

## **Part 504 – Project Installation**

### **Subpart A – General Provisions**

#### **504.0 Introduction**

- A. Installation is the phase of project development that begins after the watershed project plan has been approved and Federal assistance for installing the project has been authorized. Watershed Program funds may not be used for developing final layout and structural details until after Federal installation assistance is authorized. The installation phase continues until the construction of the project features is complete. Figure 504-D1 in this manual describes the successive phases in the life of a watershed project.
- B. Installation of project measures must be implemented as provided by project agreements between the NRCS and the sponsoring local organizations (SLOs). The project agreements detail the working arrangements, funding, and responsibilities of each party for carrying out specified elements of work.
- C. The SLO is responsible for carrying out the approved watershed project plan. NRCS is responsible for providing authorized assistance as set forth in the approved watershed project plan. As stated in the watershed agreement, no work may be initiated by either party until a project agreement is entered into that details the working arrangements.
- D. The latest civil rights nondiscrimination statement must be included in all agreements generated by this program. Contact the State public affairs specialist for a current copy of the nondiscrimination statement.
- E. Additionally, in the mutually agreed-to section all agreements generated by this program must include the following nondiscrimination clause (Title 120, General Manual (GM), Part 401, Subpart C): “By signing this agreement the recipient assures the Department of Agriculture that the program or activities provided for under this agreement will be conducted in compliance with all applicable Federal civil rights laws, rules, regulations, and policies.”

#### **504.1 Project Implementation**

##### **A. Installation Schedule**

The State Conservationist (STC) must develop a planned sequence of installation for each watershed project approved for installation. Because of variations in availability of funds and acquisition of real property rights, the actual schedule of installation may vary considerably from the planned schedule of installation. The SLO is to be advised and consulted at all stages of scheduling and performing work.

##### **B. Budget Requests and Funds Management**

- (1) Operations Budget Requests.—The STC must submit budget requests for technical and financial assistance funds for implementation of specific projects through the POINTS database, as specified by the annual budget process. The request is to be submitted as specified in Title 390, National Watershed Program Manual (NWPM), Part 504, Subpart D (in this manual). The Conservation Engineering Division (CED) will coordinate the review of the request for funds with appropriate National Headquarters staff.

- (2) Funds Management.—Funds that will not be obligated in the current fiscal year will be recalled at the end of the third quarter of the fiscal year for redistribution to projects where funds can be obligated.
- (3) Claims Management.—The STC must monitor all aspects of contract administration. The STC must ensure that efforts are made to resolve all contractual issues by mutual agreement at the contracting officer level and to avoid litigation. When contracting officer decisions for claims exceeding \$100,000 are appealed by the contractor, the STC must notify the Deputy Chief for Science and Technology and provide the information needed for the claims database. The Deputy Chief for Science and Technology, in consultation with the Deputy Chief for Management, will appoint an independent review team of representatives from CED and Management Services Division. The team will review the case and recommend alternative actions to minimize NRCS litigation risks.

### **C. Controls on Future Development**

Prior to construction of significant or low hazard dams, the STC will verify that the SLO has certified that adequate controls on future development within the breach inundation area (as defined in Title 210, National Engineering Manual (NEM), Part 520, Subpart C, Section 520.28) are in force. The controls must limit improvements within the breach inundation area such that the hazard class does not increase during the evaluated project life.

### **D. Reaffirming Feasibility**

- (1) The continued feasibility of a project must be monitored and documented in the project files every 5 years. Factors to be considered in determining the continued feasibility are economic, environmental, and social defensibility and the SLO commitment to continue the project. If it is determined that the project is no longer feasible to install, the plan must be modified to delete the infeasible elements and a completion report must be prepared.
- (2) When reaffirming feasibility, the discount rate at the time the plan was approved may be used for plans approved after January 3, 1969. A discount rate of 3.25 percent must be used for plans approved before that date. Results of an economic analysis using the current discount rate must also be included in the feasibility report.

