Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart P – ACEP-WRE Maintenance, Management, Monitoring, and Enforcement

528.150 Overview

A. This subpart provides guidance related to the maintenance, management, monitoring, and enforcement of lands enrolled in the Agricultural Conservation Easement Program - Wetland Reserve Easements (ACEP-WRE) (See Subpart U, "Exhibits," for the ACEP-WRE business process).

B. "Maintenance" is defined as work performed to keep the enrolled land functioning for program purposes for the duration of the enrollment period. Maintenance includes work performed to—

(1) Keep the applied conservation practice functioning for the intended purpose during its life span.
(2) Prevent deterioration of the practice.
(3) Repair damage.
(4) Replace the practice to its original condition if one or more components fail.

C. "Management" includes those activities or measures necessary to properly manage wetland functions and values (especially wildlife habitat) for which the land was enrolled in ACEP-WRE, for the duration of the enrollment. Management requirements may change over time depending on the habitat needs of the enrolled area.

D. "Monitoring" includes the periodic review and assessment of how land enrolled in ACEP-WRE is meeting program purposes and objectives, including an assessment of the ecological functioning of the site and the landowner's program compliance. Monitoring is addressed in Title 440, Conservation Programs Manual (CPM), Part 527, Subpart P.

E. "Enforcement" includes actions needed to ensure landowners and third parties are not violating, encroaching, or trespassing upon NRCS contractual or easement rights.

F. For all enrollment types, NRCS will identify all required management and maintenance of conservation practices, components, activities, and measures in the wetland reserve plan of operations (WRPO).

(1) These activities must be captured in the WRPO through the conservation plan itself or in associated site-specific management plans, operations and maintenance (O&M) plans, practice specification sheets or compatible use authorizations (CUAs).
(2) To the extent possible, NRCS will address landowner implementation of actions on the easement area in a comprehensive manner during the development of the final WRPO.

G. For all easement enrollments and for 30-year contracts on non-Tribal trust, allotted, and individual Indian lands, the landowner is required to obtain a CUA (see section 528.152) before implementing management or maintenance actions identified in the final WRPO or actions requested by the landowner that are prohibited under the terms of the ACEP-WRE easement or 30-year contract.

(1) NRCS is responsible for maintenance and management activities on easement enrollments, but may authorize the landowner or someone other than the landowner to perform maintenance and management activities through a CUA.
(2) If payments for management or maintenance activities are necessary, NRCS may enter into a conservation program contract (CPC) with the landowner or a contribution agreement, a cooperative agreement, an interagency agreement, or a Federal contract. Cooperating partners may include other Federal agencies, State agencies, conservation districts, technical

service providers, or other individuals or entities NRCS has determined have the expertise and capacity to implement the required items.

H. The landowner is responsible for maintenance and management activities on land enrolled through a 30-year contract. The final WRPO is part of the contract or agreement and must describe the management and maintenance activities that the landowner is responsible to implement.

(1) Contracts for 30-year land use on non-Tribal trust, allotted, and individual Indian lands require a CUA to perform activities and measures described in the WRPO.
(2) Contracts for 30-year land use on Tribal trust lands do not require separate CUAs to perform activities, however the principles of compatible and non-compatible uses described in sections 528.152 and 528.153 must be taken into consideration when developing the final WRPO, including management and maintenance activities.
(3) States may elect to use CUAs for 30-year contracts on Tribal trust lands to supplement WRPO documentation and authorize various management and maintenance activities. These CUA requests must be signed by the landowner and BIA and authorized by NRCS prior to implementation.

I. NRCS must conduct annual monitoring of easements and 30-year contracts as described in section 528.156 of this subpart to determine if ACEP-WRE purposes and objectives are being met.

J. Except for establishment costs incurred by the United States and replacement costs not due to the landowner's negligence or malfeasance, all other costs involved in maintenance of fences and similar facilities to exclude livestock are the responsibility of the landowner.

528.151 Management

A. General

The State Conservationist, in consultation with the State Technical Committee (STC), will ensure that easements and 30-year contracts are being properly managed, deficiencies are identified and corrected, and additional work is completed in a timely manner. This will include documenting, certifying, and spot checking to ensure that all phases of enrolled ACEP-WRE projects are being managed to maximize wetland habitat functions and values and accomplish the goals and objectives of the warranty easement deed or 30-year contract and the final WRPO. Easements and 30-year contracts will be monitored at least annually as specified in 440-CPM, Part 527, Subpart P, for ecological and compliance purposes.

B. Management Plans

(1) State Conservationists must ensure that site-specific management plans are included in the final WRPO. These plans are subject to change over time and prescribe how lands will be managed and restoration practices, components, measures, and activities will be implemented to maximize wildlife habitat benefits and wetland functions and values, including the following:
  (i) Hydrology management, including, as applicable, target water depths, draw down rates and timing, and flooding schedules.
  (ii) Vegetation management, including burn plans, noxious weed control, irrigation schedules, and management practices, such as grazing, disking, mowing, haying, and timber management.
(2) The landowner implementation of conservation practices, components, measures, and activities prescribed in the final WRPO requires an approved CUA unless the practices are being implemented as part of an approved CPC (see section 528.152). These include, but are not limited to the following:

(i) Managed timber harvest
(ii) Hydrology management
(iii) Pest management
(iv) Invasive species control
(v) Periodic haying or grazing

(3) Conducting any hydrology manipulation, vegetation manipulation, or other management activities outside of the WRPO and any applicable CUAs, is a violation of the easement or 30-year contract and is prohibited.

528.152 Compatible Uses

A. General

(1) ACEP-WRE lands may be used for compatible economic uses, if such use is permitted by the warranty easement deed or 30-year contract, or authorized under the WRPO and applicable CUAs. The warranty easement deed or 30-year contract identifies that certain activities, such as undeveloped hunting and fishing pursuant to State and Federal regulations, are compatible with ACEP-WRE and thus reserved rights. Most other activities require site-specific evaluation prior to determining whether they are compatible.

Note: Only activities that further both the long-term protection and enhancement of the wetland and other natural values of the enrolled area may be authorized as compatible uses through the CUA process identified in this section.

