERV., *supra* note 28.

31. CONG. RESEARCH SERV., IF10783, FARM BILL PRIMER: BUDGET ISSUES (2017), http://nationalaglawcenter.org/wp-content/uploads//assets/crs/IF10783.pdf.

the Senate Committee on Agriculture, Nutrition, and Forestry.[32] To oversimplify the legislative process, after preparing a markup and clearing these respective committees, the bill goes to the floor for a vote; into conference between the two committees; back to the floor; and ultimately to the President for signature.[33] As with much legislation, there is tension between the Senate and House Agriculture committees and the respective appropriations committees.[34] Once the Farm Bill is enacted, the fact that the program is authorized does not necessarily mean that it will actually be funded.[35] Much of the funding for the various conservation programs, however, comes through the authority of the Commodity Credit Corporation (CCC).[36] The CCC is a government-owned corporation with vast borrowing capacity, which essentially allows USDA to make program payments to cover what are often unknown liabilities (for example, outlays for commodity price subsidies for a given year are not clear due to market swings).[37] The nature of this funding stream, through borrowing and repayment of CCC debt, gives the agriculture committees substantial authority in shaping policy and outcomes, including the conservation title, by designating these programs as mandatory program spending despite the unknown amount of the agency's obligations.[38] The appropriations committees, in turn, can use or threaten changes in mandatory program spending ("CHIMPS") to offset increases in discretionary spending, giving the appropriators leverage in this process.[39]

Given the scale of the Farm Bill in both extent and coverage, the bill "has a tremendous impact on farming livelihoods, how food is grown, and what kinds of

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32. ECON. RESEARCH SERV., USDA, U.S. FARM POLICY AND POLICY PROCESS (2018), https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/us-farm-policy-and-policy-process/ [https://perma.cc/7D4Z-AB8S].

33. Stephanie Mercier, *The Making of a Farm Bill*, CHOICES, Fall 2016, at 1; *see also* HON. CHELLIE PINGREE, *Farm Bill Process*, https://pingree.house.gov/sites/pingree.house.gov/files/wysiwyg_uploaded/Farm%20Bill_handout.pdf [https://perma.cc/Y7FF-T8M5] (providing flowchart summarizing this complex legislative process).

34. Philip Brasher, *Funding Farm Bill Demands: The Difficult Path Ahead*, AGRI-PULSE (Oct. 11, 2017), https://www.agri-pulse.com/articles/10001-funding-farm-bill-demands-the-difficult-path-ahead [https://perma.cc/3WYT-XA6D?type=image] (discussing this balance).

35. NAT'L SUSTAINABLE AGRIC. COAL., FARM BILL 2018: A PRIMER (Dec. 2016), http://www.safsf.org/wp-content/uploads/2016/12/2018-Farm-Bill-Primer-for-SAFSF1.pdf [https://perma.cc/F4UR-BPUD].

36. *See, e.g.,* Jesse Ratcliffe, *A Small Step Forward: Environmental Protection Provisions in the 2002 Farm Bill,* 30 ECO. L.Q. 637, 643-44 (2003) (discussing this funding stream within the context of the Conservation Security Program); *see also* Larson v. United States, No. 4:13CV3081, 2014 WL 12539647, at *2 (D. Neb. July 28, 2014) (summarizing role of the CCC in funding easement acquisition).

37. 62 Stat. 1070; 15 U.S.C. § 714 (2018) (as amended).

38. Appropriators also have other ways to influence policy. *See, e.g.*, DAN MORGAN, GERMAN MARSHALL FUND, THE FARM BILL AND BEYOND 32 (2010) (discussing appropriators' abilities to make changes in mandatory programs and policy options).

39. MEGAN STUBBS, CONG. RESEARCH SERV., R44606, THE COMMODITY CREDIT CORPORATION: IN BRIEF 7-8, (Aug. 19, 2018), http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R44606.pdf [https://perma.cc/3TH3-7BC8] (profiling and explaining the origins of this tension).

foods are grown."[40] This in turn affects the environment, local economies, and public health.[41] For rural communities this impact is obviously magnified, although the relative impact of specific programs is subject to debate.[42] In the summer of 2018, the Senate and House agriculture committees conducted listening sessions across the country to get regional input and began drafting legislation.[43] Following that, both the House Committee on Agriculture and the Senate released their respective draft Farm Bills.[44] It was unclear at the time, with the approaching November midterms, whether there was sufficient time, political will, and focus to draft and pass such complicated legislation, but the 2018 Farm Bill (the Agriculture Improvement Act of 2018) was ultimately enacted just prior to the end of 2018.[45]

B. *The Conservation Title*

While the Farm Bill certainly covers a lot of ground, targeting how to improve the environmental performance of the working landscape is an increasing area of policy attention.[46] In different periods of the USDA's development, divergent goals have driven the agency's work within the agri-environmental policy context.[47] This

40. NAT'L SUSTAINABLE AGRIC. COAL., WHAT IS THE FARM BILL? (2014), http://sustainableagriculture.net/our-work/campaigns/fbcampaign/what-is-the-farm-bill/ [https://perma.cc/NG3P-XVFZ].

41. FSA, USDA, COMMODITY CREDIT CORPORATION, FACT SHEET (Oct. 2015), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/AboutFSA/CCC/ccc_fact_sheet.pdf [https://perma.cc/3AFH-LBSZ]; *see* NAT'L SUSTAINABLE AGRIC. COAL., *supra* note 40.

42. Jessica D. Ulrich-Schad, et al., *Assessing the Impacts of Federal Farm Bill Programs on Rural Communities*, AGREE, Apr. 2013, at 1, 25 (discussing the impacts of Farm Bill titles and arguing that commodity programs are the least effective from a rural development tool, while the nutrition and rural development titles are the most beneficial).

43. *See, e.g.,* Rod Swoboda, *Iowans Urged to Share Input on 2018 Farm Bill*, WALLACES FARMER (Aug. 21, 2017), http://www.wallacesfarmer.com/farm-bill/iowans-urged-share-input-2018-farm-bill [https://perma.cc/NSK6-P3MX].

44. *See generally* Agriculture and Nutrition Act of 2018, H.R. 2, 115th Cong. (2018); Agriculture Improvement Act of 2018, S.3042, 115th Cong. (2018).

45. *See, e.g.,* Philip Brasher, *Democrats Could Reshape Farm Bill if Impasse Kills 2018 Measure*, AGRIPULSE (Apr. 4, 2018), https://www.agri-pulse.com/articles/10787-democrats-could-reshape-farm-bill-if-impasse-kills-2018-measure [https://perma.cc/U5V7-Q32L?type=image]. Trade tensions in March - April 2018 called into question whether a farm bill would have been possible in 2018 and what consequences trade policy may have had on the budgeting debate over farm bill spending priorities. *See, e.g.,* Markie Hageman, *The 2018 Farm Bill and the Growing Trade War*, AG DAILY (Apr. 4, 2018), https://www.agdaily.com/insights/the-2018-farm-bill-and-the-growing-trade-war [https://perma.cc/N38Q-B7PB]. The 2018 Farm Bill, however, was signed into law on December 20, 2018 and will shape farm spending through the end of 2023. *See* USDA, ERS, *Agriculture Improvement Act of 2018: Highlights and Implications*, https://www.ers.usda.gov/agriculture-improvement-act-of-2018-highlights-and-implications/ (last visited Apr. 24, 2018) [https://perma.cc/7UWE-MA6A].

46. J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law,* 27 ECOLOGY L.Q. 263, 340-42 (2000) (discussing the environmental impacts of farming, the exemptions this industry generally enjoys from most of the environmental law framework, and the role of voluntary programming in assisting farmers to improve environmental performance).

47. Carl Zulauf & David Orden, *80 Years of Farm Bills – Evolutionary Reform*, CHOICES, Winter 2016, at 1, 1-5 (charting this policy development over the Farm Bill's history). By necessity this narrative is simplified to provide a generalized sense of policy evolution. Some, however, have recently changed this prevailing narrative as reductionist, but for comparative economy, the traditional framework/arc is utilized as an analytical tool, despite not being able to capture all of the complexities.

section will explore this policy evolution and provide the necessary context for the current level of policy development.

1. 1933-1940: New Deal Origins

The federal government's express involvement in conserving the working landscape dates largely from the New Deal period.[48] In the New Deal, conservation programs were used in an attempt to restore a better balance between productive considerations and ecological realities.[49] These programs focused not only on the well-known cataclysmic environmental conditions of the Great Plains,[50] but also on conservation issues nationally as a matter for policy innovation and for using federal policy to address environmental externalities.[51] While the majority of New Deal-era agricultural policy focused on trying to restore on-farm income by taking land out of production and/or reducing on-farm production,[52] there were efforts to address environmental considerations specifically on farms and privately-owned lands.[53] These programs ranged from using the Civilian Conservation Corps to plant windbreaks on farms across the Great Plains,[54] to trying to relocate farmers from sub-marginal lands to more productive areas where they would have less environmental impacts and more opportunities for economic success.[55] Over the course of the New Deal's evolution, the more expansive programs, such as the resettlement programs, were largely not adopted at scale, with technical assistance and cost-sharing programs eventually gaining more widespread and broad

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See Nathan A. Rosenberg & Bruce W. Stucki, *The Butz Stops Here: Why the Food Movement Needs to Rethink Agricultural History*, 13 J. FOOD LAW & POL'Y 12 (2017) (challenging the popular understanding of agricultural policy development).

48. *See, e.g.,* Mary Beth Blauser, *The 2008 Farm Bill: Friend or Foe to Conservationists and What Improvements are Needed?,* 12 VT. J. ENVT'L L. 547, 550-52 (2011) (charting this historical development). Federal policy intervention within the farm sector has a longer history, with the USDA's creation in 1862. *See* Act to Establish a Department of Agriculture, 12 STAT. 387 (1862)).

49. Margot J. Pollans, *Bundling Public and Private Goods: The Market for Sustainable Organics*, 85 N.Y.U. L. REV. 621, 631 n.50 (2010) (profiling early farm bill's conservation focus); *see also* R. DOUGLAS HURT, THE PROBLEMS OF PLENTY: THE AMERICAN FARMER IN THE TWENTIETH CENTURY 40, 95-96 (2002).

50. Laurie Ristino & Gabriela Steier, *Losing Ground: A Clarion Call for Farm Bill Reform to Ensure a Food Secure Future*, 42 COLUM. J. ENVTL. L. 59, 80-83 (2016) (profiling the Dust Bowl's impacts on the creation of the SCS).

51. David C. Levy & Rachael P. Melliar-Smith, *The Race for the Future: Farmland Preservation Tools*, NAT. RESOURCES & ENV'T, Summer 2003, at 15.

52. Theodore Saloutos, *New Deal Agricultural Policy: An Evaluation*, 61 J. AM. HIST. 394, 396 (Sept. 1974) (discussing this period of policy development).

53. Peter M. Lacy, *Our Sedimentation Boxes Runneth Over: Public Lands Soil Law As the Missing Link in Holistic Natural Resource Protection*, 31 ENVTL. L. 433, 443-45 (2001) (profiling the Soil Conservation and Domestic Allotment Act of 1936).

54. *See, e.g.*, Comment, *Legal Techniques for Promoting Soil Conservation*, 50 YALE L.J. 1056 (1941) (profiling early soil conservation efforts); Edwin E. Ferguson, *Nation-wide Erosion Control: Soil Conservation Districts and the Power of Land-Use Regulation*, 34 IOWA L. REV. 166 (1949) (same).

55. *See, e.g.,* Marilyn Sinkewicz et al., *Fomenting Democracy: The Case for Federal-Local Cooperation*, 13 J. FOOD L. & POL'Y 57, 60-62 (2017) (profiling the Resettlement Administration's work during the New Deal, including creating one hundred new rural communities, with a particular focus on Mileston, Mississippi).

acceptance.[56]

On the conservation front, the most significant and longest-lasting structural impact was the creation of the Soil Conservation Service (SCS), the predecessor of the contemporary NRCS, which assisted farmers in improving their management of working lands through a mix of technical and financial assistance.[57] The SCS, working through state-enabling legislation, also created a network of local soil and water conservation districts that continue to address localized issues of conservation concern.[58] The modern administrative USDA conservation apparatus, although considerably larger in size and scope, in many ways came out of the express recognition of the environmental externalities of productive agriculture and the financial and social need to rebalance or recalibrate this balance that developed during the New Deal.[59]

2. 1940-1985: The Post War Period and the Environmental Movement

In the years following the New Deal, the NRCS remained active in seeking to improve the conservation performance of working lands, but the agency's mission was not always as focused on this goal, at least as its primary objective.[60] As some commentators have noted, in the post-war years, the agency often focused on production gains, while conservation was only desirable if it could also advance this objective.[61] While many conservation practices were and are, in fact, also economically beneficial, this limited the scope of programming and perhaps increased the agency's reliance on technological solutions to address environmental considerations.[62]

An example of the type of agency agri-environmental effort made during this period is the NRCS's watershed programming.[63] These programs allocated substantial resources (both financial and technical) to building dams to control on-farm flooding, which, while debatably critical from a conservation standpoint, were

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56. *See, e.g.*, JESS GILBERT, AGRARIAN INTELLECTUALS AND THE INTENDED NEW DEAL 1-10 (2016) (charting the concepts and ultimate non-implementation of comprehensive land reform/land use planning during the "Third" New Deal); *see also* Garrett D. Nelson, *Planning with the People: Jess Gilbert on the 'Intended' New Deal*, EDGE EFFECTS (Apr. 2, 2015), http://edgeeffects.net/jess-gilbert/ [https://perma.cc/HS9N-Z4FX] (discussing the failure and potential of locally led or "low modern" land use planning during the end of the New Deal period).

57. The Soil Conservation and Domestic Allotment Act of 1936, Pub. L. No. 74-461, 49 Stat. 1148 (1936).

58. *See* Christopher S. Elmendorf, *Ideas, Incentives, Gifts, and Governance: Toward Conservation Stewardship of Private Land, in Cultural and Psychological Perspective*, 2003 U. ILL. L. REV. 423, 498-500 (2003) (discussing this focus and critiquing the effectiveness of the agency during this period); *see also* Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 232-39 (1993) (charting the history of these districts and the potential for additional policy experimentation/reach).

59. John H. Davidson, *The Federal Farm Bill and the Environment*, NAT. RESOURCES & ENV'T, Summer 2003, at 3, 4-7 (exploring the New Deal roots of this legislation).

60. TIM LEHMAN, PUBLIC VALUES, PRIVATE LANDS: FARMLAND PRESERVATION POLICY, 1933-1985, at 26 (1995) (discussing this shift in focus during the post-War period).

61. *Id.*

62. Ristino & Steier, *supra* note 50, at 84-86.

63. Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 ENVT'L L. 973, 1029-33 (1995) (discussing small watershed/dam projects during this period).

certainly viewed favorably within the communities that were being served.[64] While watershed authorities remain intact, funding for these programs, in recent years, has largely focused on providing resources to the agency to restore and rehabilitate the projects from earlier years in an attempt to keep these engineering projects operating.[65]

During the late 1970s and early 1980s, calls for change began as the environmental externalities associated with production agriculture became apparent.[66] Growing efficiency to continue to increase yields on the existing land base had the functional effect of "divorcing agriculture from ecology by replacing internal controls on ecological processes such as nutrient delivery and pest suppression with external controls such as fertilizers and pesticides."[67] As large commodity producers intensified production, based upon market demand and in part driven by governmental policies, the environmental consequences began to reach a crisis point.[68]

3. *The 1985 Farm Bill*

Despite the earlier efforts profiled above, the 1985 Farm Bill (the Food Security Act of 1985) represented a fundamental shift in how the USDA interacts with the working landscape, and included for the first time a standalone conservation title.[69] The primary change or policy adoption within this legislation was the creation of conservation compliance.[70] Conservation compliance essentially created a regulatory role for the FSA and NRCS to ensure that farmers, in exchange for

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64. *See, e.g.,* Douglas Helms, *Conservation Districts: Getting to the Roots, in* READINGS IN THE HISTORY OF THE SOIL CONSERVATION SERVICE 25, 27-29 (1992) (charting this shift to meet the changed economic realities).

65. *See Watershed and Flood Prevention Operations Programs*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/landscape/wfpo/ [https://perma.cc/Z2VE-L92A].

66. *See, e.g*., James L. Arts & William L. Church, *Soil Erosion—the Next Crisis*?, 1982 WIS. L. REV. 535, 537 ("For the first time in its history, the United States has been forced in the last decade to seriously confront limits on economic expansion imposed by the realities of a finite resource and support base."); *see also* Zachary Cain & Stephen Lovejoy, *History and Outlook for Farm Bill Conservation Programs*, CHOICES, Winter 2004, at 37, 39 (discussing the impacts on conservation of the 1970's production boom).

67. G. Philip Robertson & Scott M. Swinton, *Reconciling Agricultural Productivity and Environmental Integrity: A Grand Challenge for Agriculture*, 3 FRONT. ECOL. ENVIRON. 38, 39 (citing E.P. Odum, *Properties of Agroecosystems, in* AGRICULTURAL ECOSYSTEMS: UNIFYING CONCEPTS (R. Lowerance et al., eds., 1984)).