### **E. Water Resources Long-Range Plans**

- (1) A State water resources long-range plan must be updated every 3 to 5 years for the Watershed Surveys and Planning, Watershed Operations, and Watershed Rehabilitation Programs. Long-range plans are not required for completed watershed projects.
- (2) The water resources long-range plan must include all of the following:
  - (i) Anticipated projects to plan, implement, or both
  - (ii) Assessments of dams for rehabilitation
  - (iii) Status of rehabilitation projects
  - (iv) Project planning and implementation priorities
  - (v) Reportable products to be produced
  - (vi) Needed funds, both technical assistance (TA) and financial assistance (FA)
  - (vii) Needed personnel
- (3) For authorized watershed projects, the long-range plan must additionally include the following:

- (i) Remaining work (TA/FA) in current dollars to complete the project; this is utilized to estimate unfunded Federal commitment in the Program Operations Information Tracking System (POINTS).
- (ii) The probability of implementing the long-range plan considering land use or other changes in the watershed, local interest, and sponsor's capability to proceed with installation.
- (iii) The correct operational status of the project (not necessarily what is currently displayed in POINTS).

## **504.2 Agreements Required**

Prior to Federal financial assistance funds being granted, the STC must execute the following agreements:

### **(1) Project Agreement**

Project agreements include any agreement entered into by NRCS and the SLO in which detailed working arrangements are established for the installation of project measures. Further information and coordination is available through the State contracting specialist or appropriate administrative staff.

### **(2) Real Property Acquisition Assurance**

- (i) This assurance applies if real property interests were acquired for the installation of project measures. Form NRCS-ADS-78 must be completed and signed by the SLO and must be provided before Federal financial assistance is granted. The NRCS-ADS-78 must be supported by an attorney's opinion.
- (ii) When acquisition is needed, acquisition procedures must conform to title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA).

### **(3) Operation, Maintenance, and Replacement Agreement**

Arrangements for operating and maintaining planned practices, as well as replacing practice elements whose design life is less than the overall practice or project life, are to be included in an operation and maintenance (O&M) agreement and O&M plan between the SLO or land user and NRCS. The O&M agreement, O&M plan, or both is to be entered into before NRCS furnishes financial assistance for real property acquisition, relocation assistance, or installation of any planned measures. O&M agreements and O&M plans must conform to the requirements in the National Operation and Maintenance Manual (Title 180, National Operation and Maintenance Manual (NOMM), Part 500).

### **(4) Drug-Free Workplace Certification**

Before a construction contract is awarded to install any of the planned watershed measures, the grantees must indicate that they will abide by the regulations implementing sections 5151 to 5160 of the Drug-Free Workplace Act of 1988 (Public Law 100-690, Title V, Subtitle D; 41 U.S.C. Section 701 et seq.) and 7 CFR Section 3017.600, "Purpose," by signing OMB Form AD-1050 (for grantees who are individuals) or OMB Form AD 1049 (for grantees other than individuals).

## **504.3 Real Property Rights**

### **A. Definition**

Real property acquisition includes obtaining needed land, water, mineral, and other subsurface rights, and required Federal, State, and local permits or clearances for installation of planned measures. Acquisition of rights may be obtained with the use of fee simple title, easements and rights of way or by permits and clearances as required by applicable State regulations.

## **B. Responsibilities**

- (1) Public Law 83-566 does not provide authority for land acquisition by the Federal Government. The SLO must acquire all rights needed for investigations, surveys, installation, operation, maintenance, and inspection of works of improvement to be installed with Federal financial assistance on non-Federal lands (Public Law 83-566 Section 4(2)). This will include routes for ingress and egress. No cost sharing will be provided for engineering, legal, or administrative costs incurred by the local organizations for acquiring real property rights except for real estate appraisals in connection with cost-shared real property rights acquisition (including direct costs associated with appearing as an expert witness in condemnation proceedings on the agency's behalf).
- (2) Water and other resource rights are the responsibility of the SLO. The SLO must obtain the water rights necessary before the project agreement is signed. To fulfill their obligations, the SLO must present satisfactory evidence that water rights are held or can be obtained by landowners or their organizations or associations for the quantity, seasonal use, and storage of water, if required, to supply contemplated need.
- (3) NRCS is responsible for providing real property acquisition maps showing the minimum area and rights needed for each project measure. The STC must ensure that a real property work map is developed and furnished to sponsors. The map is to be a visual picture of cartographic presentation of the proposed project measures as they relate to existing physical features at the site; it should include some related real property information needed to acquire property rights. The map is not a construction drawing nor is to be construed to be a plat map for real property document or land record purposes. The map must show all of the following:
  - (i) Location of the project measures and a delineation or description of the minimum land areas needed for the measures, including borrow and spoil areas, construction, flowage, wildlife compensation, temporary rights needed during installation of the measures, and ingress and egress routes when applicable. To the extent known, it should also show any subsurface rights needed for mineral or other outstanding rights. The criteria of 210-NEM, Part 531, Subpart D, Sections 531.40 through 531.43, on mineral and liquid and gaseous deposits apply to this agreement.
  - (ii) Topographic information pertaining to the project measures such as water, flood and flowage, and other contour or elevation lines, landmarks, and control and other points pertinent to the project measures.
  - (iii) Existing structures and improvements that will or may be affected by the project measures, including roads and bridges, railroads, buildings, utilities, pipelines, water sources, and fences.
  - (iv) Apparent ownerships, acreages, and boundaries to the extent known to NRCS from general knowledge of the area. If ownerships and boundaries are unknown to NRCS or there is a reason to believe that they are questionable or in dispute, no attempt should be made to show this information. Sponsors are responsible for the legal aspects of property titles, boundaries, and descriptions. If State law or local practice requires that sponsors make legal plats, the STC may waive showing any ownership or boundary information on work maps.

