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Part 528 – Agricultural Conservation Easement Program

Subpart A – ACEP General Information

528.0 Purpose

A. This part provides general information about the Agricultural Conservation Easement Program (ACEP), the sources of ACEP authority, and roles and responsibilities.

B. ACEP consolidates the purposes of the Farm and Ranch Lands Protection Program (FRPP), the Grassland Reserve Program (GRP), and the Wetlands Reserve Program (WRP) into one easement program with two components. The two easement enrollment components of ACEP are agricultural land easements (ACEP-ALE) and the wetland reserve easements (ACEP-WRE). This part is organized by:

(i) ACEP provisions that affect the entire program, found in subparts A through C and R through U.
(ii) ACEP-ALE provisions that affect only the agricultural land easement component, found in subparts D through J.
(iii) ACEP-WRE provisions that affect only the wetland reserve easement component, found in subparts K through Q.

C. The purposes of ACEP are to restore, protect, and enhance wetlands on eligible land; to protect the agricultural viability, and related conservation values of eligible land by limiting nonagricultural uses of that land; and protect grazing uses and related conservation values by restoring and conserving eligible land.

D. Under ACEP-ALE, NRCS provides cost-share assistance to eligible entities to purchase agricultural land easements from eligible landowners to protect the agricultural use, including grazing uses, and related conservation values on eligible lands. Under ACEP-WRE, NRCS protects wetlands by purchasing directly from eligible landowners a reserved interest in eligible land or entering into 30-year contracts on acreage owned by Indian Tribes, in each case providing for the restoration, enhancement and protection of wetlands and associated habitats.

E. The ACEP repeals FRPP, GRP, and WRP but maintains the purposes of these predecessor easement programs. Easements and 30-year contracts previously enrolled under FRPP, GRP, and WRP, as well as easements previously enrolled in the previously repealed Farmland Protection Program (FPP) and the Emergency Wetlands Reserve Program (EWRP), are considered enrolled in ACEP. Existing easements, 30-year contracts, and agreements remain valid and enforceable, and subject to the legal framework in place at the time of enrollment, except that the long-term stewardship and management of these easements and 30-year contract lands, and ACEP funding made available for implementation, will be in accordance with the applicable provisions of this part.

528.01 Background

A. General Administration

NRCS administers ACEP using the funds, authorities, and facilities of the Commodity Credit Corporation (CCC). NRCS may, as appropriate, receive advice from the State Technical Committee and from other Federal or State agencies, conservation districts, or other organizations on program administration. No determination or recommendation by these agencies or

organizations compels NRCS to take any action that NRCS determines will not serve ACEP purposes.

B. Applicability

The ACEP is available to all 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.

C. Waivers to National Policy

The policy set forth in this manual must be followed. In limited and unusual circumstances, the Chief of NRCS or Deputy Chief for Programs of NRCS, as delegated, may waive policy in this part. A State Conservationist may seek a waiver of this policy by sending a written request for a waiver to the Deputy Chief for Programs as follows:

(i) The request must provide adequate rationale for the policy waiver. The rationale should demonstrate that approving the waiver would result in a conservation easement with equal or greater conservation value, is consistent with the purposes and objectives of the policy to be waived, and the policy waiver is needed to adapt to either a specific aspect of the landowner's situation, an eligible entity's program, or the unique characteristics of the parcel or proposed easement area.

(ii) Requested actions must be consistent with applicable statutes and regulations.

(iii) Policy waivers, unless otherwise identified in the waiver itself, will expire at the end of the fiscal year in which they are approved.

(iv) Policy waivers granted by the Deputy Chief will not be for broad requests. Policy waivers will only be granted to address requests for individual transactions or cooperative agreements, as applicable. Approved waivers must not be extended to transactions or cooperative agreements that were not specifically identified in the request and approval.

(v) A copy of the approved policy waiver or reference to its location will be maintained in the easement case file to which it applies and uploaded to the National Easement Staging Tool (NEST) upon receipt.

528.02 Public Access to Data

A. Release of Personal Information

Information about ACEP applicants is generally not released to the public because individual privacy rights must be protected. The Freedom of Information Act (FOIA), Privacy Act, section 1244 of the Food Security Act of 1985, and section 1619 of the Food, Conservation, and Energy Act of 2008 (the 2008 Act), 7 U.S.C. Section 8791, require the Government to withhold certain information related to agricultural producers and others who participate in NRCS programs. Refer to Title 120, General Manual (GM), Part 408, Subpart C, "Freedom of Information Act and Privacy Act," for NRCS policy regarding confidentiality of information.

B. ACEP Applicant Information

Aggregate or statistical information about ACEP applications may be described in news releases, Web sites, and other tools used to inform the public.

C. ACEP Landowner Information

After NRCS has made payment for an easement, additional information is available for release. The following information about ACEP–funded transactions may be released through a FOIA request:

(i) Names of landowners of funded easements
(ii) Address information, limited to State, city, county, or any combination of these. (Additional restrictions about the release of address information apply to some corporate and nonprofit business types. Consult 120-GM, Part 408, for more guidance.)
(iii) ACEP payment amounts
(iv) Other information as determined by the NRCS State or national FOIA officer in accordance with applicable statutes.

D. Geospatial Information

(1) NRCS is prohibited from disclosing geospatial information it maintains about agricultural land or operations that was collected in association with program participation. However, conservation easement boundary information may be made public as such information pertains to interests held by the United States and is not merely information provided by an agricultural producer or owner.
(2) The general public may access NRCS geospatial data at the following Web address: http://ncgcweb.ftw.nrcs.usda.gov/easements/imagery/. Available data includes the program name, easement boundaries, centroids, and State or county boundaries.

Part 528 – Agricultural Conservation Easement Program

Subpart B – ACEP Responsibilities

528.10 Responsibilities

A. NRCS

NRCS has overall leadership for ACEP and the repealed easement programs considered enrolled in ACEP, including FRPP, FPP, GRP, WRP, and EWRP. NRCS is responsible for establishing regulations, policies, guidelines, and priorities for ACEP implementation, funding, and long-term monitoring and enforcement.

B. National Headquarters (NHQ) – Chief of NRCS

National leadership is provided by the Chief of NRCS (Chief) and the Chief's designee. The Chief oversees all responsibilities of NRCS, including the delegation of authorities and responsibilities as appropriate. The Chief reserves decisionmaking on any ACEP matter delegated to lower organizational levels. The Chief also retains certain decisionmaking responsibilities that may not be further delegated, these include but are not limited to—

(i) Waivers of regulatory provisions.
(ii) Termination of all or a portion of an ACEP easement as a result of an approved easement administration action.
(iii) ACEP-WRE only: Waiver of the 24-month ownership requirement for specific circumstances.
(iv) ACEP-ALE only: Decertification of a certified entity.

C. NHQ, Deputy Chief for Programs

The Deputy Chief for Programs reserves decisionmaking on any ACEP matter within the Programs Deputy area, even if delegated to lower organizational levels, and oversees all responsibilities of the Easement Programs Division (EPD). The Deputy Chief for Programs retains certain decision making responsibilities that cannot be further delegated. These include but are not limited to—

(i) Waivers of policy provisions not delegated to the State Conservationist.
(ii) ACEP-ALE: Determinations on eligible entity requests to use a valuation methodology other than USPAP or UASFLA.
(iii) Other responsibilities delegated by the Chief.

D. NHQ, Easement Programs Division

Within NHQ, responsibilities delegated to the EPD director include but are not limited to—

(i) Developing and maintaining regulations, policies, guidelines, and procedures to meet the program requirements, purposes, and goals and ensuring that they are carried out.
(ii) Formulating budget information, calculating apportionment requests, developing allocations of ACEP funds to achieve national program objectives, and tracking implementation.
(iii) Monitoring and assisting with program implementation in accordance with ACEP requirements.
(iv) Developing, revising, and maintaining functionality of the National Easement Staging Tool (NEST) as the national ACEP database.

(v) Coordinating and developing program outreach material and promoting outreach to potential partners and eligible landowners.
(vi) Providing training and oversight to ensure program policy and goals are met.
(vii) Developing national ranking criteria and procedures used by the States to evaluate individual proposals or applications.
(viii) Reviewing and approving easement compensation procedures and values.
(ix) Coordinating with the Office of the General Counsel to ensure the legal sufficiency of program regulations, policies, procedures, and forms.
(x) Coordinating with the Farm Service Agency (FSA) and other national partners.
(xi) ACEP-ALE only:
- Developing and publishing template cooperative agreements and minimum deed requirements and terms for ACEP-ALE implementation.
- Establishing criteria for eligible entity certification, maintaining a list of certified and decertified entities, providing support to States and Regional Conservationists in review of entity certification request packages.

(xii) ACEP-WRE only:
- Developing and publishing template ACEP-WRE warranty easement deeds and 30-year contracts with Tribes.
- Determining reduction in the value of retained grazing rights.
- Reviewing and approving exhibit E's for Reservation of Grazing Rights.

(xiii) Reviewing obligations and payment records submitted in accordance with the internal controls process.
(xiv) Coordinating with the Financial Management, national service delivery teams, and the National Finance Center, where necessary, on obligation and payment issues.
(xv) Assisting States with easement enforcement and violation issues.
(xvi) Reviewing and making final determinations on easement administration action requests, with the exception of easement terminations.
(xvii) Other responsibilities as delegated by the Chief or Deputy Chief for Programs.

E. NHQ, Regional Conservationists (RCs)

The RCs are responsible for those activities as designated by the Chief or the Deputy Chief for Programs, including—

(i) Providing leadership to the States regarding administrative procedures.
(ii) Evaluating consistency between the States and coordinate across the regions regarding administrative procedures.
(iii) Evaluating overall program effectiveness at the State and regional level and coordinate across regions.
(iv) Providing oversight and quality assurance of program implementation at the State, area, and field levels.
(v) Providing oversight to ensure program goals are met and ensuring outreach to all potential program partners and eligible landowners.
(vi) Reviewing and providing final approval of eligible entity certification requests under ACEP-ALE.
(vii) Reviewing cooperative agreements or grant agreements that exceed the State Conservationist's approval authority or the prescribed dollar amount and providing delegations of authority for approved agreements.
- Review thresholds change periodically and may vary according to the agreement type or contracting method used.
- Agreements requiring review may include, but are not limited to, ACEP-ALE cooperative agreements with eligible entities, ACEP-ALE grant agreements with

certified eligible entities, or ACEP-WRE cooperative agreements to provide services such as surveys, restoration design and implementation, and monitoring;

Note: ACEP-WRE agreement to purchase conservation easement (APCE) or agreement to enter contract for 30-year land use (AECLU) are subject to internal control review but are not subject to cooperative agreement review by the RCs.

(viii) Reviewing periodic summary reports from States on various program implementation matters, including, but not limited to—

- Contract and agreement status.
- 24-month waiver requests.
- Fund obligation.
- Easement closings.
- Restoration implementation.
- Easement monitoring.
- ACEP-ALE only: Eligible entity cash contribution waivers for projects of special significance.

(ix) ACEP-ALE only:

- Addressing the concerns of eligible entities with the States' administration of ACEP in coordination with the Deputy Chief for Programs.
- Reviewing ACEP-ALE entity certification request packages submitted by the State Conservationist, approving or rejecting requests for certification, and notifying the requesting entity, the State Conservationist, and Deputy Chief for Programs of the determination.

(x) Other responsibilities delegated by the Chief or by this part.

F. NHQ, Deputy Chief for Management

The Deputy Chief of Management provides national leadership for—

(i) Providing expertise and support for ACEP-related contracts and agreements.
(ii) Providing information technology support for approved software for ACEP.
(iii) Issuing funds in the financial management system to State Conservationists for system allocations, reallocations, and modifications when approved by the Chief or Associate Chief.
(iv) Maintaining fund accountability and accounting procedures.
(v) Providing budget, contracting, obligation, payment, agreement, reimbursable and other financial management and acquisition assistance through the national service delivery teams and at NHQ.
(vi) Other responsibilities delegated by the Chief.

G. State Offices, State Conservationist

(1) State leadership is provided by the State Conservationist who is ultimately responsible to ensure programs are implemented at the State level in accordance with applicable statutes, regulations, and policies. The State Conservationist may delegate certain program responsibilities and functions to the State, area, and field offices and other staff within the State. The State Conservationist oversees all responsibilities of program activities within the State.

(2) The State Conservationist retains certain responsibilities that may not be further delegated. These responsibilities include but are not limited to the following:

(i) Serve as chairperson of the State Technical Committee (STC)

(ii) Delegate in writing responsibilities and approval authorities to the State and local level as needed to carry out State-level responsibilities that are not strictly limited to the State Conservationist

Note: The State Conservationist designates the local NRCS representatives. Any NRCS employee or group of employees serving on an interdisciplinary team may function as the local NRCS representative.

(iii) Make waiver decisions for land, landowner, and entity eligibility, where appropriate and where delegated to the State Conservationist, such as—

- ACEP-WRE only: 24-month ownership waiver requests for circumstances delegated to the State Conservationist.
- ACEP-ALE only: eligible entity cash contribution waiver requests for projects of special significance.

(iv) Select applications for funding, execute easement agreements on behalf of the United States, and authorize the expenditure of easement funds to eligible participants for the acquisition of easements on eligible land through properly executed documents

(v) Maintain program fund integrity and accountability

(vi) Monitor and manage program allocations and accounts consistent with allocation letters and all subsequent directives

(vii) Certify completeness of easement data in the NEST.

(viii) Ensure easements remain in compliance and required monitoring, enforcement, and remediation actions are taken pursuant to rights and interests held by the United States and certify that easement condition is reported annually in NEST for all closed easements

(ix) Make decisions to recommend or not approve easement administrative action requests. If approval is recommended, forward to EPD through the State Conservationist; if approval is not recommended, notify the project proponent, landowner and EPD of decision

(x) Implement a quality assurance program to ensure that program policies and objectives are met

(xi) Ensure self and staff have necessary skills and training to administer easement programs

(xii) ACEP-ALE only:

- Make decisions on acceptability of alternative legal access for ACEP-ALE, as necessary.
- Review eligible entity requests for certification and make decision to recommend for approval or to deny the request.
- Notify RCs, Deputy Chief for Programs, and Chief of potential decertification actions and forward all required information

(xiii) ACEP-WRE only:

- Review and approve determinations regarding compatible use authorization (CUA) requests (this particular authority is an exception to this list and may be delegated, but only to the Assistant State Conservationist with easement programs responsibility)

(xiv) Other responsibilities delegated to the State Conservationist by the Chief or RCs

H. State Offices, State-Level Staff.—ACEP responsibilities delegated to the State-level easement programs staff (State office) by the State Conservationist may include but are not limited to the following:

(1) General Program Responsibilities

(i) Accept applications on a continuous basis, announce availability of program funds and applicable cutoff dates, conduct outreach and signups, and process applications

(ii) Assist potential participants, including entities and landowners, in submitting proposals or applications

(iii) Complete land, landowner, and applicable entity eligibility determinations

(iv) Develop a weighted ranking process to prioritize all eligible applications, conduct ranking on eligible applications, and recommend prioritized eligible applications for funding

(v) Obtain advice from the STC in establishing State-level program priorities, policies, procedures, guidelines and matters of discretion delegated to the State Conservationist (e.g., reductions in prime farmland requirements for an area of the State and exceptions to riparian length, width, and upland buffer sizes)

(vi) Obtain input from the U.S. Fish and Wildlife Service and other Federal and State-level agencies, as necessary

(vii) Ensure necessary onsite visits occur to complete ranking, land eligibility determinations, certificates of inspection and possession, landowner interviews, the NRCS hazardous materials field inspection checklist, NRCS hazardous materials landowner interview, and any other required documents prior to required deadlines

(viii) Establish easement compensation values, including obtaining fair market values or reviews from qualified professionals as required

(ix) Ensure implementation, administration and management of easements complies with Federal environmental and historic preservation laws

(x) Develop, upload, and maintain required application and agreement information in the easement tracking tool (NEST) and submit, as requested to NHQ

(xi) Submit information supplemental to the data provided in NEST as requested by NHQ that identifies resources concerns, conservation priorities, demand, capacity, and other criteria used to determine fund allocations

(xii) Provide and obtain necessary training to implement the program effectively and in accordance with applicable statutes, regulations, and policies

(xiii) Coordinate with adjoining States on—

- Establishment of easement compensation values
- Technical standards and specifications used for restoration
- Priorities and procedures for program implementation
- Sharing personnel resources where needed
- Establishing ranking criteria

(xiv) Develop agreements with other Federal agencies, State agencies, and other partners for the efficient use of personnel and other resources, including leveraging technical assistance to meet the ACEP workload demand and achieve valuable cost-effective conservation projects

(xv) Maintain high quality conservation treatment implementation

(xvi) Develop State protocol for monitoring enrolled lands and monitor ACEP easements in accordance with 440-CPM, Part 527, Subpart P

(xvii) Review requests for easement administration action as provided in this part, providing findings and recommendation to State Conservationist for action

(xviii) Maintain official easement case files in secure, fireproof cabinets in the State office and maintain other official program records and documentation as appropriate

(xix) Prepare necessary State policy supplements to the national policy

(xx) Provide periodic status reports to the RCs or EPD as requested

(xxi) Other activities as delegated by the State Conservationist

(2) ACEP-ALE Activities and ACEP-ALE Cooperative Agreements and Grant Agreements

(i) Use the template ACEP-ALE cooperative agreement for noncertified eligible entities and the ACEP-ALE grant agreement for certified eligible entities provided by NHQ to

obligate ACEP-ALE funds, to ensure consistent and equitable implementation of ACEP-ALE, and coordinate with NHQ if the eligible entity requests modifications to its terms

(ii) Manage ACEP-ALE agreements as the agency's representative of the Commodity Credit Corporation with the selected eligible entities in accordance with regulation and policy

(iii) Maintain the NEST database of the applications, substitute parcels, enrolled parcels in signed ACEP-ALE agreements, acquired parcels, and easement monitoring efforts

(iv) Assist eligible entities to ensure that an appropriate agricultural land easement plan is developed and implemented for every ACEP-ALE parcel

(v) Obtain a hazardous materials records search and conduct the landowner interview and an onsite field inspection of the parcel prior to or within 120 days of signing the ACEP-ALE agreement

(vi) For cooperative agreements with noncertified eligible entities, review the agricultural land easement deed used by the eligible entity to ensure it contains the ACEP-ALE minimum deed terms as required by the cooperative agreement (the review should be conducted prior to submitting the deed to EPD for approval, if required)

(vii) For all applications selected for funding, confirm that the landowner has clear title and sufficient access and that the easement area does not have any onsite or offsite issues that would preclude or interfere with achieving program purposes, and ensure the eligible entity has addressed any unacceptable encumbrances to NRCS satisfaction

(viii) Monitor certified entities for compliance with ACEP-ALE requirements, conduct quality assurance reviews of ACEP-ALE easement transactions and monitoring, provide entities with notice of required remedies if issues identified, follow procedures for remediation or decertification, and report potential violations of ACEP-ALE certification requirements to State Conservationist and EPD

(ix) Monitor eligible entity monitoring and administration of ACEP-ALE-funded easements, and follow up to ensure easement enforcement activities are pursued where needed

(3) ACEP-WRE Activities

(i) Develop and submit to EPD easement compensation procedures, values, and rationale every fiscal year, including establishing geographic area rate caps with advice from the STC

(ii) Provide information to appraisers or other qualified real estate professionals needed to conduct individual appraisals or areawide market analysis

(iii) Conduct all easement acquisition activities on applications selected for funding, including confirming that the landowner has clear title and sufficient access and that the easement area does not have any onsite or offsite issues that would preclude or interfere with achieving program purposes

(iv) Coordinate with FSA, including notification of ACEP-WRE enrollment, to track county cropland caps and ensure permanent retirement of any existing cropland base acres for the land on which the easement has been obtained when WRE recording is completed

(v) Determine method for implementing restoration activities and ensure restoration is completed in accordance with ACEP policy and arrange for restoration payments to landowners, partners, or vendors

(vi) Ensure conservation treatment is in accordance with NRCS specifications and the Field Office Technical Guide (FOTG) and all planning activities are in accordance with the Title 180, National Planning Procedures Handbook (NPPH), Part 600, and this manual

(vii) Determine areas for the reservation of grazing rights option if applicable

(viii) Develop and submit to EPD for approval the exhibit E documents for the reservation of grazing rights option

(4) Obligations and Payments

(i) Ensure that the ACEP compensations rates do not exceed program limits

(ii) Coordinate with the appropriate national service delivery teams to procure services, execute contracts or agreements, obligate funds, and issue payments

(iii) Ensure that all landowners are adjusted gross income (AGI) and highly erodible land/wetland conservation (HEL/WC) eligible for the required year; AGI and HEL/WC eligibility must be verified prior to obligation, and for HEL/WC again prior to every payment

(iv) Prior to obligation and prior to every payment, ensure that all program participants that are entities provide evidence of a valid Dun and Bradstreet Data Universal Numbering System (DUNS) number and meets the Central Contractor Registration (CCR) requirements through registration or renewal in the System for Award Management (SAM) or successor registry

(v) Conduct State-level easement acquisition internal control reviews for easement obligations and payments, and prepare and submit packages to EPD for reviews of obligations and payments above the state threshold

(vi) Manage funds obligated to agreements, track financial obligations and outlays, and provide financial reports

I. Area Offices

Area offices will perform responsibilities for ACEP as delegated by the State Conservationist.

J. Field Offices

Field offices will perform responsibilities for ACEP as delegated by the State Conservationist. Responsibilities of the designated conservationists (DCs) or the local NRCS representative, as determined by the State Conservationist, may include but are not limited to—

(i) Conducting local marketing, education, and outreach activities.

(ii) Accepting ACEP applications and complete application activities as defined by State Conservationist.

(iii) Completing program eligibility determinations, especially technical and onsite land eligibility determinations, in accordance with the provisions in this part.

(iv) Completing ranking form and certifying the project meets program objectives.

(v) Forwarding application, ranking, and supporting documentation to the State office.

(vi) Conducting onsite visits to complete environmental due diligence, certificates of inspection and possession, landowner interviews, onsite eligibility determinations to verify the absence of offsite and onsite conditions that would preclude successful achievement of program objectives.

(vii) Conducting easement acquisition, restoration, monitoring, and management activities, as assigned by the State Conservationist.

(viii) Completing all conservation planning activities in accordance with the National Environmental Policy Act (NEPA) of 1969, 180-NPPH, and this manual.

(ix) Providing the landowner technical assistance to comply with the terms of easement and restoration agreements.

(x) Conducting monitoring activities in accordance with the provisions of this part and 440-CPM, Part 527, Subpart P.

(xi) Maintaining ACEP records and reports sufficient for monitoring and compliance purposes.

(xii) Advising State office of potential violations, compliance and enforcement issues.

(xiii) Coordinating with FWS, State wildlife agency, State agriculture agency, conservation district (CD), and other appropriate agencies, organizations, or cooperating partners to provide program outreach; administration assistance; input on restoration of the

hydrologic, topographic, and vegetative conditions of enrolled land; and protection of functions and values of enrolled acres consistent with program purposes

(xiv) ACEP-ALE

Assist with development of or reviewing the agricultural land easement plan as identified in the ALE cooperative agreement

(xv) ACEP-WRE

- Meeting onsite with the landowner and surveyor to identify the easement area and access route, certifying that easement or contract boundary survey is correct, and verifying boundary markers have been correctly placed
- Completing the preliminary and final wetland reserve plan of operations (WRPO) including detailed practice designs and cost estimates
- Arranging for the application of conservation practices and activities to ensure that practices meet standards and specifications in the eFOTG
- Certifying practice establishment for payment
- At the time of ACEP-WRE easement enrollment, providing FSA county office notice of location and acreage of the enrollment for the purposes of tracking county cropland limitations
- At the time of ACEP-WRE easement recording, providing FSA county office notification of easement recording, including easement recording date and easement boundary map, and acreage and location information
- Developing compatible use authorization requests for ACEP-WRE, and updating the final WRPO and associated management plans as appropriate

K. ACEP-WRE Implementation Teams

(1) ACEP-WRE Implementation Teams may be established by State Conservationists to improve the consistency and efficiency of ACEP implementation. These teams will perform responsibilities for ACEP, as delegated by the State Conservationists.

(2) Multistate ACEP teams may be developed to perform ACEP duties across State lines.

L. All NRCS Employees

NRCS employees are prohibited from servicing ACEP easements or associated agreements on land owned by the employee or members of the employee's immediate family, on land in which they or members of their immediate families have a financial interest, or where there is an appearance of or actual conflict of interest. In these situations, the State Conservationist will designate an NRCS employee to provide assistance (see Title 110, General Manual, Part 405).

528.11 Other Agency Involvement

A. Office of the General Counsel (OGC) Responsibilities

(1) The national OGC assists NRCS with ACEP implementation by—

(i) Assisting with easement deed reviews as requested by NRCS National Headquarters.

(ii) Advising NRCS about merits of conservation easement administration action requests.

(iii) Advising NRCS on issues that impact program implementation.

(iv) Advising on any other matters of ACEP implementation as deemed appropriate by NRCS or OGC.

(2) The regional OGC assists NRCS with ACEP implementation by—

(i) Reviewing sufficiency of title evidence related to each ACEP-WRE easement transaction and rendering preliminary and final title opinions.

(ii) Advising NRCS State offices on easement deed recording requirements, activities needed to implement approved easement administration actions.
(iii) Advising NRCS State offices on enforcement of easement terms, and actions or issues that impact program implementation.

B. Farm Service Agency Responsibilities

FSA is responsible for the following:

(i) Coordinating with NRCS
(ii) Determining AGI and HEL/WC eligibility
(iii) Providing maps and additional supporting data when requested at the State and local levels
(iv) Serving on the STC
(v) Implementing any support or administrative responsibilities determined jointly by NRCS and FSA at NHQ
(vi) ACEP-WRE:
- Assisting the landowner in completing the necessary FSA forms to retire or transfer program base acres
- Adjusting participant's base history, as required, using the easement boundary maps, acreage and location information provided by NRCS upon easement recording
- At the State level, informing the State Conservationist of those counties that are approaching or exceeding the Conservation Reserve Program (CRP) or ACEP-WRE county cropland limitations, ACEP-WRE easement limitations, or both

C. National Finance Center (NFC) Responsibilities.—The National Finance Center assists NRCS with ACEP implementation by—

(1) Verifying the NRCS certifying authorizing officer's signature
(2) Making payment based on the NRCS payment certification forms.
(3) Interfacing the payment data to NRCS.
(4) Contacting the NRCS-Commodity Credit Corporation liaison for action when discrepancies arise with payment certification.
(5) Entering payment information in NFC's financial system.

D. U.S. Fish and Wildlife Service.—FWS is identified in ACEP-WRE statutory and regulatory provisions as an integral partner to ACEP-WRE implementation. NRCS will include FWS in the following as applicable:

(1) Participating in the STC
(2) Assisting NRCS with land eligibility determinations after applications have been received
(3) Assisting NRCS in restoration planning so that easement lands achieve maximum wildlife benefits and wetland values and functions, taking into consideration the cost of such restorations
(4) Incorporating consultation responsibilities under section 7 of the Endangered Species Act with ACEP-WRE consultation actions
(5) Providing recommendations for NRCS consideration regarding the timing, duration, frequency, and intensity of compatible uses so that these uses further the protection and enhancement of the wetlands and other associated ecological values of the easement lands
(6) Providing recommendations for NRCS consideration for development of easement management plans, including grazing management plans developed under the reservation of grazing rights enrollment option
(7) Providing assistance, through an appropriate agreement or other mechanism, in areas of ACEP-WRE implementation where it is in the best interest of the program (e.g., efforts to

deliver ACEP-WRE restoration projects in cooperation with FWS Partners for Fish and Wildlife Program efforts)

(8) Reviewing request for easement administration action, as part of the NEPA process

E. Other Federal, State, and Cooperating Partners

Other Federal agencies, State wildlife or agricultural agencies, conservation districts, and other entities with appropriate expertise may—

(i) Provide recommendations for ranking priority criteria, except if such partner is seeking or will seek financial assistance through ACEP, it may not provide recommendations on ACEP ranking priority criteria.

(ii) Serve on the STC.

(iii) Identify program opportunities.

(iv) Provide assistance, through an appropriate agreement or other mechanism, in areas of ACEP implementation where NRCS determines it to be in the best interest of the program.

528.12 Role of State Technical Committee

A. About the STC

The State Conservationist must fully consider the recommendations of the STC, but is not bound by these recommendations when establishing State-level program procedures, guidelines, or priorities. The STC (see 7 CFR Part 610, Subpart C) is:

(i) Chaired by the State Conservationist and serves in an advisory capacity in accordance with Title 440, Conservation Programs Manual, Part 501, Subpart B, and the policy set forth here; and

(ii) Composed of agricultural producers, nonindustrial private forest land owners, and other professionals that represent a variety of disciplines in soil, water, wetlands, plant, and wildlife sciences, the STC provides the State Conservationist with technical information, analysis, and recommendations regarding implementation of the ACEP.

B. State Technical Committee Responsibilities.—The STC provides recommendations on the following matters:

(1) Developing and updating State ranking criteria and procedures

(2) Identifying priority resource concerns or land treatment areas to focus program implementation at the State level

(3) Other technical issues, which may include but are not limited to operation and maintenance criteria, easement management, and long-term monitoring procedures

(4) ACEP-ALE

Recommending additional land eligibility or prioritization parameters to focus ALE enrollment in highest priority areas of the State

(5) ACEP-WRE

(i) Recommending a list of eligible practices for ACEP-WRE

(ii) Reviewing proposed geographic area rate caps for use in determining ACEP-WRE easement compensation values

(iii) Evaluating unique wetland complexes within the State to determine if they are consistent with ACEP-WRE national eligibility criteria. Examples of unique wetland complexes include but are not limited to pocosins, prairie potholes, playas, vernal pools, fens, bogs, or ridge, and swale floodplain complexes

(iv) Identifying areas of consideration for reservation of grazing rights option of ACEP-WRE, if applicable

(v) Establishing guidelines for authorization of compatible uses on ACEP-WRE easements

C. Specialized Subcommittees

(1) The State Conservationist may convene a specialized subcommittee of the STC to assist and make recommendations in the development of State ranking criteria. In the case of a specialized subcommittee, public notification and participation are not necessary. However, final recommendations resulting from these subcommittee sessions may only be made in a general session of the STC where the public is notified and invited to attend.

(2) Representatives of any individual or entity that has an interest in a particular project who serves on the STC may not assist in the development of ranking criteria or weight assignment to ranking criteria that will be applied to their project.

Part 528 – Agricultural Conservation Easement Program

Subpart C – ACEP Appeals

528.20 Appeals

A. Appeal Process

This section identifies the different programmatic relationships that NRCS has with persons, legal entities, or eligible entities that receive payment under ACEP in return for participation in the program and the nature of the appeal rights that flow from these relationships:

(i) All ACEP appeals will be handled in accordance with 7 CFR Parts 11 and 614 and Title 440, Conservation Programs Manual (CPM), Part 510, Subparts A and B, as it relates to program appeals, specifically title XII program appeals.

(ii) Under ACEP-ALE, NRCS enters into agreements with and makes payments directly to the eligible entity for the purchase of an agricultural land easement. Thus, the eligible entity is the program participant and has appeal rights under the application process. Under ACEP-ALE, the landowner does not have any appeal rights because the landowner, under ACEP-ALE only, does not qualify as a program participant under the appeal regulations. The only exception to this is that a landowner may have appeal rights if NRCS determines that a landowner has violated the HEL/WC payment eligibility requirements under 7 CFR Part 12.

(iii) Under ACEP-WRE, NRCS enters into agreements with and makes payment directly to landowners of eligible land. Thus, landowners are the program participants for purposes of application, enrollment eligibility, and payment. Once NRCS has acquired the easement and made payment, the landowner does not have any remaining benefit or entitlement from program participation and thus ceases to be a participant for administrative appeal purposes. All landowners' party to the original easement transaction and all subsequent landowners who purchase the property encumbered by the easement do not have appeal rights under 7 CFR Part 11 or 614; such landowners may be provided limited in-State appeals for certain posteasement closing determinations as described in section E below.

B. Actions Not Appealable

(1) Actions and decisions that are generally applicable to all participants in the Nation or State are not appealable in ACEP. Items that are not appealable, include but are not limited to the following:

(i) Easement or restoration cost-share rates

(ii) For ACEP-WRE, areawide market analysis (AWMA) and geographic area rate cap (GARC) values

(iii) Geographic priority area designations

(iv) Funding allocations and decisions

(v) NRCS conservation practice standards and specifications

(vi) Application of ranking criteria

(vii) Fund availability

(viii) Science-based formulas and criteria

(ix) Other matters of general applicability

(2) Actions specific to a participant that are not appealable include—

(i) NRCS determination that land is ineligible due to unacceptable title encumbrances or insufficient access.

(ii) For ACEP-ALE—

- The ALE federal contribution amount offered by NRCS.
- NRCS not authorizing closing or not issuing payment due to expiration of an ALE cooperative agreement or ALE grant agreement.

(iii) For ACEP-WRE—

- Cancellation of a conservation program contract, since cancellations are mutually agreed upon by the contract holder and NRCS.
- NRCS not executing the warranty easement deed or 30-year contract and not issuing payment due to expiration of an APCE or AECLU.
- NRCS deciding not to extend an APCE for another period of time.

(3) Once an ACEP easement is in place, the United States obtains vested rights and interests, based on the enrollment type, that authorize NRCS to make determinations necessary to preserve, restore, enforce, and administer these rights and interests on behalf of the United States. How NRCS exercises these discretionary authorities to ensure the long-term administration and enforcement of these Federal rights and interests do not vest any program rights or privileges in the landowner, eligible entity, or third party, and thus are not program benefits. Therefore, NRCS decisions to exercise such discretionary authorities are outside the purview of the USDA appeals process under 7 CFR Parts 11 and 614 and are the jurisdiction of the Federal courts. The United States may bring actions in Federal court to enforce or defend its rights or interests in ACEP easements. NRCS discretionary authorities related to rights and interests owned by the United States include but are not limited to—

(i) NRCS decisions regarding easement administration action requests.