(2) The State Conservationist, with advice from the STC, will establish guidelines for compatible uses. Approved activities must provide for the full array of habitat types for which the enrollment was established, unless changes in habitat or management objectives are identified by NRCS with input U.S. Fish and Wildlife Service (FWS). CUAs must not adversely affect habitat for migratory birds, at-risk species, and threatened or endangered species.

(3) On easements and 30-year contracts on non-Tribal trust, allotted, and individual Indian lands, CUAs are required any time a landowner is affecting the hydrology or vegetation of the enrollment area, even when the landowner is carrying out management activities determined necessary by NRCS and outlined in the WRPO. If the landowner is implementing conservation practices or activities identified and being funded through a CPC, a separate CUA for those practices is not required. If a landowner activity will occur outside the enrolled area but will affect the hydrology or vegetation within the easement area or 30-year contract area, a CUA is also required, however NRCS cannot provide ACEP funds for such activities.

(4) The initiation of the CUA process may stem from a landowner request or from NRCS-initiated discussions and subsequent agreement with the landowner that certain activities are warranted. A landowner who obtains approval to implement compatible use activities is not under any obligation to implement the activities; however, if the landowner chooses to implement the activities, they must be conducted in accordance with the terms of the authorization.

(5) Since resource conditions change over time, NRCS will not determine that any use is permanently compatible with the project. Therefore, the landowner will not be assured of any specific level or frequency of such use that extends for the duration of the enrollment period, but rather compatible uses will be authorized for a specific period of time. All CUAs will stipulate that NRCS retains the right to modify or cancel the use at any time NRCS determines the use does not further the protection and enhancement objectives of the enrollment. Although the term of a CUA may vary, wetland and biological systems are dynamic and therefore no CUA may be granted for more than 10 years at a time.

(6) To the extent possible, NRCS will address CUAs in a comprehensive manner to minimize administrative burden to NRCS and the landowner. Therefore, one CUA may identify several activities and associated terms and conditions for each activity to be performed by the landowner. Similarly a CUA may simply reference and provide supplemental detail to an adequately detailed site-specific management plan, which may be incorporated into the CUA by reference. The comprehensive treatment of these activities through multi-use CUAs does not limit the ability of NRCS to subsequently modify or cancel a particular prescribed activity.

(7) CUAs are subject to routine revisions and are not recorded with the warranty easement deed. CUAs do not vest any right of any kind with the landowner. If multiple-year CUAs are issued, annual onsite visits are required for the first 2 years to determine if the agreements are being followed and are still appropriate. After the first 2 years of a multiple-year CUA, monitoring will be done in accordance with 440-CPM, Part 527, Subpart P.

B. Prescribing Compatible Uses

(1) All CUAs must be in writing and supported by a technical determination in the case file that clearly documents the basis of activities considered to meet compatibility requirements and guidelines for implementation.

(i) NRCS will provide the FWS, conservation district, and State wildlife agency the opportunity to provide input, but the details of CUAs are determined by NRCS at its sole discretion.

(ii) The method by which input from these partners is sought is at the discretion of the State Conservationist, and it may occur on a project-by-project basis or on a broader basis, such as by geographic area, wetland type, or habitats with similar functions and characteristics.

(iii) Keep materials provided by these partners in the case file; if no input is provided, document that their input was solicited.

(2) Compatible use authorizations are subject to requirements of the National Environmental Policy Act (NEPA). The State Conservationist must document in the case file accordingly and include a completed NRCS-CPA-52 that addresses the proposed activity. The State Conservationist must document how the activity furthers the long-term protection and enhancement of the wetland functions and values of the site, including the impact to habitat for migratory birds, at-risk species, and endangered or threatened species. When evaluating the effects an action will have on the enrolled area, a determination of "no adverse impact" is insufficient justification for authorizing an activity.

(3) A CUA will specifically describe the allowed use in terms of the following:

(i) The person requesting the compatible use

(ii) The activity being authorized and its purpose

(iii) A description of the land to be utilized

(iv) The beginning conditions of the site when the compatible use was authorized

(v) A statement of affect and compatibility

(vi) Method of implementation

(vii) Frequency of the authorized activity

(viii) Timing and intensity of implementation

(ix) Duration of the authorization

(x) Statement that NRCS has the right to modify or cancel CUAs at any time to protect the functions and values of the enrollment area (e.g., if necessary to respond to changing vegetative successional patterns, hydrology, rainfall patterns, and the general response of the easement area to the activity)

(xi) Signatures of the landowner and NRCS representative issuing the authorization

(4) The CUA must clearly reserve to the United States the right to modify or cancel the CUA therefore the following statement must be incorporated in every CUA:

"NRCS retains the right to modify or cancel this compatible use authorization at any time if the NRCS determines that such activities do not further the protection and enhancement objectives of the easement or that the landowner has failed to comply with specified terms and conditions. The landowner engages in such activities at his or her own risk. This authorization does not vest any right of any kind in the landowner. This authorization is null and void after the expiration date specified above. By signing this document, the landowner agrees to the terms described above and on any referenced documents. A landowner is not under any obligation to implement the activities; however, if the landowner chooses to implement the activities, they must be conducted in accordance with the terms of this authorization." (See Subpart U, "Exhibits," for Form AD-1160, "Compatible Use Authorization.")

(5) Economic returns that are realized by the landowner as a result of a CUA being implemented are acceptable.

(6) The State Conservationist makes the final determination of compatibility and is the NRCS responsible Federal official accountable for all such determinations. The State Conservationist may delegate this authority to the Assistant State Conservationist or area conservationist, but this authority may not be delegated any further. Other agency personnel, at the State or field level, may develop the terms and conditions that are considered for final incorporation into a particular CUA. **However, only a CUA executed by the State Conservationist or the appropriate assistant State conservationist or area conservationist will be recognized as an action of the agency.**

(7) All current and active CUA information must be entered into NEST and a copy of the CUA document uploaded into NEST prior to the end of the fiscal year in which the CUA is signed by NRCS.

(8) NRCS will not record or in any manner participate in the potential recording by others, of CUAs in the land records. CUAs do not vest any right of any kind to the landowner.