- (v) When Federal financial assistance is not involved in the real property acquisition, a tract index must be included to show or reference the land tracts and the minimum real property on the basis of apparent ownerships. However, if ownership or boundary information is not shown as provided in above paragraph the index is to be prepared on a tract basis.
  - (vi) When Federal cost sharing is involved the real property work map is to be expanded to serve as the base document in establishing Federal cost sharing arrangements. After the real property work map is furnished to sponsors, they are responsible for converting the map or developing a new map that shows actual ownerships, boundaries, outstanding prior surface, subsurface, and other rights, and other information needed to document the acquisition requirements. NRCS must use the expanded work map to develop a tract register to document the tracts or rights needed, appraisal values, acquisition costs, and cost sharing values.
- (4) The STC must approve in writing all real property acquisition maps and all subsequent changes required by NRCS. Changes may be made only after consultation with the SLO.

### **C. Requirements**

#### **(1) Dams**

- (i) For watershed projects authorized prior to December 2009:
  - If the structure does not have an auxiliary spillway, the minimum land rights area upstream from the dam must be all areas below the elevation of the top of the dam, unless the watershed plan or plan modification allows a lower elevation.
  - If the structure has an auxiliary spillway, the minimum land rights elevation may not be lower than the higher elevation of either the auxiliary spillway crest or the maximum elevation of the water surface during passage of the 100-year, 24-hour storm through the dam. If the minimum land rights elevation for a specific dam is lower than the elevation of the top of dam, the rationale for the selected elevation of required land rights must be discussed in the watershed plan or plan modification and a provision must be included in the watershed agreement that describes the potential risk and liability the sponsors and landowners may be assuming by not securing land rights to the top of dam elevation.
- (ii) For watershed projects authorized after December 2009 revision, the minimum land rights area upstream from the dam is all areas below the elevation of the top of the dam.
- (iii) For watershed rehabilitation projects the minimum land rights area upstream from the dam must be for all areas below the elevation of the top of the dam, unless the plan allows a lower elevation (not lower than the elevation of the 100-year, 24-hour storm or auxiliary spillway elevation, whichever is higher).
  - If the land rights elevation is lower than the top of the dam, the rationale for the selected elevation of required land rights must be discussed in the plan and a provision must be included in the watershed agreement that describes the potential risk and liability the sponsors and landowners may be assuming by not securing land rights to the top of dam elevation.
  - The land rights must include a prohibition on future construction of inhabitable dwellings upstream from the dam below the elevation of the top