68. Ruhl, *supra* note 46, at 272-91 (providing summary of environmental issues caused by intensifying farming practices); *see also* Neil D. Hamilton, *Harvesting the Law: Personal Reflections on Thirty Years of Change in Agricultural Legislation*, 46 CREIGHTON L. REV. 563, 572-78 (2013) (profiling shifts in policies/the agricultural sector and legislation over the past three decades). *See generally* William L. Church, *Farmland Conversion: The View from 1986*, 1986 U. ILL. L. REV. 521 (profiling the challenges with farmland loss).

69. Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (1985); *see also* Linda Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swampbusting, and the Conservation Reserve*, 34 U. KAN. L. REV. 577 (1986) (providing overview and history of this foundational farm bill).

70. Neil D. Hamilton, *Legal Issues in Enforcing Federal Soil Conservation Programs: An Introduction and Preliminary Review*, 23 U.C. DAVIS L. REV. 637, 640-41 (1990).

continued eligibility for USDA programs, were achieving a basic level of environmental stewardship.[71] This stewardship requirement applies in two areas: (1) management and protection of wetlands (frequently referred to as "swampbuster") and (2) controlling farming practices on highly erodible land (frequently referred to as "sodbuster").[72] In preventing the draining of wetlands and farming of highly erodible lands without a conservation plan, swampbuster and sodbuster, while certainly facing material program delivery challenges,[73] remain an important component of the USDA's conservation mission.[74]

In addition to conservation compliance, the 1985 Farm Bill created the Conservation Reserve Program (CRP) which provided authority for USDA to enter into contracts with landowners to temporarily retire environmentally sensitive lands.[75] CRP remains one of the USDA's largest conservation programs.[76] Overall, while there were earlier efforts to incorporate conservation into the USDA's work, the 1985 Farm Bill began the development of the agency's current conservation program mix.[77]

4. *Post-1985 Conservation Titles*

In each successive Farm Bill, the balance of spending between the conservation and other titles, as well as within the different programs included within the Farm Bill itself, has ebbed and flowed both as to the bottom line allocation and as far as the mix of programmatic offerings.[78] Over the past three decades, while

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71. *See generally* Daryn McBeth, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster Provisions" as Amended by the Federal Agricultural Improvement Act of 1996*, 21 HARV. ENVT'L L. REV. 201 (1997).

72. 16 U.S.C. §§ 3811(a), 3812, 3812(a) (2012).

73. Ristino & Steier, *supra* note 50, at 91-92 (exploring these shifts in focus from the 1990 through 2014 Farm Bills).

74. *See 2014 Farm Bill—Conservation Compliance Changes*, NRCS, USDA https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/farmbill/?cid=stelprdb1257899 [https://perma.cc/5CKV-NG3C]; *see also* Sarah J. Morath, *The Farm Bill: A Wicked Problem Seeking a Systemic Solution*, 25 DUKE ENVTL. L. & POL'Y 389, 411-13 (2015) (noting the cross-compliance requirements under the 2014 Farm Bill linking continued eligibility for crop insurance subsidies being conditioned on compliance with Sodbuster and Swampbuster).

75. Linda A. Malone, *Reflections on the Jeffersonian Ideal of an Agrarian Democracy and the Emergence of an Agricultural and Environmental Ethic in the 1990 Farm Bill*, 12 STAN. ENVTL. L. J. 3, 11-12 (1993) (discussing CRP and the 1985 Farm Bill's role in changing conservation policy); *see also* Michael R. Taylor, *The Emerging Merger of Agricultural and Environmental Policy: Building a New Vision for the Future of American Agriculture*, 20 VA. ENVTL. L. REV. 169, 178-80 (2001) (exploring the role of CRP in expanding the scope of environmental programming within the Farm Bill).

76. Barton H. Thompson, Jr., *Ecofarming: A Realistic Vision for the Future of Agriculture*?, 1 U.C. IRVINE L. REV. 1167, 1188-89 (2011) (exploring program within the context of direct payment models); *see also* J.B. Ruhl, *Agriculture and Ecosystem Services: Strategies for State and Local Governments*, 17 N.Y.U. ENVTL. L.J. 424, 426 (2008) (same).

77. Neil D. Hamilton, *Tending the Seeds: The Emergence of a New Agriculture in the United States*, 1 DRAKE J. AGRIC. L. 7, 23-24 (1996) (discussing this impact generally); *see also* J. DOUGLAS HELMS, NRCS, USDA, LEVERAGING FARM POLICY FOR CONSERVATION: PASSAGE OF THE 1985 FARM BILL (2006), https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1044129.pdf [https://perma.cc/LA87-UNNY] (providing the historical context behind this legislation).

78. MEGAN STUBBS, CONG. RES. SERV., R43504, CONSERVATION PROGRAMS IN THE 2014 FARM BILL 22-26 (2014) (charting this shift over time).

conservation compliance and land retirement (through the CRP) remain in place, additional layers of programs designed to target specific issues have been added from the introduction of significant funding towards the acquisition of conservation easements and working lands programs, which will be discussed in greater detail below.[79] An additional reflection of the general broadening of the agency's mission is the reorganization of the SCS in 1994.[80] In 1994, the SCS became the NRCS, expressly recognizing that the agency's mission had moved beyond the mere prevention of soil erosion, and toward addressing a variety of externalities associated with contemporary agricultural production and/or the growing societal recognition of the impacts of this production.[81]

This policy evolution, however, has been slow and uneven. With each farm bill cycle, there are calls for a major rethinking of U.S. farm policy to better suit farm conditions and the expectations of the broader American public about the roles of agriculture. These calls for reform have been for the most part unsuccessful because there has been no argument compelling enough to overcome the advocates of the status quo. But as time passes, the wisdom of maintaining a set of policies that have their basis in the 1930s and were designed to support a structure of agriculture that no longer exists becomes more questionable.[82]

Overall, the general trend has been toward providing a great suite of options for incorporating conservation objectives into the overall policy mix while still relying on voluntary and incentive-based programming as the sole vehicle to accomplishing these objectives.[83]

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79. *See, e.g.,* John M. Vandlik, *Waiting for Uncle Sam to Buy the Farm . . . Forest, or Wetland? A Call for New Emphasis on State and Local Land Use Controls in Natural Resource Protection*, 8 FORDHAM ENVTL. L. J. 691, 693-700 (1997) (charting this shift and the potential impacts and limits placed on natural resource management gains). Beyond the recognition of the environmental impacts of conventional agriculture, part of the motivation for this shift in the 1990s and 2000s was to comply with international trade obligations. Shifting away from red or yellow box commodity supports to environmental payments (green box) was viewed as a way to still provide financial support or assistance to the agricultural sector while avoiding potential trade consequences. *See* William J. Even, *Green Payments: The Next Generation of U.S. Farm Programs*?, 10 DRAKE J. AGRIC. L. 173, 174-78 (2005) (discussing the influence of the Uruguay Round on farm bill structure).

80. *See, e.g,* Alan R. Malasky & William E. Penn, *USDA Reorganization—Fact or Fiction*?, 25 U. MEM. L. REV. 1161 (1995).

81. Department of Agriculture Reorganization Act of 1994, 7 U.S.C. § 6901 (1994); *History of NRCS*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/about/history/ [https://perma.cc/MMC7-NM7G].

82. Ruhl, *supra* note 76, at 426 (citing David Freshwater, *Applying Multifuctionality to U.S. Farm Policy* 1 (Univ. of Ky., Econ. Staff Paper No. 437, 2002)).

83. Jim Chen, *Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation*, 48 OKLA. L. REV. 333, 350-51 (1995) (noting the reliance on voluntary and incentive structures and the exemptions agricultural operations enjoy from most environmental laws); Ved P. Nanda, *Agriculture and the Polluter Pays Principle*, 54 AM. J. COMP. L. 317, 317-21 (2006) (same). Beyond even conservation goals, the trend line has been to increase the diversity of the agency's reach. *See* Neil D. Hamilton, *America's New Agrarians: Policy Opportunities and Legal Innovations to Support New Farmers*, 22 FORDHAM ENVTL. L. REV. 530-33 (2011) (charting the introduction of beginning/new farmer programs in the 2008 Farm Bill).

C. The USDA Agency Structure

Although there are a host of USDA agencies with roles in conservation, two agencies are primarily responsible, either independently or collectively, for the delivery of the majority of Farm Bill conservation programs: (1) the NRCS; and (2) the FSA.

1. The Natural Resources Conservation Service (NRCS)

Although a variety of USDA agencies play a role in conservation planning,[84] the majority of programs discussed in this Article are either administered by the NRCS directly or otherwise rely on the agency's expertise for program delivery.[85] The NRCS, established under the Soil Conservation and Domestic Allotment Act in the New Deal, has for eight decades worked with farmers to improve the conservation performance of privately-owned working lands.[86] The agency's annual budget is nearly five billion dollars and the agency has approximately 10,000 employees nationwide.[87] Although a large component of the agency's work is in administering the Farm Bill conservation programs, the agency also has a surprising suite of conservation-related functions, from its Snowtel stations across the Rocky Mountain West (monitoring snowfall and water supply to assist farmers in estimating the available water amounts),[88] to performing primary research on a number of important issues to agricultural production, either with agency staff[89] or under the authorities of the Conservation Innovation Grants (CIG) program.[90] To provide a sense of how

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84. *Conservation*, USDA, https://www.usda.gov/topics/conservation [https://perma.cc/7XVF-S6KB] (explaining the role of the FSA, NRCS, and Forest Service in conservation efforts).

85. *Id.*; *see also* Jamie Konopacky & Laurie Ristino, *The Healthy Watershed Framework: A Blueprint for Restoring Nutrient-Impaired Waterbodies Through Integrated Clean Water Act and Farm Bill Conservation Planning and Implementation and the Subwatershed Level*, 47 ENVTL. L. 647, 650-51 (2017) (noting the predominant role of NRCS in the delivery of Farm Bill Conservation Title programs). Even for CRP, which is administered by FSA, NRCS provides a technical assistance function. *See Conservation Reserve Program*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/?cid=stelprdb1041269 [https://perma.cc/6DSG-KDT9].

86. 16 U.S.C. 590a (2018); *see also* NRCS, USDA, *More than 80 Years Helping People Help the Land: A Brief History of NRCS*, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143_021392 [https://perma.cc/5P6S-DD87] (providing overview of agency's historical development to its current role on the working landscape).

87. NRCS, USDA, 2019 PRESIDENT'S BUDGET 27-13, https://www.obpa.usda.gov/27nrcs2019notes.pdf [https://perma.cc/UR7B-F2XT] (providing actual and budgeted expenditures for the agency over the past three funding cycles).

88. *See* Doug Helms et al., *The History of Snow Survey and Water Forecasting*, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1043910.pdf [https://perma.cc/LS72-ZXVF]; *Snow Telemetry and Snow Course Data and Products*, NRCS, USDA, https://www.wcc.nrcs.usda.gov/snow/ [https://perma.cc/CM2T-YMW7].

89. *Soil Research and Laboratory*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/soils/research/ [https://perma.cc/E22H-J77Y] (providing overview of agency's continuing research functions).

90. *Conservation Innovation Grants*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/cig/ [https://perma.cc/9V85-93C3].

the agency works nationwide, this section will provide a quick overview of the various administrative layers involved in program delivery.

i. The Washington Office

Within the administrative structure of the USDA overall, the NRCS is now supervised by the newly created Under Secretary for Farm Production and Conservation, who is also responsible for the FSA and the Risk Management Agency (RMA).[91] This Under Secretary reports to the Secretary of Agriculture, a cabinet-level position.[92]

At an agency level, the NRCS is led by a Chief and two associate chiefs: one for financial matters (operations and the internal administration of the agency) and the other for conservation (which includes conservation program delivery).[93] Also reporting to the Chief are four regional conservationists based in the Washington Office, who coordinate between the state offices in their respective regions and program staff and leadership.[94]

Below the two associate chiefs are deputy chiefs for various areas, including for programs, strategic initiatives, soil science and resource assessment, and science and technology.[95] Under the Deputy Chief for Programs, NRCS has national level program staff to facilitate the administration of the Farm Bill conservation programs and to support the various state and local service offices.[96] To take one example, the Agricultural Conservation Easement Program Division is led by a director and includes several subprogram teams, each within the Washington office, which are focused on conservation transactions, program delivery questions, and stewardship of enrolled lands.[97] Not all Washington office staff is actually located in

91. Martha L. Noble, *Agricultural Management Committee Newsletter*, 20 A.B.A. SEC. PUB. AGRIC. MGMT. COMM. NEWSL. 2, 3-4 (Aug. 2017). This is a relatively new development. Until very recently, NRCS reported to the Undersecretary for Natural Resources and the Environment (which oversaw the Forest Service and the NRCS). As part of an agency reorganization in 2017, NRCS was moved to the newly created Undersecretary for Farm Production and Conservation, which administers the Farm Services Agency, the Risk Management Agency, and NRCS. *See* USDA, *Secretary Perdue Announces Creation of Undersecretary for Trade and USDA Reorganization*, https://www.usda.gov/our-agency/reorganizing-usda [https://perma.cc/848R-XHZQ].

92. Press Release, USDA, Secretary Perdue Statement on Confirmation of Bill Northey for Key USDA Post (Feb. 27, 2018), https://www.usda.gov/media/press-releases/2018/02/27/secretary-perdue-statement-confirmation-bill-northey-key-usda-post [https://perma.cc/EJ6V-XC5J] (discussing the confirmation of the first undersecretary for this policy area).

93. NRCS, *Office of the Chief Directory*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/contact/chief/ [https://perma.cc/77QR-SBW6].

94. *Regional Conservationists*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/about/leadership/regional/ [https://perma.cc/8H6L-BYU5] (providing an overview of the role of regional conservationists within the NRCS operational structure).

95. *Deputy Chief for Programs*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/contact/conservation/programs/ [https://perma.cc/HYP5-MVVD].

96. *Programs Deputy Area Telephone Directory*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/contact/conservation/programs/?cid=stelprdb1044190 [https://perma.cc/7BLX-KEHT].

97. *Id.*

Washington, and the crossover between state offices and the Washington office through temporary duty assignments ("details") and career advancement is rather fluid.[98] Not surprisingly, on a program to program level, the complexity and funding of program delivery has an impact on the number of staff working to administer each initiative at the national level.[99]

ii. State Offices

Beyond the Washington office, the NRCS has a physical presence in each state (and also covers work in U.S. territories).[100] State level efforts are overseen by a state conservationist, who has a large degree of discretion in administering covered programs and working to make sure these efforts fit local conditions and resource concerns.[101] State conservationists, in contrast to FSA state directors, are not political appointees, but rather are career NRCS staff.[102]

Each state has a state-level office which oversees the agency's operations in that state and provides specialized expertise, such as a professional engineer, that the individual district offices are able to draw upon.[103] An important component of the agency's function at the state level is the role of the state technical committees in targeting and shaping the agency's effectiveness within the state through input from a variety of stakeholders, including producers and conservation advocates.[104] To provide an example of a NRCS state office's structure and work in a given year, in 2013, NRCS Maine, comprised of 13 field offices, obligated $12 million dollars, and

98. *See, e.g.,* Minn. Soybean Research & Promotion Council, *Pullman Tabbed for New MN NRCS State Conservationist*, MSRPC BLOG, https://mnsoybean.org/blog-msrpc/pullman-tabbed-for-new-mn-nrcs-state-conservationist/ [https://perma.cc/DT4N-3GGK] (profiling the career path of an NRCS state conservationist).

99. This summary of the agency's work/structure is only intended as a survey and does not capture the full operational structure of this large administrative agency. For more detailed information, see NRCS, USDA, NATIONAL HEADQUARTERS DIRECTORY, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1118791.pdf [https://perma.cc/4CAA-4AUN].

100. *Regional Boundaries, State Offices & Centers*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/org/?cid=nrcs143_021421 [https://perma.cc/NN53-5M5G].

101. *State Conservationist (GS 14-SES), Job Description*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/careers/plan/?cid=stelprdb1097324 [https://perma.cc/BP5W-QLMJ]; *see also* NRCS Directive 400.10-400.13, Delegations of Authority (U.S.D.A. 2013) (for an overview and summary of the scope of express authority of a NRCS state conservationist).

102. *See, e.g., NRCS Welcomes New State Conservationist in Wisconsin*, NRCS, USDA, (Apr. 20, 2017), https://www.nrcs.usda.gov/wps/portal/nrcs/detail/wi/newsroom/releases/?cid=NRCSEPRD1325227 [https://perma.cc/BCH5-2YRK].

103. *See, e.g.,* Neil C. Kamman & Ethan Swift, *Tactical Basin Planning as the Vehicle for Implementation of the Vermont Clean Water Act,* 17 VT. J. ENVTL L. 710, 725 (2016) (charting NRCS's role at the state level in water quality efforts).