(ii) NRCS easement enforcement actions.

(iii) For ACEP-WRE, NRCS decisions regarding the issuance, modification, or revocation of compatible use authorizations.

C. General Conditions of Appealability

Actions and decisions that are not generally applicable to all participants in the Nation or State and are specifically adverse to the eligible entity under ACEP-ALE or to the landowner under ACEP-WRE are appealable in ACEP. Appealable items include, but are not limited to—

(i) A determination that an application is not eligible for funding, except as described paragraph B(2)(i) above.

(ii) A determination by NRCS that a landowner has violated highly erodible land or wetland conservation provisions under 7 CFR Part 12.

D. Appeals in Writing

All appeals must be requested in writing and submitted by the appellant to the State Conservationist in the relevant State by the applicable deadlines.

E. Posteasement Closing Determinations

(1) Except for violations of 7 CFR Part 12 identified above, NRCS determinations that are after easement closing are not subject to the appeal process in 7 CFR Parts 11 and 614.

(2) A WRE landowner or ALE easement holder with easement lands that are not in compliance with the easement terms will be provided notice of the NRCS determination of noncompliance, and the landowner or ALE easement holder may be provided the opportunity to file a limited in-State appeal with the appropriate State Conservationist. There is no further appeal available.

(3) The information provided by the WRE landowner or ALE easement holder pursuant to this limited in-State appeal are to provide the State Conservationist with the information necessary to ensure that the NRCS determination is in accordance with the rights acquired by

the United States under the applicable easement deed and assist with creating the necessary administrative record should court action become necessary. Therefore, all information generated by the limited in-State appeal, including the State Conservationist decision, must be incorporated into the official easement case file maintained at the State office.

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart D – ACEP-ALE General Information and Eligibility Requirements

528.30 Overview of the Agricultural Land Easement (ALE) Component

A. Introduction

(1) The purposes of ACEP-ALE are to protect the agricultural use and future viability, and related conservation values, of eligible land by limiting nonagricultural uses of that land and to protect grazing uses and related conservation values by restoring and conserving eligible land.

(2) To achieve these purposes, NRCS is authorized to facilitate and provide cost-share assistance through agreements, as defined in section 528.50, with eligible entities including State or local governments, Indian Tribes, and certain nongovernmental organizations for the purchase of agricultural land easements on eligible land from eligible landowners. The duration of each agricultural land easement will be in perpetuity or the maximum duration permitted by State law.

(3) To participate in ACEP-ALE, eligible entities must submit applications to partner with NRCS and NRCS must determine the eligibility of the entity, the eligibility of each parcel of land offered for enrollment, and the payment eligibility of the landowner of each parcel of land.

(4) Eligible entities with applications selected for funding must enter into an agreement with NRCS. Under the agreement, the Federal share of the cost of an agricultural land easement or other interest in eligible land will not exceed 50 percent of the fair market value of the agricultural land easement. The eligible entity will provide a share that is at least equivalent to the Federal share, and at least 50 percent of the eligible entity share is from the eligible entity's own cash resources unless otherwise specified in this part.

(5) The type of agreement NRCS may enter into with an eligible entity is based on the status of the eligible entity as either a certified eligible entity, as defined in Subpart H, or a noncertified eligible entity. Hereinafter the term eligible entity includes both certified and noncertified eligible entities unless otherwise specified. Eligible entities may submit a certification request to NRCS. NRCS will enter into ACEP-ALE cooperative agreements with noncertified eligible entities and ACEP-ALE grant agreements with certified eligible entities. Hereinafter the term cooperative agreement applies to both cooperative agreements and grant agreements unless specified.

B. Program Objectives

The objective of ACEP-ALE is to facilitate the purchase by eligible entities of agricultural land easements on eligible lands that protect natural resources and the agricultural nature of the land and permit the landowner the right to continue agricultural production and related uses subject to the terms of the easement and the associated agricultural land easement plan.

C. Authority

This part contains specific policy guidance for ACEP-ALE implementation consistent with subtitle H of the Food Security Act of 1985 and 7 CFR Part 1468. Additional policy guidance for implementation of ACEP-ALE includes, but is not limited to, the following:

(i) Title 180, National Planning Procedures Handbook (NPPH), Part 600
(ii) Land Evaluation and Site Assessment (LESA) Handbook (1983 edition)
(iii) Land Evaluation and Site Assessment Guidebook (1994 Edition)

(iv) Title 310, General Manual (GM), Part 402, "Land Evaluation & Site Assessment System"
(v) Title 180, National Food Security Act Manual (NFSAM)
(vi) 120-GM, Part 401, Subpart I, "NRCS National Headquarters Grants and Agreements Review and Approval Process"
(vii) 190-GM, Part 410, Subpart A, "Compliance with NEPA, Procedures for NRCS-Assisted Programs"

D. Uses of NRCS ACEP-ALE Funds

(1) The United States, through the NRCS, on behalf of the CCC, may enter into a cooperative agreement with an eligible entity or a grant agreement with a certified eligible entity to provide matching funds for the purpose of acquiring agricultural land easements to protect agricultural lands from conversion to nonagricultural uses. NRCS enters into grant agreements with certified eligible entities because it anticipates less-than-significant government involvement in the acquisition of agricultural land easement by certified eligible entities.
(2) Funds provided by NRCS to any eligible entity are limited to the Federal share of the fair market value of the agricultural land easement.
(3) ACEP-ALE funds provided by NRCS may not be used for eligible entity expenditures for appraisals, areawide market analysis, legal surveys, access, title clearance or title insurance, legal fees, development of agricultural land easement plans or component plans by the eligible entity, costs of easement monitoring, and other related administrative and transaction costs incurred by the eligible entity.
(4) When required, NRCS may procure and conduct its own technical and administrative review of appraisals, areawide market analysis, or other easement valuation reports and necessary hazardous materials reviews. NRCS will obtain these reviews through an appropriate procurement method and following proper contracting rules and procedures.
(5) NRCS may provide direct technical assistance to landowners and eligible entities to develop an agricultural land easement plan or component plans or may provide ACEP-ALE funds to technical service providers (TSP) under 7 CFR Part 652 to develop the agricultural land easement plan or component easement plans.
(6) NRCS is not authorized to use ACEP funding to support agricultural lands protection strategies that do not result in the purchase of an agricultural land easement, such as transfer of development rights programs, agricultural use taxation programs, voluntary agricultural district programs, or agricultural zoning programs.

528.31 ACEP-ALE Application Process and Eligibility Overview

A. NRCS accepts ACEP-ALE applications on a continuous basis. At the discretion of the State Conservationist and in coordination with any required national application cutoff dates, States may establish and advertise one or more application cutoff dates during the fiscal year. Complete applications received prior to the cutoff date will be reviewed, ranked and considered for funding. Applications received after the cutoff date may be considered in the next application period.

B. NRCS evaluates and selects parcels for funding through four primary steps, as follows:

(1) Reviewing application information and supporting documentation provided by the entity to determine entity eligibility, land eligibility, and landowner eligibility
(2) Conducting onsite ranking and land eligibility determinations
(3) Selecting parcels for funding based on fund availability, ranking priority, eligibility and waiver determinations, preliminary reviews of title and access sufficiency, and evaluations of

onsite or offsite conditions exist that would preclude the lands ability to meet program purposes

(4) Entering into cooperative agreements with eligible entities to purchase agricultural land easements on parcels selected for funding and obligating ACEP-ALE funds to those agreements

C. Applications for Cost-Share Assistance

(1) Entities applying for cost-share assistance must submit the following:

(i) Entity application (Form NRCS-CPA-41 or successor form) and required supporting documentation

(ii) Parcel sheet (Form NRCS-CPA-41A or successor form) and required supporting documentation for each parcel in the application

(iii) Copy of the evidence of the landowner's current legal ownership, such as a recorded deed of ownership, of the eligible land or a fully executed purchase agreement wherein the eligible landowner has agreed to purchase the eligible land

(iv) Copy of the written pending offer to acquire agricultural land easements for each parcel in the application

(v) Application items identified in subpart E

(2) Eligible entities must certify at the time of application that they have the required funds available for each parcel (see section 528.43 for further details on entity matching funds requirements).

(3) Each eligible entity that will hold or co-hold an ACEP-ALE funded easement must—

(i) Provide information to the Farm Service Agency (FSA) for entry into the Service Center Information Management System (SCIMS).

(ii) Provide and maintain current registration in the Dun and Bradstreet Data Universal Numbering System (DUNS).

(iii) Meet the Central Contractor Registration (CCR) requirements through the System for Award Management (SAM) or successor registry. Evidence of current registration must be provided at the time of application, must be valid at the time of obligation of funds and must be maintained for the duration of the cooperative agreement.

528.32 Entity Eligibility Requirements and Responsibilities

A. General.—To be eligible to receive ACEP-ALE funding, an entity must be one of the eligible entity types listed in paragraph B and must provide NRCS sufficient evidence of their ability to meet the requirements and responsibilities of an eligible entity.

B. Types of Entities That are Eligible.—To be eligible, an entity must be one of the following:

(1) An agency of any State or local government or Indian Tribe (including a farmland protection board or land resource council established under State law)

(2) A nongovernmental organization that certifies that it is—

(i) Organized for and, at all times since the formation of the organization, have been operated principally for one or more of the conservation purposes specified in clause (i), (ii), (iii), or (iv) of section 170(h)(4)(A) of the Internal Revenue Code of 1986.

(ii) An organization described in section 501(c)(3) of the Internal Revenue Code of 1986 that is exempt from taxation under 501(a) of that code

(iii) Described in paragraph (1) or (2) section 509(a) of the Internal Revenue Code of 1986 or is described in section 509(a)(3) of that code and is controlled by an organization described in section 509(a)(2) of that code

- The clauses under section 170 address the following:

- The preservation of land areas for outdoor recreation by, or the education of, the general public
- The protection of a relatively natural habitat of fish, wildlife, plants, or similar ecosystems
- The preservation of open space (including farmland and forest land) where such preservation is—
  - -- For the scenic enjoyment of the general public
  - -- Pursuant to a clearly delineated Federal, State, or local governmental conservation policy and will yield a significant public benefit
- The preservation of a historically important land area or a certified historic structure.

- Section 501(c)(3) addresses corporations and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.
- Sections 509(a) (1), (2), and (3) include churches, educational organization, and medical organizations.

(3) A Tribal entity is an ‘‘Indian Tribe’’ as defined by section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. Section 450b(e)), i.e. “federally recognized Tribes.” The Bureau of Indian Affairs publishes in the Federal Register a list of Indian Tribes that are identified as federally recognized Indian Tribes (see http://www.bia.gov/cs/groups/public/documents/text/idc-020700.pdf). Indian Tribes that are not federally recognized may qualify under nongovernmental organization status above.

C. Entity Eligibility Requirements

(1) To participate in the ACEP-ALE, eligible entities must provide sufficient documentation for the State Conservationist to make a determination that the entity has—

(i) Authority to purchase and hold agricultural conservation easements.

(ii) An established a farmland protection program that purchases conservation easements for the purpose of protecting agriculture use and related conservation values by limiting conversion to nonagricultural uses of the land.

(iii) Demonstrated a commitment to the long-term conservation of agricultural lands.

(iv) The authority and capability to acquire, manage, and enforce agricultural land easements or their equivalent.

(v) Staff capacity (either directly or through formal agreement with other entities) dedicated to monitoring and easement stewardship.

(vi) The availability of funds at the time of application sufficient to meet the eligible entity’s contribution requirements for each parcel proposed for funding.

(vii) The ability to meet the requirements of the program.

(2) Entities with existing ACEP-ALE or Farm and Ranch Lands Protection Program (FRPP) agreements or easements that are delinquent or deficient in satisfying the terms of those agreements or easements may be determined ineligible for funding under ACEP-ALE until such time as deficiencies are addressed. These deficiencies may include, but are not limited to—

(i) Failing to conduct or provide annual monitoring reports to NRCS or providing annual monitoring reports that are insufficient or late.
(ii) Existing FRPP or ACEP-ALE agreements with funds remaining more than 2 years after the attachment execution date without any expenditures or actions towards closings of easements in the third year.

D. Eligible Entity Responsibilities

The eligible entity must—

(i) Perform necessary legal and administrative actions to ensure proper acquisition and recordation of valid agricultural land easements.
(ii) Pay all costs of agricultural land easement valuation and procurement.
(iii) Hold title to the agricultural land easements.
(iv) Meet the requirements of the cooperative agreement with NRCS and the terms of the easement.
(v) Ensure that an agricultural land easement plan is completed prior to closing and updated as necessary based on annual monitoring.
(vi) Meet performance deadlines in the cooperative agreement and submit all required documentation with requests for reimbursements, advances, or extensions by required deadlines.
(vii) Maintain DUNS and SAM registration for each holding and co-holding eligible entity.
(viii) Conduct monitoring at least annually and report the results of the monitoring to the State Conservationist at least annually.
(ix) Enforce the terms of the agricultural land easement, including the agricultural land easement plan.
(x) Carry out all responsibilities specified in the cooperative agreement.
(xi) Provide information to the FSA for entry into SCIMS.
(xii) After consultation with and approval by NRCS, an eligible entity may assign another entity to manage and enforce the agricultural land easement or other interest in land. The entity assigned the management and enforcement responsibilities must have the appropriate expertise and capacity to carry out such responsibilities.
(xiii) Entities that meet ACEP-ALE entity eligibility criteria may take title as a co-holder of the agricultural land easement once they have become a party to the cooperative agreement or provided NRCS an acknowledgement of the requirement to comply with the terms of the cooperative agreement, see section 528.60A(5).

528.33 Land Eligibility

A. Land Eligibility Overview.—An onsite review by NRCS is required prior to the NRCS making a land eligibility determination. To be eligible for ACEP-ALE, land must meet each of the following criteria:

(1) Private or Tribal land that is agricultural land, including land on a farm or ranch
(2) Subject to a written pending offer for purchase of an agricultural land easement from an eligible entity
(3) Land that meets at least one of the following criteria:
(i) Has prime, unique, or other productive soil
(ii) Contains historical or archaeological resources
(iii) The enrollment of which would protect grazing uses and related conservation values by restoring and conserving land
(iv) The protection of which will further a State or local policy consistent with the purposes of ACEP

(4) Land that is at least one of the following:
  (i) Cropland
  (ii) Rangeland
  (iii) Grassland or land that contains forbs, or shrubland for which grazing is the predominant use
  (iv) Located in an area that has been historically dominated by grass land, forbs, or shrubs and could provide habitat for animal or plant populations of significant ecological value
  (v) Pastureland
  (vi) Nonindustrial private forest land that contributes to the economic viability of an offered parcel or serves as a buffer to protect such land from development
(5) Land that is in an area that has access to agricultural markets for its products, infrastructure appropriate for supporting agricultural production, and other support services
(6) Land that faces development pressure from nonagricultural use

B. Eligible Land Types.—Eligible land must be privately owned or Tribal land on a farm or ranch that meets one of the four following land eligibility criteria:

(1) Prime, Unique, or Other Productive Soil.—To meet the soils eligibility criteria, the offered parcel must contain at least 50 percent prime, unique, statewide, or locally important soil.
  (i) Prime, unique, statewide, or locally important soil designations are located in NRCS State or field office technical guides and are defined as follows:
    - Prime Farmland.—Land that has the best combination of physical and chemical characteristics for producing food, feed, fiber, forage, oilseed, and other agricultural crops with minimum inputs of fuel, fertilizer, pesticides, and labor, without intolerable soil erosion, as determined by NRCS.
    - Unique Farmland.—Land other than prime farmland that is used for the production of specific high-value food and fiber crops, as determined by NRCS. It has a special combination of soil quality, location, growing season, and moisture supply needed to economically produce sustained high quality or high yields of specific crops when treated and managed in accordance with acceptable farming methods. Examples of such crops include citrus, tree nuts, olives, cranberries, fruits, and vegetables. Additional information on the definition of prime, unique, or other productive soil can be found in 7 CFR Parts 657 and 658.
    - Farm or Ranch Land of State and Local Importance.—Land other than prime or unique farmland that is of statewide or local importance for the production of food, feed, fiber, forage, bio-fuels, or oilseed crops. The appropriate State or local government determines statewide or locally important farmland with concurrence from the State Conservationist. Generally, these farmlands produce high yields of crops when treated and managed in accordance with acceptable farming methods. In some States and localities, farmlands of statewide and local importance may include tracts of land that have been designated for agriculture by State law or local ordinance.
    - The term “Other productive soils covered in the ACEP-ALE” refers to the definitions of farm and ranch land as described above.
  (ii) The State Conservationist, with the advice of the State Technical Committee, may elect to increase or decrease the required percentage of prime, unique, statewide, or locally important soil for a specific area or region of the State. The State Conservationist must document in a general memorandum the area or region affected and the basis of the increase or reduction. A copy of the general memorandum must be kept in the easement case file for each parcel determined eligible based on this criteria. The detailed explanation should document—

- The scarcity or abundance of prime, unique, and important farmland soil in the area in which the minimum 50 percent requirement is modified.
- The conservation values of the parcels that warrant protection by an agricultural land easement despite this scarcity or abundance, which may include the—
  - Agricultural viability of the farm or ranch due to size and access to markets and support infrastructure.
  - Contributions of the farm or ranch to the agricultural industry.
  - Conservation of natural resources contributing to agricultural viability in the area.
- How the restrictions in the conservation deed will preserve the documented conservation values.

(2) Historical or Archaeological Resources.—Parcels containing historical or archaeological resources may be eligible for ACEP-ALE.

(i) For the parcel to be eligible under this criterion, the historical or archaeological sites must be on a farm or ranch to be enrolled and be—

- Listed in the National Register of Historic Places (established under the National Historic Preservation Act (54 U.S.C. Section 302101 et seq.)), including registered traditional cultural properties as defined in National Register Bulletin 38.
- Formally determined eligible for listing in the National Register of Historic Places (by the State historic preservation office ("SHPO") or Tribal historic preservation office ("THPO") and the Keeper of the National Register.
- Formally listed in the State or Tribal register of historic places.
- Included in the SHPO or THPO's inventory with written justification as to why it is eligible for the National Register of Historic Places.

(ii) For parcels determined eligible based on containing historical and archaeological resources, the agricultural land easement deed must address the protection of the historical or archaeological resources as required by Secretary of the Interior's "Standards for the Treatment of Historic Properties."

(3) Protection of Grazing Uses and Related Conservation Values.—Land the enrollment of which would protect grazing uses and related conservation values by restoring and conserving land may be eligible for enrollment in ACEP-ALE. Such land must be one of the following:

(i) Grassland, rangeland, pastureland, land that contains forbs, or shrubland for which grazing is the predominant use

(ii) Located in an area that has been historically dominated by grassland, forbs, or shrubland, and the State Conservationist, with advice from the State Technical Committee, determines that it is compatible with grazing uses and related conservation values and either of the following apply:

- Could provide habitat for animal or plant populations of significant ecological value if the land is retained in grazing uses and related conservation values
- Would address State, regional, and national conservation priorities

(iii) Grasslands of special environmental significance, which is defined in 7 CFR Section 1468.3 as grasslands that contain little or no noxious or invasive species, as designated or defined by State or Federal law; are subject to the threat of conversion to nongrassland uses or fragmentation; and the land—

- Is rangeland, pastureland, or shrubland on which the vegetation is dominated by native grasses, grass-like plants, shrubs, or forbs, or is improved, naturalized pastureland and rangeland.
- And the land provides, or could provide, habitat for threatened or endangered species or at-risk species, protects sensitive or declining native prairie or grassland types, or provides protection of highly sensitive natural resources.

(iv) For parcels determined eligible based on protecting grazing uses and related conservation values, the agricultural land easement deed must address the protection of those grazing uses or grassland values. The parcel must have a grasslands management plan included as component of the agricultural land easement plan.

(4) Land that Furthers a State or Local Policy.—The State or local policy must be consistent with the purposes of ACEP-ALE and the protection of such land must further the State or local policy.

(i) States must document how the State or local policy is consistent with the purposes of ACEP-ALE and how preservation of the parcel is consistent with that policy. This documentation must be retained in the easement case file for each parcel.

(ii) For parcels determined eligible based this eligibility type, the agricultural land easement deed must address the ACEP-ALE purposes that are being supported by a specific State or local policy.

C. Eligible Land Uses

(1) To be eligible, land must meet the land eligibility requirements, be one of the eligible land types, and must be in one of the following uses:

(i) Cropland

(ii) Rangeland

(iii) Grassland or land that contains forbs, or shrubland for which grazing is the predominant use

(iv) Located in an area that has been historically dominated by grass land, forbs, or shrubs and could provide habitat for animal or plant populations of significant ecological value

(v) Pastureland

(vi) Nonindustrial private forest land that contributes to the economic viability of an offered parcel or serves as a buffer to protect such land from development

(2) Forest Land Requirements.—Forest land is areas of native trees grown under natural conditions regardless of the products harvested (timber, nuts, berries, vines, mushrooms). Forest land is defined as land cover or use category that is at least 10-percent stocked by single-stemmed woody species of any size that will be at least 13 feet tall at maturity. Also included is land bearing evidence of natural regeneration of tree cover (cutover forest or abandoned farmland) that is not currently developed for nonforest use. Ten-percent stocked, when viewed from a vertical direction, equates to an aerial canopy cover of leaves and branches of 25 percent or greater.

Note: Land covered by trees is considered cropland when the trees are not native species (orange groves, fruit and nut tree orchards) or native species that are cultivated (planted in rows, fertilized, and cultivated).

(i) To be eligible for enrollment in ACEP-ALE, the nonindustrial private forest land must contribute to the economic viability of an agricultural operation or serve as a buffer to protect an agricultural operation from development, as determined by NRCS.

- ACEP-ALE easements may contain forest land on up to two-thirds of the ACEP-ALE easement area. The State Conservationist may waive the two-thirds limitation for acreage that NRCS determines is a sugar bush operation that contributes to the economic viability of the operation.
- NRCS may contribute funds to a portion of a larger easement where the overall forest land of the easement exceeds two-thirds of the larger easement area so long as the ACEP-ALE easement is a subcomponent of the larger easement and all of the following apply:
  - The forest land on the ACEP-ALE easement is not in excess two-thirds of the ACEP-ALE easement area.

- The deed of easement clearly identifies the portion of the easement area that is in the ACEP-ALE easement.
- The ACEP-ALE easement is a single contiguous land parcel, though it may be traversed by a public roadway or utility easement.
- The fair market value of the ACEP-ALE is appraised separately from the non-ACEP-ALE easement area and a separate value provided. The value of the ACEP-ALE may be reported in the same appraisal as the non-ACEP-ALE area.
- The Federal share of the ACEP-ALE will be based on the fair market value of the ACEP-ALE only.
- Any eligible entity or landowner contribution to the purchase price of the easement area outside of the ACEP-ALE easement area is not used as matching funds for the ACEP-ALE eligible entity contribution.

(ii) If the forested acreage is the greater of 40 acres or 20 percent of the ACEP-ALE easement area, the forested acreage must have a forest management plan as a component of the agricultural land easement plan.

(3) Incidental Land.— Incidental land includes such land as farmstead areas, other areas with agricultural buildings and infrastructure, forest land, and nonforested wetlands. The acres of incidental land must not exceed the acres of otherwise eligible land. Taken together, the eligible land and incidental land may not include forest land of greater than two-thirds of the total ACEP-ALE area unless the two-thirds acreage limitation is waived by the State Conservationist for sugar bush lands. Land that is incidental to the eligible land and that is not otherwise eligible, may be included in an ACEP-ALE easement if the State Conservationist determines any of the following apply to the incidental land:

(i) Is necessary for the efficient administration of an agricultural land easement

(ii) Significantly augments the protection of the associated farm or ranch land

(iii) Contributes to the grassland functions and values and related conservation values and is included as part of a written pending offer

D. Additional Land Eligibility Requirements

(1) Written Pending Offer.—Eligible land must be subject to a written pending offer by an eligible entity.

(i) A pending offer is a written bid, contract, or option to convey a conservation easement for any of the following purposes:

- Protecting agricultural productivity by limiting conversion to nonagricultural uses
- Protecting historical or archaeological sites from destructive practices
- Protecting grazing uses and related conservation values by restoring and conserving land
- Furthering ACEP-ALE policy or policy consistent with the purposes of ACEP-ALE

(ii) The written pending offer may be extended by the eligible entity to the landowner to acquire the conservation easement or may be from the landowner to the eligible entity to sell the conservation easement. The State Conservationist will determine the sufficiency of the written pending offer for the purposes of determining ACEP-ALE eligibility.

(iii) A written pending offer may take the form of a signed option-to-purchase agreement or other type of purchasing agreement, a letter of intent to sell the easement, an offer letter from the landowner to the eligible entity, or other similar documentation. A pending offer may document a landowner's intent to sell the easement without a commitment to a purchase price as many offers are made before the appraisals are completed.

(iv) Pending offers must be for a conservation easement in perpetuity, except where State law does not authorize permanent easements.

(v) A copy of the written pending offer must be provided by the entity at the time of application and must be retained in the easement case file for the individual parcel.

(2) Agricultural Land.—Real property is considered to be agricultural land or land in agricultural use, including land on a farm or ranch, if it is consistent with the State's program to purchase agricultural conservation easements. If there is no State program, the definitions of a farm, ranch, or agricultural use in the State's agricultural use assessment program will be used to define agricultural land.

(i) The NRCS State Conservationist must be familiar with the State's definition of agricultural use. If the State Conservationist determines the State's definition of agriculture to be so broad that an included use could lead to the degradation of soils, they may determine a farm or ranch whose use degrades the soil ineligible for ACEP-ALE. Agricultural land easement deeds will restrict the agricultural uses permitted in the deed to uses that will not degrade the soils.

(ii) ACEP-ALE funds will not be used to purchase an easement on lands that are in an agricultural use prohibited by Federal law, even if such use is authorized under State law. The agricultural land easement deeds must include a provision that requires agricultural uses to be in compliance with all applicable law, including Federal laws prohibiting the production of controlled substances.

(3) Tribal Lands.—For the purposes of ACEP-ALE, Tribal lands are eligible under certain conditions and are those defined in 7 CFR Section 1468.3 as "Acreage Owned by Indian Tribes", which means lands held in private ownership by an Indian Tribe or individual Tribal member and lands held in trust by a native corporation, Tribe, or the Bureau of Indian Affairs. The various interests that American Indian and Alaskan Native Tribes may hold in real property represent a unique form of property right in the American legal system. Interests in real property have been acquired by American Indian and Alaskan Native Tribes through various means, such as by aboriginal title, treaty, act of Congress, or executive action.

(i) Tribes may apply for ACEP-ALE as an eligible entity or as a landowner.

- When the Tribe is a landowner in an eligible entities' application, the eligible entity must be independent of the Tribe and with no apparent conflicts of interest holding and managing the ACEP-ALE easement.
- When the Tribe applies as an eligible entity it may not be a landowner of the lands to be protected.

(ii) Because of these various forms of real property interest, statutory restraints against alienation often exist. When the land offered for enrollment is on Tribal lands held in trust by the Bureau of Indian Affairs, the landowner will contact the Bureau of Indian Affairs to determine whether the Tribe must receive any necessary clearances from the Bureau of Indian Affairs to be considered eligible. Those contracts and clearances will accompany the application for ACEP-ALE. Tribal land may not be listed as a funded parcel on a cooperative agreement with NRCS under ACEP-ALE without the prior approval of the Bureau of Indian Affairs.

528.34 Ineligible Lands

A. Ineligible Lands – General.—The following lands are not eligible for cost-share assistance under ACEP-ALE. See detailed descriptions in section B below for additional information on each ineligible land type.

(1) Lands owned by an agency of the United States, other than land held in trust for Indian Tribes.

(2) Lands owned in fee title by a State, including an agency or a subdivision of a State, or unit of local government.

(3) Land owned by a nongovernmental organization whose purpose is to protect agricultural use and related conservation values.
(4) Land subject to an easement or deed restriction which, as determined by NRCS, provides similar restoration and protection as would be provided by enrollment in the ACEP-ALE.
(5) Land where the purposes of the program would be undermined due to onsite or offsite conditions, such as risk of hazardous substances, proposed or existing rights of way, infrastructure development, or adjacent land uses.
(6) Land that NRCS determines to have unacceptable exceptions to clear title or insufficient legal access.
(7) Land on which gas, oil, earth, or mineral rights exploration has been leased or is owned by someone other than the landowner unless NRCS determines that the third party rights will not harm or interfere with achieving the ACEP-ALE purposes.

B. Ineligible Lands – Detailed Descriptions

(1) Land Owned by the Federal Government, a State or Local Government, or a Nongovernment Organization.—Lands owned by an agency of the United States, other than land held in trust for Indian Tribes; lands owned in fee title by a State, including an agency or a subdivision of a State, or a unit of local government; and lands owned by a nongovernmental organization whose purpose is to protect agricultural use and related conservation values are ineligible for ACEP-ALE cost-share assistance except as provided below:
(i) NRCS may provide ACEP-ALE cost-share assistance for the purchase of agricultural land easements on land owned by a State or local government or nongovernmental organization if all of the conditions below are met:
- Ownership by the State or local government or nongovernmental organization is temporary.
- The prospective landowner meets the ACEP-ALE eligibility requirements.
- The land meets the ACEP-ALE land eligibility requirements.
- The eligible entity and an eligible prospective landowner have executed a purchase agreement for the parcel at the time of application.
- The land is sold to the eligible private or Tribal landowner prior to easement closure.

(ii) NRCS will not disburse ACEP-ALE payments to the State or local government entity or nongovernmental organization until the fee simple title has been transferred to an eligible private landowner.

(2) Land Subject to a Similar Easement or Deed Restriction.—Land that is already subject to an easement or other deed restriction that prevents its conversion to nonagricultural use are not eligible. These protections may include, but are not limited to—
(i) Enrollment in other USDA easement or set-aside programs such as ACEP-Wetland Reserve Easement (WRE), the Wetlands Reserve Program (WRP), Grasslands Reserve Program (GRP), Healthy Forest Reserve Program (HFRP), and Conservation Reserve Enhancement Program (CREP), Emergency Watershed Protection Program – Floodplain Easements (EWPP-FPE).
(ii) Lands owned by an eligible entity unless the acquisition is approved pursuant to paragraph (1) above.
(iii) Acreage already preserved by a transfer of development rights may not be enrolled under ACEP-ALE or used to meet any of the land eligibility requirements (e.g., 50-percent prime soils requirement). Where land is preserved through the sale of transfer of development rights, the acreage in question will not be counted as part of a landowner or eligible entity's match.

(3) Adverse Onsite or Offsite Conditions.—Offsite or onsite conditions that could undermine the purposes of the program, as determined by NRCS, render the site ineligible for ACEP-ALE. These adverse conditions may include, but are not limited to—

(i) The presence or potential presence of hazardous substance issues on the parcel or a neighboring site.

- NRCS will conduct an onsite visit of the offered parcel and complete a limited phase-I environmental site assessment, which includes, at a minimum: 1) an environmental record search, 2) current landowner interviews, and 3) an onsite visit to view present conditions (see Subpart U, "Exhibits," for the "Hazardous Materials Field Inspection Checklist" and the "Hazardous Materials Landowner Interview"). NRCS will procure and review the environmental record search within 120 days of identifying a parcel as selected for funding on an attachment to the cooperative agreement. NRCS conducts the limited phase-I to identify whether the parcel has any hazardous substance issues that may preclude or delay the easement acquisition.
- If the limited phase-I identifies the need for further investigation of any hazardous substance issues associated with the offered parcel, the State Conservationist will determine if further investigation should be conducted or whether sufficient information exists to determine the parcel ineligible. Further investigation conducted by or paid for by NRCS is limited to a full phase-I environmental site assessment (full phase-I ESA) that meets the requirements of 40 CFR Part 312.
- The eligible entity may obtain a full phase-I ESA conducted by a qualified environmental professional and provide it to NRCS to satisfy the requirement for NRCS to conduct a limited phase-I assessment.
- NRCS will not enroll property where hazardous substance concerns are identified and that NRCS determines pose an unacceptable risk or a risk sufficient to undermine the purposes and objectives of the program. If NRCS determines based on a limited phase-I or full phase-I ESA that there are hazardous substances on or affecting the offered parcel or that a phase-II Environmental Site Assessment is needed, the parcel is ineligible and will be removed from consideration for ACEP-ALE funding or from the cooperative agreement. NRCS will not reconsider the parcel unless and until the landowner provides sufficient documentation that all necessary assessments have been completed and that the site has been fully remediated. The eligible entity may offer a substitute parcel as provided in paragraph H below.

(ii) Proposed or existing rights of way, either onsite or offsite, such as transmission lines, highways, pipelines or other existing or proposed infrastructure that introduce disturbances or risks that undermine the purposes of the easement.

For example, transmission lines or roads fragmenting parcels offered for enrollment under grassland or grasslands of special environmental significance for protection of sage grouse or other at-risk species.

(iii) Adjacent land uses that could impede the continued agricultural viability of the parcel such as the close proximity of the site to an area with existing, planned, or zoned land uses of development or recreational use that will be negatively impacted or incompatible with ongoing agricultural operations or cultural practices such as agricultural waste or pesticide application.