C. Acceptable Compatible Uses

The types of practices, components, activities or measures that are allowed through the compatible use process may include—

(i) Installation and maintenance of acceptable structures (see section 528.152D).
(ii) Haying or mowing under certain conditions (see section 528.152E).
(iii) Grazing to establish or maintain wildlife habitat or wetland functions and values (see section 528.152F).
(iv) Forest management activities including timber harvest, for the specific purpose of restoring, protecting and enhancing optimum wildlife habitat and wetland functions and values, especially for migratory birds and at-risk species. (see section 528.153G).
(v) Maintenance of private drainage systems, but only if the activity does not adversely affect the functions and values of the wetland.
(vi) Wildlife food plots under certain conditions (see section 528.152H).
(vii) Managing water levels. NRCS will provide management guidelines to persons receiving CUA to manage water levels. Manipulating water levels outside of the compatible use process is prohibited.
(viii) Applying pest management activities.
(ix) Managing for carbon sequestration.

(x) Other conservation practices, components, activities, or measures needed to protect or enhance wildlife habitat and other functions and values of the wetland as approved by the State Conservationist with advice from the STC or with input from EPD.

D. Acceptable Structures

(1) Undeveloped recreational uses reserved to the landowner under the terms of the warranty easement deed (including hunting or observation blinds that will accommodate no more than four people and are temporary, non-permanent, and easily assembled, disassembled, and moved without heavy equipment) are not subject to the CUA process. However, undeveloped recreational uses must be consistent with the long-term protection and enhancement of the wetland and other natural values of the easement area.

(2) In contrast to non-permanent hunting or observation blinds described in paragraph (1), which are not subject to the CUA process, NRCS may authorize through the CUA process individual semi-permanent hunting or observation blinds for undeveloped recreational use. The semi-permanent hunting blinds are subject to the following requirements:

(i) May have external dimensions of no more than 80 square feet and 8 feet in height.

(ii) The CUA will describe the number, locations, and features of blinds.

(iii) Disturbance to wildlife from location, placement, installation, maintenance, and use, especially during critical periods such as night roosting and nesting season, must be kept to a minimum.

(iv) May require heavy equipment to remove, but must be able to be removed from the enrolled area with minimal ground or vegetation disturbance

(v) The CUA must stipulate that the landowner is responsible for all costs associated with the removal of the blind and the repair of any impacts to the easement area as a result of the removal.

(vi) The blind is only authorized so long as a valid CUA is in place. If the CUA is not renewed, the blind must be removed from the easement or contract area by the date of expiration of the CUA.

(vii) Must be consistent with the long-term protection and enhancement of the wetland and other natural values of the easement or contract area.

(ix) All other applicable limitations must be described in the CUA.

E. Haying or Mowing Requirements

(1) The United States possesses the right to prohibit all haying and mowing, unless NRCS determines that haying and mowing will further the protection and enhancement of the wildlife habitat and wetland functions and values. Approved haying or mowing will be identified in a CUA and in the WRPO, as appropriate. Any haying or mowing must be scheduled and subject to the following limitations:

(i) Must occur between July 15 and September 1.

(ii) Must ensure there is adequate regrowth of vegetation to provide winter cover and early spring nesting cover.

(iii) Must ensure maintenance of adequate wildlife habitat quality and other wetland functions and values.

(iv) Not allowed in areas where woody vegetation is being established or maintained.

(v) Limited to mowing for access to manage and maintain such structures as levee tops and nature trails, or as prescribed to restore and maintain native plant communities or manage succession for special-status species.

(vi) Grazing is not allowed in the same year on the same acreage that is hayed or mowed.

(2) Exceptions to the timing and frequency of haying or mowing may be considered by the State Conservationist. The evaluation must include input from the FWS, State wildlife agency, and

conservation district. These exceptions must comply with statewide program guidelines that may be established by the State Conservationist with advice from the STC. The decision must ensure the habitat needs of ground-nesting bird species are fully protected and enhanced.

(3) Except where authorized by the national ACEP-WRE manager in consultation with the NRCS national biologist, grazing is not permitted in the same year and on the same acreage as haying or mowing.

F. Grazing Requirements

(1) Except as prescribed and authorized through a WRPO, applicable CUA, or an Exhibit E to a Form NRCS-LTP-33, "Warranty Easement Deed with a Reservation of Grazing Rights" and associated grazing management plan, all grazing must cease after the easement is recorded or the 30-year contract is executed.

(2) NRCS may vary the intensity and timing of (or terminate, if necessary) approved grazing authorizations to ensure that optimum functions and values are achieved on the enrolled area. As wetland hydrology and adjacent lands are restored and protected, the vegetation will change in composition and quality, which may necessitate modifying the grazing plan from year to year. See subpart Q for detail on the reservation of grazing rights enrollment option.

(3) The local NRCS representative, with input from the landowner, FWS, conservation district, and State wildlife agency, will develop grazing guidelines. The guidelines must comply with State program guidelines that may be established by the State Conservationist, in consultation with the STC. Grazing will only be permitted when—

(i) Restoration of woody vegetation is not a component of the restoration plan, unless use can be prescribed so the timing and intensity will improve the overall habitat in the woody vegetation area and will not negatively impact establishment and survival of woody vegetation.

(ii) The site-specific grazing guidelines are developed to utilize vegetation to ensure the long-term functioning of the enrolled area or to restore and maintain the native plant communities on these sites.

(iii) It contributes to establishment and maintenance of wildlife habitat quality or other wetland functions and values.

(iv) It is timed to ensure adequate regrowth of vegetation for winter and spring habitats, as appropriate.

(v) There are no adverse effects on ground nesting birds and other wildlife.

(4) Except where authorized by the national ACEP-WRE manager, in consultation with the NRCS national biologist, grazing is not permitted in the same year and on the same acreage as haying and mowing.

G. Forest Management

(1) The United States possesses the right to prohibit all forest management activities, unless NRCS determines that forest management activities will further the wildlife habitat and wetland functions and values of an easement. Before forest management activities, including timber harvest, may be authorized on an ACEP-WRE through a CUA, a forest management plan must be developed and appended to the WRPO.