104. *See, e.g., State Technical Committee*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/me/technical/stc/ [https://perma.cc/27A6-5EGX] (last visited Feb 1, 2019).

ultimately worked with 124,560 acres of farmland throughout the state.[105]

iii. Local Service Centers

Finally, and the level of the agency most visible to farmers, NRCS has physical offices in most counties across the country to facilitate program delivery and to assist farmers in complying with conservation compliance and in applying for farm bill programming.[106] These local service centers are led by a district conservationist.[107] To provide an example of typical field office staffing and operations, NRCS's Presque Isle, Maine Field Office is supervised by a district conservationist and has roughly four staff members, including soil conservationists, conservation planners, and a civil engineer to help farmers in the impacted area with program enrollment, meeting conservation compliance requirements, and addressing other conservation related issues.[108]

One of the most critical functions played by the local service centers is serving as a resource for farmers' annual filings of their AD-1026 forms with the FSA.[109] This form certifies compliance with HEL and wetland conservation provisions (sodbuster/swampbuster) for commodity crop production.[110] Failure to file this report results in a producer's ineligibility for crop insurance subsidies and other program benefits.[111] Relatedly, the local service centers work with farmers on the crop acreage reports (FSA-578) which also must be filed annually to document all crops raised during a crop year for a given farm.[112] This information is important as it establishes a farmer's acreage totals for crop insurance and, to the extent dictated by either market or weather conditions, for commodity and disaster assistance programming.[113] Although not directly related to NRCS, these reporting

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105. NRCS ME., FISCAL YEAR 2013 ANNUAL REPORT 3 (2013). 2013 is the last year the annual report is posted on the Maine NRCS website.

106. *Local Service Centers Directory*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/contact/local/ [https://perma.cc/X8UU-RKS6] (providing a list of service centers, which "are designed to be a single location where customers can access the services provided by the Farm Services Agency, Natural Resources Conservation Service, and the Rural Development agencies.").

107. *See Soil Conservationist: Mid (GS 9)*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/careers/plan/?cid=stelprdb1085936 [https://perma.cc/KC93-UND7].

108. *Local Service Centers*, NRCS ME., USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/me/contact/local/ [https://perma.cc/LU5H-K7R2].

109. *See* NRCS, AD-0126: WHAT YOU NEED TO KNOW 1 (2017) (on file with author) (providing overview of this requirement and the self-certification requirements (conservation compliance)).

110. McBeth, *supra* note 71, at 239-40.

111. USDA, OMB No. 0560-0185, APPENDIX TO FORM FOR AD-1026 HIGHLY ERODIBLE LAND CONSERVATION (HELC) AND WETLAND CONSERVATION (WC) CERTIFICATION (2002); *see also Conservation Compliance*, USDA (June 20, 2018), https://www.rma.usda.gov/News-Room/Frequently-Asked-Questions/Conservation-Compliance [https://perma.cc/CVZ3-K2X4] (noting the importance of this requirement).

112. USDA, FSA-578, REPORT OF ACREAGE FORM, https://forms.sc.egov.usda.gov/efcommon/eFileServices/eFormsAdmin/FSA0578MANUAL_031015V01.pdf [https://perma.cc/9TUX-TJLW]; *see also* N.H. FARM SERV. AGENCY, USDA, CERTIFYING ACREAGE: FILING AN FSA-578, REPORT OF ACREAGE WITH FSA, https://www.fsa.usda.gov/Internet/FSA_File/nh_acreage_201401.pdf [https://perma.cc/5XM9-MV9R].

113. *See* N.H. FARM SERV. AGENCY, USDA, *supra* note 112.

requirements show the often close working relationship between FSA and NRCS staff in program delivery and administration, which will be explored in greater depth in the following section.[114]

2. The Farm Services Agency ("FSA")

As noted, the FSA is the other principal USDA agency involved in the delivery of conservation programs.[115] The FSA's origins are, not surprisingly, very similar to the development of NRCS.[116] In the New Deal buildout of the USDA's administrative structure, a variety of agencies were established to help the recovery of the farm sector.[117] These initiatives ranged from the relatively radical, such as the Resettlement Administration, which focused on the relocation of farmers from sub-marginal economic lands to lands in which they would have a better chance of making a successful living from the land, to the relatively, at least today, conventional, practice of providing subsidized loans through the Farm Security Administration.[118] In the 1994 USDA reorganization, many of these legacy agencies were consolidated within the FSA, including the Farmers Home Administration (the lending arm) and the Agricultural Stabilization and Conservation Service (a conservation-focused agency).[119] Today's "consolidated" FSA oversees a surprising mix of programs ranging from producer loans, administering the Conservation Reserve Program (CRP), and risk management/margin protection for dairy operators.[120]

Conservation objectives were formally added to the program mix in the 1950's, which included the development of early land retirement programming, for example, soil banking, which provided farmers with rental payments in exchange for setting

114. *See* MEGAN STUBBS, CONG. RES. SERV., R40763, AGRICULTURAL CONSERVATION: A GUIDE TO PROGRAMS (2018) (providing overview of program mix and agency roles).

115.. FARM SERV. AGENCY, USDA, *About FSA*, https://www.fsa.usda.gov/about-fsa/index [https://perma.cc/3XF6-UUMF]. The Risk Management Agency ("RMA") also has a role in the conservation scheme. RMA provides subsidized crop insurance products to farmers to help mitigate production losses. While RMA is not directly a conservation entity, remaining compliant with Sodbuster/Swampbuster is a condition of program eligibility, which provides a powerful enforcement tool given the critical role crop insurance plays in the overall farm safety net. *See About the Risk Management Agency*, RISK MGMT. AGENCY, USDA, https://www.rma.usda.gov/About-RMA [https://perma.cc/WUL7-7QWY].

116. *Agency History*, FARM SERV. AGENCY, USDA, https://www.fsa.usda.gov/about-fsa/history-and-mission/agency-history/index [https://perma.cc/Z257-RY53].

117. Jesse Gilbert & Carolyn Howe, *Beyond "State vs. Society": Theories of the State and New Deal Agricultural Policies*, 56 AM. SOC. REV. 204, 211 (1991); *see also* Donald E. Voth, *A Brief History and Assessment of Federal Rural Development Programs and Policies*, 25 U. MEM. L. REV. 1265, 1272-73 (1995).

118. *See generally* RICHARD S. KIRKENDALL, SOCIAL SCIENTISTS AND FARM POLITICS IN THE AGE OF ROOSEVELT 11, 29 (1982).

119. Christopher R. Kelley, *Recent Developments in Federal Farms Program Litigation,* 25 U. MEM. L. REV. 1107, 1108 n.3 (1995) (exploring the impact of this legislation).

120. *See generally* FARM SERV. AGENCY, USDA, *Farm Service Agency Programs*, https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/2016/farm_service_agency_programs.pdf [https://perma.cc/N46B-XWA3].

aside lands to reduce commodity surpluses.[121] Today, FSA continues to be the lead agency in the delivery of several key conservation programs, including CRP.[122] For conservation compliance, FSA also plays a role, with NRCS's technical support and assistance, in ensuring that farmers who drain wetlands or plant highly erodible lands without an approved conservation plan, are not eligible for USDA program benefits.[123]

The FSA's administrative structure is fairly similar to NRCS. FSA's Washington office oversees national policy and works through state directors.[124] FSA state directors, however, are political appointees.[125] FSA's programs are also delivered through local services centers, which are often co-located with NRCS local offices to provide consolidated program delivery to producers.[126]

To summarize, the Farm Bill defines the terms of the relationship between farmers and the federal government across a host of subject matter areas. As this legislation has expanded and evolved, the USDA's engagement on agri-environmental issues has changed to meet its evolving statutory mandates. NRCS and FSA, over time, have taken on leadership in delivering an increasingly complex array of Farm Bill programs, including those established under the current conservation title, which will be explored in the following section.

III. THE CONTEMPORARY CONSERVATION TITLE

The 2014 Farm Bill established Congress's federal spending priorities for the period from 2014 through 2018.[127] Although the large numbers of farm bill conservation programs can, at times, be disorienting, the non-compliance-based programming can be sorted into three primary blocks: (1) working lands programming; (2) land retirement programming; and (3) easement

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121. *See, e.g.,* Blake Hudson, *Dynamic Forest Federalism*, 71 WASH. & LEE L. REV. 1643, 1706-07 (2014) (discussing the impacts of this program); *see also* J. Douglas Helms, *Brief History of the USDA Soil Bank Program*, NRCS, USDA, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1045666.pdf [https://perma.cc/48CQ-RL4T] (same).

122. *See, e.g.,* David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?,* 19 HARV. ENVTL. L. REV. 303, 329-334 (1995) (exploring the impacts of this program). For a complete list of the current conservation programs administered by FSA, see *Conservation Programs*, FARM SERV. AGENCY, USDA, https://www.fsa.usda.gov/programs-and-services/conservation-programs/ [https://perma.cc/FFJ9-EGZ4].

123. *See, e.g.*, Todd S. Aagard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1276-77 (2014) (summarizing conservation compliance's role in achieving environmental gains outside of conventional environmental programming).

124. *Structure and Organization*, FARM SERV. AGENCY, USDA, https://www.fsa.usda.gov/about-fsa/structure-and-organization/index [https://perma.cc/J664-3ZYY].

125. *See, e.g., ICGA Congratulations to Amanda Dejong as the New Iowa State Director of USDA FSA*, IOWA CORN GROWERS ASSOC. (Nov. 3, 2017), https://www.iowacorn.org/about/news/icga-congratulations-to-amanda-dejong-as-the-new-ia-director-of-usda-fsa-copy/ [https://perma.cc/7ZMZ-23KZ].

126. *Service Center Locator*, USDA, https://offices.sc.egov.usda.gov/locator/app [https://perma.cc/R5WF-KR7M].

127. *Agricultural Act of 2014: Highlights and Implications*, ECON. RESEARCH SERV., USDA, https://www.ers.usda.gov/agricultural-act-of-2014-highlights-and-implications/ [https://perma.cc/7ME3-2PE5].

acquisition/funding.[128] Over the past several Farm Bills, the relative distribution of conservation funding between these programs has generally been away from land retirement towards working lands programs, with easement programs remaining fairly constant.[129] Under the 2002 Farm Bill, the relative mix was fifty-four percent for land retirement; thirty-five percent for working lands efforts; and eleven percent to support conservation easement acquisitions.[130] In the 2014 Farm Bill, the numbers for land retirement and working lands programming had roughly flipped: fifty percent working lands; thirty-six percent land retirement; and seven percent conservation easement acquisition.[131] This shift has considerable impact on the working landscape and the types of conservation outcomes that the agency is able to achieve.[132] This section will first explore the current role and importance of the conservation title and provide a working summary of the primary program areas.

A. The Role of the Contemporary Conservation Title

Within the agri-environmental context, the conservation title of the Farm Bill has an outsized role for several reasons. First, the financial outlay is unquestionably large by comparison to other private land conservation funding streams.[133] Second, the importance of the conservation title is magnified by the wide exemptions that the

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128. This is the general classification utilized by the Congressional Research Service in explaining the mix of current conservation programming. *See* STUBBS, *supra* note 114, at 1. In addition to these programs, there are also emergency programs (focused on conservation responses to disaster events), watershed programs (focused on flood prevention), and grants. *See id.* at i-iii. Given the relatively targeted nature of these specific programs, this Article primarily focuses on the three categories discussed in this section.

129. *See* Stephanie Stern, *Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives*, 48 ARIZ. L. REV. 541, 544-46 (2006) (discussing the challenges of addressing conservation on private land and the challenges of various incentive schemes); *see also* Linda Breggin & D. Bruce Myers, Jr., *Subsidies with Responsibilities: Placing Stewardship and Disclosure Conditions on Government Payments to Large-Scale Commodity Crop Operations*, 37 HARV. ENVTL. L. REV. 487 (2013) (discussing this program and arguing for additional reporting/compliance requirements for large producers seeking to access both these and the commodity/crop insurance titles).

130. Mary J. Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593, 602-09 (2010) (charting modern agriculture's impact on the environment and inadequate U.S. policy responses); *see also* Neil D. Hamilton, Essay, *Agricultural Production and Environmental Policy: How Should Producers Respond?*, 1 DRAKE J. AGRIC. L. 141 (1996) (profiling the potential societal shifts in concern about the environmental performance of working lands and possible producer responses).

131. Roger Claassen, *Emphasis Shifts in U.S. Conservation Policy*, AMBER WAVES (July 2006), https://www.ers.usda.gov/amber-waves/2006/july/emphasis-shifts-in-us-conservation-policy/ [https://perma.cc/3D2W-URF7] (profiling these shifts within recent farm bills).

132. MARCEL AILLERY, ECON. RESEARCH SERV., USDA, CONTRASTING WORKING-LAND AND LAND RETIREMENT PROGRAMS 3-4 (2006), https://naldc.nal.usda.gov/download/35118/PDF [https://perma.cc/WS8N-32BQ]. In addition to the actual delivery of conservation programs, NRCS's conservation technical assistance ("CTA") also has a substantial impact in designing and implementing conservation practices—whether funded through NRCS, state or local or private resources. *See* NRCS, USDA, *Conservation Technical Assistance*, https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/technical/cta/ [https://perma.cc/ANE9-YCZM].

133. *See* Robert Bonnie, *Financing Private Lands: Conservation and Management Through the Conservation Incentives in the Farm Bill, in* FROM WALDEN TO WALL STREET: FRONTIERS OF CONSERVATION FINANCE 183, 185 (James N. Levitt ed., 2005).

agricultural community enjoys from generally applicable environmental laws.[134] In contrast to other industries, improving the conservation performance of agricultural lands relies on incentive and performance payments or non-regulatory options, so this funding is particularly important to ensuring that these conditions will be addressed.[135]

Another important point to note is that these programs are generally voluntary and rely on the individual farmers to participate.[136] Although a majority of the programs cover much of the costs of participation, there are cost-share components associated with some program offerings.[137] Many of these programs not only rely on the farmer's seeking to participate, but also active partnership in stewarding these resources as land managers going forward.[138] Overall, regardless of which bucket the actual program fits, there generally is a very close working relationship between the farmer and the agency in accomplishing their mutually shared conservation objectives.[139]

While the general trend line has been in favor of expanding program offerings, this has also had programmatic design and funding implications.[140] As noted, the general trend line has been a move away from temporary land retirement (CRP) to working lands programs and conservation easements over the last few farm bills,

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134. *See, e.g.,* Neil D. Hamilton, *Myth Making in the Heartland — Did Agriculture Elect the New President?,* 13 J. FOOD L. & POL'Y 5, 7 (2017) (explaining the WOTUS controversy within the context of existing environmental laws).

135. Robert W. Adler, *Agriculture and Water Quality: A Climate-Integrated Perspective*, 37 VT. L. REV. 847, 863 (2013) (explaining that "[w]ater quality and other environmental programs under the Farm Bill . . . have been weighted even more overwhelmingly in favor of non-regulatory approaches to reducing the environmental impacts of agriculture."); *see* Margot J. Pollans, *Farming and Eating*, 13 J. FOOD L. & POL'Y 99, 100-01 (2017) (charting the environmental impacts and exemptions from environmental regulations for agricultural production).

136. Melissa K. Scanlan, *Adaptive Trading: Experimenting with Unlikely Partners*, 62 U. KAN. L. REV. 971, 981-85 (2014) (discussing this reliance on incentives/voluntary enrollment within the context of non-point source pollution under the Clean Water Act); *see also* Gail Osherenko, *Understanding the Failure to Reduce Phosphorus Loading in Lake Champlain: Lessons for Governance*, 15 VT. J. ENVTL. L. 323, 340-42 (2014) (profiling the reliance on voluntary programs, such as EQIP, and criticizing the return on investment).

137. *See, e.g.,* Kate Miller & Joshua M. Duke, *Additionality and Water Quality Trading: Institutional Analysis of Nutrient Trading in the Chesapeake Bay Watershed*, 25 GEO. INT'L ENVTL. L. REV. 521, 528-29 (2013) (discussing cost-share conservation programs generally); *see also* Erik Lichtenberg, *Cost-Responsiveness of Conservation Practice Adoption: A Revealed Preference Approach*, 29 J. AGRIC. & RESOURCE ECON. 420, 420-34 (2004) (profiling the impacts of cost-share program and farmer responsiveness/ultimate enrollment).

138. *See, e.g., NRCS/EQIP Program Join Forces on Diversified Farm in Maine,* ME. NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/me/newsroom/stories/?cid=nrcs141p2_003236 [https://perma.cc/BY4M-3EHA] (profiling NRCS's ongoing work with a Wrinkle in Thyme Farm in Oxford County).

139. *See, e g., River Rise Dairy Farm Protected*, ME. NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/me/newsroom/stories/?cid=nrcs141p2_003241 [https://perma.cc/JY9W-BHXK] (profiling NRCS's work to protect River Rise Dairy Farm to improve its conservation practice and deliver food to the local community).