(4) Unacceptable Title or Access Issues.— NRCS must be able to determine that ACEP-ALE funds will result in long-term agricultural protection, therefore land which NRCS determines to have unacceptable exceptions to clear title or insufficient legal access for ACEP-ALE purposes are not eligible for enrollment. NRCS, at its sole discretion, may deny funding for any application where there are unacceptable exceptions to clear title or insufficient legal

access to any property. Such issues may include but are not limited to, existing easements, rights-of-way, leases, or other encumbrances owned or leased by a third party that—

(i) Have a high likelihood of resulting in conversion to a nonagricultural use.

(ii) Allow a scope or intensity of use that could interfere with the agricultural use of the property.

(iii) May limit the entity's ability to monitor or enforce the easement.

(iv) Are mortgages or liens that cannot be removed or subordinated as required.

(5) Mineral Exploration.—Land on which gas, oil, earth, hard rock, stone, gravel, geothermal, or mineral rights exploration has been leased or is owned by someone other than the landowner is ineligible under ACEP-ALE unless it is determined by NRCS that all of the following criteria are met:

(i) The third party rights will not harm or interfere with the conservation values or agricultural uses of the easement.

(ii) Any methods of exploration and extraction will have only a limited and localized impact on the easement.

(iii) The limitations are specified in the ALE deed.

Note: NRCS may use Remoteness Tests, Mineral Assessments or the Mineral Matrix available at 440-CPM, Part 527, or other materials for the evaluation of such third party rights. NRCS may also review similar documents provided by the eligible entity or landowner.

528.35 Payment Eligibility Criteria Applied to Landowners as Beneficiary

A. Adjusted Gross Income

(1) Prior to obligating funds, NRCS must confirm based on documentation from the Farm Service Agency (FSA) that all landowners on the deed are eligible for payment based on the adjusted gross income (AGI) provisions of the Food Security Act of 1985. This determination is made in the year the individual parcel is selected for funding and must be documented in NEST and the individual easement case file.

(2) Section 1001D of the Food Security Act of 1985, as amended, establishes payment eligibility for conservation programs based upon the average adjusted gross nonfarm income for persons and legal entities. FSA promulgated regulations to implement section 1001D payment limitations at 7 CFR Part 1400 AGI provisions. For AGI purposes, the term "person" means an individual, natural person and does not include a legal entity. Additionally, the term "legal entity" means an entity created under Federal or State law. All landowners will file the AGI certification, Form CCC-941, "Average Adjusted Gross Income (AGI) Certification and Consent to Disclosure of Tax Information," or successor form with FSA. FSA is responsible for completing all AGI certifications.

Note: Indian Tribes are not subject to AGI provisions.

(3) NRCS must determine whether a payment reduction applies. In accordance with 7 CFR Part 1400, an application will be considered—

(i) Eligible and no commensurate reduction of payment will apply if the land is owned by—

- A person who is eligible for payment under the AGI provisions.
- Multiple persons, when all persons are eligible for payment under the AGI provisions.
- An AGI-eligible legal entity in which all members are eligible for payment under the AGI provisions.

(ii) Ineligible and cancelled, if the land is owned by—

- One person, and the person is determined to be ineligible for payment.

- Multiple persons, a legal entity, or a combination thereof, and any of the persons or legal entities are ineligible for payment based on the AGI provisions.

(iii) Eligible, but the ACEP-ALE easement payment will be reduced by an amount commensurate to the percent ownership of any AGI ineligible member of that legal entity.

(4) The required reduction in the ALE easement payment should be discussed with the applicants before continuing to process the application to determine if the applicants wish to continue in the process. The landowner will provide percentage of ownership documentation. NRCS will verify this information, determine whether landowners are eligible or the commensurate payment reduction is applicable due to ineligible member of otherwise eligible legal entity, and coordinate with the financial management staff to ensure that correct obligations and any necessary payment reductions occur.

B. Conservation Compliance

(1) Prior to obligating funds, and again prior to making payment to the eligible entity, NRCS must confirm based on documentation from FSA that all persons and legal entities on the deed are compliant with the Highly Erodible Land and Wetland Conservation (HEL/WC) provisions of the Food Security Act of 1985.

(2) Through operation of "affiliated persons" under 7 CFR Section 12.8, all landowners on the deed are required to be in compliance with both the HEL and WC provisions for the application to be considered eligible for enrollment. If any landowner listed on the deed is ineligible, the application is ineligible.

(3) If the landowner is a legal entity, the entity must be HEL- and WC-compliant, and required members of the legal entity must be in compliance. (see Subpart U, "Exhibits," for ACEP eligibility matrix) If any member of a legal entity that requires member eligibility is not in compliance with the HEL and WC provisions, the application is ineligible. If the landowner regains compliance with those provisions, a new application may be filed.

528.36 Participation in Other USDA Programs

Land enrolled in ACEP-ALE may be enrolled in some of USDA's conservation programs provided the eligibility requirements of the other programs are met, including the following:

(1) Agricultural Management Assistance Program (AMA)
(2) Regional Conservation Partnership Program (RCPP)
(3) Conservation Reserve Program (CRP) rental contracts to the extent authorized by the FSA
(4) Conservation Stewardship Program (CSP)
(5) Environmental Quality Incentives Program (EQIP)
(6) The ACEP-Wetland Reserve Easement component or the Emergency Watershed Protection Program – Floodplain Easement Program, provided any necessary subordinations or releases are obtained and the easement valuation accounts for existing deed or land use restrictions

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart E – ACEP-ALE Application, Ranking, and Selection

528.40 ACEP-ALE Application, Ranking, and Selection Overview

A. Application, Ranking and Selection Steps Outline.—The following outlines the procedural steps for ACEP-ALE application, ranking, and selection; some steps maybe taken concurrent with other steps, unless otherwise stated:

(1) Step 1 – Prior to the beginning of each fiscal year, the State Conservationist, with advice from the State Technical Committee, will review and update as necessary the States ACEP-ALE ranking worksheet and submit a copy to EPD prior to posting.

(2) Step 2 – By November 1 or at least 30 days prior to an announced application cutoff date, States will post the current fiscal year's ACEP-ALE ranking worksheet to the State Web page.

(3) Step 3 – NRCS accepts ACEP-ALE applications on a continuous basis. However, at the discretion of the State Conservationist and in coordination with any required national application cutoff dates, States may establish and advertise one or more application cutoff dates during the fiscal year. This announcement must be made at least 30 days in advance of the application cutoff date. Complete applications received prior to the cutoff date will be reviewed for eligibility and ranked. Eligible applications will be considered for funding. Applications received after the cutoff date may be considered in the next application period.

(4) Step 4 – Landowners interested in participating in ACEP-ALE will submit applications to entities that have an existing agricultural lands protection program.

(5) Step 5 – Entities will submit ACEP-ALE applications to the State Conservationist, including supporting documentation and any requests for waivers of the eligible entity cash contribution requirement.

(6) Step 6 – NRCS State offices will review application information and supporting documentation provided by the entity and determine entity eligibility, land eligibility, and landowner eligibility.

(7) Step 7 – NRCS will conduct onsite visits and rank eligible parcel applications using the current ACEP-ALE ranking worksheet. During this visit, States should complete the "Landowner Disclosure Worksheet," the "Hazardous Materials Field Inspection" checklist, and the "Hazardous Materials Landowner Interview." At this time, States will upload the application, eligibility, and ranking information for all eligible parcels into NEST.

(8) Step 8 – After ranking all eligible parcels, the State Conservationists will select eligible parcels for funding in order of ranking priority using ACEP-ALE funds allocated for new enrollment for that fiscal year. The State Conservationist will complete determinations on eligible entity cash contribution waiver requests for tentatively selected parcels and notify entities of waiver request determinations.

(9) Step 9 – The State Conservationist submits cooperative agreements with a Federal share exceeding $100,000 to NHQ Grants and Agreements Team, for review and delegation of authority, with a copy to the EPD director. For additional information consult National Instruction 120-301.

(10) Step 10 – Prior to obligating funds, States must complete the preobligation review pursuant to the most current easement internal controls policy and guidance.

(11) Step 11 – After receiving delegation of authority and completing internal control reviews, the State Conservationist notifies eligible entities of tentative selection and provides a copy of the unsigned template cooperative agreement (for new agreements) or an amendment (for

existing agreements), with all exhibits and attachments, including the listing of parcels selected for funding and any approved, unfunded substitute parcels.

(12) Step 12 – After the eligible entity returns a properly signed cooperative agreement or amendment, the State Conservationist may execute the cooperative agreement or amendment on behalf of NRCS. Once the cooperative agreement or amendment is fully and properly executed by all parties, NRCS then immediately obligates the funds in FMMI, within 10 business days promotes the agreement and all associated parcels in NEST, and provides a copy of the fully executed cooperative agreement to the eligible entity.

(13) Step 13 – On or before September 1, the State Conservationist notifies the entities that unfunded applications will be cancelled in the NEST unless the entity notifies the State Conservationist by October 1 that the landowner and entity still have an interest in being considered for funding in the next fiscal year.

B. General Notice Provisions

When notifying entities, landowners, or the general public about the availability of ACEP-ALE, States should provide information that includes, but is not limited to—

(i) ACEP-ALE purpose and goals.
(ii) Application cutoff dates for funding consideration.
(iii) Conditions under which cost-share assistance is available.
(iv) Description of program benefits available.
(v) How to submit a proposal and where to apply.
(vi) Land, landowner, and entity eligibility requirements.
(vii) The current ranking worksheet.
(viii) Copy of or link to the most recently published ACEP-ALE cooperative agreement for non-certified eligible entities and ACEP-ALE grant agreement for certified entities.
(ix) Copies of the current ACEP-ALE application forms (CPA-41 and CPA-41A) or information on where to locate these forms.

528.41 ACEP-ALE Ranking Process

A. Purpose and Introduction

(1) The ranking process enables the State Conservationist to prioritize applications by determining projects that most merit enrollment. The ranking process is how NRCS determines the conservation value of a parcel for the purposes of ACEP-ALE. This process does not guarantee or entitle the applicant to funding.

(2) The State Conservationist will use ranking factors consisting of national and State criteria to score and rank each eligible application. The national criteria will comprise at least half of the total ranking score. When developing the State ranking factors, the State Conservationist must use factors that are consistent with the purpose and goals of ACEP-ALE.

B. Ranking Process Overview

(1) The State Conservationist, with advice from the State Technical Committee, will establish and maintain a weighted ranking process to prioritize all eligible applications, using the national and State criteria and other the factors described in this subpart. Each fiscal year, the criteria and ranking factors must be evaluated and updated as needed to ensure that the parcels that best meet the purpose, goals, and objectives of ACEP-ALE are given the highest priority.

(2) Representatives from eligible entities participating in or applying to participate in ACEP-ALE will not be involved in developing State ranking criteria or assigning weights to the factors.

(3) The ranking process's point spread will be from zero to 400 points, with zero being the lowest possible score and least deserving of enrollment and 400 being the highest possible and most deserving of enrollment. At least 200 points must come from the national ranking criteria.
(4) The State Conservationist will develop a single ACEP-ALE ranking worksheet that will be updated each fiscal year and made available to the public through the State's Web page a minimum of 30 days before any application cutoff dates or other application deadlines.
(5) NRCS will conduct an onsite ranking of each eligible application. All eligible applications submitted within an individual application cutoff period will be ranked using the same ranking worksheet.
(6) The ranking process must be followed and parcels funded in order of ranking priority unless inadequate funds are available to fund the next highest ranked parcel. If adequate funds are not available, the State may select the next-highest-ranked parcel for which funding is available.
(7) State Conservationists should establish ranking thresholds below which parcels will not be funded.
(8) State Conservationists should return funds to NHQ for reallocation to other States rather than fund low-ranking parcels that do not effectively meet ACEP-ALE purposes.
(9) Prior to the end of each fiscal year, the State Conservationist must upload into NEST the information for each application received or considered for funding during that fiscal year, including ranking score, eligibility status, and funding status.

C. Ranking Criteria

(1) At least 50 percent of the weight of the ranking factors must be based on the national criteria. The national criteria are as follows:
(i) Percent of prime, unique, and important farmland in the parcel to be protected.
(ii) Percent of cropland, pastureland, grassland, and rangeland in the parcel to be protected
(iii) Ratio of the total acres of land in the parcel to be protected to average farm size in the county according to the most recent USDA Census of Agriculture (http://www.agcensus.usda.gov).
(iv) Decrease in the percentage of acreage of farm and ranch land in the county in which the parcel is located between the last two USDA Censuses of Agriculture (http://www.agcensus.usda.gov).
(v) Percent population growth in the county as documented by the U.S. Census (http://www.census.gov).
(vi) Population density (population per square mile) as documented by the most recent U.S. Census (http://www.census.gov).
(vii) Existence of a farm or ranch succession plan or similar plan established to address farm viability for future generations.
(viii) Proximity of the parcel to other protected land, such as military installations; land owned in fee title by the United States or an Indian Tribe, State or local government, or by a nongovernmental organization whose purpose is to protect agricultural use and related conservation values; or land that is already subject to an easement or deed restriction that limits the conversion of the land to nonagricultural use.
(ix) Proximity of the parcel to other agricultural operations and agricultural infrastructure.
(x) Maximizing the protection of contiguous acres devoted to agricultural use.
(xi) Whether the land is currently enrolled in CRP in a contract that is set to expire within 1 year.
(xii) Whether the land is grassland that would benefit from protection under a long-term easement.

(2) The remaining weight will be applied to NRCS State criteria approved by the State Conservationist. Such criteria may include only the following:
   (i) The location of a parcel in an area zoned for agricultural use.
   (ii) The eligible entity's performance in managing and enforcing easements. The measure of performance is the efficiency of easement transactions completion or percentage of parcels monitored annually and the percentage of monitoring results reported annually.
   (iii) Multifunctional benefits of agricultural land protection including social, economic, historical and archaeological, environmental benefits, species protection, or climate change resiliency.
   (iv) Geographic regions where the enrollment of particular lands may help achieve national, State, and regional conservation goals and objectives or enhance existing government or private conservation projects.
   (v) Diversity of natural resources to be protected.
   (vi) Score in the land evaluation and site assessment system or equivalent measure for grassland enrollments. This score serves as a measure of agricultural viability (access to markets and infrastructure).

(3) The ranking system may assign negative points or place at the bottom of the ranking list any parcels submitted by an entity that—
   (i) Is delinquent on conducting annual monitoring or whose annual monitoring reports are insufficient, late, or not provided to NRCS annually, or
   (ii) Has an existing FRPP or ACEP-ALE agreement with funds remaining more than 2 years after the attachment execution date without any expenditures or actions towards closings of easements in the third year.

D. Resource Concerns

(1) In addition to factors related to the threat of conversion, the NRCS State ranking factors should consider various environmental benefits and prioritize applications that will address multiple resources concerns, including but not limited to the following:
   (i) Soil
      - Erosion reduction
      - Condition improvement
      - Deposition reduction
   (ii) Water
      - Quantity improvement
      - Quality improvement
      - Air quality improvement
   (iii) Plant
      - Suitability enhancement
      - Condition improvement
      - Productivity
      - Species composition
   (iv) Animal
      - Habitat improvement
      - Habitat diversity
      - Habitat protection
   (v) Other resource concerns, such as protection of historical and archaeological sites and access to agricultural infrastructure, operations, markets, and labor

(2) These resource concerns should be addressed under State ranking criteria provided in (C)(2)(iii)-(v) above.

(3) For applications selected for funding based on their ability to address specific or multiple resource concerns the eligible entity must ensure that those resource concerns are addressed in the agricultural land easement plan.

E. Ranking Historical and Archaeological Sites.—The State ranking factors may use any of the following criteria to evaluate the relative quality of historical and archaeological sites:

(1) Diversity of resource types within each individual parcel (i.e., a parcel contains more than one type of historical or archaeological resource)
(2) Acreage of resource site
(3) Association with existing community identity
(4) Nationally significant designation (i.e., the parcel contains a national designation versus a State designation)
(5) Other criteria established by the State Conservationist, with advice from the State Technical Committee

F. Ranking Grasslands of Special Environmental Significance.—Ranking factors for grasslands of special environmental significance should be addressed under the national criteria provided at (C)(1)(xii) above and may also be addressed in the State criteria, and will emphasize all of the following:

(1) The environmental benefits of enrolling the land
(2) Cost effectiveness of enrolling the land so as to maximize the environmental benefits per dollar expended
(3) Protection of grazing uses and related conservation values
(4) Core grassland areas
(5) Extent to which the grassland remains intact
(6) The productivity of the land
(7) Additional ranking factors that the State determines are appropriate for evaluating grasslands of special environmental significance.

G. Evaluating Applications Based on ACEP-ALE Investment

If the State Conservationist determines that two or more eligible parcels are comparable in achieving ACEP-ALE purpose and goals (i.e., have the same ranking factor), the State Conservationist may not assign a higher priority to any one of these solely on the basis of lesser cost to ACEP-ALE. Criteria other than the cost of the Federal ACEP-ALE contribution must be used to break the tie.

528.42 Applications for ACEP-ALE Cost-Share Assistance

A. Application Requirements

(1) Although applications may be submitted on a continuous basis, entities that want to be considered for ACEP-ALE cost-share assistance within an identified application period must submit a complete application to the appropriate State Conservationist on or before the announced application cutoff date. A complete ACEP-ALE application must contain all of the following:
(i) Form CPA-41, “Entity Application,” identifying every proposed easement holder
(ii) Form CPA-41A, “Parcel Sheet,” for each parcel
(iii) Standard Form (SF) 424, “Application for Federal Assistance”
(iv) SF-424A, “Budget Information for Non-Construction Programs”
(v) SF-424B, “Assurances Non-Construction Programs”
(vi) Entity information required in subsection (2) below

(vii) Parcel information required in subsection (3) below

(viii) A written request for a waiver of the Eligible Entity Cash Contribution Requirement for projects of special significance, if applicable, and all information required in sub-section B below.

(2) Entity information submitted with the entity application (CPA-41) must—

(i) Document the entity's commitment to long-term conservation of agricultural lands through the use of voluntary conservation easements that protect farm or ranch lands from conversion to nonagricultural uses.

(ii) Document the entity's capability and record of acquiring, holding, managing, and enforcing conservation easements.

- This must include a citation to the State conservation easement enabling statute that the entity will rely on to acquire the agricultural land easements.
- If the entity is a State, local, or Tribal government, then this must include a citation to the entity's statutory authority to acquire conservation easements consistent with the purposes of ACEP-ALE.

(iii) Document the entity capacity to monitor and enforce the agricultural land easements.

(iv) Document or certify that, at the time of application, the eligible entity has the required funds available for each parcel (see section 528.43 for cost-share assistance and match requirements).

(v) Provide evidence of current registration in DUNS and SAM for each holding and co-holding eligible entity.

(vi) Provide evidence of entry in SCIMS.

(vii) Include a copy of the written pending offer for each parcel that the entity is submitting for cost-share assistance.

(3) Parcel information, submitted with each CPA-41A must describe the parcel to be protected using assistance from ACEP-ALE. Specifically, it must include the following for each parcel:

(i) A map showing the location of the parcel.

(ii) Evidence and map of legal and physical access to the parcel.

(iii) A map or aerial image showing the proposed parcel boundaries and larger property boundaries if different than the parcel boundaries.

(iv) A map showing each of the following that are applicable:

- The location and acres of the prime, unique, or statewide and locally important soil in each parcel
- The location and acres of lands where grazing uses and related conservation values would be protected
- The location and acres of grasslands of special environmental significance
- The location, number, and acreage of historical or archaeological sites proposed to be protected

(v) If the presence of historical or archeological sites is the basis for land eligibility, a brief description of the site's significance and documentation of the site's formal listing on the National, Tribal, or State register or eligibility for listing in the National register must be included in the application. NRCS State office will review this documentation to determine the entity's ability to manage and enforce the easement for historic preservation purposes.

(vi) A narrative description of how the protection of the parcel will further a State or local policy consistent with ACEP, if this is the basis for the parcel's land eligibility.

(vii) A map showing the location of other protected land in relation to parcel, if applicable.

(viii) Estimated agricultural land easement value, costs, and contributions for each parcel as described in section 528.43.

(ix) Narrative statement or map showing the parcel's accessibility to agricultural markets.
(x) Narrative statement or map showing the parcel's access to existing agricultural infrastructure, on- and off-farm, and other support systems.
(xi) Narrative statement or map showing the threat of conversion or fragmentation (either from non-agricultural development or cropland conversion of grassland) for each parcel.
(xii) Ownership of subsurface mineral rights and any required water rights for each parcel.
(xiii) Copies of any phase I environmental site assessments, if available.
(xiv) Copies of appraisal reports or title reports for the parcel, if available.

B. Submitting and Accepting Applications

Entities may submit applications in paper copy or electronically. Applications received after the application cutoff and incomplete applications will not be ranked or considered for inclusion in the funding cycle covered by the application cutoff. Complete applications received after the application cutoff date may be considered in the next announced funding cycle.

528.43 ACEP-ALE Cost-Share Assistance and Match Requirements

A. Overview of ACEP-ALE Federal Share, Match Requirements, and Waiver Process

(1) The ACEP-ALE cost-share assistance and match requirement must be explained to the entity applicants at the time of application.
(2) ACEP-ALE cost-share assistance will not exceed 50 percent of the fair market value of the agricultural land easement as determined using an approved methodology described in section 528.52. The eligible entity must provide an amount that is at least equivalent to the Federal share. An eligible entity may include as part of its share a qualified conservation contribution from the landowner if the eligible entity contributes its own cash resources in an amount that is at least 50 percent of the Federal share.
(3) A qualified conservation contribution from the landowner is either a charitable donation or qualified conservation contribution as defined by section 170(h) of the Internal Revenue Code of 1986. There is no requirement for landowner donations under ACEP-ALE.
(4) The amount contributed by the entity that is not a qualified conservation contribution from the landowner must be cash and must come from sources other than the landowner. Under no circumstances may the eligible entity acquire its minimum cash contribution through additional cash contributions or payments made by the landowner, loans provided by the landowner, "monitoring or stewardship" fees, "acquisition" fees, or other such fees charged to the landowner. Furthermore, because the entity contribution must be cash, other examples of prohibited sources of the entity's share include—
(i) Land from another parcel.
(ii) In-kind contributions, including administrative costs associated with agricultural land easement acquisition (e.g., surveys, appraisals, legal expenditures).
(5) At the time of application, the eligible entity must provide an estimate of the following for each parcel:
(i) The estimated acres
(ii) The fair market value of the agricultural land easement;
(iii) The total estimated entity non-Federal contribution
(iv) The requested Federal share
(v) The estimated purchase price
(vi) The qualified contribution from the landowner
(6) ACEP-ALE authorizes two exceptions under which a waiver may be granted by NRCS:
(i) The Federal cost-share amount may be adjusted for grasslands of special environmental significance (see subsection B below).

(ii) The eligible entity cash contribution requirement may be adjusted for projects of special significance (see subsection C below).

(7) As a condition of entity eligibility, the entity must be able to document and certify that they have the required funds available at the time of application. Examples of acceptable cash contributions include, but are not limited to, funds held in an entity account that are not otherwise committed or restricted, funds awarded to the entity, but not necessarily held in an entity account, and loans obtained by the entity for the purpose of acquiring conservation easements.

(8) If the entity's ability to meet the match requirement at time of application is contingent upon the receipt of a waiver of the entity cash contribution requirement for a project of special significance, then the waiver request along with all associated documentation for each parcel on which the waiver is sought must be submitted at the time of application.

B. Waiver to Increase the Federal Share for Grasslands of Special Environmental Significance (GSS)

(1) NRCS may authorize a waiver to increase the Federal share of the cost of an agricultural land easement to an amount not to exceed 75 percent of the fair market value of the agricultural land easement if all of the following apply:

(i) The eligible entity has identified on the application that the offered parcel is applying for funding consideration as a GSS.

(ii) NRCS determines the lands to be enrolled are GSS as defined in Subpart T, "Definitions."

(iii) An eligible entity will share in the cost of purchasing an agricultural land easement in an amount that is no less than 33.33 percent of the Federal share. The eligible entity share may include a qualified landowner contribution if the eligible entity contributes its own cash resources in an amount that is at least 16.67 percent of the Federal share.

(iv) The eligible entity agrees to incorporate and enforce additional deed restrictions to manage and enforce the easement to ensure the GSS attributes are protected.

(2) The determination that the parcel meets the GSS land eligibility requirements must be made prior to selection for funding. A separate cooperative agreement must be used for GSS parcels; a single cooperative agreement will not include both regular ACEP-ALE parcels and GSS parcels. The GSS land eligibility determination and waiver to adjust the Federal share must be documented by NRCS and reflected in the GSS cooperative agreement.

C. Waiver to Adjust the Eligible Entity Cash Contribution Requirement for Projects of Special Significance

(1) The State Conservationist may waive a portion of the applicable eligible entity cash contribution requirement for parcels that NRCS determines are of projects of special significance. A waiver of the entity cash contribution requirement does not result in an increase in the applicable Federal share and may only be authorized if NRCS determines that—

(i) The transaction is subject to an increase in the private landowner donation that is equal to the amount of the waiver.

(ii) The increase in the landowner donation is voluntary.

(iii) The property is in active agricultural production which means that the land is in agricultural use as defined in Subpart T, "Definitions," and that agricultural or forest-related products or livestock are being produced or have been produced within 1 year of the date of application.

(iv) The accompanying agricultural land easement plan will address the protection of the attributes resulting in the parcel being a project of special significance.

(v) The eligible entity contributes its own cash resources in an amount that is—

- For projects of special significance that are not GSS, at least 25 percent of the amount of the Federal share, or at least 10 percent of the Federal share in States that offer a State tax credit for a qualified conservation contribution on agricultural land
- For enrollment on lands that has also received a GSS waiver, at least 8.33 percent of the amount of the Federal share, or at least 3.33 percent of the Federal share in States that offer a State tax credit for a qualified conservation contribution on agricultural land.

(vi) The application is a project of special significance and the parcel meets one or more of the following criteria.

- Listed on the National Register of Historic Places or is a traditional cultural property
- Located within a micropolitan statistical area and 50 percent of the adjacent land is agricultural land
- Located within a metropolitan statistical area
- An education or demonstration farm or ranch focused on agricultural production and natural resource conservation
- A farm or ranch operated for the purpose of increasing participation in agriculture and natural resource conservation by underserved communities, veterans, beginning farmers or ranchers, or disabled farmers or ranchers
- The subject of a conservation buyer transaction where a member of underserved community, veteran, beginning farmer or rancher, or a disabled farmer or rancher has a valid purchase and sale agreement to acquire the property subject to an agricultural land easement
- Officially designated as having been in the same family ownership for over 100 years
- Meets the definition of grasslands of special environmental significance

(2) The request for a waiver must be submitted on an individual parcel basis and the following documentation must be provided to the NRCS State Conservationist by the entity:

(i) A written request for a waiver from the entity.

(ii) A signed letter from the landowner confirming that the increase in the landowner donation is voluntary.

(iii) Evidence that the land is in active agricultural production.

(iv) Evidence that the parcel meets the criteria for projects of special significance outlined in the “Eligible Entity Cash Contribution Requirement Waiver” worksheet (see Subpart U, “Exhibits”).

(v) For entities requesting a waiver to 10 percent of the Federal share, the entity must provide documentation of the State tax program that provides State tax credits for qualified conservation contributions on agricultural land.

(3) Requests for a waiver of the eligible entity cash contribution requirement may be submitted at the time of application or once the cooperative agreement is in place.

(i) As a condition of eligibility, the entity must be able to document that it has sufficient cash match available at the time of application. If an entity is relying on the approval of a waiver to meet its cash match requirement to be determined eligible, such waiver request must be submitted to NRCS by the entity at the time of application. All waiver requests and supporting documentation must be submitted, reviewed, and determinations made prior to obligating funds to the cooperative agreement for all applications tentatively selected as funded parcels. If waiver requests are incomplete, late, or denied on tentatively selected parcels at the time of fund obligation, the entity must have sufficient cash match to meet the standard entity cash contribution requirements to be eligible for enrollment.

(ii) An eligible entity may also request a waiver of the entity cash contribution requirement after a cooperative agreement has been entered into. Those waiver requests must be

submitted at least 90 days prior to the planned closing date. The waiver review and determinations must be made prior to the entity requesting payment. If waiver requests are late, incomplete, or denied, the entity must have sufficient cash match to acquire the easement.

(4) When NRCS receives a complete request from an eligible entity to waive the cash contribution requirement prior to the required deadlines for a parcel that meets land and landowner eligibility requirements and ranks high enough to for potential funding, NRCS will review the request using the "Eligible Entity Cash Contribution Reduction Waiver Request" worksheet (see Subpart U, "Exhibits"). A first level reviewer designated by the State Conservationist will review the request and materials and complete the worksheet. The completed worksheet will be reviewed by a second-level reviewer before being provided to the State Conservationist for final review.

(5) The authority to provide a waiver of the eligible entity cash contribution requirement is delegated to the State Conservationist and may not be further delegated. The State Conservationist must review the request, worksheet, and recommendations of the first and second level reviewers to ensure that the project is of special significance, that the requirements are met, the worksheet is complete, and that the waiver of the eligible entity cash contribution requirement is justified.

(6) The State Conservationist must provide the eligible entity written notification of their decision, with appropriate appeal rights if the waiver is denied. A copy of any approved waiver requests must be retained in both the cooperative agreement and individual easement case file. A copy of the approved waiver must be attached to the confirmation of matching funds document submitted for each parcel at the time payment is requested. The waiver of the eligible entity cash contribution requirement is not transferrable and is only applicable to the parcel for which the waiver was approved.

(7) State Conservationists are not required to review entity cash contribution waiver requests for applications that are ineligible or not selected for funding. Waiver requests are subject to the waiver requirements in place during the fiscal year the parcel is funded.

(8) NHQ will conduct spot checks of the waiver decision packages by States. States will be required to submit completed waiver decision packages for parcels identified by NHQ.

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart F – ACEP-ALE Cooperative Agreements and Grant Agreements

528.50 Overview of ACEP-ALE Agreements

A. Background

(1) NRCS will enter into a cooperative agreement with noncertified eligible entities or a grant agreement with certified eligible entities. The cooperative agreement and grant agreement (hereinafter cooperative agreement; unless otherwise noted all guidance applies to both cooperative and grant agreements) are the legal agreements with which the Federal Government establishes a financial assistance relationship with the eligible entity.

(2) NRCS, on behalf of the Commodity Credit Corporation, enters into a cooperative agreement for eligible entities to acquire agricultural land easements on eligible parcels selected for funding. The cooperative agreement is the principal program document under which NRCS and an eligible entity identify how they will coordinate the activities needed for the eligible entity to purchase an agricultural land easement with ACEP-ALE cost-share assistance, including each parties respective rights, roles, responsibilities, and obligations.

(3) Once NRCS selects an eligible parcel for funding, the eligible entity works with NRCS to finalize and sign the cooperative agreement prior to NRCS obligation deadlines. The cooperative agreement incorporates all necessary ACEP-ALE requirements including deadlines, reporting, and the requirement that each easement must have an associated agricultural land easement plan.

(4) Each fiscal year, NRCS National Headquarters (NHQ) publishes the standard cooperative agreement template for noncertified eligible entities for use in that fiscal year. For all new cooperative agreements entered into in a given fiscal year, the State Conservationist will use cooperative agreement template published for that fiscal year.

(5) For cooperative agreements with noncertified eligible entities only, the Easement Programs Division (EPD) may approve limited changes to the terms of the cooperative agreement template, as follows:

(i) The eligible entity may submit a request for a revision to the cooperative agreement template to the State Conservationist. For example, if the eligible entity is a State, Tribal, and local government with statutory authorities that conflict with specific terms of the cooperative agreement template.

(ii) If the State Conservationist supports the requested revision they will forward the proposed amended cooperative agreement to EPD with a copy to the Grants and Agreements Team in the Administrative Services Division for review and determination.

(iii) EPD and the Grants and Agreements Team will determine if the revisions are consistent with ACEP-ALE authorities and policy and Title 120, General Manual (GM), Part 401. EPD will consult with the USDA Office of General Counsel as needed to determine the consistency of the revisions with the statutory or regulatory authorities of ACEP-ALE.

(iv) State Conservationists must receive written approval from EPD director prior to executing a revised cooperative agreement template.

(v) The published cooperative agreement and any revisions thereto provide the needed flexibility to meet program purposes and goals at the State or local level while satisfying all ACEP-ALE program requirements.

(6) For grant agreements with certified eligible entities, the published grant agreement must be used. Revisions to the grant agreement are not authorized. The grant agreement is inherently more flexible and contains fewer specific terms than the cooperative agreement for

noncertified eligible entities. Acceptance of the grant agreement as published by NHQ is a condition of certification and eligible entities must affirm their ability and willingness to use the published grant agreement at the time certification is requested.

B. Required Agreement Provisions.—Cooperative agreements must contain the provisions necessary to ensure the ACEP-ALE program purposes and requirements are met and the cooperative agreement is implemented in compliance with NRCS authorities. The specific terms of these required provisions are included in the standard cooperative agreement template or standard grant agreement published by NHQ. Required provisions of the ACEP-ALE agreements include, but are not limited to—

(1) Identification of the eligible entity.
(2) The interests in land to be acquired, including the United States' right of enforcement, the minimum deed requirements, and the form and other terms and conditions of the easement deed.
(3) The management and enforcement of the rights on easements acquired with ACEP-ALE funds by the eligible entity or its designee.
(4) The responsibilities of NRCS.
(5) The responsibilities of the eligible entity on easements acquired with ACEP-ALE funds.
(6) Identification and responsibilities of any entities other than the primary eligible entity that will be party to the agricultural land easement or the cooperative agreement.
(7) The requirement for each easement to have an associated agricultural land easement plan that is approved by NRCS State Conservationist and signed by the landowner and the eligible entity.

Note: For easements acquired by noncertified eligible entities, these approvals are required prior to execution of the easement deed and payment of easement compensation to the landowner.