(2) The primary goal of the forest management plan component of the WRPO is to restore, protect, and enhance wildlife habitat and wetland functions and values within the forested portions of the easement. A forest management plan must be developed by an NRCS forester, or the landowner may obtain a forest management plan at their own expense from a professional, certified forester, and provide it to NRCS for review and approval. The completion of an NRCS-approved forest management plan alone does not guarantee that

forest management activities will be authorized on the easement area. Forest management activities described in the forest management plan that are approved by NRCS for implementation must be identified in a CUA and are subject to the following limitations:

(i) Forest management activities must be implemented in a manner and during timeframes that will minimize impacts to forest nesting birds.

(ii) Maximization of timber harvest for economic gain is not a consideration in developing the forest management plan or authorizing a CUA, however, any proceeds derived from the sale of timber harvested in compliance with the forest management CUA, may be kept by the easement owner.

(iii) NRCS must inspect any timber harvest operation during implementation to ensure the CUA is being implemented as written.

(3) NRCS will not authorize forest management activities that may negatively impact at-risk or listed species or fragile or rare habitats found on the easement.

(4) Except where authorized by the national ACEP-WRE manager in consultation with the NRCS national biologist, clearcutting of forested habitat is not permitted. Clear cutting may only be considered in unique situations where NRCS wildlife and forestry professionals agree that forest conditions or special wildlife habitat needs require such a measure.

H. Wildlife Food Plot Requirements

(1) State Conservationists may issue CUAs for wildlife food plots. Food plots may be authorized when the following conditions are met:

(i) The food plot is determined necessary by NRCS to complete the planned functions and values of the enrolled area.

(ii) Wildlife food plots cannot be harvested as a commodity crop.

(iii) Location, configuration, spatial arrangement, and other details are prescribed by NRCS for the specific site.

(iv) Food plots must be limited to not more than 5 percent of the total acreage of the enrolled area.

(v) Food plots will be located or configured to avoid or minimize habitat fragmentation.

(2) State Conservationists are encouraged to be flexible in allowing the use of food plots and to coordinate use restrictions with neighboring States. State Conservationists should work with FWS, State wildlife agencies, wildlife organizations, and other members of the STC to tailor the use of food plots to align with Federal and State law.

I. Commercial Shooting Preserves

(1) Commercial shooting preserves may be operated on ACEP-WRE acreage if all of the following apply:

(i) The commercial shooting preserve is licensed by a State agency, such as the State fish and wildlife agency or State department of natural resources.

(ii) The commercial shooting preserve is operated in a manner consistent with the applicable State agency rules governing commercial shooting preserves.

(iii) ACEP-WRE cover, vegetation, and hydrology is managed and maintained in accordance with the final WRPO and all applicable CUAs.

(iv) No barrier fencing or boundary limitations exist that prohibit wildlife access to or from the ACEP-WRE acreage.

(v) Related ACEP-WRE cover and vegetation management or maintenance, as determined by the State Conservationist in consultation with the STC, must—

- Be performed in accordance with the WRPO and all applicable CUAs.
- Provide benefit and enhancement to all wildlife normal to the area.
- Be conducted outside the primary nesting or brood rearing season.

- Not adversely impact the ACEP-WRE cover.
- Further the wildlife habitat benefits, water quality benefits, or other wetland functions and values identified in the final WRPO.

(2) The construction of camping facilities, wildlife pens, parking lots, or other related structures or infrastructure is not allowed on the land enrolled in ACEP-WRE.

528.153 Prohibited and Non-compatible Uses

A. In General

Prohibited and non-compatible uses include those activities that NRCS determines will not further the protection and enhancement of the functions and values of the enrolled area. When determining if a use would be non-compatible, evaluate the impact on the present functions and values, and any potential impact, constraint, or limitation that the use would have on subsequent efforts to achieve maximum wildlife benefits and wetland value and functions. Such activities are not limited to, but may include—

(i) Infrastructure projects (see section 528.153B).
(ii) Placing prohibited structures on the enrollment area (see section 528.153C).
(iii) Planting and harvesting crops for human or domestic animal consumption (see section 528.153D).
(iv) Grazing, unless authorized in an Exhibit E to a grazing reserved right enrollment or authorized as a compatible use (see section 528.152F).
(v) Surface mining, including mining for peat and other organic materials.
(vi) Water supply, waste treatment, and incompatible water conveyance systems (e.g., irrigation withdrawal or return flow of contaminated water).
(vii) Crayfish, catfish, and baitfish production where the intensity of management would undermine the functions and values of the wetland.
(viii) Hunting and fishing where the intensity would undermine the functions and values of the wetland.
(ix) Commercial seed production or harvest.
(x) Biomass production.
(xi) Commercial wild rice or cranberry production.
(xii) Development of road or other transportation systems that fragment the easement area, alter surface hydrology patterns, modify topography, or otherwise diminish the ecological values of the easement area or constrain easement area restoration or enhancement efforts.
(xiii) Drainage development or maintenance that would adversely affect wetland functions and values on the site.
(xiv) Any activity performed outside the parameters of a CUA authorization including alteration of water levels.
(xv) Any activities to be carried out on the land owned or operated by the fee title landowner of the enrollment area that is immediately adjacent to and functionally related to the land subject to the ACEP-WRE enrollment if such activities alter, degrade, or otherwise diminish wildlife habitat benefits and wetland functions, and values of the land subject to the enrollment.
(xvi) The installation or use of fences that have the effect of preventing the free movement of wildlife onto or off the enrolled area are prohibited on the enrolled area, the boundary of the enrolled area, or on the landowner's land that is immediately adjacent to, and functionally related to, the enrolled area.

B. Infrastructure Projects

Infrastructure projects must be handled through the easement administrative action process identified in subpart R. NRCS will not authorize infrastructure projects through the CUA process.

C. Prohibited Structures

(1) The construction or placing of any structures or buildings, temporary or permanent, is prohibited, except for those temporary or semi-permanent structures for undeveloped recreational uses that meet the "Acceptable Structure" requirements in section 528.152D, are authorized by NRCS, and are consistent with the terms of the deed or 30-year contract and the WRPO.

(2) Structures that are always prohibited include but are not limited to—

(i) Buildings used for residence, overnight occupancy, commercial uses, or agricultural production, such as—

- Houses.
- Trailers.
- Hunting and fishing lodges.
- Cabins and yurts.
- Fishing huts.
- Barns and out buildings.
- Storage facilities.
- Workshops.
- Fabrication facilities.
- Saw mills.