140. Doug O' Brien, *Summary and Evolution of U.S. Farm Bill Conservation Titles—Expanded Discussions*, NAT'L AGRIC. LAW CTR., http://nationalaglawcenter.org/farmbills/conservation/expanded-discussions/ [https://perma.cc/QBY6-ZYNM].

which have different advocates within the farm and conservation communities.[141] To generalize, working lands programs (such as EQIP and CSP) are most valued by the farm community.[142] The reason for this is that the programs deliver support that can actually help the operation of the farm to improve by adding a terrace or incentivizing a farmer to implement a practice that they may already have been considering.[143] Land retirement programs, particularly CRP, are also popular as these lands are temporary retirements, allowing a farmer to take fields out of production temporarily—for example, when markets are performing poorly—but allowing a farmer to re-enter the market at the expiration of the contract period if the demand curve has shifted.[144] Conservation organizations, however, have different views and priorities.[145] For example, easement programs, while generally having the support of the farm community in most areas,[146] are more valued for their lasting impact by land trusts than other programmatic offerings.[147] This debate over the purposes as well as the types and intensity of funding for programmatic offerings has a direct bearing on the agency's impact on the working landscape, which will be explored within each of the three primary program classes.

B. Working Lands Programs

Within the conservation title, working lands programs are designed to help farmers implement more environmentally sensitive or conservation focused practices on their lands.[148] For example, NRCS often provides cost-share assistance to farmers to help construct structural conservation practices, such as grass strips at a field's

141. STUBBS, *supra* note 78, AT 22-25.

142. *See, e.g.,* AM. FARM BUREAU, 2018 FARM BILL POSITION—WORKING LAND CONSERVATION PROGRAMS ARE A HIGHER PRIORITY THAN LAND RETIREMENT PROGRAMS, https://www.fb.org/files/2018FarmBill/Working_Land_Conservation_Programs.pdf [https://perma.cc/94DW-LGFD].

143. *See id.*

144. *Id*. (explaining organization's view that "[l]and retirement programs are likely to be the most cost effective solution in dealing with cropland with very highly erodible soils . . . . However, they often have negative impacts on the local rural economy as expenditures on production inputs and services are reduced.").

145. *See, e.g.,* Scott Faber, *6 Steps Toward the Greenest Farm Bill Ever,* ENVTL. WORKING GROUP — AG MAG (June 29, 2017), https://www.ewg.org/agmag/2017/06/6-steps-toward-greenest-farm-bill-ever#.WsovCC7wZhE [https://perma.cc/NKL2-85XF].

146. A notable exception is North Dakota. *See* Jon J. Jensen, *Limitations on Easements in North Dakota May Have Unintended Consequences for Qualified Conservation Easement Charitable Contributions*, 87 N.D. L. REV. 343, 343-46 (2012) (exploring the historical dispute over conservation easements in North Dakota between the agricultural and conservation communities); *see also* Lon Tonneson, *Farmers Call for End to Ducks Unlimited, NRCS Deals*, DAKOTA FARMER (Oct. 20, 2014), http://www.dakotafarmer.com/blogs-farmers-call-end-ducks-unlimited-nrcs-deals-9062.

147. *See* Sarina Katz et al., *Saving Farm Bill Conservation Programs*, LAND TRUST ALL. (Summer 2017), https://www.landtrustalliance.org/news/saving-farm-bill-conservation-programs [https://perma.cc/L9NE-WH2W].

148. *See* STUBBS, *supra* note 78, at 7-9 (providing an overview of working lands programs in the most recent farm bill); *see also* JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, FARM BILL: WORKING LANDS CONSERVATION FUNDING – A PUBLIC HEALTH PRIORITY 2 (2012), https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/_pdf/projects/fsp/farm_bill/WorkingLandsConservationBrief.pdf [https://perma.cc/6MKK-UJTD] (discussing the role and impacts of Farm Bill working lands programs).

edge, to improve the farm's environmental performance by limiting nitrogen runoff.[149]

1. EQIP

The most prominent current program of this type is the Environmental Quality Incentives Program ("EQIP").[150] "The purpose of EQIP is to promote agricultural production, forestry management, and environmental quality as compatible goals, and to optimize environmental benefits."[151] EQIP is the quintessential example of a NRCS conservation program in that it relies heavily on technical conservation standards the agency has developed for a variety of different productive functions and provides cost share assistance for its installation—combining NCRS's financial assistance ("FA") and the technical assistance/expertise ("TA") roles into a single program.[152] Under the 2014 Farm Bill, EQIP is the largest conservation program and was authorized at nearly eight billion dollars over five years.[153] Despite its benefits, EQIP does have detractors who criticize the agency for some of its funding decisions—including providing cost-share assistance to support concentrated animal feeding operations (structural practices, including the installation of waste storage lagoons).[154]

2. CSP

More recently, the Conservation Stewardship Program ("CSP"), established in its current form under the 2008 Farm Bill,[155] was added to this programmatic mix in an effort to reward farmers for providing environmental benefits.[156] The purpose of

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149. STUBBS, *supra* note 78, at 7-9.

150. 16 U.S.C. §§ 3839aa to 3839aa-9 (2018); 7 C.F.R. § 1466 (2018); NRCS, USDA, NRCS GENERAL MANUAL, TITLE 440, PART 515 (2018).

151. Herden v. U.S., 726 F.3d 1042, 1044 (8th Cir. 2013) (citing MEGAN STUBBS, CONG. RES. SERV., ENVIRONMENTAL INCENTIVES PROGRAM (EQIP): STATUS AND ISSUES 1 (2009)). EQIP faces some degree of criticism for its work with livestock producers, particularly for large feedlots/CAFOs. *See, e.g.*, Michelle B. Nowlin, *Sustainable Production of Swine: Putting Lipstick on a Pig*?, 37 VT. L. REV. 1079, 1099-1100 (2013).

152. *See, e.g., Rock Removal is Clean Alternative to Burning for Blueberry Farm*, ME. NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/me/newsroom/stories/?cid=nrcseprd389610 [https://perma.cc/3A6W-3S9Y] (explaining role of EQIP in moving to advocating for better agri-environmental practices).

153. *See* STUBBS, *supra* note 78, at 8.

154. *CAFOs and Cover Crops: A Closer Look at 2015 EQIP Dollars*, NAT'L SUSTAINABLE AGRIC. COAL. (Nov. 20, 2015), http://sustainableagriculture.net/blog/fy15-general-eqip-update/ [https://perma.cc/4C6H-K2MY].

155. The Conservation Stewardship Program was the predecessor to the Conservation Stewardship Program and was substantially similar, but program design changed as well as the payments and the levels of conservation benefit that must be provided in order to be awarded a contract. *See, e.g.*, Earman v. United States, 114 Fed. Cl. 81, 88-93 (Fed. Cl. 2013) (providing overview of program's evolution and the agency's implementation); *see also* Debra Owen, *Legislative History of the Conservation Security Program*, 9 GREAT PLAINS NAT. RESOURCES J. 36, 37-40 (2004) (providing summary of the legislative background of this innovative program).

156. 16 U.S.C. §§ 3838d-3838g (2012); 7 C.F.R. § 1470 (2014); NRCS, USDA, NRCS GENERAL MANUAL, TITLE 440, PART 507 (2018); *see also Willamette Valley Farmer Implements Conservation Practices Promoting Soil Health*, OR. NRCS, USDA,

CSP is, again, to provide some financial benefit to farmers who are already responsible stewards, while also encouraging others to move in this direction and adopt beneficial land management practices.[157] Depending upon the tier of contract signed by the farmer, the agreed upon practices will vary, but can range from recycling used motor oil on the farm to adopting or utilizing cover cropping while the land is fallow.[158] The contract renewal period is often utilized as an opportunity to move the farmer past their initial level of performance to a higher level of stewardship, including the adoption of additional practices at a higher-level or conservation tier.[159] Under the 2014 Farm Bill, the acreage cap for maximum enrollment was reduced from 12.769 million acres to 10 million acres, indicating diminished support for this program offering.[160]

As voluntary programs designed to either help farmers to implement individual conservation practices these programs have remained popular.[161] Early proposals for the 2018 Farm Bill proposed combining EQIP and CSP programs into a single programmatic offering to streamline delivery, but conservation advocates have generally opposed this consolidation given the divergent purposes behind each program, and this change ultimately did not occur.[162] Given the popularity of these programs amongst producers, it is likely that the trend line will continue to support comparatively robust funding for working lands programs as a percentage of conservation title spending.

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https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/financial/csp/?cid=nrcseprd1292111 [https://perma.cc/G37J-4YV4] (providing example of how CSP operates on a 325-acre Oregon farm).

157. *See, e.g*., William S. Eubanks II, *The 2013 Farm Bill: An Opportunity for Change*, 28 NAT. RESOURCES & ENV'T 30, 31 (2013); *see also* Ferd Hoefner, *Opinion: Conservation Stewardship Program 'Reinvention': What to Look for in the Upcoming Overhaul*, AGRI-PULSE (August 29, 2016), https://www.agri-pulse.com/articles/7408-opinion-conservation-stewardship-program-reinvention-what-to-look-for-in-the-upcoming-overhaul [https://perma.cc/4M8P-72W7] (noting function of the program and organizational concerns about program evolution and implementation).

158. *CSP Contracts*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/csp/?cid=nrcseprd1288524 [https://perma.cc/4WZQ-V2UL] (providing overview of what needs to be included in a CSP contract). Enrollment of the land employs ranking system the Conservation Management Tool, to determine which participants should be enrolled, *See* Adam I. Davis, *Ecosystem Services and the Value of Land*, 20 DUKE ENVTL. L. & POL'Y F. 339, 375 (2010) (exploring this methodology and potential impact).

159. Margot J. Pollans, *Drinking Water Protection and Agricultural Exceptionalism*, 77 OHIO ST. L.J. 1195, 1255-56 (2016) (discussing program, current impact, and potential focus areas for future policy expansion).

160. *See* STUBBS, *supra* note 78, at 26; *see also* Margot J. Pollans, *Regulating Farming: Balancing Food Safety and Environmental Protection in a Cooperative Governance Regime*, 50 WAKE FOREST L. REV. 399, 410-11 (2015) (exploring this program's design but noting that only five percent of the agricultural land base is actually enrolled).

161. Cain & Lovejoy, *supra* note 66, at 37; *see also* Dialogue, *Working Landscapes: The Future of Land Use Policy*, 45 ENVTL. L. REP. NEWS & ANALYSIS 10833, 10838 (explaining that "while land retirement programs still tend to dominate (at least in terms of expenditures), so-called working land programs have expanded over time.").

162. Philip Basher, *New Farm Bill Tweaks Commodity Title, Overhauls Conservation*, AGRI-PULSE (Apr. 18, 2018), https://www.agri-pulse.com/articles/10837-new-farm-bill-tweaks-commodity-title-overhauls-conservation [https://perma.cc/M5L4-UGHY?type=image] (exploring the House Farm Bill).

C. Land Retirement Programs

Conversely, land retirement programs focus on taking lands out of active production.[163] Initially, the strong motivation for these programs was not on securing environmental benefit, but rather on trying to correct market imbalances and address issues of overproduction by reducing the amount of land being farmed.[164] Today, the environmental benefits of land retirement programming are more often articulated as the basis for these efforts.[165] From the 2002 Farm Bill through the 2014 Farm Bill, the percentage of funds dedicated to land retirement have dropped from fifty-four percent of conservation title funding to approximately thirty-seven percent.[166]

The largest land retirement program is the CRP, administered by the FSA with technical assistance from the NRCS.[167] Under the CRP, a farmer will enter into a multiple year contract, typically ten years, and agree to take their land out of production in exchange for a cash payment over the contract's life.[168] During the period of enrollment, the farmer has to determine which practices to implement as

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163. Dayton Lambert & Patrick Sullivan, *Land Retirement and Working-Land Conservation Structures: A Look at Farmers' Choices*, AMBER WAVES, June 2006, at 22, 22-24 (exploring the environmental impacts of this program and which landowners are most likely to take advantage of land retirement verses working lands programing).

164. Terence J. Centner, *Concentrated Feeding Operations: An Examination of Current Regulations and Suggestions for Limiting Negative Externalities*, 25 COLUM. J. ENVTL. L. 219, 232-33 (2000). The ability of this type of program to actually influence markets is debatable or at least substantially limited. The reason for this, in part, is that at least for the majority of the period in which these programs have operated, these programs have been voluntary. A farmer, from a business perspective, is going to enroll lands in these programs generally only when the program payments are sufficient to offset the revenue lost from not farming these lands. This results in farmers enrolling low quality ground in the program, which can be good from an environmental perspective (as a hillside not being farmed will limit erosion and a wetland not being planted will also reduce erosion and provide habitat and water quality perspective), but the marginal character of these lands as from a production standpoint will minimize the market benefits gained from lost production. *See* Jonathan Coppess, *A Return to the Crossroads: Farming, Nutrient Loss, and Conservation*, 39 U. ARK. LITTLE ROCK L. REV. 351, 372-74 (2017) (noting the market factors that fuel enrollment and the push/pull of the relationship between commodity prices and farmer enrollment).

165. Janet E. Milne, *Watersheds: Runoff from the Tax Code*, 34 VT. L. REV. 883, 886 (2010); *see also* Jim Chen, *Get Green or Get Out: Decoupling Environmental From Economic Objectives in Agricultural Regulation*, 48 OKLA. L. REV. 333, 343-44 (1995) (critiquing this program as essentially money for nothing and paying for what should be a producer obligation).

166. STUBBS, *supra* note 78, at 3 (discussing the reasons for this shift—including high commodity prices, changing land rental rates, and new conservation technologies).

167. Jason Waanders, *Growing a Greener Future? USDA and Natural Resource Conservation*, 29 ENVTL. L. 235, 259-63 (1999) (discussing the division of conservation programs between NRCS and FSA and the operation of the CRP). Beyond CRP, there a are a variety of subprograms, designed to provide additional habitat benefits (Conservation Reserve Enhancement Program ("CREP") and those targeted on isolated wetlands (CRP- Farmable Wetland Program). Some, however, criticize this program and NGO support because: (1) these lands should not be farmed in the first instance; and (2) when the contract ends, these lands can return to production. *See* Joshua Galperin et al., *Eating is Not Political Action*, 13 J. FOOD L. & POL'Y 113, 120-21 (2017).

168. MEGAN STUBBS, CONG. RES. SERV., CONSERVATION RESERVE PROGRAM (CRP): STATUS AND ISSUES 1-4 (2014) (providing overview of enrollment and contract structure); *see also* Jesse J. Richardson, Jr., *Land Tenure and Sustainable Agriculture*, 3 TEX. A&M L. REV. 799, 806-08 (2016) (discussing the structure of this program and its challenges to tenant-farmed lands).

part of their offer.[169] As of July 2014, the five most common practices installed on CRP acres are: (1) establishment of native grasses; (2) management of established vegetative cover; (3) establishing permanent non-native grasses and legumes; (4) creation of wildlife habitat; and (5) creation of rare and declining habitat.[170] Landowners seeking to enroll land in the CRP are scored based upon their environmental benefit index (providing and weighing various environmental benefits such as wildlife, water quality, enduring benefits, erosion prevention, and air quality).[171]

For the 2018 Farm Bill, the initial House bill proposes increasing the acreage cap by four million acres, and capping payment at eighty percent of the county rental rate (reducing the payment amount) to offset this acreage increase, while the Senate's version would increase the acreage cap by only a million acres; the 2018 Farm Bill ultimately more closely resembled the House Bill—increasing the cap to 27 million acres and placing rental rates at 85 percent of county average for non- continuous acres.[172] The major critiques of CRP have historically been the types of vegetative cover installed on the landscape (or failure to mirror native systems) and the short-term nature of the contracts—as opposed to perpetual resource protection—and whether this approach maximizes conservation return on investment.[173] Given their historical use, and perhaps reflective of lower commodity prices than in the leadup to the 2014 Farm Bill, land retirement programs appear to have regained some of their earlier losses in the current legislative cycle.[174]

D. *Conservation Easement Programs*

The third category of Farm Bill conservation programs centers on the acquisition of conservation easements.[175] Conservation easements, to generalize, are private

169. STUBBS, *supra* note 168, at 4.

170. *Id.* at 5.

171. *Id.* at 2; *see also* Roger Claassen et al., *Cost-Effective Design of Agri-Environmental Payment Programs: U.S. Experience in Theory and Practice*, 65 ECOLOGICAL ECON. 737 (2008) (profiling the impact of environmental bidding on the CRP program and improving its environmental impacts).

172. Gil Gullickson, *CRP Likely to Expand by 5 Million Acres in New Farm Bill: Paying for It Will Mean Lower CRP Payments*, SUCCESSFUL FARMING (Apr. 12, 2018), https://www.agriculture.com/news/business/crp-likely-to-expand-by-5-million-acres-in-new-farm-bill [https://perma.cc/ZNN5-W4CH]; Nick Lowery, *Senate Farm Bill Passes Markup with 25 Million Acre CRP Cap*, CAPITAL JOURNAL (June 13, 2018), https://www.capjournal.com/news/senate-farm-bill-passes-markup-with-million-acre-crp-cap/article_448f9530-6f7b-11e8-9ee0-87e4f97150b4.html [https://perma.cc/N32X-HP99]. For a summary of the 2018 Farm Bill's impacts on CRP, see NAT'L ASS'N OF CONSERVATION DISTS., *2018 Farm Bill Breakdown: Conservation Reserve Program* (Jan. 22, 2019), https://www.nacdnet.org/2019/01/22/2018-farm-bill-breakdown-conservation-reserve-program/ [https://perma.cc/7ZWW-YAGF].