(8) The allowance of eligible parcel substitution upon mutual agreement of the NRCS State Conservationist and the eligible entity.
(9) The certification by the landowner prior to the planned easement closing date of the extent of any charitable contribution the landowner has provided to eligible entity.
(10) An attachment with the list of all parcels selected for funding, including the following information for each parcel:
(i) The NEST parcel ID
(ii) The landowner's names
(iii) Estimated acres
(iii) The type of easement or other interest to be acquired
(iv) The estimated fair market value and the estimated purchase price
(v) ACEP-ALE Federal share
(11) A list of any substitute parcels identified at the time the cooperative agreement is executed.
(12) The length, expiration date, and process for extension or amendment of the cooperative agreement.
(13) Standard provisions or required information related to cooperative agreements, including provisions requiring the eligible entity to comply with applicable registration and reporting requirements of the Federal Funding Accountability and Transparency Act of 2006 (Public Law 109-282, as amended) and 2 CFR Parts 25 and 170, related Executive orders, and OMB Circulars.
(14) Other requirements deemed necessary by NRCS to meet the purposes of this part or protect the interests of the United States.

528.51 Fund Obligation and Adjustments Under the Cooperative Agreement

A. Overview

(1) At the time of application, the entity provides a breakdown of the estimated fair market value of the agricultural land easement, the purchase price, the non-Federal eligible entity cash contribution, the qualified landowner contribution, if any, and the Federal share for each individual parcel. The Federal share may not exceed 50 percent of the appraised fair market value of the agricultural land easement except in the case of grasslands of special environmental significance, in which case the Federal share may not exceed 75 percent of the appraised fair market value of the agricultural land easement, contingent upon all eligible entity contribution requirements being met as identified in section 528.43.

(2) After eligibility determinations and ranking have been completed on all eligible applications submitted prior to an application cutoff date, the State Conservationist tentatively selects parcels for funding. The parcels tentatively selected for funding and the estimated Federal share amount for each parcel are listed in an attachment to the cooperative agreement. Eligible, high ranking, unfunded substitute parcels may also be identified on the attachment at this time.

(3) The cooperative agreement is the document used to obligate the ACEP funds that may be provided to the eligible entity for the purchase of agricultural land easements. The amount of ACEP funds obligated to an approved cooperative agreement is based on the cumulative total of the estimated Federal share of the tentatively selected parcels listed on the attachment to the agreement. There is only one attachment for a fiscal year.

(4) If the terms of the cooperative agreement allow for amendments to add funds in subsequent fiscal years for additional parcels selected for funding, a new attachment is developed for that fiscal year and funds added to the cooperative agreement by the obligation deadlines for the given fiscal year. The new attachment and the amendment to the cooperative agreement are the obligating documents for those subsequent year funds.

Note: Cooperative agreements entered into in FY 2014 cannot be amended to add subsequent fiscal year funding or parcels.

(5) The estimated Federal share for the individual parcel tentatively selected for funding as identified on the attachment, represents the maximum amount of ACEP funds that may be provided to the eligible entity for the purchase of that individual agricultural land easement.

(6) Once an individual parcel has an approved fair market value of the agricultural land easement the State Conservationist must determine whether adjustments are needed to the Federal share amount for the individual parcel as follows:

(i) If the approved appraised value or the available entity match is lower than the original estimate, the Federal share for the parcel must be decreased to no more than the maximum allowable cost-share amount. The ACEP-ALE funds that become available as a result of a decrease in the Federal share remain available for use under that cooperative agreement.

(ii) If the approved appraised value and associated entity match supports a Federal share amount that is higher than the original estimate, the State Conservationist has discretion to determine if the Federal share amount for the individual parcel will be increased. Pursuant to the terms of the cooperative agreement, NRCS is under no obligation to increase the Federal share above the original estimated amount. The State Conservationist may only authorize an increase in the Federal contribution amount to an individual parcel if the increase is within the scope of the original cooperative agreement and if there are sufficient funds remaining available in the cooperative agreement.

(iii) If there is a change to a parcel selected for funding that is outside the scope of the original cooperative agreement a separate determination of funding must be made before acquisition of the agricultural land easement can continue on that parcel under the same cooperative agreement. Out-of-scope changes typically include changes in the area of land offered for enrollment after the cooperative agreement is executed or after the appraisal is completed, including acreage substitutions, additions, or deletions, affecting more than 10 percent of the original acreage. Depending on the timing and circumstances of the out of scope changes, the parcel may need to be re-ranked, re-appraised, and have updated eligibility determinations made.

(6) The State Conservationist is responsible for managing the ACEP funds obligated to the cooperative agreement. Once funds are obligated to the cooperative agreement or attachment, the number of parcels ultimately funded and any subsequent increases or decreases in the Federal share amounts for the individual parcels must be managed within the funds obligated to that agreement. Additional ACEP-ALE funds will not be obligated to a cooperative agreement for increases in the Federal share amount for an individual parcel as long as funds remain available in the cooperative agreement.

B. Obligation of Funds through the Agreement

(1) Prior to the obligation of funds, the State Conservationist will ensure all necessary reviews and authorizations are in place, as follows:

(i) All cooperative and grant agreements must undergo, at a minimum, a first and second level State preobligation review pursuant to the most current easement internal controls policy.

(ii) Prior to execution, all agreements with a Federal share exceeding $100,000 must be submitted to NHQ Grants and Agreements Team for review and delegation of authority, with a copy to EPD.

(iii) All agreements or amendments with a Federal share exceeding the State's identified threshold for national level review under the most current easement internal controls policy must be submitted to EPD. National preobligation internal control reviews may take up to 30 days.

(2) After the State Conservationist conducts all required reviews and receives required approvals and delegations of authority, the State Conservationist will send the cooperative agreement to the eligible entity for signature. After the eligible entity executes the cooperative agreement, and then the State Conservationist, on behalf of the Commodity Credit Corporation, executes the cooperative agreement, NRCS will obligate the ACEP funds in the NRCS financial system and report the agreement and parcels in NEST.

(i) The fully executed cooperative agreement is the document that authorizes NRCS to obligate ACEP-ALE funds for the eligible entities to purchase agricultural land easements from eligible landowners on eligible parcels selected for funding.

(ii) Funds obligated to the cooperative agreement in a given fiscal year may be expended over multiple years in accordance with the terms and deadlines identified in the cooperative agreement.

(iii) If the terms of the cooperative agreement allow for amendments to add funds and parcels in subsequent fiscal years, the subsequent fiscal year's selected eligible parcels will be identified on a new attachment to the cooperative agreement. There is no guarantee of funding for additional parcels in subsequent fiscal years.

C. Parcels Listed in Attachments to the Cooperative Agreement

(1) An individual attachment to the cooperative agreement lists the parcels that are intended to be acquired with the funds obligated in that fiscal year. In addition the attachment may list

substitute parcels that are eligible but did not rank high enough to be funded at the time of obligation.

(2) The terms of the cooperative agreement provide that nothing in the agreement obligates NRCS or the entity to purchase all or any of the agricultural land easement parcels listed on the cooperative agreement attachment. Listing parcels on the cooperative agreement attachment and obligation of funds often occurs prior to the completion of due diligence investigations, appraisals and reviews, and title clearance.

(3) Due to changing circumstances, including but not limited to landowner withdrawal, insufficient funds, unapproved appraised values, inability to clear title or provide sufficient access, hazardous substance issues, or expiration of offers, parcels originally selected for funding may ultimately not be funded or may be removed from the list. If sufficient funds remain available in the cooperative agreement, eligible parcels listed as substitutes may be funded or new eligible parcels not listed as substitutes may be added through an amendment to the cooperative agreement and selected for funding. Substitute parcels may be funded as long as the—

(i) Parcel is replacing a parcel previously selected for funding.

(ii) Landowners meet the ACEP-ALE landowner eligibility criteria in the year the parcel is selected for funding.

(iii) Parcel meets ACEP-ALE land eligibility criteria.

(iv) Parcel can be purchased with the existing funds obligated in the cooperative agreement.

(v) Parcel provides an equivalent or greater conservation value than the deleted parcel.

(vi) Parcel to be funded is the highest ranked unfunded parcel of the available substitute parcels offered under the agreement.

(vii) Parcel ranks high enough to be selected for funding in the fiscal year in which it is added to the cooperative agreement.

(4) If a parcel is listed as selected for funding on a cooperative agreement attachment, it must not be listed as a funded or substitute parcel on any other cooperative agreements.

(5) The substitution of acres within a pending offer must not decrease the conservation value of the offered easement or the value of the parcel in meeting the program purposes. If the substitution affects more than 10 percent of the originally offered area, the parcel must be re-ranked using the most current ALE ranking worksheet. The reconfigured parcel must rank high enough to be selected for funding in the fiscal year in which it is re-ranked. If lands of lesser fair market value are substituted in the pending offer, the payment must be reduced according to a new appraisal.

D. Cooperative Agreement Lengths, Deadlines, and Extensions

(1) The initial term of a cooperative agreement with a noncertified eligible entity is up to 3 fiscal years following the fiscal year the agreement is signed, with the possibility of extensions up to a maximum of 5 fiscal years. The initial term of a grant agreement with a certified eligible entity is up to 5 fiscal years following the fiscal year the grant agreement is signed, with the possibility of extensions up to a maximum of 7 fiscal years.

(2) Each fiscal year attachment to an ACEP-ALE agreement expires 24 months after the end of the fiscal year the attachment is added to the agreement. Each attachment may be extended for one 12-month period. If the terms of the agreement allow subsequent fiscal year attachments—

(i) A 3-year cooperative agreement that is extended to 5 years may have a total of three attachments.

(ii) A 5-year grant agreement that is extended to 7 years may have a total of four attachments.

(4) All ACEP-ALE agreement and attachment expiration dates are always August 31 of the applicable year. To request an extension of either the agreement or the attachment expiration dates, eligible entities may submit a request in writing to the State Conservationist.

(i) The State Conservationist should only grant extensions of the attachment expiration date due to circumstances beyond the control of the entity.

Note: Extending the attachment expiration date will reduce the closing efficiency of the eligible entity. Closing efficiency is a consideration in ranking parcel applications submitted by the eligible entity as well as in an eligible entity request for certification.

(ii) Extending an expiration date requires an amendment to the cooperative agreement and any such amendment must be executed prior to expiration of the cooperative agreement or attachment being extended.

(iii) Eligible entities must request cooperative agreement or attachment extensions at least 30 days in advance of the expiration date.

(iv) A copy of each amendment must be uploaded into NEST.

(v) Agreements or attachments that are expired may not be extended under any circumstances.

(5) Each attachment to the cooperative agreement has two performance deadlines: the closing deadline and the payment request deadline. The eligible entity may request an extension to either performance deadline from the State Conservationist.

(i) All parcels listed on a given attachment that will receive ACEP funds must close within 18 months and request payment within 23 months of the end of the fiscal year in which the funding is obligated for that attachment (e.g., parcels funded with FY 2015 funds must close on or before March 31, 2017, and payment must be requested on or before July 31, 2017).

(ii) Performance deadlines may be extended for any length of time up to a total of 12 months.

(iii) The State Conservationist must provide a written response to the eligible entity within 10 business days of the entity's request for an extension any performance deadlines.

(iv) Extending these performance deadlines does not require an amendment to the cooperative agreement as long as the expiration date of the agreement or attachment is not extended.

(v) The performance deadlines cannot be extended beyond the expiration date of the cooperative agreement or applicable attachment.

Figure 528-F1: Example – Cooperative Agreement for 3 Years, Extended to 5 Years

Cooperative Agreement Execution Date			September 1, 2015	FY 15	
Initial Agreement Expiration Date			August 31, 2018	FY 18	
Maximum Agreement Expiration Date			August 31, 2020	FY 20	
FY of Fund Obligation (Attachment)	**Attachment Listing Parcels**	**Closing Deadline**	**Payment Request Deadline**	**Attachment Expiration Deadline**	**Maximum Attachment Extension**
2015	A	March 31, 2017	July 31, 2017	August 31, 2017	August 31, 2018
2016	B	March 31, 2018	July 31, 2018	August 31, 2018	August 31, 2019
2017	C	March 31, 2019	July 31, 2019	August 31, 2019	August 31, 2020

(6) Approval of amendments to extend cooperative agreement or attachment expiration dates will only be approved by the State Conservationist and cannot be further delegated.

(7) Funds in cooperative agreements or attachments that are not disbursed before the cooperative agreement or attachment expires will be deobligated and returned to the NHQ.

528.52 Determining Fair Market Value of the Agricultural Land Easement

A. The Federal share must not exceed 50 percent of the fair market value as approved by NRCS of the agricultural land easement, as determined using any of the following:

(1) An appraisal using the Uniform Standards of Professional Appraisal Practices (USPAP) or the Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA/Yellow Book)
(2) An areawide market analysis or survey
(3) Another industry-approved method approved by NRCS

B. For parcels selected for funding, the eligible entity is responsible for obtaining and providing NRCS with an acceptable determination of the fair market value of the agricultural land easements that conforms to applicable industry standards and NRCS specifications and meets NRCS appraisal policy, including the requirements found in Title 440, Conservation Programs Manual (CPM), Part 527, Subparts E and F, and in this part.

C. The eligible entity is approved to use either the USPAP or UASFLA appraisal methodologies. If the eligible entity requests to use an areawide market analysis or other industry-approved method, NRCS approval of the methodology is required prior to entering into the cooperative agreement.

D. If the value of the easement is determined using an appraisal, the appraisal must be completed and signed by a State-certified general appraiser and must contain a disclosure statement by the appraiser (see 440-CPM, Part 527, Subparts E and F). The effective date of the appraised value must be within 6 months before or after the date the cooperative agreement or applicable amendment is executed identifying the parcel selected for funding or must be within 12 months of the easement closing date.

E. Noncertified eligible entities must provide a copy of the applicable valuation report used to establish the fair market value of the agricultural land easement to NRCS at least 90 days prior to the planned easement closing date or the earlier when possible. NRCS must obtain a technical review and approve the value determination prior to the eligible entity's purchase of the easement, including payment of easement compensation to the landowner.

F. Requests by the eligible entity to obtain and use an areawide market analysis for determining fair market value of the agricultural land easement must be submitted to the State Conservationist and approved by EPD director prior to entering into the cooperative agreement. The areawide market analysis must be conducted in accordance with NRCS specifications and completed and signed by a person determined by NRCS to have professional expertise and knowledge of agricultural land values in the area subject to the areawide market analysis. As part of the request, the eligible entity must include the following documentation:

(1) A map and description of the market areas to be analyzed.
(2) Adequately descriptive definitions of the land uses to be analyzed.
(3) The proposed standard agricultural land easement deed to be used on all enrollments within each market area.

G. Requests from eligible entities to use another industry-approved method must be submitted to State Conservationist and approved by the Chief of NRCS prior to entering into the cooperative agreement. As part of the request, the entity must identify the industry-approved method proposed, and copies of or references to the applicable industry standards. If approved, NRCS will identify the acceptable applicable industry standards and provide any associated NRCS specifications for the methodology approved.

H. NRCS will review, for quality assurance purposes, appraisals, areawide market analysis, valuation reports, other information resulting from another industry-approved method approved for use by NRCS, and associated technical reviews.

I. Agency-approved appraisal reports and technical appraisal reviews must be retained in the individual easement case file.

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart G – ACEP-ALE Deed, Title, and Plan Requirements

528.60 Agricultural Land Easement Deed Requirements

A. General Provisions

(1) The statutory purpose of ACEP-ALE is to protect the agricultural use and future viability and related conservation values of land by limiting nonagricultural uses of the land and to protect grazing uses and related conservation values by restoring and conserving eligible land. Therefore, ACEP-ALE funds must result in long-term protection of agricultural land and the provisions of funded agricultural land easements must limit the nonagricultural use of the land.

(2) Activities that meet the definition of agricultural uses provided in 7 CFR Section 1468.3 and as described in section 528.33D(2) are deemed agricultural uses of the land for the purposes of ACEP-ALE. Activities that are not considered agricultural uses must be prohibited or limited to ensure the parcel remains available for agricultural uses.

(3) NRCS is required by law to ensure that ACEP-ALE funded agricultural land easement deeds contain provisions that ensure the ACEP-ALE purposes will be met. NRCS ensures that ACEP-ALE funds will result in agricultural land protection by—

(i) Evaluating land for ability to effectively protect agricultural and related conservation values using eligibility and ranking criteria.

(ii) Reviewing pre-existing rights in the property, such as mortgages, liens, and leases, to ensure there are not pre-existing conditions that would limit the ability of the parcel to meet program purposes.

(iii) Identifying minimum ACEP-ALE deed requirements and conducting reviews of agricultural land easement deeds to ensure provisions meet the program purposes and requirements.

(4) NRCS safeguards the public investment in agricultural land protection by requiring the eligible entity to place, monitor and enforce appropriate prohibitions and limitations on nonagricultural uses in the deed terms. The eligible entity's deed terms must prohibit or limit nonagricultural uses that are incompatible with agricultural uses and uses that involve a relatively irretrievable commitment of agricultural resources.

(5) The eligible entity will acquire the agricultural land easement, hold title to the agricultural land easement, and manage, monitor, and enforce the agricultural land easements, with the United States holding a right of enforcement. If multiple entities will co-hold an ACEP-ALE funded agricultural land easement as grantees of the agricultural land easement, all such entities are considered the beneficiary of federal funds and will be required to comply with the terms of the cooperative agreement. Cooperating entities may co-hold an easement when either of the following apply:

(i) All easement holders are party to the cooperative agreement.

(ii) All easement holders have provided to NRCS sufficient documentation of their status as sub-recipient of Federal funds and acknowledgement of the requirement to comply with the terms of the cooperative agreement.

(6) When negotiating the terms of a conservation easement deed, the eligible entity and landowner should consult with their own attorneys to ensure that all legal requirements and any applicable Internal Revenue Service requirements are met.

(7) Subtitle H of the Food Security Act of 1985 Section 1265(a) provides for the purchase of an easement "or other interests in eligible land." Such other interests must have the same

purpose of protecting the agricultural use of the land and must follow the same guidelines as agricultural land easements set forth in this manual. Wherever the terms "agricultural land easement," "conservation easement," "agricultural land easement deed," or "conservation easement deed" appear, they include such other interests in eligible land. State offices must obtain prior approval by EPD director for any use of ACEP-ALE funds towards the acquisition of "other interests in land."

B. Survey Requirements

(1) The legal description of the ACEP-ALE parcel must conform to the description set forth in the title records for the funded parcels. Existing surveys or boundary descriptions for the parcel and the appropriate record book and page as well as the tax parcel number must be referenced in the deed.

(2) Legal descriptions of the ACEP-ALE parcel must comply with the survey standards in the State in which the parcel is located. Both existing and new legal descriptions must close to within the tolerances set by the State survey standards. NRCS has no separate ACEP-ALE boundary or survey standards or requirements.

(3) The eligible entity must obtain a new boundary survey and legal description to State survey standards if any of the following apply:

(i) The ACEP-ALE funded easement area is less than or only a portion of the entire property described in the current legal descriptions of record, unless NRCS determines the current legal description is adequate for ACEP-ALE purposes.

(ii) NRCS determines the current legal description is not accurate.

(iii) The ACEP-ALE funds are being used to protect less than the entire area protected by a larger conservation easement.

C. Baseline Documentation

(1) The eligible entity must provide a baseline documentation report for each parcel to NRCS prior to closing on the easement (see Subpart U, "Exhibits," for baseline documentation example). The baseline report must be incorporated into the agricultural land easement deed by reference.

(2) The noncertified eligible entity must provide NRCS a draft baseline documentation report at least 90 days prior to the planned closing date of the agricultural land easement. Certified eligible entities must provide NRCS the baseline documentation report at the time payment request is submitted.

(3) The baseline documentation report must contain maps and full descriptions and pictures of items including but not limited to: property location, land use, land cover and its condition; crops and crop rotations; condition of the grassland, pasture, range, hay or forest lands; animal inventories and waste storage facilities; any critical nesting habitat for declining populations of grassland dependent birds; all physical structures, infrastructure and improvements, including barns, sheds, corrals, fences, ponds, watering facilities, and roads; irrigation rights and volume of irrigation water rights to be retained for the easement; any problem areas; and any special features for which the parcel is being protected, such as historical or archeological resources. (See Subpart U, "Exhibits," for baseline documentation report items).

D. Minimum Deed Requirements

(1) The eligible entity may use its own terms and conditions for the deed of agricultural land easement and must ensure that agricultural land easements acquired with funds made available under the cooperative agreement meet the following requirements:

(i) Address all of the minimum deed requirements identified at 7 CFR Section 1468.25(d).

(ii) Conveyed for the purpose of protecting natural resources and the agricultural nature of the land.

(iii) Run with the land in perpetuity or where State law prohibits a permanent easement, for the maximum duration allowable under State law.

(iv) Protect the agricultural use, future viability, and related conservation value, of the parcels by limiting nonagricultural uses of that land or protect grazing uses and related conservation values by restoring and conserving eligible land. This may include specific protections related to the specific purposes for which the parcel was selected, including historical or archaeological resources or grasslands of special environmental significance.

(v) Provide for the effective administration, management, and enforcement of the agricultural land easement by the eligible entity or its successors and assigns.

(vi) Subject the parcel to an approved agricultural land easement plan.

(vii) Include the required United States Right of Enforcement language.

(viii) Provide the United States access to the easement area sufficient to ensure compliance pursuant to its right of enforcement.

(ix) Specify that impervious surfaces will not exceed 2 percent of the ACEP-ALE easement area, excluding NRCS-approved conservation practices, unless NRCS grants a waiver (see paragraph F below).

(x) Prohibit commercial and industrial activities except those activities that are consistent with the agricultural uses of the land.

(xi) Prohibit the subdivision of the property subject to the agricultural land easement, except as described in paragraph H below.

(xii) Includes other minimum deed terms specified by NRCS to ensure that ACEP-ALE purposes are met.

(2) For cooperative agreements with noncertified eligible entities, the agricultural land easement deed must be approved by NRCS prior to closing and must be submitted to NRCS at least 90 days before the planned easement closing date.

(3) For grant agreements with certified eligible entities, NRCS review of the agricultural land easement deed will occur after acquisition in accordance with the provisions of the grant agreement and the requirements of this manual.

(4) NRCS may request the Office of General Counsel's assistance with agricultural land easement deed reviews.

E. Agricultural Land Easement Duration

ACEP agricultural land easements must be perpetual or for the maximum duration under applicable State laws. Where State laws have not authorized or prohibit perpetual conservation easements, ACEP agricultural land easements must be for the maximum duration authorized by State law, but under no circumstances less than 30 years. Some States allow landowners the right to revisit and terminate their conservation easements after a certain time period. Agricultural land easements that contain such language may only be funded if such termination rights are mandated by State law. NRCS may choose not to fund agricultural land easements in States that allow for the termination of a conservation easement.

F. Impervious Surface

(1) Impervious surfaces will not exceed 2 percent of the ACEP-ALE easement area, excluding NRCS-approved conservation practices. Impervious surfaces are defined as material that does not allow water to percolate into the soil on the parcel; this includes, but is not limited to, residential buildings, agricultural buildings with or without flooring, paved areas, and any other surfaces that are covered by asphalt, concrete, or roofs. This limitation does not include public roads or other roads owned and controlled by parties with rights superior to agricultural land easement.

(2) The noncertified or certified eligible entity may submit a request for waiver of the 2-percent impervious surface limitation for each parcel to the State Conservationist not less than 90 days prior to closing on the easement. The State Conservationist may waive the 2-percent impervious surface limitation on an individual easement basis, provided that no more than 10 percent of the easement area is covered by impervious surfaces.

(3) Before waiving the 2-percent limitation, NRCS will consider, at a minimum, population density; the ratio of open, prime, and other important farmland versus impervious surfaces on the easement area; the impact to water quality concerns in the area; the type of agricultural operation; parcel size; and the purposes for which the easement was acquired. All approved impervious surface waivers will be documented and the evidence retained in the individual easement case file.

(4) An eligible entity may also request a waiver to employ its own process for waiving the impervious surface limitation if the process is applied on an individual easement basis. The eligible entity's process for waiving the impervious surface limitation must be approved by the NRCS Deputy Chief for Programs. The entity must submit its request along with the details of their process to the State Conservationist for their review. If the State Conservationist concurs with the process and recommends approval, the State Conservationist must forward their recommendation, along with the entity request and process information to EPD at least 90 days prior to planned closing date.

(5) NRCS will not approve blanket waivers or an entity process that approves blanket waivers of the impervious surface limitation. All ACEP-ALE easements must include language limiting the amount of impervious surfaces within the easement area.

G. Building Envelope

(1) The eligible entity must prepare a map of existing and proposed building envelopes for each parcel and submit it to NRCS at least 90 days prior to the planned closing date.

(2) In general, the future location of any building envelopes should be identified on the map attached to the deed. The agricultural land easement may allow buildings envelopes to be located after closing, if the deed specifies the number of floating building envelopes and requires State Conservationist approval of the location prior to construction.

(3) State Conservationist approval will be conditioned on locating the building envelope, to the greatest extent possible—

(i) To not include prime farmland.

(ii) Near existing roadways.

(iii) Near existing buildings, structures, and other approved building envelopes.

H. Subdivision

(1) In general, the agricultural land easement deed should prohibit future subdivision of the protected property. If the landowner intends to subdivide a parcel in the future, individual applications should be submitted for the individual intended subdivided parcels and ranking conducted on the individual applications. If the smaller parcels rank high enough to be selected for funding, separate agricultural land easements may be purchased on the individual parcels.

(2) The eligible entity must address the potential for future subdivision in the agricultural land easement deed. The eligible entity may include provisions to prohibit subdivision of the easement area entirely, except where State or local regulations explicitly require subdivision to construct residences for employees working on the agricultural land easement area.

(3) If the eligible entity instead of prohibiting future subdivision of the protected property wants to provide for the future subdivision of the protected property, then the agricultural land easement deed must identify the maximum number of future parcels. Additionally, if the boundaries of the proposed subdivisions—

(i) Are identified and approved by the State Conservationist prior to closing, both the approved number and boundaries must be identified in the agricultural land easement deed. No further NRCS review is required at the time of future conveyance of the parcels as identified in the deed.

(ii) Are not identified prior to closing, the eligible entity must submit a request to the State Conservationist for approval prior to authorizing a subdivision. The entity must certify that the requested subdivision is required to keep all farm or ranch parcels in production and viable for agriculture use and that separate conveyance of the farm or ranch parcels subject to the agricultural land easement will move the land from one agricultural operation to another. The State Conservationist must determine that—

- Parcels resulting from the subdivision of the protected property will meet ACEP land eligibility requirements of 16 U.S.C. Section 3865 et seq. as enacted on the date the original parcel was enrolled in ACEP, including the allocation of the impervious surface limitation between the subdivided parcels.
- The resulting parcels will not be below the median size of farms in the county or parish as determined by the U.S. Department of Agriculture's most recent National Agricultural Statistical Survey (NASS).

I. Agricultural Land Easement Deed Recording and Signature

(1) The agricultural land easement deed must meet the requirements of the State and county recording statutes where the agricultural land easement deed will be recorded.

(2) The holder of the agricultural land easement must accept the agricultural land easement deed. Acceptance is indicated by an authorized official of the holder signing the agricultural land easement deed on an acceptance page.

(3) The United States is not a grantee but holds certain limited rights in the agricultural land easement. Acceptance by the holder of the agricultural land easement will give rise to the rights of the United States in its right of enforcement in the agricultural land easement.

(4) The United States is not required to sign the ACEP-ALE funded agricultural land easement to give rise to the United States Right of Enforcement. No representative of the USDA will sign the ACEP-ALE funded agricultural land easement unless signature by a third party right of enforcement holder is required by State law. If State law requires such acceptance, States must obtain EPD review and approval of the acceptance document prior to closing and the acceptance document may only be signed by the State Conservationist.

528.61 Guidelines for Agricultural Land Easement Deed Review

A. Deed Review for Noncertified Eligible Entities

(1) Although the noncertified eligible entity may use its own terms and conditions in the agricultural land easement deed, there are certain provisions that must be included in the agricultural land easement deed for it to be legally sufficient, conform to agency policy, and be consistent with the purposes of ACEP-ALE. These provisions are addressed in the "Minimum Terms for the Protection of Agricultural Use", which NRCS has established in the "ALE Minimum Deed Terms" addendum (see Subpart U, "Exhibits," for the "ALE Minimum Deed Terms" addendum). The addendum is a standing exhibit to the cooperative agreement.

(2) The eligible entity may introduce its own deed terms, including those that are consistent with but more restrictive than the ALE minimum deed terms. If the eligible entity introduces its own deed terms that are inconsistent with the ALE minimum deed terms, the ALE minimum deed terms will control. The ALE minimum deed terms themselves may not be modified except for appropriate changes to meet formatting requirements.

(3) Use of standardized ALE minimum deed terms will expedite NRCS review of agricultural land easements, streamline program delivery, increase the transparency of program requirements, ensure the equitable treatment of all participants, and reduce inconsistency in the long-term management and enforcement of the easements

(4) All agricultural land easement deeds must be provided to the NRCS State office 90 days prior to the planned closing date and must be approved by NRCS prior to closing. The level of NRCS review and type of approval required for individual easement deeds prior to closing is based on how the eligible entity elects to incorporate the ALE minimum deed terms.

(i) If an eligible entity elects to attach the "ALE Minimum Deed Terms" addendum to the deed, review by EPD is not required; instead, review will be conducted by the State Conservationist who will verify that the—

- Terms of the addendum are not modified.
- Addendum is signed by the landowner and eligible entity and attached to the agricultural land easements deed at the time of closing and recordation.
- Paragraph below is inserted at the bottom of the agricultural land easement deed:

  This agricultural land easement is acquired with funds provided, in part, under the Agricultural Conservation Easement Program (ACEP). The EXHIBIT ____ is attached hereto and incorporated herein by reference and will run with the land in perpetuity [or for the maximum duration allowed under applicable State laws]. As required by 16 U.S.C. Section 3865 et seq. and 7 CFR Part 1468 et seq. and as a condition of receiving ACEP funds, all present and future use of the protected property identified in EXHIBIT ____ (legal description or survey) is and will remain subject to the terms and conditions described forthwith in this addendum entitled "Minimum Deed Terms For The Protection Of Agricultural Use" in EXHIBIT ___, that is appended to and made a part of this easement deed.

(ii) If the eligible entity elects not to attach the "ALE Minimum Deed Terms" addendum to the agricultural land easement deed, then the eligible entity will ensure that ALE minimum deed terms as written in the "ALE Minimum Deed Terms" addendum are included in the body of every agricultural land easement deed. The agricultural land easement deed must be reviewed and approved for use by EPD prior to the eligible entity requesting an advance of the Federal share or closing on an agricultural land easement.

(iii) Upon mutual agreement by NRCS and the eligible entity, the cooperative agreement may be amended to include an agricultural land easement deed template if the provisions of the deed template address the ALE minimum deed terms and is approved by EPD in advance of the amendment. If the eligible entity elects to use the approved template without changing any terms or conditions, review of the individual, final agricultural land easement deeds by EPD is not required; instead, review will be conducted by the State Conservationist who will verify that the individual, final agricultural land easement deed is the same as the EPD-approved template. Verification by the State Conservationist must be completed prior to the eligible entity requesting an advance of the Federal share or closing on the easement.

(5) NRCS will conduct quality assurance reviews on the agricultural land easements acquired by the eligible entity under the cooperative agreement. If the final deeds contain modifications to the ALE minimum deed terms, NRCS may require the deeds to be remedied and may terminate the cooperative agreement.

528.62 Title Review and Clearance

A. Title Review Requirements

(1) Prior to purchasing an agricultural land easement, onsite inspections, due diligence, and landowner interviews must be completed and all title evidence must be reviewed to ensure that programmatically and legally sufficient title in the property is obtained. These reviews will include thorough examination of both unrecorded and recorded exceptions to the title to determine whether any existing exceptions to the title, encumbrances, agreements, leases, easements, other clouds on the title, or other circumstances exist that would in any way undermine NRCS's ability to achieve the purposes of the program or the eligible entities ability to enforce the easement.

(i) For cooperative agreements with noncertified eligible entities, the review and documentation will be completed by the eligible entity and NRCS, and issues must be remedied by the landowner and the entity prior to closing the easement.

(ii) For grant agreements with certified eligible entities, the review and documentation will be completed by the eligible entity, and issues must be remedied by the landowner and the entity prior to closing the easement. Documentation submitted to NRCS will be reviewed for compliance after the easement is acquired. Any noncompliance issues identified by NRCS must be remedied by the landowner and the entity.

(2) The eligible entity will obtain and review a title commitment, preliminary title report, or other form of preliminary title evidence along with all underlying documents for each parcel selected for funding, and must provide copies to NRCS. The eligible entity will evaluate the title, including all outstanding and reserved interests in the parcel. The eligible entity must inform NRCS of any potential impacts those recorded and unrecorded interests may have on the agricultural land easement deeds ability protect the agricultural uses by limiting the nonagricultural uses.

(3) The eligible entity and NRCS must also consider unrecorded interests in the parcel such as lease holders, unauthorized occupants or users, or other evidence of interests discovered through landowner interviews and site visits. States are required to use the "Preliminary Certificate of Inspection and Possession" form to determine and document the presence of unrecorded liens, leases, options, or other claims against the property that may impact the landowner's ability to provide clear title to the property or impact the ability to achieve the purposes of the program on the parcel. The "Preliminary Certificate of Inspection and Possession" form must be completed by NRCS prior to issuing the easement payment.

(4) NRCS will determine whether the recorded and unrecorded exceptions will prevent the easement from achieving the purposes of the program. NRCS will take into consideration the eligible entity's review and findings.