(ii) Any other structure that puts a lasting footprint on the easement and diminishes wildlife habitat benefits and wetland values and functions.

(3) Conservation practices, measures, activities, and components that are prescribed by the WRPO or through a CUA are not considered prohibited structures. Additionally, hunting and observation blinds for undeveloped recreation consistent with the provisions described in the warranty easement deed and section 528.152D may be permissible.

D. Planting and Harvesting Crops

(1) Operation of the land, including planting and harvesting of crops, is under the control of the landowner until the ACEP-WRE easement is recorded or the 30-year contract is executed. Any crops planted before the easement is recorded or 30-year contract is executed may be harvested if authorized in writing by NRCS (see Subpart U, "Exhibits," for a sample preacquisition crop harvest authorization letter).

(2) If authorized through a CUA, landowners may also plant a crop during the spring following the easement recordation when the easement is recorded after October 1, provided the crop is planted before July 1 the following year. This crop will be under the control of the landowner for subsequent harvest. However, a subsequent planting of a crop for harvest after the easement is recorded is prohibited.

(i) Example 1.—ACEP-WRE easement is filed on July 20, 2015. The participant may harvest crops planted before the easement was filed if authorized in writing by NRCS.

(ii) Example 2.—ACEP-WRE easement is filed on October 4, 2015. The participant may harvest crops planted before the easement was filed if authorized in writing by NRCS and plant crops for crop year 2016 if authorized by NRCS in a CUA. The participant is prohibited from planting crops beginning July 1, 2016.

(3) The State Conservationist will—

(i) Provide each affected landowner with written notification of authorization for cropping.

(ii) Provide a copy of the authorization to the FSA.

(iii) Advise the landowner to contact FSA regarding the impact the ACEP-WRE easement will have on any base acres, allotment history, and payments.

(4) For easements, in situations where there would be a substantial savings in restoration costs, the landowner may be granted temporary permission to crop that portion of the easement lands that, if left idle, would subsequently need additional site preparation as a part of the restoration effort. This policy authorizes special temporary permission to crop easement lands only when it is not possible to initiate the restoration practice in a timely manner, resulting in additional costly site preparation. Landowners utilize this crop policy at their own risk. **NRCS will advise** landowners to consult FSA and that they may not be entitled to any USDA benefits related to such cropping.

(5) The permission to crop an easement area as a means of attaining restoration cost savings or other site preparation benefits must be provided to the landowner as a written CUA and will be limited to only the cropping season that is immediately prior to the date the restoration work is to commence.

(6) When the restoration action will be delayed, cessation of cropping is required until the cropping season immediately prior to the date the restoration work is to commence. The cessation of cropping provides a wide variety of wetland, wildlife, and water quality benefits; therefore, continued cropping until the actual restoration work commences is a violation of program authority.

528.154 Reserved Rights

The landowner reserves certain rights on the sale of an easement or signing of a 30-year contract. These reserved rights are contingent on not interfering with the rights purchased by the United States. These rights are as follows:

(1) Title.—Record title, along with the landowner's right to convey, transfer, and otherwise alienate title to these reserved rights.

(2) Quiet Enjoyment.—The right of the landowner to enjoy the rights reserved on the easement area without interference from others.

(3) Control of Access.—The right to prevent trespass and control access by the general public, subject to the operation of State and Federal law.

(4) Recreational Uses.—The right to undeveloped recreational uses, including undeveloped hunting and fishing and leasing of such rights for economic gain, pursuant to applicable State and Federal regulations that may be in effect at the time. Undeveloped recreational uses may include use of hunting or observation blinds that will accommodate no more than four people and are temporary, non-permanent, and easily assembled, disassembled, and moved without heavy equipment. Undeveloped recreational uses must be consistent with the long-term protection and enhancement of the wetland and other natural values of the easement area.

(5) Subsurface Resources.—The right to oil, gas, minerals, and geothermal resources underlying the easement area, provided that any drilling or mining activities are to be located outside the boundaries of the easement area, unless activities within the boundaries are specified in accordance with the terms and conditions of exhibit C, which is appended to and made a part of the warranty easement deed or 30-year contract, if applicable.

(6) Water Uses and Water Rights.—The right to water uses and water rights identified as reserved to the landowner are set forth in exhibit D, which is appended to and made a part of the easement deed, or 30-year contract, if applicable.

(7) Traditional Cultural Uses.—For 30-year contract enrollments only, the ability to engage in non-commercial traditional cultural activities is permitted to the extent that such activities do not interfere with the long-term protection and enhancement of the wetland and other natural values on the property.

528.155 Operation and Maintenance

A. The State Conservationist is the final approval authority for the implementation of any repair, maintenance, or replacement of any conservation practice, measure, or activity, regardless of whether or not the practice life expectancy has expired or the practice was damaged by a major storm or other natural disaster. This approval does not obligate National Headquarters (NHQ) to provide funds for the work.

B. When a natural disaster, such as an earthquake, devastating fire, or severe flood event, occurs, the local NRCS representative must notify the State Conservationist and give status reports on the condition of the site. Upon the request of the State Conservationist, the Chief may approve additional funding, based on availability of funds, to replace or repair practices destroyed by unusual circumstances beyond the control of the landowner. Contact the national ACEP-WRE manager when funding is needed to repair or reestablish a damaged site.

C. Landowners agree to the O&M of the easement areas in accordance with the final WRPO, including maintenance of all structural practices in good operating condition for the duration of the easement (or for the life expectancy of the practice, when the life expectancy of the practice exceeds the remaining duration of the enrollment). NRCS may enter into agreements with the landowner, other Federal agencies, State agencies, conservation districts, or other cooperating partners to assist with O&M activities. When the landowner has agreed to perform these activities, an agreement will be developed in accordance with the CUA process, as appropriate.

528.156 Monitoring

A. All ACEP-WRE enrollments will be monitored in accordance with 440-CPM, Part 527, Subpart P. The monitoring information will be entered into NEST prior to the end of each fiscal year and a copy of the annual monitoring worksheet will be kept in the official enrollment case file maintained at the state office, and are to be retained for the duration of the enrollment.

B. While restoration is being implemented, all enrollments will be monitored through onsite visits to ensure the proper implementation of conservation practices, components, measures, and activities. These visits will be conducted as often as needed, but at least annually. Additionally, the status of the easement restoration agreement will be reviewed in accordance with section 528.145.