173. David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 332-34 (1995) (profiling the role of CRP and its benefits/drawbacks).

174. *See, e.g.*, Robert Heimlich & Roger Claaseen, *Conservation Choices for a New Millennium*, CHOICES, Winter 1999, at 45 (noting the relationship between commodity prices and funding for land retirement initiatives).

175. *See, e.g.,* Marie Claire Osswald, *Custom-Made Conservation: Resource-Specific Conservation Easement Implementation Unpaves the Path of Tax Abuse*, 32 J. ENVT'L L. & LITIG. 1, 18-20 (2016) (providing an overview of NRCS easement programs).

agreements between a landowner and a governmental agency or non-governmental organization designed to safeguard these lands against insensitive development or other specified threats.[176] Through this agreement, where the landowner is giving up some of his or her rights to modify or develop the property in exchange for consideration, the easement-holder commits to enforcing the terms of the agreement.[177] To provide a working definition, "[u]sing the traditional 'bundle of sticks' metaphor for property, we can describe the landowner as losing one of the sticks in her bundle. A[n] . . . easement is in essence taking a stick out of the bundle and giving it to someone else."[178] A unique aspect of conservation easements is that these interests in land are typically perpetual and are binding upon subsequent landowners, which differs from land retirement programs and other agency programs.[179]

Within federal agricultural policy, conservation easements are a relatively new development, beginning as a pilot program with the 1990 Farm Bill.[180] This strand of activity, however, has quickly become an important funding stream for conservation advocates seeking to leverage these dollars to carry out landscape-level projects and has also resulted in some cultural shifts within the NRCS from serving in more of a technical support/financial role to that of active land manager.[181] This change is not without difficulty, as it has required different skills and has changed, at least in part, the agency's relationship with its producers away from an advisory role to a quasi-regulatory role involving land transactions and the enforcement of these restrictions.[182] Since the 1990 pilot program, the agency has administered a variety of easement programs focused on securing different conservation objectives, including the Wetlands Reserve Program (wetlands), the Farm and Ranchland Protection Program (farmland), and the Grassland Reserve Program (sensitive

176. Jesse J. Richardson, Jr., *Land Tenure and Sustainable Agriculture*, 3 TEX. A&M L. REV. 799, 801 (2016) (profiling this tool).

177. Fred Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. & SOC. 107, 108-110 (2015) (providing overview of this legal mechanism).

178. Jessica O. Lippman, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVT'L L. & LITIG. 293, 298 (2004).

179. *See, e.g*., Sean M. Kammer & Sarah E. Christopherson, *Reserving a Place for Nature on Spaceship Earth: Rethinking the Role of Conservation Easements*, 43 COLUM. J. ENVTL. L. 1, 21-22 (2018) (summarizing the impact of NRCS easement programs).

180. *See* TOM DANIELS AND DEBORAH BOWERS, HOLDING OUR GROUND: PROTECTING AMERICA'S FARMS AND FARMLAND 80-82 (1997) (profiling the origins of this strand of farmland preservation effort).

181. NRCS has had to essentially build up an administrative infrastructure for national program delivery. *See, e.g*., NRCS, NAT'L BULLETIN No. 440-17-11-PGM- EASEMENT SUPPORT SERVICES IMPLEMENTATION UPDATE, https://directives.sc.egov.usda.gov/viewerFS.aspx?hid=41251 (providing overview of the ESS program and intended role in program delivery)

182. *See, e.g.,* Rodgers v. Vilsack, 2015 WL 4488078 (E.D. Mo. July 23, 2015) (profiling dispute over conservation easement granted to the U.S. through the WRP program). To clarify, although enrollment in these programs is voluntary, once the easement is in place this imposes affirmative and negative restrictions on a landowner's use of the property, which diverges from the typical reliance on purely voluntary/financial support methodologies. *See* John Echeverria, *Regulating versus Paying Landowners to Protect the Environment*, 26 J. LAND RESOURCES & ENVT'L L. 1, 5-9 (2005).

grasslands).[183] In the 2002 Farm Bill, easement programs were only allocated eleven percent of the entire funding mix; in the 2014 Farm Bill, easement programs are at around seven percent of total funding. These programs, while vitally important to the conservation community, have not gained much in relative funding.[184] By contrast, the rate of conversion of agricultural land to non-agricultural use has continued unabated, leading the American Farmland Trust to call for a doubling of conservation easement funding in the next farm bill.[185]

Generally, the specific idea behind USDA conservation easement programs is two-fold: (1) to advance conservation gains; and (2) to advance farmland preservation objectives.[186] The 2014 Farm Bill consolidated the agency's conservation easement programs into the unified Agricultural Conservation Easement Program ("ACEP").[187] The prominent Wetland Reserve Easements ("ACEP-WRE") is primarily focused on wetlands and conservation gains, while ACEP-ALE is more focused on farmland protection-related objectives.[188]

1. ACEP-WRE

The first and longest running prong of ACEP is the agency's ACEP-WRE.[189] ACEP-WRE is designed to promote wetland habitat on lands that are currently being farmed, former or degraded wetlands, or lands that have been substantially altered by flooding over time, in an effort to restore wetland conditions to the landscape.[190] The idea behind ACEP-WRE is to restore lands that likely should not have been farmed in the first place given their hydrological characteristics, habitat benefits, or susceptibility to flooding.[191] For ACEP-WRE easements, NRCS purchases these

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183. *See generally* Karen Jordan, *Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs*, 43 CASE W. L. REV. 401, 404 (1993) (exploring the introduction of USDA easement programs).

184. STUBBS, *supra* note 78, at 3 (charting this funding over the last three farm bills).

185. AM. FARMLAND TRUST, FARMS UNDER THREAT: THE STATE OF AMERICA'S FARMLAND 34-35 (2018), https://www.farmlandinfo.org/sites/default/files/AFT_Farms_Under_Threat_May2018%20maps%20B_0.pdf [https://perma.cc/5AS9-THV3].

186. *See, e.g.*, Ethan Howland, *USDA to Spend $328 Million on Easement Program*, CQ ROLL CALL WASHINGTON ENERGY BRIEFING, 2014 WL 4437185 (discussing program and goals).

187. Peter Lehner & Nathan A. Rosenberg, *Legal Pathways to Carbon-Neutral Agriculture*, 47 ENVTL. L. REP. NEWS & ANALYSIS , Oct. 2017 , at 10845, 10866; *see also* Adam Reimer, *Ecological Modernization in U.S. Agri-Environmental Programs: Trends in the 2014 Farm Bill*, 47 LAND USE POL'Y, Sept. 2015, at 209, 210-12.

188. See, USDA, NRCS, Agricultural Conservation Easement Program, https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/ [].

189. Agricultural Act of 2014, Pub. L. No. 113-79; 128 Stat. 665 (Feb. 7, 2014); 7 C.F.R. § 1468 (2014). ACEP-WRE replaced the former Wetlands Reserve Program, which began in the early 1990s as a way to restore wetlands on farmed lands. *See also* Cyril F. Kormos, *The Wetlands Reserve Program*, 2 ENVT'L L. 173 (1994); Brian J. Oakley, *The Wetlands Reserve Program: Charting a Course Through the WRP*, 8 DRAKE J. AGRIC. L. 631 (2003) (providing summary of the program, enrollment, and operational challenges).

190. 7 C.F.R. § 1468.30 (2014).

191. Perhaps ironically, many of the wetlands that the NRCS is now creating or restoring are replacing wetlands that USDA helped to drain last century as an appreciation of their environmental and other social values (including flood control) has become more commonly recognized. *See, e.g.*, MICHAEL T. SUCIK & ELIZABETH MARKS, NRCS, USDA, THE STATUS AND RECENT TRENDS OF

interests in land (through a warranty easement deed)[192] directly from farmers and holds and monitors these restrictions over time.[193] Post-acquisition, NRCS then provides most, if not all, of the funding for the restoration, enhancement, or creation of the wetland on the protected parcel.[194] Given the targeted role of ACEP-WRE easements, these purchases are designed to more directly achieve environmental goals with the benefit of retiring sub-marginal lands and to also eliminate ongoing disaster, crop insurance, and commodity payments.[195] As of 2014, NRCS, through its program authorities, has worked with over eleven thousand landowners to enroll over two million acres of wetlands in this program, indicating the scale at which this program has landscape impacts.[196]

2. *ACEP-ALE*

The other prominent band of conservation easement funding is for the protection of farms threatened by development though agricultural land easements (ACEP-

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WETLANDS IN THE UNITED STATES, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1262239.pdf [https://perma.cc/72UU-TYYQ].

192. WRP/WRE warranty easement deeds are highly restrictive—beyond even typical conservation easements—leaving the landowner with few remaining rights outside of quiet use and enjoyment of the property. *See, e.g.*, Adena Rissman et al., *Land Management Restrictions and Options for Change in Perpetual Conservation Easements*, 52 ENVT'L MGMT. 277, 282 (with "NRCS-WRP easements, the easement holder had nearly all control over land management, with options for altering land use in their sole discretion.").

193. *Agricultural Conservation Easement Program: Wetland Reserve Easement Component*, ME. NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/me/programs/easements/acep/ [https://perma.cc/9XY8-AQXG] (profiling program and agency's purchase of these interests in lands from eligible participants).

194. *See* NRCS, USDA, NRCS GENERAL MANUAL, TITLE 440, PART 528.100 (2018). NRCS speaks of WRE as being a prime example of shared stewardship or responsibility. NRCS dedicates substantial resources (financial and technical) on these projects and relies on the landowner to ensure their continued operation or function. This has resulted in a sort of sea-change in NRCS's approach to designing wetlands. In the early days of the program, NRCS often created very complicated wetland projects that relied on substantial intervention and engineering to achieve their goals (for example, creating artificial ponds or other structural improvements that were expensive and difficult to maintain). Not surprisingly, this often resulted in substantial operational commitments and costs that the current and subsequent landowners may or may not have always been willing to endure, which can lead to system failure. More recent program guidance across all levels of the agency has focused on low-impact projects that rely on natural processes, to the degree, possible (for example, encouraging wetlands to naturally reclaim lands by removing tile or other structural barriers). This, however, also has landowner complications as the expectations of the landowner enrolling in the program may expect something other than this passive system, particularly if they are looking to create specific forms of habitat (for example, a pond for ducks). *See generally Agricultural Conservation Easement Program*, MASS. NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/ma/programs/easements/acep/ [https://perma.cc/886T-BNZB] (providing overview of structural practices).

195. MARCEL AILLERY, ECON. RESEARCH SERV., USDA, CONTRASTING WORKING-LAND AND LAND RETIREMENT PROGRAMS 1-6 (Mar. 2006), https://www.ers.usda.gov/webdocs/publications/42910/29511_eb4_002.pdf?v=41326 [https://perma.cc/9TLV-ULE5] (explaining the programmatic goals or intentions behind ACEP-WRE).

196. NRCS, USDA, RESTORING AMERICA'S WETLANDS: A PRIVATE LANDS CONSERVATION SUCCESS STORY, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1045079.pdf [https://perma.cc/LZH2-DUMQ].

ALE).[197] ACEP-ALE conservation easements focus on securing development rights to prevent the conversion of these lands to non-agricultural use with the end objective of keeping the lands available for future agricultural activity.[198] As a result, the restrictions in an ACEP-ALE conservation easement differ materially from ACEP-WRE conservation easements and are less restrictive, as this program is trying to manage or conserve working lands, which requires flexibility over time to adapt to changing conditions.[199] Conservation and farmland preservation objectives in ACEP-ALE are often linked and achievable, but are not always directly aligned or even compatible in all circumstances.[200]

ACEP-ALE conservation easements also vary from those secured under ACEP-WRE in that these conservation easements are not actually held by the NRCS.[201] NRCS, through the Farm Bill, provides financial resources to qualified entities (state agencies or land trusts focused on this specific mission area) to secure lands within their geographic areas.[202] This cost-share assistance provides fifty percent of the cost of acquisition, which can be higher for some limited and defined resource categories, such as targeted grasslands,[203] and relies on the state or non-governmental entity (NGO) to raise the remainder of the capital.[204] To ensure that the easements meet baseline standards, the NRCS has developed minimum deed requirements to ensure that the terms of the conservation easements actually obtain the targeted land

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197. Agricultural Act of 2014, Pub. L. No. 113-79, § 1265B (2014); 7 C.F.R. § 1468.20 (2016).

198. Rachel Armstrong, *On Infertile Ground: Growing a Local Food System Through Agriculture Conservation Easements*, 19 DRAKE J. AGRIC. L. 149, 150-54 (2014) (exploring program roles and challenges).

199. *See generally* AM. FARMLAND TRUST, AGRICULTURAL CONSERVATION EASEMENT PROGRAM, AGRICULTURAL LAND EASEMENTS (Oct. 2017), http://www.farmlandinfo.org/sites/default/files/Agricultural_Conservation_Easement_Program_Agricultural_Land_Easements_2017_AFT_FIC.pdf [https://perma.cc/ZQN4-YAWT] (discussing program generally).

200. Jess R. Phelps, *Defining the Role of Conservation in Agricultural Conservation Easements,* 44 ECOLOGY L. Q. 627, 663-65 (2017) (exploring this tension).

201. ACEP-ALE easement funding is provided to qualified entities in two forms: (1) through grant agreements; and (2) through cooperative agreements. Depending upon the nature of the partnering entity, the structure of the operative agreement between USDA and the easement-holder will have a direct impact on the nature of oversight involved and the level of NRCS approval that will be required as far as approving the easement's and holder's compliance with programmatic requirements. 440 Conservation Programs Manual 528.50.

202. *Farm Bill Conservation Programs*, LAND TR. ALL., https://www.landtrustalliance.org/topics/federal-programs/farm-bill-conservation-programs [https://perma.cc/47C3-P2L9].

203. *See, e.g.*, *Agricultural Conservation Easement Program*, KAN. NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/ks/programs/easements/acep/ [https://perma.cc/3LUH-HD9J] (discussing cost-share amounts).

204. NRCS, USDA, NRCS GENERAL MANUAL, TITLE 440, PART 528.43 (2015). The cost-share requirement, while expanding the impact of the federal investment, limits the number of entities that partner with NRCS, as raising the needed match is not always possible. Many of the most successful farmland preservation partners have access to relatively stable funding through state appropriations or tax proceeds. One method many entities utilize to raise the needed capital is to rely, in part, on a landowner contribution. NRCS policy allows for an owner to contribute up to twenty-five percent of the value of a parcel through a bargain sale, which leaves the partnering entity with only the remaining twenty-five percent of the acquisition cost to secure. *Id.*

management goals.[205] Through the 2014 Farm Bill, NRCS has worked with farmers to protect over one million acres of farmland and 340,000 acres of grassland through the agency's legacy conservation programs; since the 2014 Farm Bill, the agency has worked with its partners to secure another approximately 500,000 acres of farm ground through these authorities.[206]

Overall, the three primary prongs of the contemporary conservation title have expanded the scope and reach of the agency to tackle a wider scope of issues across the working landscape. This reach, however, still relies on national programs that have to be flexible enough to address conditions across a wide spectrum of production types and environmental conditions and contexts. To the degree that agricultural policy is capable of addressing these issues, regional considerations have to play a role in both program design and implementation. The farm bill conservation programs only establish the operating platform. It is then up to the administrative agencies and their partners to ensure that the programs operate as intended and provide the targeted conservation benefits, which will be explored in the following section.

IV. REGIONALITY WITHIN THE FARM BILL

In referring to regionality within the farm bill, it is important to define and distinguish what this actually means in practice. There are different degrees and variations to regionalism, which range from inherent regionalism as a function of the diversity of American agriculture to express regionalism actually targeted through programs designed to advance and achieve these regional priorities. Given the complexity of the contemporary conservation title and the importance of this funding stream, accounting for this regionalism and ensuring that the programs are sufficiently flexible and tailored to address localized conservation conditions on the ground is vital. This section will explore the various ways regionalism has historically been and is currently incorporated within the farm bill's conservation title.

A. Inherent Regionality

First, the nature of the U.S. agricultural sector very materially contributes to both the need for and the actual regionality of contemporary agricultural conservation policy.[207] Without fully exploring the myriad factors that define a food system

205. 7 C.F.R. § 1468.25 (2016). There is also flexibility for certified entities in meeting certain benchmarks to expedite project enrollment. *See Certification Gets Conservation Easements on the Ground Faster*, NRCS, USDA (Nov. 14, 2013), https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/home/?cid=STELPRDB1236899 [https://perma.cc/RFW3-9ZE7] (explaining the role of the certification process as provided first in the 2008 farm bill).

206. NRCS, USDA, ENSURING THE FUTURE OF AGRICULTURE: AGRICULTURAL CONSERVATION EASEMENT PROGRAM, AGRICULTURAL CONSERVATION LAND EASEMENTS 12 (2018) (profiling program impacts).

207. *See, e.g.*, *Ag and Food Sectors and the Economy*, ECON. RESEARCH SERV., USDA, https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/ [https://perma.cc/73SX-Z6VQ] (providing summary overview of the U.S. agricultural sector).

supporting a population of over three hundred million citizens, a number of factors fit within this category, ranging from climatic/growing conditions to the value of land and cost of production—all of which contribute to the variability of the application of conservation programs to these productive forms.