(5) The "Certificate of Use and Consent" form and related addendum must be completed for all parcels selected for funding. Each exception must be fully documented as either acceptable or needing to be removed or subordinated, or other appropriate remedy. Each exception must be documented on the "Certificate of Use and Consent" form and must include a description of the exception, the recommendation for addressing the exception, and the basis for the recommendation. (see Subpart U, "Exhibits," for a title exception guide). Below are examples of recommendations, brief descriptions, and rationales that may appear on the "Certificate of Use and Consent" form:

(i) Administratively acceptable outstanding rights would not interfere with agricultural land easements ability to protect the agricultural uses by limiting the nonagricultural uses. Examples of administratively acceptable outstanding rights include are rights-of-way and easements for existing roads and utilities (e.g., electric, gas, sewer, water, or communications). The "Certificate of Use and Consent" documentation may appear as follows:

- Acceptable – Existing 30-foot-wide power line right-of-way on southerly easement boundary, power line located on the perimeter of the field, no long-term negative impacts anticipated to result from presence or maintenance of power line.

(ii) Administratively Waived Outstanding Right.—Administratively waived outstanding rights include third-party rights where a diligent effort was made to acquire the outstanding right without success, there is a low risk that the third-party rights will be exercised, and the impact on the agricultural value would be acceptable if exercised. All efforts to acquire the rights and the rationale for determining that the probability is low for the third-party to exercise those rights must be documented in writing. In these situations, the State Conservationist may approve the funding of the easement subject to these outstanding rights. Examples of administratively waivable outstanding rights include—

- Mineral rights held by third parties and approved by the State Conservationist using the mineral rights matrix located in 440-CPM, Part 527, Subpart Y, "Exhibits."
- Alternative legal access approved by the State Conservationist in accordance with subsection B below that does not meet the standard requirements of being an insurable, unconditional, or transferable legal right of recorded access for the term of the easement.
- The certificate of use and consent documentation may appear as follows:

  Acceptable – Existing natural gas lease held by over 50 parties due to multiple generations of inheritance of rights, located in an area with no known reserves and no infrastructure for transport; mineral assessment has determined very low likelihood of future exploration or extraction, no long-term negative impacts anticipated to result from presence or maintenance of outstanding gas lease.

(iii) Unacceptable Outstanding Rights.—Administratively unacceptable outstanding rights include, but may not be limited to—

- Liens against the property (mortgages, mechanic's liens).
- Right-of-way and easements that prevent the agricultural use of the property.
- Provisions that require the United States to—
  - Commit to future appropriations.
  - Make a payment by a specific date.
- Rights not clearly defined or that might limit the agricultural land easements ability to protect the agricultural uses by limiting the nonagricultural uses.
- Rights that could unduly interfere with the agricultural use of the property.
- The certificate of use and consent documentation may appear as follows:
  - Must be subordinated or removed: Existing county flowage easement, allows county to subject the land to permanent flooding, levee has been intentionally and accidentally breached numerous times, a permanent breach of the levee is currently being examined and has a high likelihood of approval, permanent flooding of the parcel would preclude future agricultural use;
  - Must be subordinated or removed: mortgages;
  - Must be removed: judgments, mechanics, or tax liens.

  Note: For certified eligible entities, the certified eligible entity rather than NRCS will complete a certificate of use and consent or a substantively similar document, prior to acquisition of the agricultural land easement. Within 30 days of recordation or request for reimbursement, whichever is sooner, the certified eligible entity will provide the NRCS State office a copy of the final recorded agricultural land easement deed, copy of the final policy of title insurance, and a copy of the certificate of use and consent or similar document.

(6) The landowners and eligible entities are responsible for providing clear title to the property, which may require such remedies as—

(i) Securing a subordination or release of the rights from the third party owner/lessee of the pre-existing rights.

(ii) Terminating or cancelling leases or options.

(iii) If prior to acquisition: reconfiguring the boundaries of the parcel to eliminate or reduce to a minimal level the surface impact the full exercise of the rights will have on the parcel. If the acreage of the parcel changes by more than 10 percent it must be re-ranked. The reconfiguration cannot reduce the parcel's ranking score below that of the lowest scoring parcel funded in the same fiscal year the subject parcel is funded.

(7) The eligible entity must provide NRCS with documentation that all unacceptable exceptions have been remedied. For noncertified eligible entities, this documentation must be provided to NRCS 30 days prior to the planned closing date for reimbursements and 60 days prior to the planned closing date for advances (see subpart I). The State Conservationist may not disburse funds or approve the closing of an agricultural land easement if the there are any unacceptable outstanding rights to the parcel. For certified eligible entities, this documentation must be provided upon request and issues identified by NRCS must be remedied in accordance with NRCS instructions and the terms of the grant agreement.

B. Access to Agricultural Land Easements

(1) This subsection pertains to all new ACEP-ALE applications and all pending agricultural land easement transactions that NRCS has entered into under ACEP-ALE and former FRPP. Agricultural land easements must have sufficient access as described in this part to be eligible to receive and retain ALE cost-share assistance.

(2) The landowner and eligible entity are responsible to ensure sufficient access to the entire easement area and provide evidence of access to NRCS. The State Conservationist is responsible to determine if the provided access is physically and legally sufficient to allow ingress and egress to the entire easement area in the event that NRCS has to exercise the United States' Right of Enforcement.

(3) Sufficient access requires NRCS to have both physical and legal access to the entire easement area (also referred to as the parcel) to be able to exercise the rights it obtains under the agricultural land easement purchased by the eligible entity.

(i) Physical access is sufficient if NRCS can reliably, safely, and efficiently conduct onsite visual and physical inspections of the parcel to monitor compliance with the terms of the agricultural land easement and the agricultural land easement plan (including any component plans such as a conservation plan on highly erodible cropland, grazing plan on grassland, or forest management plan on forest land) throughout the term of the easement.

(ii) Legal access is sufficient if the access offered by the landowner and the eligible entity is an insurable, unconditional, and transferable legal right of recorded access for the term of the easement.

(iii) If the State Conservationist determines that the identified access does not satisfy the legal access requirements described in subsection (ii) above, then they may consider alternative legal access as described in subsection (iv) below across lands owned by the United States (Federal lands), such as lands managed by the Bureau of Land Management (BLM) or the U.S. Forest Service (USFS), subject to the following conditions:

- The landowner and eligible entity must provide documentation to the State Conservationist that it is not practicable to acquire legal access as described in subsection (ii) to the entire easement area. Such documentation may include—
  - A map showing that the parcel is landlocked by adjacent lands owned by the United States.

- If the parcel is adjacent to but not landlocked by lands of the United States, written evidence that the landowner has made one or more offers to acquire access across adjacent non-Federal lands and those offers have been rejected and that the only other way to access the parcel is across adjacent lands owned by the United States.

- The landowner and eligible entity agree to include assurance in the agricultural land easement deed that access will continue to be provided and maintained comparable to the current access for the duration of the easement.

(iv) Alternative legal access is sufficient when the landowner can provide proof of any of the following access rights that provide a link from a public roadway or other legal access point to the easement area:

- Use of roads owned and maintained by the United States and managed by Federal agencies such as the BLM and USFS (this may include numbered system roads).
- Use of rights of way authorized under the Federal Land Management Policy Act (FLPMA) of 1976.
- Use of reciprocal rights of way between the landowner and a Federal agency.
- Long-term access permits issued by a Federal agency, 30 years or greater in length, that may be renewed upon agreement of the landowner and the Federal agency.
- A letter from an authorized representative of a Federal agency establishing the landowner's permission to cross the Federal land for casual use.

(v) The eligible entity must provide documentation to NRCS that the land meets the above criteria for alternative legal access.

(vi) The "Certificate of Use and Consent" must be used to document in the file that the access to the parcel has been administratively considered and whether or not it has been found to be sufficient. If alternative legal access is used, it must be documented on the "Certificate of Use and Consent," signed by the State Conservationist, and retained in the individual easement case file.

C. Title Insurance Requirements

(1) When securing title insurance, at a minimum, the eligible entity must—

(i) Acquire ALTA title insurance for all acquisitions in the full amount of the agricultural land easement purchase price.

(ii) Provide NRCS with a copy of the title insurance commitment and all supporting documents at least 90 days in advance of the planned closing date.

- The title commitment must be free and clear of any and all outstanding rights or encumbrances on the title except those that NRCS decides are administratively acceptable or waivable.
- If any such encumbrances are acceptable or waivable, they must be listed on the certificate of use and consent. Any encumbrances that are not acceptable must be removed or subordinated to the provisions of the agricultural land easement deed.

(iii) Ensure the title insurance company is approved by the State insurance commissioner or its equivalent.

(2) If an eligible entity fails to meet these minimum requirements, NRCS may terminate funding.

528.63 The Agricultural Land Easement Plan

A. General

(1) All ACEP-ALE easements must be subject to an agricultural land easement plan (ALEP) and may also require component plans to address specific land uses or resource concerns on the parcel. At a minimum all ALEPs must—

(i) Describe the activities which promote the long-term viability of the land to meet the purposes for which the easement was acquired, this may include a farm or ranch succession plan.

(ii) Include a description of the farm or ranch management system, and, if applicable, irrigation water right volumes needed for the agricultural activity on the easement. The ALEP may incorporate or refer to information from baseline documentation reports, as appropriate.

(iii) Identify required and recommended conservation or management practices that address the purposes and resource concerns for which the parcel was selected, such as those identified on the ALE ranking sheet, the land eligibility determinations, waiver requests, the cooperative agreement or deed, or other project documents. The ALEP may incorporate or cross-reference practices identified in other plans, such as an organic systems plan for organic operations, a comprehensive nutrient management plan for animal feeding operations, or care of historic sites for easements with historical or archeological resources.

(iv) Identify additional or specific criteria associated with permissible and prohibited activities consistent with the terms of the deed. For example, if a deed specifies that the location of the building envelope may be adjusted if it does not adversely affect the agricultural resources, the ALEP should describe the agricultural resources and how they may be impacted by construction of structures. Not every ALEP will need to specify additional or specific criteria for deed terms; whether such criteria are required should be determined by NRCS based on the agricultural resources present on the property and the clarity of the deed restrictions.

(v) Establish a limit on the impervious surfaces to be allowed consistent with the farm or ranch management system and consistent with the limitations identified in the deed.

(vi) If the parcel includes grassland, highly erodible land (HEL) or forest land, a component plan must be incorporated by reference into the ALEP. Conservation or management practices or activities included in an attached component plan do not need to be identified separately in the ALEP. Component plans must be developed for each land use type present on the parcel, as follows:

- A grasslands management plan is required if the parcel meets the land eligibility criteria in section 528.33B(3). An ACEP-ALE grasslands management plan must meet the requirements identified in section 528.63B, below.
- A conservation plan is required if the parcel contains HEL. Additionally, where appropriate, the conservation plan may include conversion of highly erodible cropland to less intensive uses. An ACEP-ALE conservation plan must meet the requirements in section 528.63C, below. NRCS or another NRCS-certified planner is responsible for assisting with the development of an HEL conservation plan.
- A forest management plan is required if the parcel contains contiguous forest that exceeds the greater of 40 acres or 20 percent of the total easement area. A forest management plan must meet the requirements in section 528.63D, below.

(3) The eligible entity is responsible for providing the ALEP and any required component plans to NRCS for the agency's review and approval. The eligible entity may elect to have NRCS or a qualified third party develop the required plans. State Conservationists must ensure the plans address the minimum criteria identified in this part, whether the plan is developed by NRCS or a third party.

(4) If the eligible entity requests NRCS to develop the plans, this should be identified in the cooperative agreement. NRCS is authorized to provide direct technical assistance for NRCS to develop the plans. If NRCS develops the plans, it will be done so in consultation with the eligible entity and the landowner and in accordance with Title 180, National Planning Procedures Handbook (NPPH), Part 600, and the NRCS Field Office Technical Guide

(FOTG). State Conservationists must work with the entity to ensure planning is requested and occurs with sufficient time to allow NRCS to complete and for the entity and landowner to review and sign the plans prior to easement closing.

(5) If a third party develops the ALEP, it is at the eligible entity's own expense. NRCS review and approval of the ALEP developed by a third party is as follows:

(i) For cooperative agreements with noncertified entities, the ALEP must be approved by NRCS and signed by the landowner and the eligible entity prior to easement closing.

(ii) For grant agreements with certified eligible entities, the ALEP must be signed by the landowner and the eligible entity prior to easement closing. NRCS review of the ALEP will occur after acquisition in accordance with the terms of the grant agreement and as part of the quality assurance review process. The eligible entity may request NRCS review and approval of the ALEP prior to closing.

(6) The eligible entity is responsible to ensure compliance with any required provisions of the agricultural land easement plan.

B. Grasslands Management Plan Component Requirements

(1) The grasslands management plan must describe the grassland types on the easement area and the management systems and practices needed to conserve, protect, and enhance the viability and functions and values of those grasslands. The functions and values of grasslands are the ecosystem services provided, including but not limited to domestic animal productivity, biological productivity, plant and animal richness and diversity, fish and wildlife habitat (including habitat for pollinators and native insects), water quality and quantity benefits, aesthetics, open space, and recreation.

(2) The grasslands management plan must include—

(i) A baseline description of the grassland resource, to include the species components of the grassland, such as an ecological site description or, at minimum, a brief description of the grassland species composition.

(ii) A description of the grassland management system consistent with NRCS practices contained in the eFOTG, including the prescribed grazing standard for easements that will be managed using grazing.

(iii) The management of the grassland for grassland-dependent birds, animals, water quality and quantity benefits, or other resource concerns for which the easement was enrolled.

(iv) The permissible and prohibited activities.

(v) Any associated restoration plan or conservation plan.

(3) The grasslands management plan may be updated and amended as necessary to include management changes for protection of grassland resources as needed. Changes to the grasslands management plan must be consistent with ACEP policy and maintaining the grassland resources.

(4) At a minimum, the grasslands management plan must be reviewed during the annual monitoring of the easement by the eligible entity to determine if the current grassland management is consistent with the plan and the changes to the plan are needed.

C. Conservation Plan Component Requirements

(1) At the time of application, every parcel landowner must file a Form AD-1026, "Highly Erodible Land and Wetland Conservation Certification," at the local USDA service center. By signing the AD-1026, the each landowner certifies that they are in compliance with HEL and wetland conservation (WC) provisions on all farms or ranches in which the landowner has an interest. The AD-1026 gives NRCS authorization to enter upon and inspect the property for the purpose of confirming HEL and WC compliance.

NRCS must confirm all landowner HEL/WC eligibility requirements are met at the time of obligation and again prior to payment.

(2) Where highly erodible croplands are included in the enrollment, a conservation plan component of the agricultural land easement plan will be developed by NRCS or an NRCS-certified planner in accordance with the provisions outlined in Title 180, National Food Security Act Manual (NFSAM), and the NPPH. Implementation of any provisions required under the conservation plan must occur within one year unless the State Conservationist grants an extension due to conditions beyond the landowner's control.

(3) The conservation plan may require conversion of highly erodible cropland to less intensive uses. All such plans must be reviewed and approved by NRCS and signed by the landowner and the eligible entity prior to closing.

(4) The conservation plan is considered "up-to-date" as long as there are no changes to the agricultural operations on the parcel. If there are changes the agricultural operations on the parcel, the conservation plan must be updated. The eligible entity and landowner must update the plan in the event the agricultural uses of the property change.

(5) The eligible entity must report any changes in the agricultural operation from the previous year on its annual monitoring report. If a change in operations is reported, the eligible entity must instruct the landowner to schedule an appointment with NRCS to have the conservation plan updated within 12 months. If, at the time of the next annual monitoring report, the landowner has not obtained an updated conservation plan (and it is not due to inaction by NRCS), then the landowner is in violation of the provisions of the agricultural land easement and the eligible entity is responsible to bring the landowner into compliance.

(6) NRCS will monitor the status of the conservation plan in accordance with HEL/WC status review requirements. Prior to entering the protected property, NRCS will notify the landowner in accordance with NFSAM procedures.

(7) A violation of the conservation plan will be considered a violation of the agricultural land easement, once all appeal rights have been exhausted. (See section 528.92 for violation procedures.)

D. Forest Management Plan Component Requirements

(1) A forest management plan component is necessary if the ACEP-ALE enrollment contains contiguous forest that exceeds the greater of 40 acres or 20 percent of the easement area.

(2) The forest management plan component describes the management system and practices to conserve, protect, and enhance the viability of the forest land. A forest management plan component contains a brief description of the forest land with a map identifying the forest land area.

(3) The forest management plan component must be provide a description of how the forest contributes to the economic viability or how the forestland serves as a buffer to protect from development along with the any management components needed to maintain the economic viability or buffer status.

(4) Forest management plans may include a forest stewardship plan, as specified in section 5 of the Cooperative Forestry Assistance Act of 1978 (16 U.S.C. Section 2103a), another practice plan approved by the State Forester, or another plan determined appropriate by NRCS. The plan complies with applicable Federal, State, Tribal, and local laws, regulations, and permit requirements. The forest management plan will also include any reference to current private, industry, State, or local forest management plans that the enrolled forest area is currently under. A copy of the referenced plans may be included if available.

(5) At a minimum, the forest land management plan must be reviewed during the annual monitoring of the easement by the eligible entity to determine if the current grassland management is consistent with the plan and the changes to the plan are needed.

E. Agricultural Land Easement Plan Practice Implementation Cost Share Sources

(1) Landowners may pursue cost-share assistance to implement conservation practices identified in the agricultural land easement plan through other USDA conservation programs, such as the—
   (i) Agricultural Management Assistance Program (AMA).
   (ii) Conservation Reserve Program (CRP) where authorized by FSA.
   (iii) Conservation Stewardship Program (CSP).
   (iv) Environmental Quality Incentives Program (EQIP).
   (v) Regional Conservation Partnership Program (RCPP).

(2) The availability of financial assistance for a landowner through the above-mentioned programs is subject to the eligibility requirements, policies, and procedures of the individual programs.

(3) ACEP-ALE is not authorized to provide cost-share assistance for the installation or implementation of conservation practices.

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart H – ACEP-ALE Eligible Entity Certification

528.70 Overview of the Entity Certification Process

A. NRCS employs a national certification process through which eligible entities may be certified. Certification allows eligible entities administrative flexibility when participating in ACEP-ALE, based on demonstrated experience preserving agricultural land and successful participation in NRCS's Farmland Protection Program (FPP), Farm and Ranch Land Protection Program (FRPP), or ACEP-ALE.

B. An eligible entity may submit a written request for certification and all required request package documents at any time to the State Conservationist for the State in which they are seeking certification. There is no specific solicitation period for certification requests.

(1) Multistate Certification.—If an eligible entity seeks certification in multiple States, the written request must be submitted to the State Conservationist for the State in which the eligible entity has completed the greatest number of FPP, FRPP, or ACEP-ALE funded easement acquisitions and must list all the States for which it is seeking certification. Eligible entities seeking multistate certification must demonstrate the ability to address State-specific conservation easement requirements in each State listed. The lead State Conservationist will notify the Regional Conservationist and other affected State Conservationists of the request.

C. The State Conservationist will review the materials submitted in the request package. Based on the review, the State Conservationist may recommend the entity for certification to the Regional Conservationist, may deny the request for certification, or may follow up with the entity as appropriate to obtain any additional information.

D. State Conservationist recommendations to approve certification will be forwarded to the Regional Conservationist. Final determination on certification approval rests with the Regional Conservationist. The Regional Conservationist will notify the eligible entity of the final decision in writing and send a copy to the appropriate State Conservationists.

E. If the State Conservationist or the Regional Conservationist determines that an eligible entity does not meet certification requirements, written notification will be sent to the eligible entity and will identify the reasons for denying certification. The eligible entity may be invited to resubmit its application after addressing the criteria identified in the denial. An eligible entity's failure to achieve certification does not affect its ability to participate in ACEP-ALE as a noncertified eligible entity.

528.71 Certification Prerequisites

An entity seeking certification must meet the requirements of an eligible entity as identified in section 528.32 of this part and must provide evidence to the State Conservationist documenting that the entity—

(1) Agrees to use easement valuation methodologies identified in 7 CFR Section 1468.24 for ACEP-ALE funded easement acquisitions.
(2) Holds, manages, and monitors a minimum of 25 agricultural easements (these do not have to be NRCS-funded easements).
(3) Holds, manages, and monitors a minimum of five ACEP-ALE, FRPP, or FPP funded conservation easements in good standing. States will verify this information based on data from NEST.

(4) Completes conservation easement transactions in a timely fashion. Closing efficiency will be evaluated by determining the average time to close all ACEP-ALE, FRPP, or FPP funded conservation easements over the most recent 5-year period.
(5) Maintains the capacity to enforce the provisions of easement deeds and provides documented history of such enforcement. Capacity to enforce is a combination of monitoring conservation easements and addressing violations of conservation easement terms. The entity must demonstrate that in the last 5 years it has—
  (i) Monitored all ACEP-ALE, FRPP, or FPP funded conservation easements on at least an annual basis, with an onsite visual inspection at least once every 5 years and provided required monitoring reports to NRCS annually.
  (ii) Brought violations of easement provisions into compliance.
(6) For nongovernmental organizations, the existence of a sufficient dedicated fund for the purposes of legal defense, monitoring, and enforcement. Dedicated funds are also referred to as "stewardship funds" or "legal defense funds."
(7) Agrees in its request for certification to use the published ACEP-ALE grant agreement for certified eligible entities if certified. This agreement will satisfy the requirement that the entity have a plan for administering easements enrolled under this part, as determined by NRCS (see Subpart U, "Exhibits," for sample cover letter from an entity requesting certification).

528.72 Certification Request Package

Eligible entities must submit a written request for certification along with all required documentation to the appropriate State Conservationist. The request package should be submitted to the State Conservationist electronically, must address all of the certification prerequisite requirements, and must include the following documents:

(1) A cover letter wherein the entity—
  (i) Requests certification under ACEP-ALE
  (ii) Outlines the eligible entity's ability to meet ACEP-ALE certification requirements
  (iii) Agrees to use easement valuation methodologies identified in 7 CFR Section 1468.24 for ACEP-ALE funded acquisitions
  (iv) Agrees to use the published ACEP-ALE grant agreement for certified eligible entities if it is certified, with a copy of the grant agreement attached to the cover letter as a reference
(2) A list of 25 agricultural easements that the eligible entity holds, including the location of such easements (State and county), the date each listed easement was last monitored, and the results of that monitoring visit (e.g. in compliance, in violation, etc.).
  (i) If the entity requests a waiver to this requirement, then the entity must provide evidence of comparable experience working with conservation easements and with the agricultural community. This evidence must include a list of up to 25, but no less than 10, conservation easements or similar interests in real property the entity holds, manages, or enforces, and a written explanation of how this experience ensures the entity can meet ACEP-ALE purposes and requirements. The State Conservationist has authority to grant this waiver and must document the basis for their determination.
(3) A list of the eligible entity's five most recently closed ACEP-ALE, FRPP, or FPP funded conservation easement transactions and the final policy of title insurance for each.
(4) Evidence that the entity has the capacity to enforce the provisions of easement deeds and history of such enforcement, including—

(i) The entity must provide a copy of its most recent annual monitoring reports for all ACEP-ALE, FRPP, or FPP funded conservation easement, unless previously submitted to NRCS.

(ii) Verification from States based on NEST data that the entity monitored all of its ACEP-ALE, FRPP, and FPP easements in the year preceding the request for certification.

(iii) Documentation of resolution for all ACEP-ALE, FRPP, or FPP funded conservation easements that were violated.

(iv) Documentation of any enforcement actions the eligible entity has taken within the past 5 years in, such as—

- Court documents, such as motions initiating an enforcement action and court's opinions, narrative description of specific enforcement actions and violation resolution strategies.
- If no enforcement issues, a narrative description of any proactive actions taken by the eligible entity to educate easement landowners, maintain contact with them, and prevent easement violations.

(6) A copy of the written acquisition, monitoring, and enforcement policies of the eligible entity.

(7) If a nongovernmental organization, documentation of the existence of sufficient dedicated fund and the amounts set aside in the dedicated fund for monitoring and enforcement. Documentation must include either the relevant portions of the eligible entity's financial statements or bank records.

(i) A dedicated fund is considered committed to these purposes if it is held in a separate account and may not be used for other purposes.

(ii) The dedicated fund is considered sufficient if it has at least $50,000 for legal defense and $3,000 per easement for management and monitoring.

(iii) A sufficiently capitalized risk pool will satisfy the requirement of a dedicated fund, however unless the risk pool explicitly covers monitoring of easements then documentation of dedicated monitoring fund will still be required.

(8) If an eligible entity is seeking multistate certification, the eligible entity must include a list of the States in which it is seeking certification.

(9) Entities are encouraged to provide documentation of any professional accreditation or certification the entity has received that relates to the eligible entity's ability to meet ACEP-ALE certification requirements. This documentation is not required, but may be considered during review of the request for certification.

528.73 Reviewing the Certification Request Package

A. The State Conservationist or designee will review an entity's certification request package for completeness and compliance with the requirements listed above (see Subpart U, "Exhibits," for sample letter acknowledging receipt of entity certification request package). Additionally, the State will assemble and review NRCS records to verify the requirements for certification have been met and will prepare necessary supporting documents, including—

(1) The State-completed "Certification Request Review and Determination Checklist" (see Subpart U, "Exhibits," for certification request review and determination checklist).

(2) Any documentation related to specific certification criteria that the State Conservationist determines are salient to whether the eligible entity meets certification criteria.

(3) The State Conservationist waiver to the requirement that the entity hold 25 agricultural easements, if applicable.

(4) A review of the five most recently closed ACEP-ALE/FRPP funded conservation easement transactions to verify that—

(i) The eligible entity's appraisal was approved by the technical appraisal reviewer and supports the Standard Form (SF) 270 submitted by the eligible entity.
(ii) The conservation easement deed language was approved by NRCS and is the same conservation easement deed language recorded by the eligible entity.
(iii) The final policy of title insurance only contains exceptions from coverage approved on the certificate of use and consent.
(iv) All parcels that include highly erodible croplands have an up-to-date conservation plan that was developed in accordance with the HEL/WC provisions in the NFSAM.

(5) Confirmation using NEST data that the average closing time is 24 months or less for the 5 years preceding the request for certification.
(i) Time to close an easement is measured from the date NRCS obligated funds to the date of the last signature on the conservation easement deed.
(ii) Closing efficiency is measured by the average closing time of all parcels funded in the 5 years preceding the request.
(iii) If less than 5 years of data are available, the closing efficiency will be based upon the number of years of available data.
(iv) The State Conservationist may waive the 24-month-or-less average closing time requirement if the entity documents that its closings were delayed for reasons beyond its control. Delay may not be attributed to NRCS review of documents unless any single document review took longer than 90 days from the date the complete document was submitted to NRCS.

(6) Verification using NEST data that the entity has conducted annual monitoring and provided an annual monitoring report for every ACEP-ALE, FRPP, or FPP conservation easement held by the eligible entity.

(7) Confirmation that the eligible entity provided a brief description of how any ACEP-ALE, FRPP, or FPP easement violations were brought back into compliance. States will ensure the condition reported in NEST is consistent with the report provided by the entity.

B. If the request package is incomplete, States will provide the entity with a list of missing items needed before the review can be completed. Incomplete packages will not be forwarded to the Regional Conservationist for approval (see Subpart U, "Exhibits," for sample letter notifying entity of incomplete request package).

C. If the request package is complete but the entity does not meet the certification requirements, the State Conservationist will notify the entity in writing with a copy to the Regional Conservationist. The letter must identify the reasons the entity failed to meet the necessary criteria and may invite the entity to an updated certification request (see Subpart U, "Exhibits," for sample letter notifying entity of denial of certification request).

D. If the State Conservationist determines the request is complete, compliant, and recommends the entity for certification, the State Conservationist will forward the request package, additional supporting documentation, and his or her recommendation to the Regional Conservationist using the "Certification Review Request and Determination Checklist" (see Subpart U, "Exhibits," for certification request review and determination checklist).

Note: If an entity is seeking multistate certification, the Regional Conservationist will request the State Conservationist from each of the listed States to provide any information the State Conservationist determines is salient to whether the eligible entity meets the certification criteria.

E. The Regional Conservationist will review the certification request package and the supporting documentation from the States and will document their review using the eligible entity "Certification Request Review and Determination Checklist" (see Subpart U, "Exhibits," for certification request review and determination checklist).

F. If the Regional Conservationist determines that the eligible entity has met the requirements for certification, then the Regional Conservationist will notify the entity in writing that it is a certified eligible entity in accordance with 7 CFR Section 1468.27 (see Subpart U, "Exhibits," for sample letter notifying entity of approval of certification request). The Regional Conservationist will copy the Deputy Chief for Programs and the State Conservationist in all States in which the certification is effective. The notification will—

(1) Include the time period during which the certification is effective.
(2) Inform the certified eligible entity that their certification does not extend to eligible entities funded through the certified eligible entity.
(3) Require execution of the published ACEP-ALE grant agreement for certified eligible entities prior to obligating ACEP-ALE funds.

G. If the Regional Conservationist determines that the eligible entity does not yet meet the certification requirements, he or she will notify the entity in writing and will copy the Deputy Chief for Programs and the appropriate State Conservationists (see Subpart U, "Exhibits," for sample letter notifying entity of denial of certification request).

528.74 Certification and Administrative Flexibility Provided to Certified Eligible Entities

Upon NRCS certification the certified eligible entity will carry out the actions required by ACEP-ALE with greater independence and without significant involvement from NRCS. As a result:

(1) NRCS may enter into an ACEP-ALE grant agreement with the certified eligible entity through which NRCS may obligate funding for a maximum of 5 years. An eligible entity must request certification and be approved as a certified eligible entity prior to entering into an ACEP-ALE grant agreement for certified eligible entities. An eligible entity certified under FRPP is considered certified under ACEP-ALE so long as it meets the certification requirements in this part and continues to pass the annual quality assurance reviews.
(2) New parcels or prior-year unfunded parcels may be submitted for funding by certified eligible entities but must compete for funding each year.
(3) The certified eligible entity may apply the benefits of certification to parcels funded under an existing cooperative agreements executed in fiscal year 2015 or later by transferring the funded parcels and associated funds to the grant agreement.
(4) Certified eligible entities must ensure the agricultural land easement plan and any required component plans are completed prior to closing and signed by the landowner prior to closing. NRCS review of the agricultural land easement plan is not required prior to closing unless the certified eligible entity selects NRCS to develop the plan. For plans not developed by NRCS, the eligible entity may request NRCS review and approval of the agricultural land easement plan prior to closing, but it is not required. NRCS will review the agricultural land easement plan after closing as part of the quality assurance review.
(5) Certified eligible entities may use their own terms and conditions in the agricultural land easement deeds and must include the standard United States Right of Enforcement clause as stated in the grant agreement. The certified entities deed terms and conditions must address the ACEP-ALE minimum deed requirements identified in 7 CFR Section 1468.25(d) and in the grant agreement. To address the ACEP-ALE minimum deed requirements certified eligible entities may elect to use but are not required to use the "ALE Minimum Deed Terms" addendum published by NRCS.
(6) Certified eligible entities are required to obtain fair market value appraisals of the agricultural land easement, ensure clear title, and record the agricultural land easement deeds in accordance with the terms of the grant agreement.

(7) Certified eligible entities will close ACEP-ALE easements without NRCS approving the agricultural land easement deeds, conducting title reviews, reviewing title policy commitments, or approving appraisals prior to closing. NRCS will conduct reviews of the easement acquisition transaction after closing through the quality assurance review process.
(8) In unique circumstances, the certified eligible entity may request NRCS review of a proposed deed template prior to execution of the ACEP-ALE grant agreement. NRCS may decline to review these documents prior to closing without impairing NRCS's ability to complete and enforce a post-closing quality assurance review.

528.75 Quality Assurance Review and Decertification

A. Upon certification by NRCS, the certification remains effective throughout the duration of the Agricultural Act of 2014 or until the expiration of the funded grant agreement, whichever is longer, unless the entity is decertified. NRCS will conduct annual quality assurance reviews of the easement acquisition transaction and annual monitoring reports to ensure certified eligible entities continue to meet the certification requirements. These reviews may occur at any time during the fiscal year. The reviews must determine whether the conservation easement was acquired and is being monitored and enforced in accordance with the requirements set forth by NRCS in its certification of the eligible entity and the grant agreement entered into with the certified eligible entity.

B. NRCS will review at least 15 percent of the conservation easement transactions submitted by the certified eligible entity for payment each fiscal year. NRCS will review the agricultural land easement deed, title clearance and final policy of title insurance, appraisal, the baseline documentation report, and agricultural land easement plan, for every parcel in the 15 percent of parcels selected for quality assurance review. To perform a quality assurance review on the—

(1) Appraisal.—NRCS will complete a technical review according to the technical review standards and specification in 440-CPM, Part 527, Subpart F.
(2) Final policy of title insurance.—NRCS will complete a "Certificate of Use and Consent" based on a review of the final title insurance policy to determine if any unacceptable encumbrances remain on the title. If unacceptable encumbrances remain on the final title policy, NRCS will also review the certificate of use and consent or equivalent that was completed by the eligible entity prior to closing (see subpart G of this manual) and any associated title clearance documents. Purchasing easements on land with clear title and sufficient legal access is reflective of the entity implementing policies and procedures to ensure the long-term integrity of the ACEP-ALE funded conservation easement. NRCS will also review the final title policy to verify it is insuring the correct parties and is for the full amount of the agricultural land easement purchase price.
(3) Agricultural land easement deed.—NRCS will review the recorded deed to ensure that it—
   (i) Was conveyed for the purpose of protecting natural resources and the agricultural nature of the land.
   (ii) Runs with the land in perpetuity or, where State law prohibits a permanent easement, for the maximum duration allowable under State law.
   (iii) Protects the agricultural use, future viability, and related conservation value of the parcels by limiting nonagricultural uses of that land or protects grazing uses and related conservation values by restoring and conserving eligible land, including grasslands of special environmental significance.
   (iv) Provides for the administration, management, and enforcement of the agricultural land easement by the certified eligible entity or its successors and assigns.
   (v) Permits effective enforcement of the conservation purposes of such easements.
   (vi) Includes the United States Right of Enforcement clause as stated in the grant agreement.
   (vii) Ensures the parcel is subject to an agricultural land easement plan.