- of the dam. All land rights must be identified by metes and bounds surveys conducted by a professional land surveyor.
- (iv) On privately owned land, real property rights must be acquired for the structure, spillways, the reservoir area (including permanent and temporary water storage areas), areas for spillway discharge, mitigation areas and areas for other activities including construction, operation and maintenance, spoil disposal, borrow, and diversion of water.
    - Fee simple title or term easements for at least the length of the period of analysis are required for the dam, spillways, ingress and egress routes, and pool areas.
    - Flowage easements in lieu of fee simple title may be obtained for the flood pool (temporary water storage), areas of spillway discharge, and areas needed only for construction or disposal of spoil.
    - Temporary easements may be obtained in lieu of permanent rights-of-way where needed to install measures to mitigate unavoidable adverse landscape resource effects.
    - Additional criteria for real property rights are contained in 390-NWPM, Part 504, Subpart A, Section 504.3(C)(3) (of this manual).
  - (v) Before construction of any project for local flood protection, the SLO must agree to participate in and comply with applicable Federal floodplain management and flood insurance programs as described in the watershed agreement.
  - (vi) Prior to construction of “high” hazard dams, the STC will require the SLO to provide an emergency action plan in accordance with 210-NEM, Part 520, Subpart B, Section 520.27, and 180-NOMM, Part 500.
  - (vii) On publicly owned lands, the SLO must acquire special use or occupancy permits from the appropriate land-managing agency before any detailed planning or implementation of structural works of improvement are undertaken. The SLO must apply for permits with sufficient lead time to ensure an orderly installation of the project.
  - (viii) In determining real property rights needed for the structure, the STC must consider all pertinent circumstances including present and likely future land use and the extent of potential damage from flooding caused by proper operation of the structure.
- (2) Channels
- (i) The STC must ensure that all of the following are included in the minimum area of real property rights to be acquired for the channel work:
    - Areas within the channel’s designed top width and berm width necessary on each channel bank to ensure stability of the channel, channel banks, and side slopes
    - Areas needed for installation, inspection, design, operation and maintenance, ingress and egress, and disposal and diversion of water
    - Areas needed for environmental protection features
    - Other areas adversely affected by changed stream flow characteristics or induced flooding
  - (ii) Fee simple title or term easements for the period of analysis must be acquired for the channel itself, appurtenances, any needed diversions, and areas needed for ingress, egress, and travel ways to allow for operation and maintenance of the works of improvement. In addition, fee title or easements are required for any additional areas, including downstream areas that may be subjected to adverse

effects by changed stream flow characteristics, such as extended flooding of low-water crossings and more than negligible flood damage to property.

(3) Induced Flooding.—In cases where the installation could result in induced flooding, the following criteria must be met with respect to various types of works of improvement.

(i) Flooding of Roads and Railroads

- Top-of-dam elevations may not be set at a level higher than upstream highways and public roads. An exception may be made when it is possible for the highway or public road to be closed when necessary for a brief period and an alternate all-weather route can be used with a minimum of inconvenience. A written right or permission to flood the highway or public road must be obtained from the State, county, or agency having jurisdiction over the highway or public road. The written right or permission may be an easement, court order, or, if those may not legally be given, a permit. The written right or permission must be accompanied by a citation of the applicable State statute or a written opinion of the State attorney general stating that the State, county, or agency granting the permission has legal authority to allow the road to be closed by flooding.
- Occupied dwellings affected by the temporary closing of the flooded road must be accessible by an all-weather road that will not flood more frequently than it did under preconstruction conditions. If a road providing the only access to a dwelling is at a lower elevation than that of the top of dam, a historical record of preconstruction temporary flooding must be developed and documented in the administrative record.
- Public roads may be located at the same elevation as the top of the dam, or below the top of the dam elevation (such as in the case of a road located in or across the auxiliary spillways of dams) under exceptional cases, if any of the following conditions apply:
  - Because of the nature of the terrain adjacent to the dam area (such as in mountainous areas), the road must be located so that one or more points of the road crown is at or near the top of the dam.
  - Natural flooding of one or more points along the road above or below the project area would make the road impassable before any flooding caused by the structure would take effect, and State law permits flooding of roads under those conditions.
  - Flow through the auxiliary spillway is at a lesser frequency than that at which the road flooded before construction of the structure.
- Railroads that are to remain in use may not be flooded.

(ii) Flooding of Buildings

- The STC may not allow dwellings, including basements, or any other buildings that contain valuable property or that may be used as permanent or seasonal living quarters, to remain in the area upstream of a dam and below the top-of-dam elevation and the area downstream from the dam within the flowage area of the auxiliary spillway, unless they are floodproofed or otherwise protected from damage. Before financial assistance is made available to the SLO, the dwelling or building must be demolished, relocated, raised, floodproofed, or protected by a floodwall. This must be done so that drainage is adequate and ponding of water is not unreasonable.
- If requested by the SLO and approved by the STC, other buildings, such as barns and garages, will be allowed to remain in the flowage easement area.