1. Climatic and Growing Conditions

For one, climatic and soil conditions vary and support different productive schemes and, in turn, variations in conservation programming. Maine's climate versus other coastal states makes it pretty clear that while one may produce abundant root vegetables, the other may choose to focus on fruit production. Given the diversity of American agriculture, climate and growing conditions directly influence the types of production and the types of environmental challenges that a region may face in addressing the correlated environmental impacts and minimizing the environmental footprint associated with these productive forms.[208] While conservation title funding certainly benefits certain production forms more than others as a function of political and perhaps historical considerations,[209] the conservation title has evolved over time to become more inclusive and flexible, addressing a broader range of production forms as the environmental impacts of different productive forms become better understood and investigated.[210]

2. Economic Drivers—Macroeconomic and Regional Markets

Relatedly, market conditions also shape the regionalism of agriculture. For example, Maine's agricultural sector is not directly able to compete with larger Midwestern farms and their lower prices of production.[211] Maine dairies have to rely on imported grain to feed their cattle as the local market is unable to compete on a price basis in the commodity arena, which has additional market consequences, leading producers to focus on certain productive activities to maximize their return

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208. *See* COMM. ON A FRAMEWORK FOR ASSESSING THE HEALTH, ENV'T, AND SOC. EFFECTS OF THE FOOD SYS. ET AL., A FRAMEWORK FOR ASSESSING THE EFFECTS OF THE FOOD SYSTEM 4 (Malden C. Nesheim et al., June 17, 2015), https://www.ncbi.nlm.nih.gov/books/NBK305182/ [https://perma.cc/5KWL-SZ7S] (profiling the varied environmental impacts associated with the applicable productive forms).

209. *CAFOs & Cover Crops: A Closer Look at 2015 EQIP Dollars*, NAT'L SUSTAINABLE AGRIC. COAL.: NSAC'S BLOG (Nov. 20, 2015), http://sustainableagriculture.net/blog/fy15-general-eqip-update [https://perma.cc/2QPD-QJGQ].

210. *See* Suresh Sureshwaran & Stephanie Ritchie, *U.S. Farm Bill Resources and Programs for Beginning Farmers*, CHOICES, Summer 2011 http://www.choicesmagazine.org/choices-magazine/theme-articles/innovations-to-support-beginning-farmers-and-ranchers/us-farm-bill-resources-and-programs-for-beginning-farmers- [https://perma.cc/T2HJ-P85N] (providing an overview of the 2008 Farm Bill's focus on beginning farmers and tailoring programs to reduce barriers to participation in Farm Bill programming and to becoming a farmer).

211. John Dillon, *As Crisis Rocks Dairy Industry, Farms Focus on How To Manage Milk Supply,* ME. PUB. RADIO *(*Aug. 11, 2018), http://www.mainepublic.org/post/crisis-rocks-dairy-industry-farmers-focus-how-manage-milk-supply#stream/ [https://perma.cc/54T9-BRD4] (discussing the market conditions and impacts on Maine dairies).

on investment and capital.[212]

The regional economy also has an impact. If a farm is located near an urban center, value added agricultural production, including potentially agri-tourism, has a better potential to achieve success and higher returns than a similarly situated farm located in a rural area with many very similarly, if not identically, situated producers.[213] To again take the Maine example, the relative proximity to the New York and Boston metropolitan markets has influence on the types of agricultural production favored by producers.[214] As a result, the state specializes in specialty production, including food businesses, rather than more commodity-oriented production.[215] These advantages allow Maine farmers to compete in specialty or value added agriculture and to experiment in order to stay ahead on the productive curve.[216] This, in turn, logically leads to Maine legislators, in the farm bill debates over program allocations, to favor some programs/allocations more than others as directly benefiting their constituencies.[217]

3. The Impact of Culture and Custom

Culture and custom fit within this mix as well. The agricultural traditions of a given region, such as New England or the Midwest, have lingering influences on current production choices.[218] While farmers are highly aware of market signals, the sunk costs of substantial investments—both in infrastructure and experience—also heavily weigh towards certain productive outcomes and against drastic productive

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212. *See generally* ME. LEGISLATURE, EXECUTIVE SUMMARY OF THE COMMISSION TO STUDY OPTIONS FOR PRESERVING THE DAIRY INDUSTRY IN THE STATE (1996), https://legislature.maine.gov/doc/2300 [https://perma.cc/GR4C-BJK3] (discussing this and other issues).

213. *See, e.g.*, *State Policies to Bolster Maine's Agricultural Economy*, ME. FARMLAND TRUST (Mar. 21, 2018), https://www.mainefarmlandtrust.org/state-policies-to-bolster-maines-agricultural-economy/ [https://perma.cc/WC8R-QPW5] (explaining the role of value-added agriculture in Maine).

214. *See, e.g.*, *Strategic Plan 2013-20*, AGRIC. COUNCIL OF ME., http://maineagcom.org/about-agcom/strategic-plan/ [https://perma.cc/YDY4-P9Z8].

215. *See* Laurie Schreiber, *As Maine Agriculture Evolves, Farm Financiers Aim To Keep Up,* MAINEBIZ (Apr. 2, 2018), http://www.mainebiz.biz/article/20180402/CURRENTEDITION/303299995/as-maine-agriculture-evolves-farm-financers-aim-to-keep-up [https://perma.cc/82CP-9FYE].

216. *See* JED BEACH, ME. ORGANIC FARMERS & GARDENERS ASSOC., MAINE'S ORGANIC FARMS—AN IMPACT REPORT (2010), http://www.mofga.org/Portals/2/Reports/MaineOrganicFarmsImpactReport.pdf [https://perma.cc/P5UB-K7HG].

217. *See, e.g.*, Juila Bayly, *Proposed Farm Bill Could Mean Bad News for Maine's Organic Farmers*, BANGOR DAILY NEWS: HOMESTEAD (May 25, 2018), https://bangordailynews.com/2018/05/25/homestead/proposed-farm-bill-could-mean-bad-news-for-maines-organic-farmers/ [https://perma.cc/SU8F-YW8Z] (exploring Maine's agriculture and the impacts of the farm bill legislation on its crops).

218. *See* Linda Lobao & Katherine Meyer, *The Great Agricultural Transition: Crisis, Change, and Social Consequences of Twentieth Century US Farming*, 27 ANN. REV. SOC. 103, 103-07 (2001). Despite the role of custom and tradition, farmers are often quick to adapt to new technology or find new ways to produce their crops as the economic realities of these operations often force change/evolution. *See Farms on the Fringe: New Takes on America's Farming Tradition, on Earth*, NRDC, https://www.nrdc.org/onearth/farms-fringe-new-takes-americas-farming-tradition [https://perma.cc/SZP5-M699] (profiling six producers and their efforts to evolve to a changing climate and to improve their environmental performance).

shifts.[219] If a Maine farm has heavily invested in robotic dairy production, it is not going to be easy to move away from this productive decision, and it may need to expand its production, despite a saturated market, to try to stay ahead on a marginal basis.[220]

4. *The Value of Land/Cost of Production*

Lastly, the value of land and cost of production also plays a role.[221] If land is comparatively cheap, this will allow for a greater variety of possible agricultural uses.[222] If the land is more expensive, and the machinery necessary to achieve the type of agricultural production is equally costly, this may limit the forms of agricultural production that are feasible within that geographic context and will shape producer decisions.[223]

This national/regional/local differentiation creates policy tensions as far as which goals or agricultural forms the legislation should seek to further.[224] While over the past few Farm Bills there have been some shifts to allow smaller farms greater access to the full suite of conservation programs and funding, many are still critical of the legislation's degree of support for large-scale commodity crop operations.[225] This critique begs the question whether the programmatic offerings

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219. *See, e.g.*, Corie Brown, *Rural Kansas Is Dying. I Drove 1,800 Miles To Find Out Why*, THE NEW FOOD ECON. (Apr. 26, 2018), https://newfoodeconomy.org/rural-kansas-depopulation-commodity-agriculture/ [https://perma.cc/5CKH-7ZV3] (charting the impacts of commodity production on rural communities and resistance to adopting other agricultural forms based on existing infrastructure).

220. *See, e.g.*, John Dillon, *Got Too Much Milk? Dairy Dumping Highlights Production Bottlenecks, Northeast Surplus,* VT. PUB. RADIO (May 9, 2018), http://digital.vpr.net/post/got-too-much-milk-dairy-dumping-highlights-production-bottlenecks-northeast-surplus#stream/0 [https://perma.cc/FG4K-8RXG] (profiling these challenges).

221. *See, e.g.*, Bill Spiegel, *What You Need to Know About Farmland Values*, SUCCESSFUL FARMING (Mar. 22, 2016), https://www.agriculture.com/content/what-you-need-to-know-about-farmland-values [https://perma.cc/QE6F-7ZZE?type=image] (profiling farmland values and producer impacts).

222. *See, e.g.*, UNIV. OF VT. NEW FARMER PROJECT, CULTIVATING HEALTHY COMMUNITIES EXTENSION, HOW TO DETERMINE THE RIGHT FARM RENTAL RATE (July 2014), https://www.uvm.edu/newfarmer/land/RentalGuide.pdf [https://perma.cc/R2UD-NFK6] (profiling the various factors which influence rental markets and the types of production that will utilize available lands).

223. *Id*.

224. *See, e.g.*, Todd Kuethe & Jonathan Coppess, *Mapping the Farm Bill: Voting in the House of Representatives*, UNIV. OF ILL.: FARMDOC DAILY (Apr. 17, 2014), http://farmdocdaily.illinois.edu/2014/04/mapping-the-farm-bill-voting-in-the-house-of-representatives.html [https://perma.cc/K3SC-8QRJ] (charting regional opposition and support for the last Farm Bill).

225. *Resources for Small Farms*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/home/?cid=stelprdb1249066 [https://perma.cc/TL5X-7FNF] (profiling the availability of programs for small and beginning farmers); *see also* CONG. RESEARCH SERV., No. 7-5700, FARM BILL PRIMER: FEDERAL PROGRAMS SUPPORTING NEW FARMERS (2017), https://nationalaglawcenter.org/wp-content/uploads//assets/crs/IF10641.pdf [https://perma.cc/Y6F9-QF5X]. *But see* Jim Robbins, *Can Reforming the Farm Bill Help Change U.S. Agriculture?,* YALE SCH. OF FORESTRY & ENVTL. STUDIES: YALE ENV'T 360 (Mar. 22, 2012), https://e360.yale.edu/features/can_reforming_the_farm_bill_help_change_us_agriculture [https://perma.cc/NK78-C69R] (assessing the impacts of current farm program design generally); James B. Stewart, *Richer Farmers, Bigger Subsidies*, N.Y. TIMES (July 19, 2013),

are sufficiently tailored to address localized conditions and a diversity of agricultural productive forms.[226] These examples are not intended as an exclusive detailing of regional distinctions and impacts that, in turn, have policy impacts, but instead are only intended to illustrate that there is a certain degree of regional consideration baked into existing farm policy calculations purely owing to the fact that the U.S. agricultural sector is itself far from uniform.[227]

B. Appropriative Regionality

The nature of the appropriations process also has an impact on regional variability of farm programming. As discussed above, eighty percent of the 2014 Farm Bill is dedicated to food assistance programming alone.[228] The historic balance in Farm Bill debates is that it requires the agreement of farm state (interested in supporting commodity crop producers through crop insurance and subsidy support) and urban (interested in ensuring continued access to food nutrition programming) legislators in order to get enacted.[229] While this alliance has, to some extent, frayed, the nutrition title has remained within the Farm Bill (rather than as standalone nutrition legislation).[230] If your state is primarily urban, this may impact the state's allocation of the other titles by nature of the state's agricultural base (implicitly) or even potentially expressly by its design and which programs are funded.

To some extent, some attempt at regional balance is expressly provided by statutory mandate. For example, the 2002 Farm Bill and subsequent farm bills have included a regional equity component, which allowed lower scoring parcels to enroll above higher scoring parcels if the state had not reached a certain spending

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https://www.nytimes.com/2013/07/20/business/richer-farmers-bigger-subsidies.html [https://perma.cc/WN7Z-A7EX] (summarizing the flow of USDA subsidies generally).

226. *See, e.g.*, NAT'L SUSTAINABLE AGRIC. COAL., *Path to the 2018 Farm Bill*, NSAC BLOG (Mar. 14, 2017), http://sustainableagriculture.net/blog/path-to-2018-farm-bill-conservation [https://perma.cc/884L-PKY8] (criticizing the amount of EQIP funding tailored to concentrated animal feeding operations (CAFOs) and large-scale irrigation projects).

227. A.P. Reimer et al., *Farmers and Conservation Programs: Explaining Differences in Environmental Quality Incentives Program Applications Between States*, 68 J. SOIL & WATER CONSERVATION, Mar./Apr. 2013, at 110-19 (discussing the factors shaping farmer participation in the EQIP program across states); *see also* Laura McCann & Roger Claassen, *Farmer Transaction Costs of Participating in Federal Conservation Programs: Magnitudes and Determinants*, 92 LAND ECON. 256, 256-60 (2016) (exploring these issues to farmer participation). One factor that may shape enrollment is that transaction costs may favor larger production forms as these may constitute a real or perceived barrier to entry to these programs.

228. VICTOR OLIVEIRA, ECON. RESEARCH SERV., USDA, EIB-190, THE FOOD ASSISTANCE LANDSCAPE: FY 2017 ANNUAL REPORT (2018), https://www.ers.usda.gov/webdocs/publications/88074/eib-190.pdf?v=43174 [https://perma.cc/U4MA-ZAYV] (profiling spending under this program).

229. *See* Chuck Abbott, *Farm Bill? Rural America Doesn't Have the Time,* SUCCESSFUL FARMING (Apr. 16, 2018), https://www.agriculture.com/news/business/farm-bill-rural-america-doesn-t-have-the-time [https://perma.cc/VWJ4-4N82] (explaining that the "traditional urban-rural alliance for passage of a farm bill is fraying," and explaining the policy challenges this presents).

230. *See* Philip Brasher, *Lesson #4: Linking Farm, Food Programs Is Crucial to Farm Bill Passage*, AGRI-PULSE (Mar. 5, 2017), https://www.agri-pulse.com/articles/8996-lesson-4-linking-farm-food-programs-is-crucial-to-farm-bill-success [https://perma.cc/VQ4X-ZCMT] (discussing this balance/alliance).

benchmark (or share of program funding).[231] For another example, for CSP, the NRCS allocates the enrolled acreage cap amongst states by the state's percentage of national agricultural land base to provide a rationalized frame for balancing different states' needs.[232] While there is clearly an attempt to promote some degree of functional balance, the nature of the programs (as discussed below), such as their operation and function, necessarily impacts the allocation of these funds. A state's share of conservation program funds is often contested and is not without controversy and is impacted by both appropriative and administrative determinations regarding how to administer a specific conservation program, which will be further explored below.[233]

C. Programmatic Regionality

Once past the regionalism of agriculture and the appropriations cycle, program delivery also matters and has an impact in several ways. This section will explore the concept of programmatic regionality and how impacts can vary substantially through program design, discretionary agency decisions, and program delivery.

1. Program Design and the Nature of National Programming

The first type of regional variation or impact that regionality has on farm program delivery is embedded into the design of the actual programs. Given the targeted nature of a specific national conservation program, it may be utilized more in certain areas of the country to address certain environmental challenges or be better suited for the types of agricultural production/operations that are located within a specific geographical context.[234]

For example, consider the impacts of the relative design of the two primary conservation easement strands within the ACEP under the 2014 Farm Bill. ACEP-ALE and the ACEP-WRE have different levels of interest and engagement in

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231. Cain & Lovejoy, *supra* note 66, at 41. The 2014 Farm Bill had similar requirements allowing each to state to access, if possible, at least 0.6% of the funds made available for a conservation program. *See* Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 § 2603 (2014); CYNTHIA NICKERSON ET AL., ECON. RESEARCH SERV., USDA, THE FARM BILL'S REGIONAL EQUITY PROVISION: IMPACTS ON CONSERVATION PROJECT OUTCOMES, ERR-98 at 21-23 (2010), https://ageconsearch.umn.edu/bitstream/95452/2/ERR98.pdf [https://perma.cc/A8P7-3STA] (noting the complex tradeoffs made by inclusion of the regional equity provision and how this might influence future project design).

232. NRCS, FINAL COST-EFFECTIVENESS ANALYSIS FOR THE CONSERVATION STEWARDSHIP PROGRAM 1, 18-34 (2010) (discussing allocations from the 2009 ranking period as well as discretionary decision points influencing program delivery).

233. *See, e.g.*, Emily Gilbert et al., *Improving Federal Allocation of EQIP Funding*, DUKE NICHOLAS SCH. OF THE ENV'T 1, 8 (2013), https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/6796/MP%20EQIP%20_QinJ.pdf;sequence=1 [https://perma.cc/DB44-994C] (exploring EQIP funding and state-level share issues within the context of working to expand North Carolina's share of global EQIP funding).