C. Once restoration has been implemented all enrollments will be monitored according to the schedule identified in 440-CPM, Part 527, Subpart P.

528.157 Violations

A. Preventing Violations and Enforcement Policy

(1) The purpose of monitoring and enforcement activity is to prevent violations. The keys to successfully preventing violations are—

(i) Maintaining an ongoing, good relationship with the landowner. There is no substitute for frequent, direct interaction with the landowner to reinforce the provisions of the easement and answer questions that may arise.

(ii) An easement or contract document with clear and enforceable conditions and restrictions.

(iii) A comprehensive WRPO including, as appropriate, CUAs, landowner management plans, and O&M plans that have been reviewed with and are understood by the landowner.

(iv) A history of regular, systematic, and well-documented monitoring occurrences or contract status reviews.

(v) Contact with new landowners regarding ACEP-WRE "Warranty Easement Deed" language, allowances, restrictions, and responsibilities.

(2) Communication with landowners is key to minimizing violations on land enrolled in ACEP-WRE. Depending on the activity and the individuals involved, this communication may occur via personal contact, letter, telephone, or through an intermediary.

(i) NRCS State offices should consider developing newsletters or other regular means of communication with ACEP-WRE landowners to facilitate an understanding of wetland and wildlife benefits resulting from their enrollment in the program.

(ii) When discussing easement or contract requirements, this communication must be concise and frank in relation to what is permitted on the enrolled area.

(3) NRCS personnel who conduct site visits should review procedures for handling potentially violent situations prior to making personal contact with landowners or alleged trespassers to ensure the safety of all NRCS personnel and agents.

(4) To enforce easements effectively and to detect and prosecute violations, it is necessary to collect and preserve information and to manage inspection records in a consistent manner. NRCS must have good inspection records and a record of conversations with the landowner to be able to reasonably determine how and why a violation occurred. An accurate, well-documented administrative record is essential and will be far more important in court than what may be recalled for personal testimony.

(5) The terms and conditions of the easement deed or 30-year contract should be discussed with the landowner prior to recording the easement or executing the contract. If the property is transferred, it should be reviewed as soon as possible with the new landowners. (see Subpart U, "Exhibits," for sample letter to new landowner).

B. Investigating Suspected Violations

(1) The State program manager will report all suspected violations immediately to the national ACEP-WRE manager and local Office of General Counsel (OGC) representative. The suspected violation and the eventual disposition of the violation should be documented in the official case file and pertinent information and monitoring data uploaded into NEST. Schedule an onsite visit immediately when a potential violation has been reported to NRCS or noted from monitoring activities. The purpose of the visit will be to confirm if a violation actually exists.

(2) When a potential violation is found by remote sensing or otherwise, an onsite inspection is necessary. Before making the onsite inspection, the following material should be assembled:

(i) Case file, which includes all permits, plans, and correspondence.

(ii) Copy of pertinent material from the official State office file.

(iii) "Easement Violation Worksheet" to record findings (see Subpart U, "Exhibits," for the easement violation worksheet).

(iv) Map noting location of possible violation;

(v) Camera or video equipment to record the condition of the site. Photographs should be taken as soon as possible when significant changes (such as land use, new drainage facilities, or possible violations of the easement) occur.

(vi) The State Conservationist must contact the landowner by certified, return receipt letter or telephone call to schedule a date to visit the site. The returned receipt card or documentation of the telephone call must be kept in the official enrollment case file.

(3) During the site visit to investigate the potential violation, document the following information:

(i) The names and affiliation of individuals involved in the inspection, including the landowner if appropriate.

(ii) Location of the potential violation.

(iii) A complete set of notes about the possible violation, including—

- Size, extent, and location of the possible violation
- Grass, forbs, tree, and shrub species in the area
- The type of restoration completed, if appropriate
- Quantification of impacts, such as loss of wildlife species, disturbed nests, removed or destroyed posts, amount and effect of grazing, etc.
- Any other activities or pertinent site conditions

(iv) Compile photographic documentation of all aspects of the possible violation, including—

- Photos or videos from various directions that capture the type and extent of the alleged violation, such as haying, mowing, grazing, cultivation, dumping, or encroachment.
- The most serious aspects of the alleged violation.
- Potentially controversial areas concerning compliance.
- Show the general nature of the surrounding area so adequate compliance is easier to achieve.
- Mark on a map the points from which photographs were taken, and label all pertinent data on the photographic coverage.

(v) Collect GPS points of the violation and photo point locations.

(vi) Delineate the location of the violation on a current map.

Note: If the landowner or their representative is present during this visit the NRCS representative should request that the landowner cease any ongoing violation activities. However, the NRCS representative should not discuss specific enforcement actions that may be taken during this visit. Specific enforcement actions and procedures must first be determined in consultation with OGC before informing the landowner.

(4) Visits to the easement area to investigate suspected violations and such observations as wildlife usage, water conditions, land use practices, and other items of interest concerning the easement must be thoroughly documented. The individual making the report should date and sign each entry on each item of documentation. Reports documenting no evidence of violation are just as important as those reports confirming and documenting violations. See Subpart U, "Exhibits," for the easement violation worksheet for guidance on what information to collect.

C. Handling Violations

(1) When a violation of the easement, 30-year contract, or a CUA is confirmed, the landowner must be notified immediately and given reasonable opportunity to correct the violation voluntarily within 30 calendar days of the date of the notice, or such additional time as the State Conservationist may allow. Depending on the severity of the violation, this initial notification may be in writing or may be made verbally by the NRCS and documented to the easement case file.

For example, upon finding unauthorized cattle on the easement, the NRCS representative may verbally tell the landowner to remove the cattle within 24 hours. A follow-up site visit must be conducted the next day to determine if the violation has been cured, and the results must be carefully documented in the easement case file.

(2) If a violation is not cured as a result of a verbal notification to the landowner or if verbal notification is not appropriate for the situation, written notice is required.

(3) When a violation has occurred, it is **extremely important** that the State Conservationist contact the local OGC representative for—

(i) Advice on the contents of the landowner violation notification letter, including appropriate "cease and desist" language.
(ii) NRCS violation documentation requirements.
(iii) Enforcement proceedings strategy.