(viii) Specifies that impervious surfaces will not exceed 2 percent of the ACEP-ALE easement area, excluding NRCS-approved conservation practices, unless NRCS has granted a waiver to increase the impervious surface limit.

(ix) Includes an indemnification clause requiring the landowner to indemnify and hold harmless the United States from any liability arising from or related to the property enrolled in ACEP-ALE.

(x) Includes an amendment clause requiring that any changes to the easement deed after its recordation be consistent with the purposes of the agricultural land easement and this part.

(xii) Prohibits commercial and industrial activities except those activities that NRCS has determined are consistent with the agricultural use of the land.

(xiii) Prohibits or limits the subdivision of the property subject to the agricultural land easement.

(xiv) Includes specific protections related to the purposes for which the agricultural land easement was purchased, including provisions to protect historical or archaeological resources or grasslands of special environmental significance.

(4) Agricultural land easement plan.—For any plans not completed by NRCS and signed by the landowner prior to closing, NRCS will review the agricultural land easement plan and any component plans to ensure that the plans—

(i) Meet the requirements for an agricultural land easement plan specified in 7 CFR Section 1468.26(a).

(ii) Describe the activities that promote the long-term viability of the land to meet the purposes for which the easement was acquired.

(iii) Identify required or recommended conservation or management practices or activities that address the purposes and resource concerns for which the parcel was selected.

(iv) Identify additional or specific criteria associated with permissible and prohibited activities consistent with the terms of the deed.

(v) If the agricultural land easement contains certain land use types, NRCS will review the plan to ensure the required component plans are incorporated and sufficient for each land use type present on the easement as follows:

- Grasslands must have a grasslands management plan which meets the requirements identified section 528.63, including a description of the grazing management system consistent with NRCS prescribed grazing standards.
- Forest land as described in section 528.33C(2) has a forest management plan as described in 528.63.
- Highly erodible land has a conservation plan that meets the requirements of 7 CFR Part 12, 180-NFSAM, and section 528.63. If conversion of highly erodible cropland to less intensive uses is needed, the component conservation plan must be reviewed by NRCS prior to closing.

(5) Baseline documentation report.—NRCS will review the baseline documentation report, incorporated in the agricultural land easement deed by reference to ensure the report meets the requirements identified in the grant agreement.

C. NRCS will also conduct an annual review of the annual monitoring reports provided by the certified eligible entity. The entity has primary responsibility for monitoring and enforcement of the ACEP-ALE easement. NRCS will ensure that an annual monitoring report has been submitted annually for every NRCS funded conservation easement held by the certified eligible entity. Additionally, each year, NRCS will conduct a detailed review of 15 percent of the annual monitoring reports to ensure the reporting requirements have been met.

D. If NRCS finds that the certified eligible entity did not complete an agricultural land easement deed, title review and insurance, appraisal, or plan as required, or the annual monitoring as required,

NRCS must notify the certified entity in writing. The letter from NRCS must identify the deficiencies, identify the required corrective actions to be taken by the entity, and provide a specified period of time for the entity to correct the deficiencies. If the deficiencies are not corrected to NRCS's satisfaction, NRCS may pursue remedies including but not limited to the return of cost-share funds, decertification of the entity, or termination of the grant agreement. If a deficiency is discovered, NRCS may also conduct a quality assurance review on any or all other parcels funded in the grant agreement.

E. NRCS will also assess the certified entities certification status such that if during the quality assurance review or at any other time, NRCS finds that the certified eligible entity no longer meets the criteria in 7 CFR Section 1468.27 and this subpart NRCS will allow the certified eligible entity a specified period of time, at a minimum 180 days, to take actions necessary to correct the identified deficiencies to continue to meet the criteria as a certified entity.

F. If the certified eligible entity fails to correct the identified deficiencies, NRCS will send a notice of decertification to the eligible entity as provided in this section.

(1) If the deficiency has not been corrected at the end of the specified time period, NRCS will send written notice by certified mail, return receipt requested, of proposed decertification of the entity and ineligibility for future ACEP-ALE funding. This notice will contain a list of outstanding actions that have not been sufficiently corrected, the status of funds in the grant agreement, and the impact on the eligibility of the entity to apply for or request ACEP-ALE funds.
(2) The entity may contest the notice of decertification in writing to the Chief of NRCS within 20 calendar days of receipt of the notice of proposed decertification.
(3) The Chief, or designee, will make a final determination of decertification and send formal notice of decertification to the entity with a copy to the appropriate Regional Conservationist, State Conservationists and the Deputy Chief for Programs. EPD will enter decertifications into NEST.
(4) NRCS may also determine if any further administrative action is necessary, including whether suspension and debarment action under 2 CFR Parts 180 and 417 should be initiated.

G. Grounds for decertification include, but are not limited to, any of the following:

(1) Failure to meet ACEP-ALE statutory and regulatory program requirements
(2) Breach or violation of the terms of an ACEP-ALE grant agreement
(3) Engaging in a scheme or device to defeat the purposes of ACEP-ALE, including coercion, fraud, misrepresentation, or providing incorrect or misleading information
(4) Committing any other action of a serious or compelling nature as determined by NRCS that demonstrates the certified eligible entity's inability to meet ACEP-ALE requirements
(5) Failure to take corrective action to address deficiencies upon notice from NRCS

H. The period of decertification will be 3 years. During these 3 years, the entity is not eligible for any of the benefits of certification.

I. Decertification will result in termination of the grant agreement and ineligibility of the entity to receive funding for any transactions remaining under the grant agreement at the time of termination. NRCS may require the entity to return any financial assistance provided by NRCS for easements that fail a quality assurance review and are not remedied to NRCS's satisfaction. NRCS may determine that the decertified entity no longer qualifies as an eligible entity during the period of decertification or suspension and debarment of the decertified entity.

J. The entity may be recertified upon application to NRCS after the decertification period has expired and when the entity has met the requirements as outlined under 7 CFR Section 1468.27 and this part.

K. EPD will maintain a national list of certified and decertified entities that each State office must check prior to entering into an ACEP-ALE grant or cooperative agreement.

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart I – ACEP-ALE Financial Management Procedures

528.80 Overview

A. This subpart provides guidance on the administration of ACEP-ALE agreements, including contracting and fund management activities. In particular, this subpart addresses topics related to the use of ACEP-ALE funds, cooperative agreement management, easement payments issued under the ALE agreement, and NRCS procurement of review reports, easement conveyance, and recording requirements. Several topics addressed in this subpart are covered in greater detail in other agency policy. Wherever possible, these policies have been cross-referenced.

B. NRCS is responsible for the administration and management of ACEP-ALE funds. NRCS uses the Financial Management Modernization Initiative (FMMI) system for the obligation and payment of ACEP-ALE funds and the National Easement Staging Tool (NEST) for the tracking of ACEP-ALE applications, agreements, and parcels.

C. All obligations and payments for the acquisition of the easement will comply with the most current easement internal controls policy. Notwithstanding the payment type, NRCS will not provide tax advice, including any representations about the tax implications of any easement, contract, or financial transaction.

D. Once the appropriate documents are reviewed, determined complete and proper, and funds availability is verified, the State Conservationist will sign the appropriate obligating document. Funds are then obligated in FMMI to the eligible entity as the vendor. States must work with the eligible entity to obtain all information needed to establish the eligible entity as the vendor in FMMI. Typically, this will come from the entity's registration in SAM. If vendor records are not available through SAM, States must provide this information to the financial management staff at the time the obligation is entered.

E. NRCS enters into a cooperative agreement with the eligible entity, obligates funds to the cooperative agreement, maintains the cooperative agreement and easement case file, ensures the terms of the cooperative agreement are fulfilled, and issues payments in accordance with applicable policies, including the most current easement internal controls policy, financial management policy, and grants and agreements policy (see Title 120, Federal Grants and Cooperative Agreements Handbook (FGCAH), and National Instruction (NI) 120-301, "Processing Grants, Agreements, and Memorandums of Understanding").

528.81 Calculating Final Easement Payment Amounts

A. ACEP-ALE funds are obligated to the cooperative agreement or subsequent attachments and are based on the eligible entity's estimates of acreage and easement value of the individual parcels. ACEP-ALE funds are obligated to the entire cooperative agreement and not to the individual parcels. After the cooperative agreement has been entered into there may be changes to the estimated easement value based on the final approved appraisal or changes in estimated acreage. These final approved acreages and appraised easement values, along with any approved waivers of eligible entity cash match requirements, bargain sale reductions, NRCS scope determinations, and ACEP-ALE funds available under the cooperative agreement, will be the basis for determining whether adjustments to the Federal share are needed to determine the final ACEP-ALE cost-share payment amounts in accordance with limitations described in Section 528.43, "Cost-Share Assistance and

Match Requirements." and Section 528.51, "Fund Obligation and Adjustments Under the Cooperative Agreement."

B. If the landowner is paid more than the appraised fair market value of the agricultural land easement, the eligible entity is responsible for 100 percent of the easement cost over the appraised fair market value of the agricultural land easement.

C. In the case of a bargain sale, where the landowner chooses to donate part of the agricultural land easement value by accepting a payment less than the full appraised market value of the easement, the eligible entity must contribute a minimum of the purchase price (appraised fair market value of the agricultural land easement minus the landowner donation) as provided in this section (see Subpart U, "Exhibits," for example donation scenarios).

D. Prior to closing, the eligible entity must provide the applicable "Statement to Confirm Matching Funds" (NRCS-CPA-230 or successor form) signed by the landowner and the eligible entity acknowledging:

(1) The appraised fair market value of the agricultural land easement
(2) The landowner's qualified donation or contribution.
(3) The agricultural land easement purchase price.
(4) The eligible entity cash contribution amount.
(5) The Federal share.
(6) The administrative costs for the agricultural land easement and the eligible entity's recommended entity and landowner contributions to acquisition costs and to a stewardship fund. (see Subpart U, "Exhibits," for Form CCC-230, "Confirmation of Matching Funds (2014 Farm Bill)").

E. The estimate of an eligible entity's recommended contribution to a stewardship fund should be justified by an estimate of the expenses the eligible entity will incur over time in monitoring and enforcing the easement.

(1) State program managers must scrutinize recommended contributions of more than 2 percent of the appraised fair market value.
(2) State program managers must review the matching funds requirement during the site review of the parcel to ensure that the landowners understand that ACEP-ALE does not require them to contribute to the stewardship fund or the easement acquisition cost.

F. The eligible entity is required to certify that its minimum required cash contribution comes from other sources outside of the landowner. This applies to both formal and informal agreements made between the landowner and the eligible entity. For the purposes of making this determination, the term "landowner" includes the landowner's immediate family members and organizations controlled or funded by the landowner or an immediate member of the landowner's family.

528.82 Easement Closing and Payment Procedures

A. Overview

(1) Payment of the Federal share of the agricultural land easement will be issued to the eligible entity on a reimbursable basis after the easement is acquired or as an advance payment issued prior to closing. Typically, ACEP-ALE funds will be paid to an eligible entity on a reimbursable basis once the easement is acquired. When the eligible entity cannot obtain 100 percent of the funds to be paid to the landowners at the closing of an agricultural land easement on a parcel and needs the United States to provide the Federal share at closing rather than on a reimbursable basis, the eligible entity may request an advance of the Federal share for the parcel from the State Conservationist.

(2) Payments made for the purchase of agricultural land easements will be based on the information provided on Standard Form (SF) 270, "Request for Advance or Reimbursement" and the applicable SF 270 supplement. The SF-270 and all required payment request documentation will be prepared by the eligible entity and submitted to NRCS. The eligible entity may submit the SF-270—

(i) Prior to closing when a payment is to be issued at closing (advance payment).

(ii) After the agricultural land easement has been recorded and the landowners have been paid (reimbursement).

(iii) On a quarterly basis for each quarter that agricultural land easements have been recorded and the landowners have been paid (reimbursement).

(3) The entity will submit a separate SF-270 to NRCS for parcels on each attachment of each cooperative agreement. A copy of the NRCS approval letter for each parcel that has received an eligible entity cash contribution waiver requests must be submitted with the payment request for that parcel. When an advance is requested, the eligible entity must notify NRCS and provide the required payment request package documents at least 60 days prior to the planned closing date. NRCS will not issue the payment more than 30 days prior to the planned closing date. The timelines for submission of documents to NRCS are outlined in this part.

(4) Noncertified entities only.—In addition to submitting the required payment request documents, noncertified eligible entities must also obtain NRCS approval of the agricultural land easement deed, appraisal, title commitment, baseline documentation report, and agricultural land easement plan prior to requesting advance of the Federal share or closing on an agricultural land easement for which the Federal share will be requested. NRCS will document its approval of the required documents by completing and signing the "NRCS Approval Letter for a Noncertified Eligible Entity to Proceed with the ACEP-ALE Acquisition" and provide a copy to the eligible entity (see Subpart U, "Exhibits," for the NRCS approval letter for a noncertified eligible entity to proceed with the ACEP-ALE acquisition).

(5) Payments will be made to the eligible entity established as the vendor in FMMI, unless payment has been assigned to a payee on the SF-270. Payments will be made to through an electronic funds transfer (EFT). The payee must provide their bank routing and account information to NRCS. If an escrow or closing agent is the payee to administer the funds for the agricultural land easement purchase, their address is established as another address code under the eligible entity's vendor number in FMMI. For payments to the closing agent, a separate "Assignment of Payment" form (NRCS-CPA-1236 or successor form) is not required.

(6) The eligible entity or the closing agent will prepare all IRS-1099 reporting for landowners. The closing agent must prepare the IRS-1099 for advances.

B. Closing and Payment Review Procedures for Noncertified Eligible Entities

(1) Pre-closing Steps: Reimbursements and Advances

(i) Step 1.—No less than 90 days prior to the targeted closing date, for each parcel the eligible entity must send to NRCS—

- The agricultural land easement deed.
- A hardcopy and electronic copy of the appraisal report.
- A copy of the title company's title commitment and underlying documents.
- A summary of the findings or recommendations from the entity review of the recorded and unrecorded exceptions.
- A draft baseline documentation report for each parcel.
- A copy of the agricultural land easement plan.

- Any impervious surface waiver requests and supporting documentation.
- A map of any existing and proposed building envelopes.
- Any waiver requests and supporting documentation for eligible entity cash contribution waivers for projects of special significance submitted after the cooperative agreement is entered into.

(ii) Step 2.—NRCS must review the materials provided by the eligible entity as described below. Generally NRCS should complete the review within 45 days of receipt of complete materials from the eligible entity. However for parcels above the internal control national review threshold that will request an advance payment, NRCS must complete this review with 30 days of receipt of a complete package of materials from the entity. These timelines apply only after NRCS receives a complete set of the required materials from the entity. NRCS must—

- Review the deed for conformance to policy and required deed terms. NRCS will provide the eligible entity with notification of the acceptability of the agricultural land easement deed or a list of changes needed to meet ACEP-ALE program purposes.
- Conduct a technical review of the appraisal to ensure that the Federal share being provided by the United States is supported by the appraised fair market value of the agricultural land easement. NRCS will provide the eligible entity with notification of the acceptability of the appraisal or information on the changes needed to meet applicable appraisal standards and NRCS requirements.
- Examine the title commitment and complete Form NRCS-LTP-23, "Certificate of Use and Consent" (see Subpart U, "Exhibits," for Form NRCS-LTP-23). NRCS will consult with the USDA Office of the General Counsel as necessary.
- Inspect the parcel and complete a Form NRCS-LTP-27, "Preliminary Certificate of Inspection and Possession" (see Subpart U, "Exhibits" for Form, NRCS-LTP-27).
- Provide the eligible entity with written notification of title issues that must be remedied, such as—
  - Recorded and unrecorded exceptions to the title that must be removed or subordinated.
  - Leases that must be terminated.
  - Options that must be cancelled.
- Review the agricultural land easement plan and draft baseline documentation report. NRCS will notify the eligible entity if the plan is approved or if additional changes are needed.
- Review and complete determinations on eligible entity cash contribution requirement waiver requests submitted 90 days prior to the planned closing date.
- Advances only: The State Conservationist must send the letter to the eligible entity providing the closing agent requirements for an advance payment of ACEP-ALE funds and attach the NRCS closing agent requirements (see Subpart U, "Exhibits" for the letter to the eligible entity regarding closing agent requirements for ACEP-ALE advance payments and the NRCS closing agent requirements).

(2) Pre-closing Steps: Reimbursements Only

(i) Step 3.—No less than 30 days prior to the planned closing date, the eligible entity must—

- Notify NRCS of the planned date to close on the agricultural land easement.
- Provide NRCS with documentation of resolution of identified issues with title, appraisals, deeds, or easement plans.
- Provide NRCS with a signed and completed "Confirmation of Matching Funds (2014 Farm Bill)," and a copy of any approved entity cash contribution waivers.

(ii) Step 4.—Prior to the closing, NRCS must—

- Sign the "Confirmation of Matching Funds" and provide a copy to the eligible entity.
- Complete and sign the "NRCS Approval Letter for a Noncertified Eligible Entity to Proceed with the ACEP-ALE Acquisition" and provide a copy to the eligible entity (see Subpart U, "Exhibits," for the NRCS approval letter for a noncertified eligible entity to proceed with the ACEP-ALE acquisition).

(3) Pre-closing Steps: Advances Only

(i) Step 3.—No less than 60 days prior to the planned closing date, the eligible entity must—

- Send NRCS a completed SF-270, "Request for Advance or Reimbursement" and a completed "SF-270 Supplement for Noncertified Eligible Entities" with all required documentation as identified in the cooperative agreement (see Subpart U, "Exhibits," for SF-270 and SF-270 supplement for noncertified eligible entities).
- Notify NRCS of the planned date to close on the agricultural land easement.
- Provide NRCS with documentation of resolution of identified issues with title, appraisals, deeds, or easement plans.
- Provide NRCS a copy of the unexecuted agricultural land easement deed with all exhibits.
- Provide NRCS with a signed and completed "Confirmation of Matching Funds (2014 Farm Bill)," and a copy of any approved entity cash contribution waivers.
- Provide a copy of the agricultural land easement plan signed by the landowner and the baseline documentation report signed by the eligible entity and the landowner.
- Return the completed NRCS closing agent requirements document to NRCS signed by the closing agent verifying that the he or she meets the requirements and signed by the eligible entity in concurrence. The completed document must also include the closing agent's name, address, and electronic funds transfer information (e.g., banking and routing information or wire instructions, and escrow account information). (see Subpart U, "Exhibits" for the letter to the eligible entity regarding closing agent requirements for ACEP-ALE advance payments and the NRCS closing agent requirements).
- Provide a copy of the American Land Title Association (ALTA) title commitment and evidence of liability insurance equal to at least the amount of the Federal funds being provided.
- Provide a signed settlement statement prepared by the closing agent.

(ii) Step 4.—Prior to the closing, NRCS must—

- Complete the review of the SF-270 payment request in accordance most current easement internal controls policy. States must submit a copy of the payment request package for national review and approval for all agricultural land easement payments that meet the national review threshold. Complete payment request packages for national review must be submitted to NHQ no less than 30 days before the planned closing date.
- Sign the "Confirmation of Matching Funds" and provide a copy to the eligible entity.
- Complete and sign the "NRCS Approval Letter for a Noncertified Eligible Entity to Proceed with the ACEP-ALE Acquisition" and provide a copy to the eligible entity (see Subpart U, "Exhibits," for the NRCS approval letter for a noncertified eligible entity to proceed with the ACEP-ALE acquisition).

(iii) Step 5.—No more than 30 calendar days prior to the planned closing date and only after NRCS has received, reviewed and approved all required documentation, NRCS may make an advance payment of the Federal share. The advance payment of the Federal share will be issued to the closing agent via electronic funds transfer for the closing agent to hold in escrow.

(iv) Step 6.—After the Federal share is deposited in escrow and prior to the closing, the eligible entity must obtain a receipt for the Federal funds from the closing agent and provide it to NRCS.

C. Reimbursement to Noncertified Eligible Entities

(1) Step 1.—After the eligible entity has completed the contractual requirements and paid the ACEP-ALE landowners, the eligible entity must—

(i) Send the NRCS State office a completed and signed SF-270 and a completed "SF-270 Supplement for Noncertified Eligible Entities" with all required documentation as identified in the cooperative agreement (see Subpart U, "Exhibits," for SF-270 and SF-270 supplement for noncertified eligible entities).

(ii) Provide a copy of the closing agent's closing statement for each parcel.

(iii) Attach on a separate piece of paper, the landowner's names, acres acquired, term of agricultural land easements, amounts paid, Federal share of the agricultural land easement cost, and dates payments were made to the landowners.

(iv) Include a copy of the recorded agricultural land easement deed for each parcel.

(v) Provide a copy of the ALTA title insurance policy.

(2) Step 2.—Upon receipt of a completed and signed SF-270, NRCS must—

(i) Date stamp the SF-270.

(ii) Complete the review of the payment request in accordance with the most current easement internal controls policy. States must submit a copy of the payment request package for national review and approval for all agricultural land easement payments that meet the national review threshold within 10 days of receipt of a complete payment request package. States must inform entities with payment requests requiring national review that the national review of complete payment request packages may take up to 30 days.

(iii) Ensure recorded agricultural land easement deed contains the approved language.

(iv) Ensure the final policy of title insurance contains only those exceptions approved by NRCS and the eligible entity.

(iv) Ensure funds are available for payment.

(v) Enter payment request in FMMI. "Prompt Payment Act" interest is not applicable to NRCS-funded programs.

(vi) Enter Federal Assistance Award Data System (FAADS) data, if applicable, using Code for Federal Data Assistance (CFDA) number 10.913. FAADS reporting is not required for Federal and State government payees.

(3) Step 3.—In the SF-270 block labeled "This space for agency use," NRCS must include—

(i) A two-digit payment-type code.

- Use "FP" for payments made in the same fiscal year the cooperative agreement was entered into.
- Use "FL" for payments made after the fiscal year the cooperative agreement was entered into.

(ii) A two-digit fiscal year of cooperative agreement.

(iii) The NEST cooperative agreement number, the NEST parcel number, and the FMMI WBS element.

(iv) The same cooperative agreement number obligated in FMMI.

(v) The name, signature, and telephone number of the NRCS certification official.

D. Closing and Payment Review Procedures for Certified Eligible Entities

(1) Step 1.—At the time the payment request is submitted, the certified eligible entity must provide NRCS—

(i) A completed SF-270, "Request for Advance or Reimbursement" and a completed "SF-270 Supplement for Certified Eligible Entities" with all required documentation as identified in the grant agreement (see Subpart U, "Exhibits," for SF-270 and SF-270 supplement for certified eligible entities).
(ii) A signed and completed "Confirmation of Matching Funds (2014 Farm Bill)," and a copy of any approved entity cash contribution waivers.
(iii) The agricultural land easement deed.
(iv) A hardcopy and electronic copy of the appraisal report.
(v) A copy of the title company's title commitment and underlying documents.
(vi) A certificate of use and consent or similar document with the summary of the findings or recommendations from the entity review of the recorded and unrecorded exceptions.
(vii) A signed baseline documentation report for each parcel.
(viii) A copy of the signed agricultural land easement plan.
(ix) Any impervious surface waiver requests and supporting documentation.
(x) A map of any existing and proposed building envelopes.
(xi) For advance payments only, Return the completed NRCS closing agent requirements document to NRCS signed by the closing agent verifying that the he or she meets the requirements and signed by the eligible entity in concurrence. The completed document must also include the closing agent's name, address, and electronic funds transfer information (e.g., banking and routing information or wire instructions, and escrow account information). (see Subpart U, "Exhibits" for the letter to the eligible entity regarding closing agent requirements for ACEP-ALE advance payments and the NRCS closing agent requirements).

Note: For payments to certified eligible entities, NRCS will not review the content of items (iii)-(x), above, prior to issuing the payment. NRCS will retain these documents in the official easement case file and will review these documents for agricultural land easement transactions selected for quality assurance review.

(2) Step 2.—Upon receipt of a completed and signed SF-270, NRCS must—
(i) Date stamp the SF-270.
(ii) Complete the review of the payment request in accordance with the most current easement internal controls policy. States must submit a copy of the payment request package for national review and approval for all agricultural land easement payments that meet the national review threshold within 10 days of receipt of a complete payment request package. States must inform entities with payment requests requiring national review that the national review of complete payment request packages may take up to 30 days.
(iii) Ensure funds are available for payment.
(iv) Enter payment request in FMMI. Prompt Payment Act interest is not applicable to NRCS-funded programs.
(v) Enter Federal Assistance Award Data System (FAADS) data, if applicable, using Code for Federal Data Assistance (CFDA) number 10.913. FAADS reporting is not required for Federal and State government payees.

(3) Step 3.—In the SF-270 block labeled "This space for agency use," NRCS must include—
(i) A two-digit payment-type code.
- Use "FP" for payments made in the same fiscal year the grant agreement was entered into.
- Use "FL" for payments made after the fiscal year the grant agreement was entered into.

(ii) A two-digit fiscal year of grant agreement.
(iii) The NEST agreement number, the NEST parcel number, and the FMMI WBS element.

(iv) The same grant agreement number obligated in FMMI.
(v) The name, signature, and telephone number of the NRCS certification official.

E. Closing Agent Responsibilities for all Advance Payments

(1) The term "closing agent" refers to a title company, an escrow company, a private attorney, or other qualified entity or entities that assist the eligible entity and NRCS with the execution and recordation of the agricultural land easement deed and other closing responsibilities.
(2) The closing agent must meet the NRCS closing agent requirements. See Subpart U, "Exhibits," for NRCS closing agent requirements.
(3) The closing agent may not hold the funds in escrow for more than 30 calendar days. If the agricultural land easement cannot be closed within 30 calendar days, the closing agent must return the funds (and any accrued interest) to NRCS in accordance with NRCS instructions. The VC document type will be created in the financial system, liquidating the advance and creating an accounts receivable. Once the payment is received from the closing agent, the funds are returned to the original obligation and would then be available for advance.
(4) The escrow account must be fully insured by the closing agent to ensure that Federal funds are not lost due to bank failure or otherwise.
(5) If interest accrues while the funds are deposited in escrow, the closing agent will return the interest accrued, unless otherwise indicated within the cooperative agreement to the NRCS State office. The check will be made payable to the CCC/NRCS.

F. Post-closing Requirements for All Reimbursements and Advances

(1) Step 1.—Immediately following closing, the eligible entity must ensure that the closing agent—
(i) Issues a policy of title insurance on a standard ALTA owner's policy in the amount of the purchase price as of the time and date of the recording of the agricultural land easement deed to the eligible entity.
(ii) Records or files the agricultural land easement deed with local county registrar of land records within 5 business days of conveyance of the agricultural land easement to the holder.
(2) Step 2.—The closing agent is also responsible for delivering all of the following to the eligible entity:
(i) A statement covering the agreed upon closing costs
(ii) Original policy of title insurance on the standard ALTA owner's policy form
(iii) Original and one copy of executed settlement statements
(iv) Recorder's certified copies of the agricultural land easement deed, and clearance documents, including subordination agreements
(v) IRS 1099 reporting information
(3) Step 3.—Within 30 days of recordation or with the request for reimbursement, whichever is sooner the eligible entity must provide NRCS a copy of the—
(i) Recorded agricultural land easement deed and clearance documents, including subordination agreements.
(ii) Final policy of title insurance.

G. Repayments for Cooperative Agreement Violation or Overpayment

The NRCS will notify the eligible entity in writing of the amount due, specifying the exact contract violation or the extent of the overpayment. The notification should advise the eligible entity that they will receive a formal bill from the National Financial Center with information on where to send the payment. The bill should be received in approximately 2 weeks. The NRCS finance staff creates a bill in Internet Billing (IBIL) that provides the necessary information for

the National Financial Center to produce the actual hardcopy bill that is mailed to the eligible entity.

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart J – ACEP-ALE Easement Records, Monitoring, Enforcement

528.90 Maintaining Official Case Files and NEST Records

A. The NRCS State office will update the NEST database with the following information within 10 days of receiving the recorded agricultural land easement deed:

(1) Eligible entity
(2) Name of the owners of the agricultural land easement acquired
(3) County and Federal Information Processing Standard (FIPS) code where land is acquired
(4) Acres acquired
(5) Acres of prime, unique, and important farmland acquired
(6) Acres of crop land acquired
(7) Acres of forested land acquired
(8) Acres of grazing lands acquired (includes range land and pasture land)
(9) Acres of incidental land acquired
(10) Revised total agricultural land easement value
(11) Revised Federal share of easement payment
(12) Revised eligible entity share of the easement payment
(13) Revised landowner donation towards the agricultural land easement
(14) Closing date of the parcel
(15) Reimbursement date of payment, or, in the case of an advance, easement closing date

B. The following material related to acquiring an agricultural land easement must be maintained in a fireproof file at the NRCS State office:

(1) A copy of the signed and recorded agricultural land easement deed
(2) Subordination agreements, easement deeds, and other agreements entered into at the time of closing or after closing
(3) Title reports on the protected property and final title insurance policy
(4) Evidence of access documentation including documentation of determination of alternative legal access if applicable
(5) Copy of the written pending offer (purchase and sales agreement) between the eligible entity and landowner
(6) Maintain a copy of the Standard Form (SF) 270 and internal controls review document, including a copy of and documentation related to any approved eligible entity cash contribution waivers
(7) A copy of the easement valuation documents, such as appraisal meeting USPAP requirements, UASFLA (Yellow Book) requirements, or both, or approval documents to use AWMA or other industry-approved methods, and associated valuation reports
(8) Appraiser's certification statement
(9) Technical review report
(10) "Confirmation of Matching Funds" (Form NRCS-CPA-230 or successor form) as a signed statement verifying the appraised fair market value and purchase price of the agricultural land easement, as well as the landowner and eligible entity's contributions
(11) Form NRCS-LTP-23, "Certificate of Use and Consent" (see Subpart U, "Exhibits," for Form NRCS-LTP-23)
(12) Form NRCS-LTP-27, "Preliminary Certificate of Inspection and Possession" (see Subpart U, "Exhibits," for Form NRCS-LTP-27)

(13) Completed environmental site assessment materials, including at a minimum, the hazardous materials field inspection checklist, hazardous materials landowner interview, and the environmental records search
(14) Copies of all approved waiver requests, such as the eligible entity cash contribution waiver; impervious surface waiver; any eligibility criteria waivers of the 50 percent prime, unique, statewide, or locally important soil criteria; or documentation of State or local criteria consistent with ACEP-ALE purposes
(15) Completed baseline documentation report
(16) The agricultural land easement plan (at time of closing) and subsequent amendments
(17) Annual monitoring reports submitted by the eligible entity
(18) Documents related to suspected, potential, or confirmed violations and their resolution

C. The following material related to acquiring an agricultural land easement must be included in the ACEP-ALE case file (fireproof file is at the State's discretion) at the NRCS State office:

(1) A copy of the original ACEP-ALE proposal or application
(2) Documentation regarding the ranking of the application and eligibility for funding, including as applicable
(3) Signed cooperative agreement relating to the agricultural land easement or other interest in land
(4) Verification of highly erodible land (HEL) and wetland conservation (WC) eligibility (Form AD-1026, "Self-Certification of Highly Erodible Land and Wetland Conservation Compliance")
(5) Verification of AGI eligibility (Form CCC-941, "Average Adjusted Gross Income (AGI) Certification and Consent to Disclosure of Tax Information," or successor form)
(6) Completed Form NRCS-CPA-52, "Environmental Evaluation Worksheet"

D. Six-part folders may be used to organize the documents associated with the entity cooperative agreement documents and the ACEP-ALE parcel documents. A separate file is recommended for the documents associated with the cooperative agreement.

528.91 Agricultural Land Easement Monitoring and Review

A. Pursuant to the terms of the cooperative agreement, the eligible entity, its successors, or its assigns has primary responsibility to monitor and enforce the terms of the agricultural land easement. The eligible entity will annually monitor compliance and provide NRCS with an annual monitoring report that documents that the grantee and grantor are in compliance with the agricultural land easement and associated agricultural land easement plan.

B. The eligible entity will deliver a copy of the annual monitoring report based on the most recent annual monitoring event for each closed parcel to the NRCS State program manager. The monitoring report must address all ACEP-ALE questions on the NRCS template ACEP-ALE monitoring report in Title 440, Conservation Programs Manual (CPM), Part 527, Subpart P.

C. Annual monitoring by the eligible entity will be conducted through onsite visits or through a review of the most recent and best publically available imagery that is no more than 2 years old and has not been used for a previously recorded monitoring event. During onsite monitoring, inspectors will meet with landowners, tenants, or renters if possible and invite the landowner to accompany them during the inspection. Photographs taken from designated photo points are desirable to document current conditions and any changes. If remote sensing discovers evidence of abnormalities, an onsite monitoring review must be done prior to delivering an annual monitoring report to NRCS.

D. The eligible entity will compare the conditions on the agricultural land easement to the conditions in the baseline documentation report. The eligible entity must prepare an updated impervious surface map if there are changes in the amount or location of impervious surface.

E. NRCS will conduct onsite monitoring if the eligible entity's annual monitoring report is insufficient or is not provided annually, or if NRCS has evidence of an unaddressed violation, as determined by the State Conservationist, or for older easements that require NRCS monitoring in the terms of the deed or cooperative agreement. Monitoring of agricultural land easements conducted by NRCS will follow the procedures outlined in Title 440, CPM, Part 527, Subpart P. Every effort should be made to coordinate any NRCS onsite monitoring reviews with the holder of the easement.