234. *See Protect Your Land*, AM. FARMLAND TRUST, https://www.farmlandinfo.org/directory [https://perma.cc/22C7-45D6]. For example, in Iowa, only one land trust (focused on Johnson County) is listed in the Farmland Preservation Directory for the American Farmland Trust—the Burr Oak Land Trust—indicating a lack of partnering organizations for the use of ACEP-ALE in the state.

different regions.[235] The ACEP-WRE is highly popular in states with substantial wetlands and in states along rivers or migratory bird flyways, such as Arkansas.[236] As these easements are actually acquired by the NRCS, landowners can apply directly to the agency in order to enroll their lands without relying on a third party state agency or land trust being available to secure these lands.[237] On the other hand, ACEP-ALE benefits states with farmland preservation programs (the Northeast) as well as areas with substantial grasslands or working ranches by virtue of the statutory requirements for enrolling lands.[238] In order to enroll in the ACEP-ALE program, a landowner has to partner with a land trust or state agency who, in turn, has to contribute at least twenty-five percent of the project's cost in order to meet the cost-share requirements under ACEP-ALE.[239] Based on the requirement for match, ACEP-ALE benefits areas with dedicated funding from either local or state government for farmland preservation and is perhaps better suited to certain agricultural forms and challenges (for example, protecting agriculture in areas with substantial development pressure).[240] States such as Iowa, where farmland loss has not traditionally been as pressing of an issue, are less able to benefit from this program.[241] Although it may not be apparent on its face, the actual application of a conservation program and its targeted mission has disparate regional consequences.

2. *Discretionary Regionality*

Beyond program design, an agency's decision-making and administrative oversight of a program can have material impacts. Agency leadership and national

235. NAT'L SUSTAINABLE AGRIC. COAL., *A Closer Look at the Agricultural Conservation Easement Program in 2014*, NSAC BLOG (Feb. 12, 2015), http://sustainableagriculture.net/blog/acep-fy14-drilldown/ [https://perma.cc/3CM6-R3TF] (providing a breakdown by project type and dollars allocated by state between ACEP-ALE and ACEP-WRE in FY2014).

236. *Wetland Reserve Program*, ARK. NRCS, USDA (last visited Feb. 22, 2019) https://www.nrcs.usda.gov/wps/portal/nrcs/detail/ar/newsroom/?cid=nrcs142p2_034775 [https://perma.cc/HJ3X-VELW] (noting Arkansas is a national leader in enrolled wetlands, ranking second currently).

237. *See* AM. FARMLAND TRUST, FARMLAND INFO. CTR., AGRICULTURAL CONSERVATION EASEMENTS (2016), https://www.farmlandinfo.org/agricultural-conservation-easements [https://perma.cc/N3WS-HUAA] (providing overview of this program's impacts).

238. NAT'L SUSTAINABLE AGRIC. COAL., *supra* note 235.

239. 7 C.F.R. § 1468.20(a)(1) (2016); NRCS, USDA, NRCS GENERAL MANUAL, TITLE 440, PART 528.43 (2015).

240. AM. FARMLAND TRUST, FARMLAND INFO. CTR., STATUS OF STATE PACE PROGRAMS (2016) https://www.farmlandinfo.org/sites/default/files/State_Purchase_of_Agricultural_Conservation_Easement_Programs_2016_AFT_FIC_09-16.pdf [https://perma.cc/X8A3-GTMW]. For example, one of the factors for eligibility for ACEP-ALE is that the land actually faces developmental pressure or risks being converted to non-agricultural use. This degree of risk may not be present in areas of the country where development pressure is lacking. In such areas, it may be less likely for land trusts to be targeting working lands conservation, which likely complicates efforts to utilize ACEP-ALE in some areas nationally.

241. *See* Paul D. Gottlieb, *Is America Running Out of Farmland*?, CHOICES, Fall 2015, (charting Iowa's farmland situation); *see also* Donnelle Eller, *Iowa Farmers Getting Squeezed Out by Land Preservation Tax Credits, Farm Bureau Says,* DES MOINES REGISTER (Feb. 16, 2017), https://www.desmoinesregister.com/story/money/agriculture/2017/02/16/iowa-farmers-getting-squeezed-out-land-preservation-tax-credits-farm-bureau-says/96438658/ [https://perma.cc/LT89-Z5M9] (profiling opposition within the state to tax credits supporting land acquisition).

program staff have substantial discretion in implementing the often broad mandates provided by Congress.[242] This does not happen in a vacuum and involves political appointees, state level staff, and public input in both the rulemaking and the directive process.[243] Depending on the political priorities of the agency, a program can have regional variation and impact. In many instances, this is necessary to allow program staff to work through the complex issues of determining how a program should be administered to find a working balance between maximizing conservation impact and ensuring that producers nationwide are able to access a program as appropriate. This balancing happens on a few levels and varies by program with regard to funding levels, the types of conservation activity the program supports, and how the program is ultimately administered on the ground to ensure that it works for the targeted producers.

3. *Administrative Regionality*

Beyond discretionary decisions made by policymakers, there are differences that result from the day to day operation of agency programs. NRCS is very much structured on a state by state basis, with considerable authority resting with a state conservationist and state technical committees.[244] For example, within the context of EQIP, as "environmental conditions vary widely across the United States, the specific conservation practices approved through EQIP must be determined locally."[245] This program design, as discussed above, allows for the express consideration of regional perspectives and needs within national conservation programs separate from allocative and discretionary decisions made at the federal level. This may not occur evenly, or ultimately may result in all production types necessarily being covered. Most conservation programs are designed to be sufficiently flexible to address a wide range of contemporary agricultural production, which is driven at the state and local level by producer needs.

To help bridge the gap between federal policy and more localized conservation and production concerns, NRCS's state technical committees play an important role in shaping priorities—including providing information and recommendations on "conservation priorities and criteria for natural resources conservation activities and programs, including application and funding criteria, recommended practices, and program payment percentages."[246] By agency policy, these committees help to prioritize state level goals in concert with state conservationists and are designed to

242. Sarina Katz et al., *Saving Farm Bill Conservation Programs,* SAVING LAND MAG., Summer 2017, https://www.landtrustalliance.org/news/saving-farm-bill-conservation-programs [https://perma.cc/4D3L-XJTL] (discussing this discretion within the rulemaking process).

243. *See, e.g.*, NAT'L SUSTAINABLE AGRIC. COAL., AGRICULTURAL CONSERVATION EASEMENT PROGRAM: RECOMMENDATIONS FOR 2014 FARM BILL IMPLEMENTATION, http://sustainableagriculture.net/wp-content/uploads/2015/04/NSAC-ACEP-Recommendations_June2014.pdf [https://perma.cc/JA5F-THHG] (providing comments to NRCS regarding program implementation).

244. *See infra* at II.B.

245. Hernden v. United States, 726 F.3d 1042, 1042 (8th Cir. 2013) (discussing the role of state technical committees).

246. NRCS, USDA, NRCS GENERAL MANUAL, TITLE 440, PART 501.21(1) (2015) (providing overview of the role of the state technical committees and the various functions this advisory group plays); *see generally* 7 C.F.R. § 610.

represent a diversity of interests.[247] For example, in Maine, the NRCS state technical committee includes representatives from the Maine Association of Conservation Districts, state and federal agencies, the Nature Conservancy, the Maine Farm Bureau, individual producers, and the Maine Sustainable Agriculture Society, to name a few partnering entities.[248] Having local partners involved to share information and insight on a wide variety of policy issues helps to ensure that the agency's decisions are tailored to the situation in the state.[249]

4. *Express Targeting of Localized Conditions*

Beyond the more embedded aspects of regionalism inherent in conservation easement programs generally, a number of Farm Bill initiatives over the years have specifically focused on addressing localized issues of conservation concern or have allocated portions of the Farm Bill appropriated funds to address this issue. For example, the 2008 Farm Bill included two specific authorities to address water quality issues—the Chesapeake Bay Watershed Program and the Great Lakes Basin Program.[250] To examine one of these programs in greater detail, the Chesapeake Bay Watershed Initiative was designed to improve and restore water and air quality within the basin, and allocated considerable funding to achieve these goals.[251] "The Initiative focus[ed] on high-priority areas, including the Susquehanna, Shenandoah, Potomac, and Patuxent River basins . . . , [b]y supporting certain agricultural practices such as nutrient management, vegetative buffers, and crop residue management and providing technical and financing assistance for these priority areas."[252] The program addressed resource concerns in three focus areas—cropland, grazing, and livestock waste, and the eligible practices that would mitigate these concerns.[253] The authorities provided under the 2008 Farm Bill did not actually create new program vehicles, but simply authorized or focused the Agency's attention and resources, through its other program offerings, to addressing these specific issues within this geographic band—here, specifically through the

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247. NRCS, USDA, NRCS GENERAL MANUAL, TITLE 440, PART 501.22(B) (2015) (providing list of mandatory members/represented interests of a state technical committee).

248. *State Technical Committee Members*, ME. NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/me/technical/stc/?cid=nrcs141p2_002896 [https://perma.cc/U4TM-6PS8].

249. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY, U.S. SENATE, AGRICULTURAL CONSERVATION: SURVEY OF USDA STATE TECHNICAL COMMITTEE MEMBERS (Feb. 2002) https://www.gao.gov/new.items/d02371sp.pdf [https://perma.cc/UV78-LPGA] (explaining the role of the state technical committees and surveying committee members with regard to their views on the effectiveness of various USDA conservation programs).

250. Act of June 18, 2008, Pub. L. No. 110-246, §§ 2604-2605, 122 Stat. 1797 (2008). Notably, these authorities were repealed in the 2014 Farm Bill and were replaced by and consolidated within the Regional Conservation Partnership Program (RCPP) which will be discussed in the following section.

251. Under the 2008 Farm Bill, Congress authorized $188 million for work within this targeted area "to improve the water quality in this critical area." *Chesapeake Bay Watershed Initiative*, NRCS, USDA, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1047308.pdf [https://perma.cc/U8S2-XPDM] (explaining program and intended outcomes).

252. RENA STEINZOR & SHANA C. JONES, CTR. FOR PROGRESSIVE REFORM, REAUTHORIZING THE CHESAPEAKE BAY PROGRAM: EXCHANGING PROMISES FOR RESULTS 14 (2009).

253. *See id.* at 10, 13.

authorities of EQIP.[254]

5. Regionality by Design—The Regional Conservation Partnership Program

Most recently, the Regional Conservation Partnership Program ("RCPP") has begun to change the ad hoc nature of regional efforts within the Farm Bill to provide additional and specific authority for the agency to address targeted areas of conservation concern through partnerships.[255] The specific purpose of the RCPP was to facilitate partnering with local organizations through the agency's traditional covered programs such as EQIP, CSP, and ACEP, but with a few specific changes to provide the flexibility and the authority to support more collaborative initiatives.[256]

Under RCPP, NRCS enters into partnership agreements to first define the relationship.[257] "Partners are required to provide a significant contribution to the overall cost of the project, including in-kind services such as monitoring, conservation planning, and producer assistance" with the idea of leveraging these resources to maximize conservation gain.[258] For the 2014 Farm Bill, "RCPP uses 7% of available conservation program funds plus an additional $100 million annually in mandatory funding to address specific natural resource concerns in selected project areas."[259]

The primary difference between RCPP and past efforts is this program's reliance on local sponsors/partners for program delivery.[260] NRCS's view is that "the greater flexibility under the Regional Conservation Partnership Program will allow [the] agency to work on a larger, more regional scale than farm-by-farm or ranch-by-

254. *See generally Chesapeake Bay Water Initiative*, NRCS, USDA (July 2011), https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/?cid=nrcs144p2_027068 [https://perma.cc/27DY-P9AF].

255. *See generally* Agricultural Act of 2014, Pub. L. No. 113-79, § 2401, 128 Stat. 649; *see also About RCPP*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/farmbill/rcpp/?cid=nrcseprd1308280 [https://perma.cc/DT8K-QFXY].

256. *Regional Conservation Partnership Program,* NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/farmbill/rcpp/ [https://perma.cc/K6JN-AHP3].

257. *See Strengthening Conservation with Regional Partnerships,* NRCS, USDA, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1252536.pdf [https://perma.cc/3QH6-545C].

258. *Regional Conservation Partnership Program*, NAT'L SUSTAINABLE AGRIC. COAL., http://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/cooperative-conservation-partnership-initiative/ [https://perma.cc/U72P-P9GP] (explaining the program and its possible impacts).

259. STUBBS, *supra* note 78, at 12.

260. *See* Lauren Manning, *An Interview with Outgoing Secretary of Agriculture Tom Vilsack: Reflections on His Legacy & Challenges Facing a New Era in American Agricultural Policy*, 13 J. FOOD L. & POL'Y 162, 173-74 (quoting Vilsack as stating "I think we saw an example of [leveraging partnerships] with the Regional Conservation Partnership Program that essentially said, look, we're going to put money aside . . . and we're going to leverage that into more outside the federal governmental resources committed to conservation"); *see also* Coppess, *supra* note 164, at 377 (noting that "[u]nlike previous conservation programs, RCPP is unique in that it requires matching assistance from non-federal entity partners to leverage private funding for region-wide conservation outcomes").

ranch."[261] RCPP also allows the agency to work in multiple areas across multiple programs with dedicated funding streams. In the past, Congress has provided specific authorities (targeted authorities) for addressing areas of specific conservation concern, such as the Great Lakes Basin Program discussed above.[262] Under RCPP, NRCS has the ability, with partner input, to create its own targeted areas and provides the flexibility to tailor one or more covered programs to the specific needs as laid out and demonstrated by those responding to the Request for Proposals.[263] Last, RCPP is to add regulatory flexibility.[264] The statute/rule allows NRCS to waive regulatory requirements to the extent that this helps promote the targeted conservation objectives.[265] While statutory requirements cannot be waived, this regulatory flexibility may allow projects that would otherwise be constrained through agency-created rulemaking to achieve their objectives.[266]

Vermont NRCS's experience with the RCPP provides a lens into its effectiveness and operation.[267] To date, Vermont NRCS has created or worked with partners on six projects—ranging from state level projects focused on forest health and management practices to participation in a national level project seeking to improve agricultural and forestry practices with the goal of improving Lake Champlain water quality.[268] For FY2018, NRCS has selected two state-level projects

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261. Ellyn Ferguson, *USDA Sets Funds for Broad Conservation Push*, CQ ROLL CALL, Jan. 15, 2015, at 1, 2015 WL 179327 (quoting then NRCS Chief Jason Weller on the impact of this program).

262. *See supra* Section IV.C.4.

263. *See* NRCS, USDA, NRCS GENERAL MANUAL, TITLE 440, PART 529.20 (2017); *see also* Neil C. Kamman & Ethan Swith, *Tactical Basin Planning as the Vehicle for Implementation of the Vermont Clean Water Act*, 17 VT. J. ENVT'L. L. 710, 725 (2016) (profiling the role of partnerships in RCPP implementation of various Vermont programs).

264. *See* Food Security Act of 1985, Pub. L. 99-198, § 1271C(b)(1)(B), 99 Stat. 1504. Even this degree of flexibility has been viewed as insufficient. *See* Regional Conservation Partnership Improvement Act, https://www.agriculture.senate.gov/imo/media/doc/RCPP%20Improvement%20Act%20-%20One%20Page%20Summary.pdf [https://perma.cc/T6SE-3EC3] (proposing moving beyond covered programs for the RCPP); Jacqueline Toth, *Stabenow, Ernest Team Up on Bill To Change Conservation Program*, CQ ROLL CALL, Oct. 18, 2017, at *1, 2017 WL 4674812 (2018) (discussing this proposed legislation).

265. *See Announcement of Program Funding No. USDA-NRCS-NHQ-RCPP-17-01 for Fiscal Year 2017*, NRSC 1, 5-6 (March 14, 2016) (on file with author) (explaining the role of RCPP in adjusting covered program terms and requesting that applicants seeking adjustments to program requirements should contact NRCS in the pre-proposal stage to determine whether this will be allowable and qualify as non-statutory).

266. *See* NRCS, USDA, NRCS GENERAL MANUAL, TITLE 440, PART 529.26, Adjustment of Terms (2017) (explaining the process for obtaining an adjustment of terms). For example, an adjustment of terms that might be approvable is adjusting ranking factors in a given jurisdiction to "better reflect unique local circumstances and purposes." *Id.*

267. *See RCPP in Vermont: Program Overview*, VT. NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/vt/programs/farmbill/rcpp/ [https://perma.cc/KCU8-DW2A]; *see also Regional Conservation Partnership Program (RCPP) Partnering for Conservation Solutions in Vermont*, VT. NRCS, USDA (on file with author) (summarizing the status of the various RCPP projects in the state through 2017).