(4) The State Conservationist must notify the EPD director, who must notify the Deputy Chief for Programs and send the written notice to the landowner by certified, return receipt mail (see Subpart U, "Exhibits," for a sample easement violation notification letter). **OGC and EPD should review the draft notice prior to sending it to the landowner to ensure that NRCS is not compromising its enforcement position.** The returned receipt card must be kept in the official enrollment case file.

(5) Enforcement actions are not subject to the appeal process in 7 CFR Parts 11 and 614; however, the State Conservationist must follow the specialized appeal procedures for limited in-State appeal to the State Conservationist outlined in Subpart C, Section 528.20E, "Post-easement Closing Determinations."

(6) Prior to and immediately following the response deadline, an onsite visit must be made to determine if the landowner has complied with the correction notice, and observations must be carefully documented in the easement case file. Follow the procedures in Section 528.125, "Enforcement," below.

D. Unique Situations

(1) NRCS recognizes that certain impairments may be beyond the control of the fee landowner or others with an interest in the subject land. For example, if a beaver dam on the easement area causes water to back onto an adjacent landowner's property, the dam may need to be removed or otherwise modified so that the rights of the adjacent landowner are not adversely impacted.

(2) NRCS may, to the extent possible, work with adjacent landowners and the fee title landowner to facilitate actions to address specific problems. However, NRCS has no legal obligation to remedy the problem. NRCS assistance may be in the form of any of the following actions:
(i) Providing the fee title landowner with permission to take specific actions on the easement or agreement area
(ii) Providing the fee title landowner with permission to have the adjacent landowner or another party enter the easement or agreement area to take specific actions
(iii) Taking action on the easement area to address the problem
(iv) Offering to purchase an ACEP-WRE easement on the adjacent landowner's property if eligible

(3) The party performing the corrective action must follow recommendations and direction prescribed by NRCS. This policy does not provide authority to perform or provide funds for corrective actions, such as maintenance or drainage improvements, outside the easement area.

528.158 Enforcement

A. OGC and NHQ Consultation

All actions taken once a violation has been identified must be conducted with the guidance and ongoing participation of the local OGC attorney and EPD.

B. Pre-contact Preparation

(1) The NRCS State office must verify current fee title land ownership and if applicable, tenancy. Verification can be accomplished using courthouse records, FSA records, etc.

(2) Review and become completely familiar with the case file in preparation for an interview with the landowner or tenant.

Note: It is important to thoroughly document all easement files. All previous violations and resolution measures should be reviewed. Particular attention should be paid to prior contacts with the landowner and the landowner's reactions to NRCS activities on the easement area. Prior confrontations and unusual reactions of the landowner, if any, should be noted.

C. Landowner or Tenant Contact

(1) Interview Phase.—The interview must involve two NRCS employees who have both received training in handling potentially volatile situations. This phase of the investigation could determine the success in resolving any dispute.

(i) Identify yourself and the assisting employee, and state that you represent the U.S. Department of Agriculture's Natural Resources Conservation Service. The individual must know that it is a Federal employee who is meeting with them. This may be extremely important if the interview results in an NRCS employee being assaulted.

(ii) Establish the identity of the individual to be interviewed. Initially, this may be the landowner or tenant. Obtain the individual's address.

(iii) Identify the manager of the land in question.

(iv) Try to establish who is responsible for the activity that is considered a violation. It may also be possible to establish who ordered the activity, and whether it was done by an alleged violator's employee or through contract.

(v) Identify all persons involved and conduct an interview with each, as necessary.

(vi) Share photos and location maps of the violation. Do not take the case file to the meeting. There may be portions of the file that NRCS is prohibited from releasing to the landowner, operator, or the general public. Only USDA, NRCS, and OGC officials are permitted to have access to the full file.

(vii) If, at any point during the conversation, issues arise that may confuse the issues surrounding the case, it is best to tell the individual that you will contact them after completing your investigation. Contact the local OGC for advice before you make any demands related to the violation. NRCS personnel should withdraw from any situation that becomes hostile.

(2) Post-interview Procedures.—As soon as NRCS employees have departed from the subject's location, thoroughly document all evidence obtained during the interview. Important evidence may be lost if trusted only to memory. Considerable time can pass between the interview and the time when the information may be needed in court.

(i) Prepare the "Easement Violation Worksheet," completing the elements that apply.

(ii) Prepare a memo to the file.

- Include the name and address and a complete description of the subject.
- Include a reference to the tract of land covered by easement.
- You may include factual observations regarding the demeanor of the landowner, but do not use derogatory statements.
- More importantly, make reference to direct quotes the landowner made, either spontaneously or in response to specific questions.

(3) Compliance Requirements and Restitution.—After the interview, NRCS must decide what must be done to restore or remediate the damage to the easement. This may require consultation with various NRCS professionals and OGC. OGC may refer serious violations to the U.S. Attorney's Office (USAO).

(4) After NRCS decides how to remediate the damage to the easement, notify the landowner, operator, or both by certified letter that remediation is required. Request assistance from OGC to review the letter prior to sending it. (See Subpart U, "Exhibits," for a sample violation notice letter.)

(i) In the letter, reiterate what was told to the subject during the interview.

(ii) Clearly state the compliance terms and the compliance deadline.
(iii) Attach a map indicating the locations and work required for compliance.
(iv) The letter must be sent by certified mail, with return receipt requested and restricted delivery. The stamped receipt is the only evidence that will indicate in court that the subject received the letter.
(v) Inform the subject that if compliance is not obtained, the case will be referred to OGC and USAO for possible prosecution. In the initial letter, it may be preferable to avoid mentioning prosecution in order to keep a positive tone to the communication. Follow-up letters should mention that prosecution could occur if remediation is not obtained.

(5) Landowner Notification of Violation.—In addition to officially notifying the landowner of the violation and the steps required to cure it, written notices to the landowner of the violation are an important part of the administrative record of the violation, which may be used later in court (see Subpart U, "Exhibits," for a sample violation notification letter).

(i) In a certified letter, return receipt requested, set forth the facts of the easement violation to the landowner and detail the remediation requirements and period to cure. Provide the landowner the opportunity to submit a limited in-State appeal of the post easement closing determination to the State Conservationist in accordance with section 528.20.