Approval for flooding buildings of this type will not be granted if the building is used for the storage of feed, regulated chemicals, perishables, supplies, equipment, or other items that would be substantially damaged by flooding. This prohibition against allowing other buildings also applies to any building used for other purposes if flooding would cause an interruption or delay of operations carried on in the building or if a death or damage to the building's contents could occur.

(iii) Flooding of Water Sources

Flooding of water sources, such as springs, wells, or stream diversions, or the interruption of delivery, conveyance, and disposal systems is prohibited until the SLO has complied with State laws, ordinances, and regulations relating to water sources.

(iv) Flooding of Utilities

Public or private utilities may not be flooded unless the utility company or owner has determined that the function of the facility will not be affected adversely and a subordination agreement has been obtained.

(v) Flooding of Burial and Historical Sites

- Burial sites, such as cemeteries and private family plots, may not be flooded unless disinterment and reburial has been accomplished in accordance with applicable State laws (Public Law 89-665).
- Historical sites or monuments may not be flooded until compliance with procedures for such property has been completed as required under the National Historic Preservation Act. The STC must assist the SLO in obtaining permission to survey for or recover archeological or historical resources in accordance with 420-GM, Part 401. The STC must ensure that appropriate Government-to-government (Tribal government) consultation is conducted per Executive Order 13085.

(4) Permit or Term Easements for Project Installation

Permit or term easements are to be acquired for areas in addition to those covered in sections (1), (2), and (3) above as needed for surveys and investigations, for one-time operations such as spoil spreading, and as needed for construction performance. These areas include those for construction ingress and egress, equipment staging, and parking lots.

(5) Public Recreation and Public Fish and Wildlife Habitat Improvements and Developments

- (i) Fee simple title is required for all privately owned land acquired for public recreation and public fish and wildlife habitat purposes when Watershed Program cost-sharing assistance is provided. Fee simple title is preferred for all non-Federal public land needed. However, if it is not feasible to obtain this title, the granting of a perpetual easement generally will suffice. An acceptable permit from the agency administering the land will be sufficient for real property rights required on Federal land.
- (ii) At least one access road must be provided to all principal recreation areas. Rights-of-way required for public utilities, such as power lines and pipelines needed to service recreation or fish and wildlife developments, must be acquired by at least a perpetual easement.
- (iii) Construction of private facilities on land acquired with Federal cost-share funds is prohibited. The exception to this is for facilities constructed or operated by

private concessionaires on a controlled permit basis to serve the planned use of the improvement or development, approved by the SLO and NRCS.

- (6) Wetland or Floodplain Acquisition
  - (i) Wetland and floodplain conservation easements, including land acquired or improved for flood damage reduction using Watershed Program cost sharing will be acquired by the SLO. Real property acquired in fee title or as perpetual easements with deed restrictions must be compatible with the purposes for which the land was acquired. These easements must be used to retain excessive floodwaters, improve water quality and quantity, and provide habitat for fish and wildlife.
  - (ii) Real property acquired by the SLO in fee title will be addressed in the operation and maintenance agreement and must not be sold or otherwise disposed of except as provided for in the watershed agreement (see exhibit in 390-NWPM, Part 506, Subpart C, Section 506.30, in this manual).
  - (iii) Wetland and floodplain acquisition will be used to retain excessive floodwaters, improve water quality and quantity, provide habitat for fish and wildlife. When acquired for flood damage reduction, use must be compatible with flood mitigation. Land uses must be limited to purposes that provide public benefit such as recreation, fish and wildlife habitat, water quality improvement and other purposes that are compatible with the remaining flood hazard.

#### **504.4 Easement Monitoring and Enforcement**

Wetland, floodplain, and mitigation easements acquired with Watershed Program funds will be operated and maintained by the project sponsor according to an operation and maintenance plan and agreement. Any monitoring protocol established must be discussed and be addressed in the Plan-EA or Plan-EIS and the associated finding of no significant impact or record of decision. The operation and maintenance plan and agreement must require that federally funded easements be protected as applicable to the intended purpose of the easement. Signage must be used, as needed, to protect easements.