F. The conservation plan component of the agricultural land easement plan monitoring is the responsibility of NRCS. NRCS must monitor conservation plans in accordance with highly erodible land and wetland conservation compliance status review requirements. NRCS must conduct the review of conservation plan implementation in accordance with Title 180, National Food Security Act Manual (NFSAM).

G. NRCS will conduct contract status reviews on practices NRCS has a contract with the landowner to implement under other conservation programs, such the EQIP, WHIP, AMA, CSP, CRP, or other programs.

528.92 Agricultural Land Easement Enforcement

A. Background

The eligible entity, or its successors or assigns, have primary responsibility for enforcement of the agricultural land easement and agricultural land easement plan. A violation is considered to have happened if any of the following occur:

(i) The land is converted or developed to nonagricultural uses not consistent with the purposes and provisions of the agricultural land easement.
(ii) Damage or destruction occurs to the resources identified for protection in the agricultural land easement, including, but not limited to, highly erodible land, prime farmland, grasslands of special environmental significance, or historical or archeological resources.
(iii) The terms and conditions of the deed conveying the agricultural land easement or other interest are violated.
(iv) Any required elements of the agricultural land easement plan are violated, including, but not limited to, the conservation plan on highly erodible lands is not implemented or maintained (see section 528.63).

B. Procedures for Suspected or Potential Violation

(1) If NRCS encounters a suspected or potential violation of the agricultural land easement deed or agricultural land easement plan, NRCS will notify the eligible entity. NRCS may contact the regional Office of General Counsel (OGC) for advice on documentation recommendations and eligible entity notification procedures. The eligible entity must investigate and provide NRCS with documentation of the outcome within the timeframe specified in the notification. The suspected violation and the eventual resolution of violations must be documented in the easement case file.
(2) Any NRCS visits to the agricultural land easement area and observations must also be documented in the easement case file. The individual making the report must date and sign each entry on each item of documentation. Positive reports, showing no evidence of violation, are just as important as a negative report.

(3) It is the eligible entity's responsibility to enforce the terms and conditions of the agricultural land easement and the agricultural land easement plan, however, if there is a violation of the conservation plan component of the agricultural land easement plan as it relates to the HEL/WC provisions of the Farm Bill, NRCS is responsible to enforce the HEL/WC compliance provisions in accordance with the procedures outlined in 180-NFSAM. A violation of the HEL/WC compliance provisions and policy in the NFSAM is considered a violation of the agricultural land easement only after the landowner has exhausted all applicable appeal and waiver rights.

For example, if a person is deemed to be in good faith, in accordance with NFSAM provisions, a person is not determined to be in violation of the HEL/WC provisions.

(5) NRCS will notify the eligible entity of a potential HEL/WC violation following the initial contact made to a landowner.

(6) NRCS will provide official notification of the conservation plan violation as an official easement violation to the eligible entity only after the landowner has exhausted all the appeal and waiver rights afforded to the landowner in the NFSAM and 440-CPM, Part 510, "Appeals." Figure 528-J1 outlines the initial steps NRCS should take in case of a potential violation discovered by NRCS.

Figure 528-J1

Step	Action
1	Record the potential violation.
2	Photograph any portion that may have relevance.
3	If the landowner is onsite with you document any discussions with the landowner. Discuss the potential violation if appropriate.
4	In the case of potential HEL/WC violations, notify the NRCS State Easement Manager who will notify the landowner and then the eligible entity. In the case of all other potential violations notify the eligible entity and the NRCS State Easement Manager.
5	If an HEL/WC violation, begin the procedures outlined in the NFSAM.
6	Notify the eligible entity of the outcome of any NFSAM proceedings.

C. Procedures for Confirmed Violation

(1) When a violation is confirmed, the State Conservationist must notify EPD and the regional office of the Office of the General Counsel (OGC) for advice on documentation requirements and the contents of the eligible entity notification document to ensure that NRCS is not compromising its enforcement position.

(2) After review by OGC, the State Conservationist must send written notice to the eligible entity by certified, return receipt mail. The returned receipt card must be kept in the official easement case file. It is the eligible entity's responsibility to contact the landowner and conduct enforcement proceedings.

(3) Following receipt of notification by NRCS, the eligible entity must provide documentation to NRCS of their proceedings in accordance with the instructions provided in the notification letter.

(4) If a violation is not addressed or corrected by the landowner and eligible entity, NRCS may take actions in accordance with the United States' Right of Enforcement included in the agricultural land easement deed. NRCS may also take actions with regard to the entity's status and ability to participate in the program, including but not limited to, decertification of a certified entity, determining an eligible entity no longer eligible, terminating the cooperative or grant agreement, or other steps.

D. Legal Action and Cost Recovery

(1) In the event the United States exercises its right of enforcement, it is entitled to recover any and all administrative and legal costs associated with—

(i) Any enforcement or remedial action related to the enforcement of the easement from the landowner, including, but not limited to, attorneys' fees or expenses related to landowner's violations.

(ii) Any enforcement of the easement from the eligible entity, including, but not limited to, attorney's fees or expenses related to the eligible entity's violations or failure to enforce the easement.

(2) Legal action may take either or both of two forms:

(i) Civil action to prevent further easement violation or to collect monetary damages

(ii) In especially egregious circumstances, criminal prosecution of the person who violates the easement, Federal law, or regulation.

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart K – ACEP-WRE Application Process and Eligibility Requirements

528.100 Overview of the Wetland Reserve Easements (WRE) Component

A. WRE Purpose

(1) The purpose of the Agricultural Conservation Easement Program-Wetland Reserve Easement (ACEP-WRE) is to restore, protect, and enhance wetlands on eligible private or Tribal lands while maximizing wildlife habitat benefits.
(2) The enrollment options available to eligible landowners are listed in figure 528-K1.

Figure 528-K1

Enrollment Option	Duration	Eligible Applicant
30-Year Contract	30 years	Acreage owned by Indian Tribes only
30-Year Easement	30 years or the maximum duration allowed by State law if less than perpetual	Private landowners or Indian Tribes (including Native Corporations)
Permanent Easement	Perpetuity	Private landowners or Indian Tribes (including Native Corporations)

B. Program Objectives

The objectives of ACEP-WRE are to protect, restore, and enhance the functions and values of wetland ecosystems to attain—

(i) Habitat for migratory birds and other wetland-dependent wildlife, including endangered or threatened species and species of concern.
(ii) Protection and improvement of water quality.
(iii) Attenuation of floodwater.
(iv) Recharge of ground water.
(v) Protection and enhancement of open space and aesthetic quality.
(vi) Carbon sequestration.
(vii) Protection of native flora and fauna contributing to the Nation's natural heritage.
(viii) Contribution to educational and scientific scholarship.

C. Agreements

(1) Partnerships may be established at the national, regional, or State level to—
(i) Implement components of the program.
(ii) Leverage program funds.
(iii) Provide for the longer-term conservation of the ACEP-WRE 30-year easements.
(iv) Coordinate acquisition or restoration implementation activities.
(v) Assist NRCS with the easement acquisition process.
(vi) Assist with development of easement restoration agreements.
(vii) Assist with restoration planning, design or implementation.
(viii) Assist with monitoring and management activities.

(2) NRCS may enter into cooperative or contribution agreements with State or local agencies, conservation districts, and private conservation organizations to assist NRCS with program implementation, including the provision of technical assistance. NRCS may also enter into interagency agreements with other Federal agencies.

(3) Agreements may include but are not limited to the following:

(i) Taking applications

(ii) Easement acquisition functions, such as procuring due diligence reports (environmental record searches, title commitments, etc.), appraisals, easement boundary surveys, or closing agent services

(iii) Restoration planning and design

(iv) Implementing restoration plans

(v) Maintenance, management, and monitoring activities

(4) Agreements must be specific enough to accurately and specifically define deliverables, track program expenditures, and document accomplishments. Agreements must conform to applicable policy, depending on the type of agreement (see subpart O of this manual for further information).

(5) NRCS may enter into agreements with a State, nongovernmental organization, or Indian Tribe to carry out the Wetland Reserve Enhancement Partnership (WREP) enrollment option as described in subpart Q of this manual.

D. Delegated Management, Monitoring, and Enforcement Authority

(1) Under ACEP-WRE, NRCS may, at any time, delegate its easement management responsibilities to a conservation organization that has appropriate authority, expertise, and technical and financial resources, as determined by NRCS, to carry out such delegated responsibilities. NRCS may also, at any time, delegate its easement management, monitoring, or enforcement responsibilities under ACEP-WRE to other Federal or State agencies that it determines to have the appropriate authority, expertise, and technical and financial resources to carry out delegated responsibilities. State or Federal agencies may utilize their general statutory authorities in administering delegated management, monitoring, or enforcement responsibilities for the ACEP-WRE easements. These responsibilities shall not be delegated to any conservation organization or Federal or State agency who is the fee title owner of the land subject to the easement.

(2) These delegations are accomplished through the use of a memorandum of understanding or other appropriate written agreement that details the responsibilities of all parties, includes a termination clause, and may be recorded with the easement.

(3) The authority to subordinate, modify, exchange or terminate the easement is reserved to the Chief and will not be vested in a delegated agency or organization. See subpart R of this manual for the policy and procedure related to easement administration actions which include subordination, modification, exchange, and termination of the easement.

528.101 Application Process and Eligibility Overview

A. This subpart provides information about the application process, land eligibility, and landowner eligibility criteria. (See Subpart U, “Exhibits,” for the ACEP-WRE business process.)

B. NRCS accepts ACEP-WRE applications on a continuous basis. At the discretion of the State Conservationist and in coordination with any required national application cutoff dates, States may:

(1) Establish and advertise one or more application cutoff dates during the fiscal year. Applications received after the cutoff date will be considered in the next application period; or

(2) Establish a process to rank applications continuously and fund all eligible applications that score above a threshold established by the State Conservationist.

C. NRCS evaluates and approves applications through three primary steps:

(1) Gathering landowner information, determining landowner eligibility, and conducting preliminary investigations.
(2) Conducting onsite land eligibility determination (which includes determining legal and physical access to the proposed easement site), conducting environmental ranking, and developing a preliminary restoration plan.
(3) Selecting for funding based on outcome of eligibility determinations, ranking priority fund availability, and any waiver requests; ability to provide clear title, access rights, any necessary water rights; and determinations that there are no onsite or offsite issues or conditions that would preclude enrollment or restoration.

528.102 Landowner Information

A. Application

(1) Landowners who are interested in participating in ACEP-WRE must apply by submitting a completed application. (See Subpart U, "Exhibits," for application package materials.)
(2) Only owners of private land or acreage owned by Indian Tribes may enroll land in the ACEP-WRE. The landowners must be able to convey clear title to the land and provide consent or subordination agreements from each holder of a security interest in the land.
(3) Landowners must be willing and able to grant NRCS or its designee unencumbered, unrestricted, transferable, and otherwise sufficient physical and legal access from an identified Federal, State, or local public right of way to the entire enrolled area for the term of the enrollment for restoration, management, maintenance, monitoring, and enforcement purposes.

B. Information Provided to Landowners

(1) Upon the landowners' completion of the application (NRCS-CPA-1200), NRCS provides the landowners with program information to help them decide whether to continue with the application process, including a list of the documentation that must be provided prior to NRCS taking any action on the application. All landowners must be informed about landowner and payment eligibility requirements under the highly erodible land and wetland conservation (HEL/WC) provisions of the Food Security Act of 1985 and the adjusted gross income (AGI) provisions. They must also be informed that land enrolled in ACEP-WRE is ineligible for any other USDA program payment for the life of the enrollment. Additionally, landowners operating under an employee identification number (EIN) must also be informed about the requirements to obtain a valid Dun and Bradstreet Data Universal Numbering System (DUNS) number and meet the Central Contractor Registration (CCR) requirements through registration or renewal in the System for Award Management (SAM) or successor registry. (See Subpart U, "Exhibits," for a sample information to applicant letter.)
(2) Information provided to easement applicants includes—
(i) A sample copy of a blank warranty easement deed and associated exhibits appropriate for the enrollment option selected. This deed is the document used by a landowner to grant and convey to the United States by and through NRCS an easement with appurtenant rights of access to the easement area. Revisions to the warranty easement deed are not permitted.

(ii) Notification of landowner requirement to provide clear title and unencumbered, unrestricted, and transferable legal right of access from an identified Federal, State, or local public right of way to the entire enrolled area for the term of the enrollment.

(iii) A sample copy of Form AD-1158, "Subordination Agreement and Limited Lien Waiver," or successor form. This waiver is used to subordinate mortgages and obtain limited lien waivers to the United States, when applicable, with respect to any and all interests of the subordinating party in or related to the easement area. The form will be recorded with the warranty easement deed, if applicable.

(iv) A sample copy of the Form NRCS-LTP-31, "Agreement for the Purchase of a Conservation Easement" (APCE). The landowner and the State Conservationist must sign this document before NRCS incurs costs for surveys and closing procedures on the easement.

(3) When the application is for a 30-year contract on acreage owned by Indian Tribes, this information includes—

(i) A sample copy of a blank "Contract for 30-year Land Use" and associated exhibits based on ownership type. The contract details the terms and conditions of the enrollment, responsibilities of the landowner and NRCS, restrictions on land use, and potential violations. Revisions to the "Contract for 30-year Land Use" are not permitted.

(ii) A sample copy of the Form NRCS-LTP-40, "Agreement to Enter Contract for 30-Year Land Use" (AECLU). The landowner and the State Conservationist must sign the AECLU before NRCS proceeds with incurring survey and final contract execution costs.

(iii) Notification to the landowner of the requirement to provide clear title and access rights. Any farming leases must be terminated prior to execution of the 30-year contract.

C. Information Provided by Landowners

(1) Before NRCS proceeds further, all landowners must be established in the Service Center Information Management System (SCIMS) and have the following documents completed, reviewed, and filed at the USDA service center (see Subpart U, "Exhibits," for sample landowner application checklist):

(i) Copy of the current property deed or other current evidence of ownership, including a breakdown of ownership shares if applicable

(ii) Form AD-1026, "HELC/WC Certification"

(iii) Form CCC-941, "AGI Certification and Consent to Disclosure of Tax Information," and related forms

(iv) Form CCC-901 or CCC-902, "Member's Information" (when the landowner is a legal entity)

(v) Proof that the entity is a legal and valid entity in the State where the land is located, usually by a certificate of good standing from the secretary of the State

(vi) Evidence of a valid DUNS number and current registration in SAM if landowner is an entity

(vii) Evidence of signature authority as described in section 528.103D

(2) Eligibility must be determined for all landowners of record, as listed on the current property deed or equivalent current evidence of ownership documentation, including all individuals, entities, and entity members down to the individuals as required.

(3) In accordance with Farm Service Agency (FSA) Handbook 1-CM, FSA will work with customers to gather any additional information needed to complete the SCIMS record. Using the information listed above, FSA will establish the specific business type for each landowner.

528.103 Landowner Eligibility Determination

A. General

Once the documents provided by the landowner have been received, NRCS must determine if the landowner is eligible to participate in the program by reviewing the following information. (See Subpart U, "Exhibits," for the ACEP eligibility matrix)):

(i) Evidence of ownership to determine that the land has been owned by the applicant for at least 24 months, unless proof is provided of adequate assurances that the land was not acquired for the purposes of enrolling in ACEP-WRE, as described in section 528.103B

(ii) Evidence of the landowner ability to provide unencumbered, unrestricted, and transferable legal right of access from an identified Federal, State, or local public right of way to the entire enrolled area for the term of the enrollment

(iii) Documentation from FSA that all persons and entities on the deed are compliant with the HEL/WC provisions of the Food Security Act of 1985

(iv) Documentation from FSA that all persons and entities on the deed are eligible for payment based on the adjusted gross income provisions of the Food Security Act of 1985 so that NRCS can determine whether a payment reduction applies (section 528.103C)

(v) Evidence of signature authority to determine its sufficiency (section 528.103D)

(vi) Proof that the entity is legal and valid in the State where the land is located, usually evidenced by a certificate of good standing from the secretary of the State

(vii) Evidence of a valid DUNS number and current registration in SAM if landowner is an entity

(viii) Proof of ownership of sufficient water rights, when needed for wetland restoration

B. 24-Month Ownership Review and Waiver Process

(1) The applicant must have owned the land for at least 24 months prior to application to be eligible to enroll land in a permanent or 30-year ACEP-WRE easement. NRCS may, at its sole discretion, waive the 24-month ownership requirement if any of the following criteria apply:

(i) The land was acquired by will or succession as a result of the death of the previous landowner.

(ii) The ownership change occurred due to foreclosure on the land, and the owner of the land immediately before the foreclosure exercises a right of redemption from the mortgage holder in accordance with State law.

(iii) The landowner provides adequate assurances that the land was not acquired for the purpose of placing the land in the ACEP-WRE.

(2) If an applicant has not owned the land for the requisite time period, NRCS must notify the applicant that the application is ineligible unless a written waiver request is submitted by the applicant that describes or provides documentation that one of the three above listed waiver criteria applies. The designated conservationist must forward the applicant's waiver request and documentation to the State Conservationist. (See Subpart U, "Exhibits," for sample 24-month ownership and waiver information letter.)

(3) For waiver recommendations, the State Conservationist should consider the management and use of the property since it was purchased, documentation provided by the landowner, or other information provided by the landowner regarding the personal or financial circumstances. A 24-month ownership waiver request worksheet will be completed for all 24-month ownership waiver request determinations. (See Subpart U, "Exhibits," for the 24-month ownership waiver request worksheet.)

(4) The State Conservationist may waive the 24-month ownership requirement if the documentation supports a finding that the land was acquired by will or succession or that the landowner exercised a right of redemption, as described in paragraphs (1)(i) and (1)(ii) above.

(5) If the basis for the waiver request is adequate assurance that the land was not acquired for the purpose of placing the land in ACEP-WRE, the responsible approving official (either the Chief or the State Conservationist) will be determined based on the circumstances surrounding the change in ownership.

(6) The State Conservationist may waive the 24-month ownership requirement based on adequate assurances the land was not acquired for the purposes of placing the land in ACEP-WRE when the change in ownership has occurred as a result of one of the following circumstances:

(i) The prior landowner owned the land for 24 months or more and continues to own one-half or greater interest after the ownership change, for example:

- A spouse is added to the deed.
- A prior owner transfers property from their individual ownership into a trust, life estate, or other entity of which they are a member or beneficiary.
- A majority share of an entity is bought out by an existing member.

(ii) The prior landowner owned the land for 24 months or more and transferred ownership amongst members of his or her immediate family (father, mother, spouse, children, grandparents, or grandchildren).

(iii) The change in ownership is the result of a completed contract for sale (or contract for deed) entered into 24 months or more prior to the application date.

(iv) The current landowner had leased the land for agricultural purposes for 24 months or more prior to the application date and provides evidence of agricultural lease or operator status for the required 24-month period.

(7) The State Conservationist will submit all other 24-month ownership waiver requests to the Chief through the Deputy Chief for Programs. **These applications must have ranked high enough for enrollment after all other eligibility requirements have been verified.** The State Conservationist will provide a copy of the landowner's written waiver request and any additional documentation provided by the landowner, an evaluation of the documentation and surrounding circumstances, a copy of the evidence of ownership document, and the State Conservationist's recommendation on whether to grant the waiver documented on the 24-month ownership waiver request worksheet. The State Conservationist must provide a clear explanation for the basis of their recommendation. (See Subpart U, "Exhibits," for the 24-month ownership waiver request worksheet.)

(8) The Chief determines if the information provided constitutes adequate assurances that the landowner did not purchase the land for purposes of enrolling in ACEP-WRE and whether a waiver request should be granted. The Chief provides the determination to the State Conservationist, and the State Conservationist notifies the landowner of the determination and the landowner's rights to appeal. (See Subpart U, "Exhibits," for a sample ineligibility determination letter.)

(9) All 24-month ownership waiver requests, approved or denied, must be reported in the National Easement Staging Tool (NEST) by answering the "Land Owned for 24 Months" data element on the application record. Documentation for the basis for the request and the determination made by the State Conservationist or Chief must be uploaded to the "Documents" page of the NEST record. A document type of "24-Month Waiver Documentation" should be selected.

(10) If the application is not funded in the same fiscal year the 24-month ownership waiver is granted, the waiver remains valid and may be applied in a subsequent fiscal year only if there is no further change in ownership after the waiver is granted.

C. Adjusted Gross Income (AGI) Review

(1) Section 1001D of the Food Security Act of 1985, as amended, establishes payment eligibility for conservation programs based upon the average adjusted gross nonfarm income for persons and legal entities. FSA promulgated regulations to implement section 1001D payment limitations at 7 CFR Part 1400 AGI provisions. For AGI purposes, the term "person" means an individual, natural person and does not include a legal entity. Additionally, the term "legal entity" means an entity created under Federal or State law. All landowners will file the AGI certification, Form CCC-941, with FSA. FSA is responsible for completing determinations on all AGI certifications.

Note: Indian Tribes are not subject to AGI provisions.

(2) In accordance with 7 CFR Part 1400, an application will be considered—

(i) Eligible and no commensurate reduction of payment will apply if the land is owned by—

- A person who is eligible for payment under the AGI provisions.
- Multiple persons, when all persons are eligible for payment under the AGI provisions.
- An AGI-eligible legal entity in which all members are eligible for payment under the AGI provisions.

(ii) Ineligible and cancelled, if the land is owned by—

- One person, and the person is determined to be ineligible for payment.
- Multiple persons, a legal entity, or a combination thereof, and any of the persons or legal entities are ineligible for payment based on the AGI provisions.

(iii) Eligible, but ACEP-WRE easement payments to a legal entity will be reduced by an amount commensurate to the percent ownership of any AGI ineligible member of that legal entity.

(3) The required reduction in payments should be discussed with the applicants before continuing to process the application to determine if the applicants wish to continue in the process. The landowner will provide percentage ownership documentation. NRCS will verify this information, determine whether landowners are eligible or the commensurate payment reduction is applicable due to ineligible member of otherwise eligible legal entity, and coordinate with the financial management staff to ensure that correct obligations and any necessary payment reductions occur. (See Subpart U, "Exhibits," for ACEP Eligibility Matrix.)

D. Signature Authority Documentation Review

(1) Many landowners, whether an individual person or a legal entity, conduct business, including program participation, through agents and representatives who have been authorized to execute documents on behalf of the landowner. NRCS may work with landowners through their authorized representatives if the landowner has provided sufficient signature authority documentation (see figure 528-K2 below) to demonstrate that the representatives are authorized to execute documents on behalf of the landowner and NRCS has determined that the representatives have the requisite signature authority for the type of document being executed.

(2) To verify a sufficiently authorized signatory for a legal entity, NRCS will review a copy of the organizational documents, formational documents, or other legal documents clearly designating the individuals who possess signature authority for the legal entity. The type of documents will depend on the type of entity and may include items such as filed articles of incorporation and bylaws, corporate charters, court orders of appointment, trust agreements, last will and testaments, partnership agreement and filed articles of partnership, certificate of formation, or others. When specific or sufficient signatory authority is not provided in the

entity documents, all members must sign the agreement and deed or contract documents, amend the entity documents, or execute a power of attorney that designates an individual to act as the attorney-in-fact or agent for the legal entity.

(3) To verify a sufficiently authorized signatory for an individual person, NRCS will review a copy of the power of attorney, court orders of appointment, legal guardianship or conservatorship, or other legal documents clearly indicating the authority of the designated individual to sign on behalf of a landowner who is an individual person.

(4) In addition to instruments listed above, the following forms are adequate to authorize a representative to execute the specified documents on behalf of a landowner participating in ACEP-WRE:

Figure 528-K2

Form Number and Name	**Sufficient Authority to Sign**	**Insufficient Authority to Sign**
CCC-901, "Member's Information"	• Application, • Conservation Program Contract • Payment Applications	• Agreement for Purchase of Conservation Easement • Warranty Easement Deed
FSA-211, "Power of Attorney"	• Application, • Conservation Program Contract • Payment Applications	• Agreement for Purchase of Conservation Easement • Warranty Easement Deed
NRCS-CPA-09, "Power of Attorney," or successor form	Adequate for all ACEP-WRE documents	

Note: Of the NRCS and FSA forms listed in figure 528-K2, only the notarized Form NRCS-CPA-09 creates sufficient authority to sign the warranty easement deed and related closing documents.

(4) All signature authority documents must be reviewed by NRCS to determine adequacy and applicability. NRCS must also send the signature authority documents to the local Office of the General Counsel (OGC) attorney for review during the title opinion process.

E. Preliminary Investigations for Easements and 30-Year Contracts

(1) Once the landowner is determined eligible for enrollment under an easement or 30-year contract and the information required by this section (528.103) has been provided and determined to be adequate by NRCS, preliminary investigation services may be obtained by the agency. The preliminary investigations include, at a minimum, the preliminary title search and a limited phase I.

(2) The preliminary title search and underlying documents are used to determine if title issues exist that would preclude or delay closing the easement. The preliminary title search must include copies of all the underlying documents. In some cases, a title commitment binder may be ordered at this time, along with the preliminary title search. Generally, NRCS secures preliminary title search services from a vendor with whom NRCS intends to acquire easement closing services. See subpart M for additional information on title review and closing agent requirements.

(3) NRCS conducts the limited phase-I to identify whether the land has potential hazardous substance issues that may preclude or delay successful enrollment and restoration of the land in ACEP-WRE. This limited phase-I must include at a minimum: 1) an environmental

records search, 2) current landowner interviews, and 3) an onsite visit to view present conditions. NRCS will not enroll property where hazardous substance concerns are identified and that NRCS determines pose an unacceptable risk or a risk sufficient to make restoration not feasible.

(4) The preliminary title search and limited phase-I should be conducted as early in the process as possible to verify eligibility and minimize the risk of fund deobligation. The preliminary title search and all three parts of the limited phase-I must be obtained and reviewed prior to obligating easement funds unless there are extenuating circumstances such as allocations provided with less than 45 business days remaining in the fiscal year. All investigations must be completed prior to easement closure or 30-year contract execution.

(5) The preliminary title and environmental record searches and reports, when conducted and provided by qualified, non-NRCS personnel, will use financial assistance funds. Preliminary investigation services will be procured using an appropriate procurement method, and funds will be obligated to the procurement document for obtaining title and record search services.

528.104 Ineligible Landowners

A. Highly Erodible Land and Wetland Conservation Compliance

(1) Landowners must be in compliance with the HEL/WC provisions of the Food Security Act of 1985 to participate in ACEP-WRE and receive payment.

(2) Through operation of "affiliated persons" under 7 CFR Section 12.8, all landowners on the deed are required to be in compliance with both the HEL and WC provisions for the application to be considered eligible for enrollment. If any landowner listed on the deed is ineligible, the application is ineligible.

(3) If the landowner is a legal entity, the entity must be HEL- and WC-compliant, and required members of the legal entity must be in compliance. (see Subpart U, "Exhibits," for ACEP eligibility matrix) If any member of a legal entity that requires member eligibility is not in compliance with the HEL and WC provisions, the application is ineligible. If the landowner regains compliance with those provisions, a new application may be filed.

(4) See subpart O for further details regarding applicability of HEL/WC payment eligibility provisions to particular program payments.

B. Adjusted Gross Income

Persons or legal entities are ineligible to participate in ACEP-WRE if they do not meet the adjusted gross income limitations, have not filed, or have been determined ineligible by FSA. Those for whom a payment reduction is not applicable are also ineligible. See subpart O for further details regarding applicability of AGI payment eligibility provisions to particular program payments.

C. Federal, State, and Local Governments

Landowners that are units of Federal, State, or local governments are not eligible to enroll lands in ACEP-WRE.

528.105 Land Eligibility

A. General

(1) Determining eligibility for enrollment requires an assessment of both technical and administrative land eligibility requirements. To be determined eligible, NRCS must determine that—

(i) The land is either privately owned or acreage owned by Indian Tribes.

(ii) In consultation with FWS, that the enrollment of such land maximizes wildlife benefits and wetland functions and values.

(iii) The likelihood of successful restoration of such land and the resultant wetland functions and values merit inclusion in the program, taking into consideration the cost of the restoration, protection, enhancement, maintenance, and management.

(iii) Such land meets the eligible land or other eligible land types identified in this section.

(iv) The land is capable of having wetland hydrology and hydrophytic vegetation restored (including determining whether adequate water rights are available, if applicable, to carry out desired wetland restoration and management efforts for the duration of the enrollment period).

(v) The offering is of sufficient size and has properly configured boundaries that allow for the efficient management of the enrollment area.

(vi) The landowner is willing and able to grant NRCS or its designee unencumbered, unrestricted, transferable and otherwise sufficient physical and legal access from an identified Federal, State, or local public right of way to the entire enrolled area for the term of the enrollment for restoration, management, maintenance, monitoring, and enforcement purposes.

(vii) Otherwise promotes and enhances ACEP-WRE objectives.

(viii) There are no offsite or onsite legal or physical issues that would preclude or diminish successful conveyance, restoration, management, or enforcement of the enrolled area (see section 528.106 for additional information).

(2) NRCS, in consultation with FWS, determines land eligibility for ACEP-WRE enrollment through an onsite evaluation process, identified in paragraph B of this section. The ACEP-WRE statutory and regulatory land eligibility provisions identify eligible lands, other eligible lands, and ineligible lands. This section describes the criteria for determining whether land meets either eligible land or other eligible land criteria. Section 528.106 identifies ineligible land criteria.

(3) For the purposes of enrollment in ACEP-WRE, a “certified” or “official” wetland determination, as defined by the National Food Security Act Manual (NFSAM), is not required to determine eligibility.

(4) The easement case file must contain documentation that identifies which portions of the offered area meets which technical land eligibility criteria. If lands meeting the “other eligible lands” criteria are included in the easement area, the case file must document the basis for the inclusion of those lands along with any applicable waivers.

B. Onsite Determination

Land eligibility is determined during onsite field reviews by NRCS and an appropriate interdisciplinary team of partner specialists, including FWS. The landowner should be invited to participate in these field reviews. It is recommended that the field reviews be completed only after all requirements outlined in section 528.103 have been completed to the satisfaction of NRCS. During the onsite field reviews of the offered acres, NRCS will—

(i) Determine if the land meets one or more of the eligible land type requirements to be eligible for enrollment, as listed in the ACEP-WRE statute, rule, and section 528.105C.

(ii) Complete ranking of the land in accordance with subpart L.

(iii) Complete preliminary planning activities so that a cost estimate can be derived for eligibility and ranking purposes and to ensure that restoration activities are feasible.

(iv) Complete the Hazardous Materials Field Inspection Checklist and Hazardous Materials Landowner Interview (see Subpart U, “Exhibits,” for a hazardous materials field inspection checklist and hazardous materials landowner interview) to determine if there are offsite or onsite conditions that would preclude restoration of the enrolled area or use

of the area for the purposes of the program. In most cases, if hazardous substance issues are found, the site is not eligible for enrollment.

(v) Determine if any onsite or offsite issues not identified in step iv would make the land ineligible for enrollment.

(vi) Complete the National Environmental Policy Act (NEPA) evaluation process and complete required documentation to ensure compliance with NEPA provisions. At minimum, the Form NRCS-CPA-52, "Environmental Evaluation," should be completed along with appropriate supporting documentation.

(vii) Interview the landowner and complete the landowner disclosure worksheet which contains information about use or occupancy of the land, structures, leases, or other information about the property. (See Subpart U, "Exhibits," for landowner disclosure worksheet.) NRCS should request the landowner provide copies of any written, unrecorded leases or agreements at this time.

(viii) Verify by a field visit that the proposed boundary and ingress and egress route are acceptable to NRCS. At minimum, land access must be all-wheel-drive accessible.

C. Eligible Land Types – Farmed or Converted Wetlands

(1) Farmed wetland or converted wetland together with the adjacent land that is functionally dependent on the wetlands are eligible for enrollment, except that converted wetland are not eligible if the conversion was not commenced prior to December 23, 1985, except as provided for in section 528.105I(3).

(2) For the purposes of ACEP-WRE eligibility only, lands may be considered farmed wetland or converted wetland if such land is identified by NRCS to be any of the following:

(i) Farmed or Converted Wetlands.—Wetlands farmed under natural conditions, farmed wetlands, prior converted cropland, commenced conversion wetlands, or farmed wetland pasture. NRCS makes this determination based on NFSAM criteria.

(ii) Former or Degraded Wetlands.—Former or degraded wetlands that occur on lands that have been or are being used for the production of food and fiber, including rangeland, pastureland, hayland, and forest production lands, where the hydrology has been significantly degraded or modified and will be substantially restored through the implementation of the Wetland Reserve Plan of Operations (WRPO).

For example, if the hydrology has been significantly degraded or modified due to long-term grazing or silvicultural management practices, such as diversions, dams, ditches or other water management infrastructure, and the hydrology and vegetative structure can be restored by the implementation of the WRPO, then the site is eligible.

(iii) Lands Substantially Altered by Flooding.—Lands substantially altered by flooding so as to develop and retain wetland functions and values. To qualify, the alteration must be determined to be of such magnitude and permanency that it is unlikely that the alteration will cease to exist during the easement or contract period. Furthermore, the extent of the surface or subsurface flooding or saturation must be great enough to create hydrologic conditions that have or will develop hydric soil and hydrophytic vegetation characteristics over time. Additional efforts may be utilized to further improve wetland functions and values through implementation of the WRPO.

Examples include—

- Land that has been scoured by floods or broken levees.
- Lands that have soil saturation and water table elevation changes as a result of offsite surface or subsurface hydrologic changes (e.g., dams and irrigation systems).