Note: This is a very limited appeal to the State Conservationist only and does not trigger NRCS appeal regulations at 7 CFR Part 614 or NAD jurisdiction. Copy the local OGC attorney and EPD on the letter. Provide your contact information in case the landowner has any questions.

(ii) The letter should provide the guidelines for remediation. In the letter, request that the landowner call you when the work is completed.
(iii) For serious violations, require that an NRCS representative be present to ensure proper compliance. It is extremely difficult to get landowners to go back and complete a small amount of additional work once major work is completed.
(iv) If an extended deadline has been granted, write the landowner as a reminder of the deadline.
(v) Mitigating circumstances, such as weather, high water levels, or illness should be taken into consideration and documented in the correspondence. Seeding the crop or other work excuses are not mitigating circumstances.
(vi) Explain in the letter to the landowner that noncompliance may be referred to the USAO for possible legal action. The U.S. Attorney makes the decision whether to prosecute a case, so be careful not to make representations in this regard.

(6) Compliance Check—

(i) Immediately following the expiration of the period to cure, it is essential to make a field check to ensure compliance. For example, in the case of cultivated, plowed, or destroyed grasslands, compliance will not be complete until reseeded grasses are established. Reseeding by the landowner or operator is only a first step to being in compliance. NRCS must be prepared to tell the landowner or operator that they will be out of compliance until the grassland habitats have been reestablished. This may take several years and may require mowing of weeds (with prior authorization) or reseeding (with prior authorization).
(ii) After NRCS determines that the easement area has been remediated, send a certified letter notifying the landowner. Mention that any future violations may be referred to the USAO for possible action. (See Subpart U, "Exhibits," for a sample confirmation of remedied violation letter.)

(iii) In the event the landowner does not comply, an attempt should be made to re-contact the landowner. These efforts should be thoroughly documented in the case file. If efforts to obtain compliance are unsuccessful, the NRCS State office will notify OGC. NRCS, with OGC's assistance, will draft and send a certified letter to the landowner indicating noncompliance and that the case is now being referred to the USAO through OGC. (See Subpart U, "Exhibits," for a sample notification letter of case submission to Department of Justice.)

(7) Judicial Process—

(i) Litigation Report.—The NRCS State office must prepare three copies of a litigation report when an easement violation is to be referred to the USAO for possible legal action. The State office should initially forward one copy to OGC for review. Once complete, forward a complete second copy to OGC who will forward the complete litigation report to the USAO. The litigation report should contain the following:

- The easement deed and all associated exhibits
- Documentation of notice
- The complete administrative record related to the violation and subsequent enforcement attempt by NRCS
- A demonstration of the violation including, correspondence, maps, photographs, or video of the site showing the violation
- Testing results
- Correspondence from the landowner or tenant
- Any other relevant information
- An index to the report for ease of reference
- A summary of the facts, including a chronology of events
- Agency names and contact numbers

(ii) Recovering Costs.—The United States or the Department is entitled to recover any and all administrative and legal costs, including attorney's fees or expenses, associated with any enforcement or remedial action. Legal action can take either or both of two forms:

- Criminal prosecution of the person who violates the easement, Federal law, or regulation
- Civil action to prevent further easement violation or to collect monetary damages

(iii) Liability.—The landowner subject to the easement deed is responsible for any losses the Federal Government sustains when the landowner does any of the following:

- Infringes on the rights of others
- Does not comply with applicable laws or regulations
- Allows others to infringe on the rights of the Federal Government

528.159 Other Considerations

A. Mitigation

(1) ACEP-WRE easements and contracts provide authority to protect, restore, enhance, and improve enrolled wetlands and associated habitats in a manner that will maximize wildlife habitat and other wetland functions and values. The assumption is that ACEP-WRE lands will receive the conservation attention necessary to achieve this full degree of protection, restoration, enhancement, and improvement. It is not permissible to enter into ACEP-WRE easements or contracts and not implement, to the maximum extent practicable, all needed land treatment conservation actions.

(2) It is not appropriate to allow another entity to expend mitigation funds on any of the land treatment conservation actions that would be practicable to fund under ACEP-WRE. This

policy extends to any compensatory action taken by an entity to mitigate adverse ecological impacts, including but not limited to, the Clean Water Act of 1972, the Endangered Species Act of 1973, and the Marine Mammal Protection Act of 1972. Section 1222(f)(2) of the Food Security Act of 1985, as amended, does not allow wetlands restored with Federal funds to be utilized for the Food Security Act wetland mitigation purposes.

(3) There may be limited opportunities when enhancement activities under a mitigation project would go beyond those wetland restoration activities normally carried out under ACEP-WRE. Landowners who wish to enter into mitigation arrangements should be made aware that if they enter into an agreement with a third party that requires the exercise of rights held by the United States, such actions will be subject to the CUA and WRPO modification process, both of which are subject to NRCS review, approval, modification or cancellation. NRCS will amend the WRPO and prescribe CUAs at its sole discretion and in accordance with the compatible use process identified in section 528.152 of this subpart. (See Subpart U, "Exhibits," for a sample limitations to use of ACEP-WRE area for mitigation letter.)

B. Ecosystem Services Credits for Conservation Improvements

(1) The USDA recognizes that environmental benefits will be achieved by implementing conservation practices, components, measures, and activities funded through ACEP-WRE, and that environmental credits may be gained as a result of implementing activities compatible with the purposes of a ACEP-WRE easement or contract.

(i) NRCS asserts no direct or indirect interest in credits generated by activities not funded through ACEP-WRE. Activities required under an environmental credit agreement that affect land cover, vegetation, or hydrology under an ACEP-WRE enrollment may require an amendment to the WRPO, to the 30-year contract, or a CUA under an easement. All agreements and instruments filed on the land for environmental credits are subordinate to the ACEP-WRE and are not binding to the United States.

(ii) Landowners should be cautioned that any applicable credits may be subject to additional requirements and may not be possible on certain ACEP-WRE lands.

(2) Amendments to the WRPO and any applicable CUAs are at the sole discretion of NRCS. The agency will only consider such amendments when the amendment does not infringe on the rights of the United States and when the amendment furthers the wetland and wildlife functions and values being achieved on the easement area.