268. The Lake Champlain Regional Conservation Partnership Program cost $16 million and was the second largest agreement for the program in its initial year. *See* VT. DEP'T OF ENVTL. CONSERVATION, LAKE CHAMPLAIN REGIONAL CONSERVATION PARTNERSHIP PROGRAM FREQUENTLY ASKED QUESTIONS AND/OR QUESTIONS FROM THE WEBINAR EVENT (on file with author) (discussing the scale

for RCPP funding: (1) Connecting the Connecticut River Watershed (a project led by The Nature Conservancy with an NRCS investment of nearly $5 million), focused on addressing habitat for fish and wildlife along the four New England states within this targeted watershed; and (2) Nutrient Management Planning for Soil and Water (a project led by the Vermont Association of Conservation Districts with an NRCS investment of $800,000), focused on creating nutrient management plans for an additional eighty small farmers (16,000 acres of land) to reduce phosphorus loading into Lake Champlain.[269] For an example of an ongoing project, take the Cold Hollow to Canada project launched in 2017, which operated in seven towns in Northern Vermont—and built upon an existing cross boundary management scheme.[270] The program "initially engaged twelve landowners spanning over 2,000 acres in the town of Enosburg. RCPP [helped] expand the work to 50 landowners and 8,000 acres by adding woodlots in Richford and Montgomery and the existing partners in Enosburg."[271] As a result, "[t]he effort [encouraged] Vermont's private forest owners to manage wildlife habitat, find solutions for the effects of climate change, and develop ways to help forests adapt to changing conditions" through a total federal grant of $640,000.[272] This works through a variety of technical assistance, conservation initiatives, outreach, and citizen science to accomplish the overall project goals, and results in a very different program outreach and delivery than the agency has utilized in the past.[273]

Overall, RCPP represents the furthest that the envelope for regional conservation programming has been pushed to date as far as leveraging partner support and working across various conservation programs in a regional fashion or focused manner.[274] Whether this continues to be the trend depends on a variety of factors—production prices, the effectiveness of the program in delivering desired conservation objectives, and the ability of the agency to administer and effectively

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and role of this partnership agreement); *see also* VT. AGENCY OF NAT'L RESOURCES, *The Lake Champlain Regional Conservation Partnership Program: Accelerated Implementation of Agricultural and Forestry Conservation Practices in the Lake Champlain Watershed of Vermont and New York*, VERMONT.GOV (2016), http://dec.vermont.gov/sites/dec/files/wsm/erp/docs/FFY2016_November_RCPP_Report_ID449.docx.pdf [https://perma.cc/S9LG-Y96G]. This grant continues through 2020 and provides "financial and technical assistance to agricultural and forest landowners for the development and implementation of water quality improvement projects in the Lake Champlain Basin." VT. DEP'T OF ENVTL. CONSERVATION, *Lake Champlain Regional Conservation Partnership Program (RCPP)*, VERMONT.GOV, http://dec.vermont.gov/watershed/cwi/rcpp [https://perma.cc/E75A-ETD3].

269. *Regional Conservation Partnership Program: FY'18 Projects by State*, NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/farmbill/rcpp/ [https://perma.cc/K6JN-AHP3] (providing overview of all RCPP projects for the current fiscal year).

270. *See generally* COLD HOLLOW TO CANADA, https://www.coldhollowtocanada.org/ [https://perma.cc/GTK2-XESU] (providing overview of project and project partners/funders).

271. News Release, *NCPP Expands Woodland Management Program in Vermont*, Vt. NRCS, USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/newsroom/releases/?cid=nrcseprd1308856 [https://perma.cc/758P-XXWG].

272. *Id.*

273. *See, e.g.*, *Woodlots Program*, COLD HOLLOW TO CANADA, https://www.coldhollowtocanada.org/what/woodlots/ [https://perma.cc/8AS4-Q72C].

274. *See generally* Adam Reimer, *Ecological Modernization in U.S. Agri-Environmental Programs: Trends in the 2014 Farm Bill*, 47 LAND USE POL'Y 209 (2015) (summarizing these shifts in conservation policy through the 2014 Farm Bill).

provide ongoing oversight.[275]

V. REGIONALITY AND THE NEXT CONSERVATION TITLE

Given the complicated, bifurcated, and divided nature of our agricultural system, it is likely that there will continue to be an additional focus on incorporating regionalism or regional flexibility within the next conservation title. In order to maximize the benefits of such a potential shift, there are a few factors to consider and evaluate in how to incorporate the increasing desire to include regional factors within national conservation programs, and involve greater partnership support and funding, while still ensuring that the federal investment is being maximized to provide its intended degree of benefit. This section will provide several specific recommendations, including the need for strong national program oversight to increase agency transparency, with an eye to maximizing the value of regionality, while minimizing the potential drawbacks.

A. Defining a Clear Role of National Program Staff and Oversight

A regional approach is valuable, as is partnering to leverage scarce resources, but thorough national oversight as well as a baseline for conservation practices are necessary building blocks within this program for a few reasons.

1. Reliance on National Program/Specialized Staffing

First, it is often difficult to recruit and retain specialized expertise, to the degree needed to run the types of programs that the USDA is now tasked with managing, without using a national platform to work across state lines. Leveraging the expertise of national program staff to benefit national program delivery, rather than creating fifty different operational centers, is likely to provide comparatively streamlined program delivery and will be necessary to ensure the agency's compliance with its legal obligations.[276] For example, for the ACEP program, the NRCS has recently shifted much of the back of the house or transaction specific work away from the various state offices to a national team, and to specifically recruit transactional experience, with the assistance of the USDA's Office of General Counsel, to better and more efficiently accomplish these increasingly complicated real estate transactions.[277] To the extent that RCPP relies on covered programs, such as ACEP,

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275. *See generally* David Orden & Carl Zulauf, *Political Economy of the 2014 Farm Bill*, 97 AM. J. AGRIC. ECON. 1298 (2015) (charting the policy issues shaping the 2014 Farm Bill's conservation title); *see also* Larkin A. Powell, *Periodic Corrections to Agricultural Land Values Provide Opportunity for Conservation*, J. SOIL & WATER CONSERVATION, Mar/Apr 2015, at 39A (noting the relationship between program design and land prices as a function of policy shifts over time).

276. NRCS, EASEMENT SUPPORT SERVICES IMPLEMENTATION EXECUTIVE SUMMARY (July 2017), https://directives.sc.egov.usda.gov/OpenNonWebContent.aspx?content=41255.wba [https://perma.cc/M434-PQ2F].

277. *See Conservation and Forestry: Perspectives on the Past and Future Direction for the 2018 Farm Bill Before the S. Comm. of Agric., Nutrition, & Forestry*, 115th Cong. 3-4 (2017) [hereinafter *Hearings on 2018 Farm Bill*] (testimony of Jimmy Bramblett, Deputy Chief for Programs, Natural Resources Conservation Service, USDA) (explaining the rollout of NRC's Easement Support Services program to improve operations of the easement program).

developing strong national level teams able to provide support and oversight to these programs in the field will be vital to their success—and to the efficient and timely administration of these programs and program funds across the various states and partners.

2. *Defining Floors/Policy Frameworks and Functional Oversight*

Second, there is a value to consistency. When a program diverges from a standard norm, there can be criticisms, both legal and through public perception, of unfairness and inconsistent treatment of producers across state lines.[278] For instance, allowing changes or modifications to a conserved property in one region may lead to challenges in another, as far as the agency not having a coherent or consistent position. Whether this is a legal or a political challenge is somewhat irrelevant as both can cause potential problems to the effective operation of the agency. Divergent policies and requirements also, by necessity, increase transactional and administrative costs both in initial implementation and over the life of the program. In short, exceeding certain standards of deviation from an established mean adds both legal risk and uncertainty and costs—both reputational and administrative—that should be appropriately mitigated.[279]

B. *The Move Towards an Expanded RCPP*

To effectively accomplish conservation gains, the move towards regionalism and regional targeting of conservation priorities has been, and will likely continue to be, a more express regional approach to program delivery. While the implicit regionalism embedded within the conservation title will remain, if conservation advocates retain the goal of having a more direct voice and stake in shaping the allocations and use of this funding stream, the most likely way to address this is to encourage the further expansion of RCPP. The RCPP, although a challenging program to administer, perhaps represents a growing recognition that other stakeholders "may lead plan development and implementation" and leverage scarce agency resources.[280] While other non-conservation agencies have long experimented with policies, such as block grants, to more effectively partner, in both planning and in funding, with localized partners, the RCPP represents an initial, although sizable, shift in this direction within conservation title funds. With a specific appropriation and seven percent of other covered programs as its operating capital under its 2014 authorities, this is a substantial funding stream that has been able to attract a diverse array of projects across the country that is now working to address "284 high-impact projects, bringing together more than 2,000 conservation partners, who have

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278. Bonnie, *supra* note 133, at 187-88 (discussing program delivery issues in North Carolina and the challenges in balancing national priorities with state and local concerns and actual program delivery).

279. Given the need for national leadership and to develop coherence within its partnership practices, the ability of the agency to modify or even waive regulatory requirements under the RCPP will merit further examination to see whether, under the 2014 Farm Bill, the flexibility this provision was designed to achieve is able to provide sufficient gains to merit the additional associated administrative costs.

280. Konopacky & Ristino, *supra* note 85, at 667.

contributed an estimated $1.4 billion in financial and technical assistance" (beyond the $800 million contributed by NRCS).[281] In implementing the 2018 Farm Bill, public and congressional support and reaction to the first wave of these projects is telling as far as whether this represents a larger and lasting trend towards partnership, or if this will be somewhat of a high-water mark, with a retreat to more traditional, and in some ways established and straightforward, farm bill programming that has survived past reauthorization cycles.[282]

C. Ensuring Transparency for More Effective Partnerships

In order to move to a regional platform, the involvement of partners is critical.[283] The more integrated a partner can be to the agency's mission and program delivery, the more conservation benefit can be actually be delivered, or the better the partnering entities will be in ensuring they are avoiding overlap and redundancy in their efforts.[284] A challenge to this integration is the application of confidentiality provisions that apply to the NRCS and other USDA agencies.[285] Section 1619 of the Farm Bill bars USDA from disclosing information provided by farmers relating to their agricultural operations (or geospatial information) to third parties.[286] While this may seem straightforward, the practical impact of this prohibition is to occasionally complicate partnership efforts.[287] There are exceptions to Section 1619, such as getting the consent of the producer to share this information, but this is hard to accomplish in practice as there often is not a way to clearly identify those that the partnering entity should actually be targeting to increase their environmental performance.[288] Another exception applies to situations where the partnering entity is directly working to deliver an NRCS covered program and where the partner signs a confidentiality agreement.[289] This approach, however, only works when the partner is again directly working with or on behalf of the agency in delivering its programs, which limits the reach of the partner in affirmatively linking its efforts

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281. *Hearings on 2018 Farm Bill*, *supra* note 277, at 4 (testimony of Jimmy Bramblett, Deputy Chief for Programs, Natural Resources Conservation Service, USDA).

282. Coppess, *supra* note 164, at 377 (citing this issue and the possible implications of this from a conservation policy design perspective).

283. *See, e.g.*, Callie Eideberg, *How the Farm Bill Can Scale Conservation*, ENVTL. DEFENSE FUND, https://www.edf.org/ecosystems/how-farm-bill-can-scale-conservation [https://perma.cc/577V-45PQ] (explaining the crucial role partners can play in expanding the reach of farm bill programs).

284. *See generally Rehabilitation of the Chesapeake Bay: Healing the Bay the Voluntary Way: Hearing Before the Subcomm. on Conservation & Forestry of the H. Comm. on Agric.*, 114th Cong. (2016) (statement of Russell C. Redding, Sec'y, Pa. Dep't of Agric.) (summarizing the potential issues associated with Section 1619 in partnering with NRCS).

285. Ristino & Steier, *supra* note 50, at 102-04 (discussing the challenges of statutory confidentiality provisions as fairly recent additions to the Farm Bill).

286. 7 U.S.C. § 8791(b) (2017).

287. Advocates for general governmental transparency are also highly critical of the enactment of confidentiality provisions. *See* Andrea Freeman, *The 2014 Farm Bill: Farm Subsidies and Food Oppression*, 38 SEATTLE L. REV. 1271, 1271-73 (2015); *see also* Benjamin Cooke & Gabriella Corbo-Perkins, *Co-opting and Resisting Market Based Instruments for Private Land Conservation*, LAND USE POL'Y, Jan. 2018, at 172-74 (2017) (noting these challenges as causing equity and effectiveness issues in relation to society's investment in these lands).

288. 7 U.S.C. § 8791(b)(4)(c).

289. *Id.* § 8791(b)(3).

with those already in progress within the agency.[290]

These confidentiality provisions also can make it difficult to determine which producers NRCS is working with versus those enrolled in a state program to avoid duplicative efforts.[291] For example, if a state partner wants to use its own programming to achieve similar goals to a riparian buffer program, the state partner would not necessarily be able to directly access information from NRCS on where this work has already been occurring.[292] The unintended consequence of Section 1619 of the 2008 Farm Bill has been to make integrated project planning, for some types of programming, more difficult and less effective than would otherwise be the case.[293] In a move to a regional conservation title where partnerships are to play a bigger role, potential revisions to Section 1619 and the application of the confidentiality provision may be helpful for avoiding this obstacle towards more integrated project planning.

D. Working to Address the Challenges of Regional Program Delivery

Last, the challenge of program delivery on a regional basis is providing consistent conservation gains.[294] An additional challenge is to avoid having the putative benefits of partnering with interested parties drive up program delivery costs as their administrative costs could potentially be a drag on overall investment. NRCS tries to avoid this issue by requiring partners to bring substantial capital to the project as a requirement of program participation through the RCPP, but it is not clear how effectively actual partnership dollars are being leveraged versus their non-monetary contributions. Additionally, this type of program is very difficult to administer given its high reliance on partners. In making awards to partners, rather than individual farmers, NRCS must have a high degree of confidence in its partners and that the partners are able to track their funding down the farmer level. Initial OIG audit activity found at least one potential compliance violation (in Oregon), which was explored, and after additional investigation, it was determined that all payments were made to eligible producers; this demonstrates the potential for oversight challenges and compliance issues.[295] Overall, while partners can be valuable, the partners have

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290. *See* Linda Breggin & D. Bruce Myers, *Subsidies with Responsibilities: Placing Stewardship and Disclosure Conditions on Government Payments to Large-Scale Commodity Crop Operations*, 37 HARV. ENVT'L L. REV. 487, 512 n.115 (2013).

291. Adena R. Rissman, *Evaluating Conservation Effectiveness and Adaptation in Dynamic Landscapes*, 74 LAW & CONTEMP. PROB. 145, 169-71 (2011).

292. Adena R. Rissman et al., *Public Access to Spatial Data on Private-Land Conservation*, 22(2) ECOLOGY & SOC'Y, June 2017 ("[L]ack of information impacts governments, nonprofits, and citizen groups. At the state level, conservation agency employees may be forced to work with information that is aggregated at the county level, when their planning occurs at the watershed scale.").

293. *See id.* (charting the complications and issues within getting information on private land efforts).

294. *See, e.g.*, USDA OIG, AUDIT REPORT 10601-0003-31, NRCS: WETLAND CONSERVATION PROVISIONS IN THE PRAIRIE POTHOLE REGION 8 (Jan. 2017), https://www.usda.gov/oig/webdocs/10601-0003-31.pdf [https://perma.cc/BF5D-66YR] (noting interpretational differences in administering wetland compliance in the North Central region).

295. USDA, AUDIT REPORT 10601-0004-31(2), NRCS REGIONAL CONSERVATION PARTNERSHIP PROGRAM CONTROLS—INTERIM REPORT 4 (Nov. 2017), https://www.usda.gov/oig/webdocs/10601-

to be competent, responsible, and accountable for delivering conservation on the ground to ensure that this model actually secures and provides net conservation benefit. This will take considerable upfront effort by the agency to vet partners and to learn in its management and oversight of these efforts.

VI. CONCLUSION

Understanding the role that regionalism plays within the conservation title is necessary to gauge and have a sense of what possible objectives may be achievable in the next Farm Bill. When referring to this regionality, not all regionalism is the same and may not have the same meaning or impact. There has been a very gradual historic shift towards addressing conservation issues on a local level through actual policy design, and USDA, working primarily through NRCS, has the tools at the state and local level to tailor policies to work to address the most severe conservation programs challenging our regional and local environments. The challenge to leveraging this framework, tradition, and experience in a coherent and targeted fashion involves working through the issues of developing responsible partnerships with governments and non-profit partners, which include defining the appropriate roles, working to address unnecessary and unhelpful confidentiality restrictions which serve as a practical bar to appropriate levels of information sharing, and ensuring that the targeted conservation benefits are being obtained.

Ultimately, the conservation title, as one of the largest funding sources for addressing the conservation performance of privately-owned and working lands, must be continually re-evaluated.[296] A failure to give appropriate attention and examination to the influences and impacts of this program constitutes at best a missed opportunity, and at worst an inefficient use of taxpayer dollars. Given the degree of variation in environmental conditions that farmers and our regions face, designing programs expressly tailored to take advantage of local knowledge and additional resources may be the best way to ensure that these programs are actually addressing the issues of greatest concern to the impacted communities. Programmatic experience has perhaps already shown that express, rather than de facto, regionalism has the potential to better leverage the resources that partners bring to the table, and can provide clear and transparent conservation benefits across the working landscape.

0004-31(2).pdf [https://perma.cc/CE5T-SASL] (noting the issues and the agency's response to the OIG recommendations).

296. Konopacky & Ristino, *supra* note 85, at 649 n.5 (noting that the Farm Bill's conservation title is our nation's largest investment in working lands conservation).