D. Eligible Land Types – Croplands or Grasslands

(1) Certain croplands or grasslands that were used for agricultural production that are subject to flooding from the natural overflow of a closed basin lake, or pothole are eligible for enrollment in ACEP-WRE if the land has a high likelihood of successful restoration and meets all the criteria detailed below:
(i) The size of the parcel offered for enrollment is a minimum of 20 contiguous acres.
(ii) The soils are hydric.
(iii) The depth of the water is 6.5 feet or less.

(2) Water depths vary throughout the year and from year to year due to the dynamic aspects related to flooding in these systems. Therefore, NRCS will verify the water depth within 15 business days of application or will accept producer self-certification on depth if NRCS's verification is not completed within 15 business days.

(3) Land flooded from the overflow of a closed basin lake is only eligible if the State or other entity is willing to provide 50 percent share of the cost of the easement. This limitation does not apply to lands flooded from the overflow of a pothole. States must contact NHQ for specific guidance regarding closed basin lake enrollments.

E. Eligible Land Types – Riparian Areas

(1) Riparian areas along streams or other waterways are eligible, provided that the offered riparian area directly links wetlands less than 1 mile apart and that those wetlands are currently protected or will be protected under the same ACEP-WRE easement transaction. Protected wetlands include areas currently enrolled under an existing easement or other resource protection device or circumstance that achieves the same objectives as an easement, such as a State or Federal wildlife management area.

(2) If the riparian area will link already-protected wetland areas, then no additional wetland acres are required to enroll the riparian acres.

(3) If the riparian area will link two or more wetland areas that are not yet protected, but would be protected under the same ACEP-WRE easement action, then both the riparian area and wetland areas are eligible for enrollment and must be enrolled under the same or a concurrent easement transaction. The wetland areas to be enrolled must not meet any of the land ineligibility criteria under section 528.106.

(4) Eligible riparian areas should average no more than 300 feet in width, measured from the top of bank on one side, or 600 feet in width, if both sides of the river, stream, channel, or water body are offered for enrollment.

(5) Larger widths or linkages of wetland areas greater than 1 mile apart should be considered if the riparian zone and its associated wildlife or ecological values so warrant; waivers for additional width or for eligible wetland areas more than one mile apart may be granted by the State Conservationist.

(6) The riparian areas, including the linking wetlands if enrolled under the same easement transaction, will be considered to be a part of the eligible acres to which additional adjacent lands may be added.

F. Eligible Land Types – Lands in the Conservation Reserve Program (CRP)

(1) Eligible Conservation Reserve Program (CRP) lands include farmed wetlands and adjoining lands that meet all of the following criteria:
(i) Are subject to an existing CRP contract
(ii) Have the highest wetland functions and values
(iii) Are likely to return to production after the land leaves the CRP

(2) Such lands may be enrolled in the ACEP-WRE only if the land and landowner meet the eligibility requirements of this subpart and if the enrollment is requested by the landowner

and agreed to by NRCS. Upon closing of the easement, the CRP contract for the property will be terminated or otherwise modified, subject to such terms and conditions as are mutually agreed upon by FSA and the landowner.

(3) Lands established to trees under CRP are ineligible for enrollment unless they meet the requirements identified in section 528.106B(2) below.

G. Other Eligible Lands – Wetlands Restored or Protected Under a Private, State, or Federal Program

(1) Eligible land types previously restored under a local, State, or Federal restoration program, including the FWS Partners for Fish and Wildlife Program, or privately developed wetland areas meeting or capable of meeting NRCS restoration standards and specifications are eligible. A wetland that has already been restored but is not fully protected will be considered a positive attribute in ranking.

(2) Lands that have entered into the restoration cost share agreement enrollment option of the former Wetlands Reserve Program or another similar restoration program, such as the FWS Partners for Fish and Wildlife Program, may, during the agreement period or after, be enrolled in the 30-year contract, 30-year or permanent easement options of ACEP-WRE.

Note: Lands that have been entered into the ACEP-WRE 30-year easement or contract option may, during the easement or contract period, be enrolled in the permanent easement option. Compensation for the permanent easement will not exceed 25 percent of the applicable geographic area rate cap (GARC) being offered at the time the land is offered for permanent enrollment (see Subpart O, Section 528.148, "Converting a 30-year easement to a permanent easement").

(3) Land subject to an easement or deed restriction that (as determined by NRCS) provides similar restoration and protection of wetland functions and values as would be provided by enrollment in ACEP-WRE, may still be considered eligible. Such lands may be eligible if NRCS determines that the existing easement or deed restriction terms will not restrict or interfere with NRCS in its exercise of the rights to be acquired under the ACEP-WRE easement (or the easement or deed restriction can be removed or subordinated to the ACEP-WRE easement) and that any of the following apply:

(i) ACEP-WRE enrollment would provide significant additional resource protection, such as additional cropping restrictions.

(ii) The additional restoration and protection would provide critical habitat for targeted threatened or endangered species.

(iii) The existing easement or deed restrictions do not provide for full restoration of the wetland functions and values.

(4) Examples

(i) An area subject to an FWS "no drain, burn, level, or fill" easement, which prohibits further drainage but does not restrict cropping. Because the FWS easement does not provide "comparable" conservation benefits, the ACEP-WRE easement would be value added.

(ii) A site could be considered eligible for a 30-year easement if the current deed restrictions would last for 10 years or less from the date of application.

(iii) A site could be considered eligible for a permanent easement if the current deed restriction was for a term less than 30 years.

Note: Lands with a deed restriction similar to ACEP-WRE that is 99 years in duration are not eligible for ACEP-WRE enrollment.

(5) Individual appraisals may be required to determine the easement compensation values for lands subject to an existing easement or deed restriction that is determined to be eligible by

NRCS if the applicable areawide market analysis (AWMA) fair market values and associated GARCs do not take into consideration the presence of such deed restrictions.

H. Other Eligible Lands – Hydric Soil Minor Components (Inclusions) and Problematic Hydric Soils (Non-Typical Situations)

(1) Often, there are minor components (small inclusions) of hydric soils in map units of nonhydric soils. These hydric soils are relevant in determining eligibility for ACEP-WRE if hydrology and hydrophytic vegetation can be restored.
(2) Some soils that meet the hydric soil definition may not exhibit typical hydric soil morphology. These problematic hydric soils exist for a number of reasons, and their proper identification requires additional information, such as landscape position and presence or absence of restrictive soil layers, or information about hydrology.
(3) In some cases, problematic hydric soils may appear to be nonhydric due to the color of the parent material from which the soils developed. In others, the lack of hydric soil indicators is due to conditions that inhibit the development of redoximorphic features despite prolonged soil saturation and anaerobic conditions. In addition, recently developed wetlands may lack hydric soil indicators because insufficient time has passed for their development, such as an agriculturally induced wet area created through compaction in a pasture. Sometimes, site disturbance, such as plowing, may obscure the evidence of hydric characteristics. For these situations, if site assessment verifies that restoration of hydrology and hydrophytic vegetation is feasible, the areas may be considered eligible for enrollment in ACEP-WRE.
(4) When hydric soil minor components (inclusions) or problematic hydric soils occur, the land proposed for enrollment could be considered eligible land if it otherwise meets one of the eligible land types listed in this section. The decision to utilize this land eligibility criterion must be made by the State Conservationist and be based on the restorability and ecological merits of the site.
(5) The decision to enroll such areas in ACEP-WRE only applies to ACEP-WRE and its authorities, and has no bearing on the manner in which these soils are handled under the wetland identification process for wetland compliance (NFSAM) purposes. (See 180-NFSAM.) The State Conservationist must specifically consider the wildlife benefits and overall need to facilitate effective program implementation.

I. Other Eligible Lands – Adjacent Lands

(1) If the proposed easement area includes eligible lands as described in paragraphs C through H of this section, the easement may also include adjacent lands that meet all of the following criteria:
   (i) The adjacent lands will contribute significantly to the wetland functions and values or adjacent lands that are incidental but necessary for the practical administration of the enrolled area.
   (ii) The acres of adjacent lands to be enrolled must not exceed the acres of otherwise eligible land to be enrolled.
   (iii) These adjacent lands are considered to be primarily upland buffer and associated areas but may also include created wetlands, restored nonagricultural wetlands, riparian areas that do not meet the requirements of paragraph E of this section, artificial wetlands, and noncropped natural wetlands.
(2) The State Conservationist may consider waiving the one-to-one matching limitation in certain unique situations. These determinations and waivers must be documented in the easement case file and may include the following situations—
   (i) Enrollment of unique or critical wetland complexes. Examples of unique wetland complexes include, but are not limited to, pocosins, prairie potholes, playas, vernal pools,

fens, bogs, and ridge and swale floodplain complexes. (The State Conservationist must seek input from FWS before granting a waiver on this basis.)

(ii) Enrollment targeting wetland dependent species that require additional upland areas for nesting or protection from predators. (The State Conservationist must seek input from FWS before granting a waiver on this basis.)

(iii) Enrollment where the wetland acres could become degraded from agricultural activities on lands not in the enrolled area and additional upland buffers are needed for adequate protection.

(iv) Strict application of the ratio would create unmanageable boundaries, negatively impacting the practical administration of the enrolled area by NRCS.

(v) Strict application of the ratio would leave areas of land remaining outside the enrolled area, creating uneconomic or unmanageable remnant parcels for the landowner.

(3) Converted wetlands (180-NFSAM designations "CW" and "CW+year") are not eligible for enrollment in ACEP-WRE. However, where such areas are an incidental portion of an otherwise eligible easement offer, the converted wetlands may be considered eligible adjacent land if **all** of the following criteria are met:

(i) Not enrolling the area would create unmanageable boundaries, negatively impacting the practical administration of the enrolled area by NRCS.

(ii) Not enrolling the area would leave areas of land remaining outside of the enrolled area that would create uneconomic or unmanageable remnant parcels for the landowner.

(iii) The landowner is willing to enroll the acreage for no compensation.

(iv) The landowner is willing to restore the converted wetlands as prescribed by NRCS, entirely at the landowner's expense.

Note: Land may not be enrolled by the landowner who was responsible for the conversion; that landowner is ineligible to enroll in ACEP-WRE, in accordance with section 528.104A.

528.106 Ineligible Land

A. General

The following land is not eligible for enrollment in the ACEP-WRE:

(i) Converted wetlands (180-NFSAM designations "CW" and "CW+year") if the conversion was commenced after December 23, 1985, except as noted in section 528.105I(3).

(ii) Lands established to trees under a CRP contract, except as provided in section B of this section.

(iii) Lands that would exceed the county cropland enrollment limitations tracked by FSA.

(iv) Lands owned by an agency of the United States, other than acreage owned by Indian Tribes.

(v) Lands owned by a State, including an agency or a subdivision of a State or a unit of local government.

(vi) Land subject to an easement or deed restriction that, as determined by NRCS, provides similar restoration and protection of wetland functions and values as would be provided by enrollment in ACEP-WRE.

(vii) Lands where the purposes of the program or implementation of restoration practices would be undermined due to onsite or offsite conditions.

(viii) Restoration or maintenance cost to the Government that is determined to be excessive for the area or type of wetland.

(ix) Land that NRCS determines to have unacceptable exceptions to clear title or legal access that is encumbered, nontransferable, restricted, or otherwise insufficient.

B. Detailed Descriptions of Ineligible Land

(1) Converted Wetlands.—This refers to land that has been labeled as "CW" or "CW+year" as part of a certified wetland determination conducted for NFSAM wetland compliance purposes.

(2) Lands Established to Trees Under CRP.—In general, lands established to trees under a CRP contract are not eligible, whether the contract is active or not. However there are specific circumstances under which the State Conservationist may determine these lands to be eligible if—

(i) Tree establishment has not been completed, a planted stand failed to become established, or a stand that was determined to be established subsequently failed. NRCS will determine if plantings failed or were established and failed.

(ii) The State Conservationist determines the enrollment of such lands would further the purposes of the program based on the following criteria:

- The application meets all other ACEP-WRE eligibility criteria.
- The established cover conforms to ACEP-WRE restoration requirements.
- If the CRP contract is active, upon closing of the ACEP-WRE easement, the CRP contract for the property will be terminated or otherwise modified, subject to such terms and conditions as are mutually agreed upon by FSA and the landowner.
- Any additional criteria developed by the State Conservationist.

Note: The basis for the NRCS decisions must be documented in the case file and a record kept of how many acres of lands established to trees under CRP are determined eligible and include such information in NEST.

(3) County Cropland Limitation.—No more than 25 percent of the total cropland in any county, as determined by FSA, may be enrolled in CRP and ACEP-WRE easements (ACEP-WRE easements include existing easements previously enrolled in the Wetlands Reserve Program (WRP) and Emergency Wetland Reserve Program (EWRP)). In addition, no more than 10 percent of the total cropland in the county may be subject to easements acquired under ACEP-WRE. These limitations do not apply to areas devoted to windbreaks and shelterbelts after November 28, 1990, or to cropland designated by NRCS with "subclass w" in the land capability classes IV through VIII because of severe use limitations due to soil saturation or inundation.

(i) State easements acquired through the Conservation Reserve Enhancement Program (CREP) do not count against the easement limitation.

(ii) FSA maintains an electronic record of the acreage enrolled in ACEP-WRE and CRP at the county level. This record should be accurate to the extent that approved CRP contracts have been recorded in the system and NRCS has provided current data regarding ACEP-WRE enrolled easement acreage. For easement enrollments, NRCS is required to provide FSA the total acreage enrolled and a map that identifies both the enrolled area and any exempt "subclass w" soils within the enrolled area.

(iii) FSA will determine the acreage it considers cropland on the nonexempt soils and update the CRP software with total cropland data accordingly. ACEP-WRE easements on noncropland acreage, as determined by FSA, or on cropland situated on exempted "subclass w" soils, as determined by NRCS, do not affect the cropland or easement limitation.

(iv) When calculating the total enrolled CRP acreage, the FSA software excludes CRP acreage that is scheduled to expire by the end of the current fiscal year. Before accepting new offers on cropland acreage in ACEP-WRE, the State Conservationist will verify the current enrollment limits with FSA.

(v) NRCS and FSA must concur before a waiver of the 25 percent limit of this subsection can be approved. Such a waiver will only be approved if the waiver will not adversely

affect the local economy and if operators in the county are having difficulties complying with the conservation plans implemented under 16 U.S.C. Section 3812.

(vi) The State Conservationist is responsible for determining whether a county cropland waiver will be requested. NRCS determinations must be submitted to the FSA State Committee for concurrence. FSA requires that the FSA national office review and approve requests in excess of 30 percent of the county cropland total.

(vii) Waiver requests submitted to FSA for concurrence must contain the following:

- Letters of recommendation from at least one county commissioner and representatives of the conservation district.
- Form AD-894, "Request for Cropland Waiver" (available from the local FSA office), with all items completed based on information received on Form AD-893, "Recommendation of Percent of Cropland to be Enrolled in CRP/ACEP-WRE."

(viii) Upon NRCS's request, FSA will distribute Form AD-893 to at least a 10 percent random sampling of the agricultural producers and groups listed on Form AD-894, items 26 and 27. FSA will forward responses received on Form AD-893 to NRCS.

(ix) The State Conservationist may determine the level of interest in the county for waiving the cropland limitation for ACEP-WRE and the effect of a waiver on producers and businesses in the county based on the information received on Form AD-894. If a waiver would have significant adverse effects, the State Conservationist may, with FSA concurrence, deny the request or lower the percent of cropland acreage limitation than recommended by the field office.

(x) There is no authority to waive the 10-percent limitation of ACEP-WRE easements on cropland.

(xi) States with counties that were previously at or near the 10-percent limit should review the soils information for those counties. NRCS should determine the ACEP-WRE easement acreage, including WRP and EWRP easements, enrolled on croplands that are on exempted "subclass w" soils and provide that information to FSA. At the State level, NRCS and FSA should determine the adjusted cropland enrollment percentages after excluding ACEP-WRE easement acres on cropland with exempted "subclass w" soils. NRCS should inform FSA at the local level that NRCS may be enrolling new ACEP-WRE easements in those counties.

(4) Land Subject to a Similar Easement or Deed Restriction.—Land that is subject to an easement or deed restriction that, as determined by NRCS, provides similar restoration and protection of wetland functions and values will be considered ineligible if NRCS determines one of the following:

(i) That ACEP-WRE enrollment will not provide significant additional resource protection to the wetland functions and values that would warrant expenditure of Federal funds.

(ii) That the existing easement or deed restriction will interfere or restrict NRCS in its exercise of the rights to be acquired under the ACEP-WRE easement and existing easement or deed restriction cannot be removed or subordinated.

(5) Adverse Onsite or Offsite Conditions.—Offsite or onsite conditions that could undermine the purposes of the program or the successful implementation of restoration, as determined by NRCS, render the site ineligible. These adverse conditions may include, but are not limited to—

(i) The presence or potential presence of hazardous substance issues.

- If hazardous substance issues arise during the limited phase-I (record search, landowner interview, or NRCS field visit), NRCS may determine whether further investigation should be conducted or whether sufficient information exists to determine the site ineligible. Further investigation conducted by or paid for by NRCS is limited to a full phase-I environmental site assessment that meets the requirements of 40 CFR Part 312.

- OGC and EPD consultation is required if the State Conservationist wishes to proceed with the acquisition of an easement with documented hazardous substance issues identified during any part of the limited phase-I record search, onsite field visit, landowner interview or full phase-I assessment. NRCS, in consultation with OGC, will ascertain whether a combination of landowner response actions and liability protections provided to the United States can be established to allow the acquisition to continue.
- If NRCS determines that a phase-II environmental site assessment is needed, the land is ineligible. NRCS will not reconsider the site unless and until the landowner provides sufficient documentation that all necessary assessments have been completed and that the site has been fully remediated such that restoration or inundation of the site does not pose risk of hazardous waste contamination.
- NRCS will not enroll land that is or contains constructed wetlands used to treat wastewater or contaminated runoff.

(ii) Proposed or existing rights of way, either onsite or offsite, such as—

- Public or private drainage ways that will adversely affect the long-term success of the restoration to an unacceptable degree.
- Existing or proposed infrastructure routes that introduce disturbances or risks that undermine the purposes of the easement.

(iii) Adjacent land uses that could impede complete restoration or prevent wetland functions and values from being fully restored, such as—

- Adjacent or nearby airports.
- High-density residential areas.
- Dumps, mining or extraction facilities.
- Storm sewer, wastewater, feedlots, septic system, or other outlets.

(6) Impacts to Adjacent Lands.—The land is ineligible if the enrollment of the neighboring land is essential to the successful restoration of the wetlands and those adjacent landowners are unwilling or are ineligible to participate.

(7) Other Conditions.—There may be other existing conditions that the State Conservationist may determine warrant excluding enrollment of the proposed acres. These conditions include but are not limited to the following:

(i) Lands where water rights cannot be ensured for the easement duration and such rights are necessary to meet program restoration objectives.

(ii) Cultural resources or wetland-dependent endangered species are present, and restoration practices would have adverse long-term impacts on those resources.

(iii) Onsite or offsite erosion problems that cannot be reliably or cost-effectively addressed and may impact successful restoration of the site.

(iv) Land boundary configurations that are not mutually acceptable to both NRCS and the landowner, such as if the landowner has purposely manipulated the offered acreage to create in-holdings, outparcels, landlocked adjacent landholdings, road right-of-ways through the easement, or other boundary configurations that NRCS determines may negatively impact the restoration, protection, management, or enforcement easement area. Conversely, if the landowner is unwilling to exclude areas identified by NRCS as unacceptable based on a determination that including those areas will create an unacceptable risk, liability, maintenance, or other issue.

(8) Excessive Restoration or Long-Term Costs.—Lands where the cost of restoration for the easement area will exceed the fair market value of the land are ineligible. This criterion may be waived by the State Conservationist in situations in which it is documented that the restoration may be accomplished without accumulating a long-term operation and maintenance cost burden to the program

(9) Unacceptable Title or Access Issues.—Land that NRCS determines to have unacceptable exceptions to clear title or legal access that is encumbered, nontransferable, restricted, or otherwise insufficient are not eligible for enrollment. Ineligibility due to title encumbrances is not appealable. NRCS may request and opinion from OGC determining that the title is not satisfactory and stating the reasons why. Such issues may include but are not limited to—

(i) Existing easements, rights-of-way, leases, or other encumbrances limiting NRCS ability to restore, manage, monitor, or enforce the easement or contract area, such as a flowage easement that prohibits the reestablishment of trees or a public drainage easement that prevents hydrology restoration to a substantial degree.

(ii) Lands that have severed mineral rights or gas and oil leases that have a high likelihood of having an adverse impact on the easement area and cannot be subordinated to the ACEP-WRE easement (see mineral matrix in part 527).

(10) The State Conservationist may determine, on a case-by-case basis and in consultation with FWS, OGC, and NHQ, to enroll the lands with evaluated risk conditions if it is determined the benefits warrant such enrollment.

528.107 Notification of Ineligibility

Applicants found to be ineligible for participation in ACEP-WRE will be notified in writing of their status and advised of any applicable appeal rights. Appeal rights can be found in Title 440, Conservation Programs Manual, Part 510, “Appeals and Mediation.” Ineligibility may be the result of the lands not being eligible or the landowner not being eligible. (See Subpart U, “Exhibits,” for a sample ineligibility determination letter.)

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart L – ACEP-WRE Ranking Criteria

528.110 Overview

The ACEP regulations provide that the State Conservationist will, in consultation with U.S. Fish and Wildlife Service (FWS) and the State Technical Committee (STC), rank applications for enrollment in the ACEP-WRE based on—

(1) The likelihood of successful restoration of wetland functions and values, and maximizing wildlife benefits, taking into consideration the cost of restoration, protection, enhancement, maintenance, management, and the cost of acquiring the easement or 30-year contract.
(2) The significance of the wetland functions and values.
(3) The duration of a proposed enrollment, with permanent easements being given priority over nonpermanent easements or 30-year contracts.

528.111 Establishing ACEP-WRE Ranking Criteria

A. Ranking Purpose and Process Overview

(1) The ranking process enables the State Conservationist to prioritize enrollment offers by determining applications that most merit enrollment. However, this process does not guarantee or entitle the applicant to funding.
(2) The State Conservationist, with advice from the STC, establishes a weighted ranking process to prioritize all eligible applications, considering the factors described in this subpart. Give priority to those applications that provide the maximum wildlife benefits associated with restoration and protection of wetland functions and values, considering all associated acquisition and restoration costs and the duration of the enrollment.
(3) The State Conservationist will develop a form to record the ranking criteria, develop a process to collect data, rank the applications, and select applications for funding. The ranking system's point spread should be sufficient to allow differentiation between applications.
(4) The State Conservationist may develop multiple ranking forms or establish funding pools to address variability in habitat types offered for enrollment. The development of multiple ranking forms or funding pools may be necessary to facilitate enrollment of diverse habitat types that otherwise may be difficult to compare within a single set of ranking criteria. Funding pools also allow flexibility to ensure priority habitat types that would not compete as well with other habitat types may still be selected.
(5) These State-developed ranking forms will be made available to the public through the State's ACEP-WRE Web page.

B. Ranking Criteria Overview

The ranking criteria for easements and 30-year contracts will emphasize—

(i) The environmental benefits of enrolling the land.
(ii) Cost effectiveness of enrolling the land to maximize the environmental benefits per dollar expended.
(iii) Whether the landowner or others, are offering to contribute financially to the enrollment or restoration, to leverage Federal funds.
(iv) The extent to which the purpose of the program would be achieved on the land.
(v) Other factors issued by the Easement Programs Division (EPD).

C. Environmental Benefit Considerations

The ranking process will include consideration of the wetland functions and values as defined in subpart T of this manual, and—

(i) Ranking criteria to assess the environmental benefits of enrolling the land, should include but are not limited to—

- Habitat that will be restored for the benefit of migratory birds and wetland-dependent wildlife, including the diversity of wildlife species that will be benefitted or the life-cycle needs that will be addressed.
- Habitat for threatened, endangered, or other at-risk species, including the planned extents and anticipated use of the restored habitats on the easement area, and diversity of at-risk species benefitted.
- Protection or restoration of native vegetative communities.
- Habitat diversity and complexity to be restored and protected on the enrollment area.
- Extent of wetland losses within a geographic area, including wetlands generally or specific wetland types.
- Proximity and connectivity to other protected habitats.
- Extent of adjacent beneficial land uses.
- Water quality protection or improvement.
- Attenuation of floodwater flows.
- Water quantity benefits through increased water storage in the soil profile or through groundwater recharge and consideration of proximity to impaired water bodies.
- Carbon sequestration.

(ii) The extent to which the original hydrology can be restored.

- Hydrology restoration potential must comprise at least 50 percent of the potential points awarded for environmental benefit considerations.
- To receive hydrology restoration ranking points, hydrology restoration or enhancement practices must provide hydrologic conditions suitable for the needs of the native wetland-dependent wildlife species that occurred in the area and appropriate for the wetland functions and values that existed prior to manipulation.
- Hydrology restoration potential should be assessed based on physical site characteristics including:
    - Soil properties such as soil texture, soil structure, and soil drainage classes.
    - Landscape features such as geomorphic position, flooding frequency, slope and water table depths.
    - The source of hydrologic and the degree and type of hydrologic manipulation and the extent to which it can be restored.

(iii) The likelihood that the site will retain its habitat functions and values after the enrollment period ends.

Note: The ranking process should consider the physical site conditions and ownership pattern that may result in some form of increased protection, such as a separate conservation easement or purchase agreement.

(iv) Duration of the enrollment, with priority given to permanent easements over shorter-term enrollment options.

D. Economic Considerations

(1) At a minimum, the ranking process should include the following economic considerations:
(i) Estimated easement or 30-year contract cost per acre, if appropriate.
(ii) Estimated restoration costs.
(iii) Partnership contributions that reduce NRCS costs will be reflected positively in the ranking process. The State Conservationist must ensure NRCS has financial control for the full amount of funding. When a landowner or other entity is offering to contribute funds for a part of the projected restoration or easement costs, the funds pledged to the program as a means of receiving favorable ranking, must be under NRCS financial control.
(iv) A cost-benefit comparison. Applications that have a lower cost per environmental benefit ratio will receive higher rankings.
(v) Potential near- and long-term management, repair, replacement, or operation and maintenance costs.

(2) During the ranking process, cost factors may be estimated using comparable market value, geographic area rate caps, landowner offers, established restoration costs, and pledged partner contributions.

E. Special Considerations

States may also include special considerations in the ranking process, such as—

(i) Priority geographic regions. The State Conservationist, with advice from the STC, has the authority to give priority to certain geographic regions of the State where restoration of wetlands may better achieve State and regional objectives. Additionally, an easement offer, in a priority geographic region, may be accepted before other individual easement offers that rank higher but are outside the priority region.

This policy provides an opportunity for the State Conservationist, in consultation with the FWS, to begin an ACEP-WRE initiative in an area that has been determined important for ACEP-WRE involvement, regardless of specific individual site ranking.

(ii) Priority wetland habitat types. The State Conservationist, with advice from the STC, has the authority to prioritize certain habitat types to receive additional ranking consideration. Unique, rare, or declining habitat types, identified for protection, and restoration, may be identified, and prioritized in the State's ranking criteria.
(iii) Applications in special water-quality target areas.
(iv) Creating contiguous wetland areas under easement protection, such as along river corridors or within drainage districts.
(v) Enhancing effective restoration of previously enrolled land.
(vi) Reducing habitat fragmentation and boundary management problems.

Example: In-holdings in the conservation area would potentially exhibit marginal wetland functions, but, if enrolled, would enable substantial restoration and enhancement of the surrounding area.

(vii) Promoting adjacent landowner participation.
(viii) Enhancing long-term protection of previously restored wetlands. When a wetland has previously been restored, but not fully protected by an easement, as described in section 528.105G, the restoration will be considered a positive attribute in the ranking process.
(ix) Excessive permitting requirements or permitting requirements that require excessive time to secure. Higher priority should be given to areas where successful restoration work will not be complicated by unusual permit problems.

Example: If there are State or local permitting processes that are complex and lengthy, the site may not warrant further consideration. At a minimum, the permit question should be fully incorporated into the site consideration.

(x) The level of complexity for engineering design, practice application, and operation and maintenance.

Note: The State Conservationist, in consultation with the STC, may elect to establish a minimum easement size to ensure program objectives are achieved, to ensure easement management effectiveness, or improve program efficiency, as long as the minimum does not unintentionally exclude high-quality applications, such as critical habitat for endangered and threatened species, or prevent participation by limited-resource farmers and ranchers.

528.112 Ranking Process

A. The ranking process will be conducted as part of the onsite field investigations completed by NRCS (with the landowner and FWS, when available). NRCS may provide an opportunity for input from the State wildlife agency and the conservation district (CD), to determine eligibility of the proposed enrollment area and develop the preliminary restoration plan and preliminary wetland reserve plan of operations (WRPO).

B. Once the field evaluations are completed, the field office staff or the Wetland Implementation Team will submit the following information to the State office (See Subpart U, "Exhibits," for a sample application checklist for submittal to State office):

(1) Application for participation in the ACEP-WRE.
(2) Copies of the landowner and land eligibility information (see subpart K).
(3) Completed ranking form signed by an NRCS representative, including the landowner's signature when available and input from FWS, conservation district, and State wildlife agency representative, if provided.
(4) The amount of any voluntary landowner offer to accept a reduced per acre easement value, documented in writing and signed by the landowner.
(5) A completed "Landowner Disclosure Worksheet" to initially document any unrecorded encumbrances and assess the potential presence of offsite and onsite conditions that would prevent successful restoration or pose an unacceptable risk to NRCS (See Subpart U, "Exhibits," for landowner disclosure worksheet).
(6) Completed "Hazardous Materials Field Inspection Checklist" and "Hazardous Materials Landowner Interview" (See Subpart U, "Exhibits," for hazardous materials field inspection checklist and hazardous materials landowner interview).
(7) National Environmental Policy Act documentation (Form NRCS-CPA-52, "Environmental Evaluation Worksheet").
(8) Other items specified on state application checklists, such as documentation of water rights.
(9) Partnership pledges to provide financial assistance.
(10) Plat map showing location and boundaries of offered area.
(11) Preliminary WRPO, including—
  (i) A clear objective and understanding about desired outcome of restoration activities.
  (ii) An aerial plan map showing boundaries of offered acres, access right-of-way, existing land use, conservation practices, the location of planned restoration practices, planned habitats, and planned land use.
  (iii) List of planned conservation practices, measures and activities, estimated quantities, and estimated costs.

(iv) A soils map.

C. Maps and practices identified in the preliminary WRPO and applicable worksheets will be developed using Customer Service Toolkit and stored in the National Conservation Planning database or other agency-approved conservation planning software.

528.113 Ranking and Selection

A. In general, applications should be selected as prioritized based on the outcome of the ranking process. However, the State Conservationist, in consultation with the STC, has the authority to establish priorities and circumstances under which the State Conservationist may select applications outside of a strictly applied ranked order. Circumstances that would warrant these selections may include but are not limited to the following:

(1) Large Project Size.—If a high-ranking but unusually large project would consume a disproportionate amount of a State's ACEP-WRE budget, the large project may be deferred until sufficient funds become available.
(2) Insufficient Funds.—If sufficient funds are not available to select the next-highest-ranked offering, offerings may be passed over until the next fundable project is reached.
(3) Augments Existing or Concurrent ACEP-WRE Acquisition Efforts in an Area.—Applications that may not rank high on their own merits but will contribute to the benefits of an existing or pending easement should be prioritized. Specifically, enrollments that further effective restoration and function of existing ACEP-WRE lands, reduce habitat fragmentation by protecting and restoring contiguous areas, resolve boundary issues, contribute to management, eliminate inholdings, or serve as a necessary buffer.
(4) Rare, Unique, or Individual Habitats.—Allow for enrollment of wetland types that are ecologically significant but whose values may not be adequately captured through the established ranking system.
(5) Emerging Issues.—Enrollment of specific habitat types or in habitats in targeted geographic areas may be warranted due to disasters, new science, or changing priorities when contribution to and consideration of these factors is not be sufficiently captured in the established ranking system.

B. All ACEP-WRE offers should be ranked; however, unique projects may be selected outside of the traditional rank order when the selection is warranted. These selections should be documented either through a separate rationale document or accounted for as a special circumstance captured within the ranking process itself. For example, ranking forms may include a "Special Circumstances or Initiative" option to allow points to be assigned, based on relative importance of the circumstance addressed by the application. Alternatively, letters of support or supplemental documentation supporting the enrollment of unique projects may be included as supporting documentation in the case file. The selection rationale should be documented, either on the ranking form, or in through supplemental documentation used in the selection process.

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart M – ACEP-WRE Enrollment and Acquisition

528.120 Overview

A. This subpart provides guidance on administrative activities, procedures, and policy related to the enrollment and acquisition of 30-year contracts, 30-year easements, and permanent easements.

B. The enrollment and acquisition process proceeds after NRCS determines that the landowner and the land are eligible, and after the onsite visits, including ranking and preparation of the preliminary wetland reserve plan of operations (WRPO), have been completed. Upon NRCS's execution of Form NRCS-LTP-31, "Agreement for the Purchase of Conservation Easement" (APCE), or Form NRCS-LTP-40, "Agreement to Enter Contract for 30-Year Land Use" (AECLU), the acres are considered enrolled in ACEP-WRE. (See Subpart U, "Exhibits," for the ACEP-WRE business process flow chart exhibit.)

528.121 Selection for Enrollment

A. General

(1) Applications are accepted on a continuous basis. The State Conservationist may establish one or more application cutoff dates for evaluation, ranking, and funding consideration of those applications received before the cutoff date. The State Conservationist may also implement a process to select applications for funding on a continuous basis if they meet threshold requirements established by the State Conservationist, with input from the State Technical Committee (STC).

(2) Once the application materials have been submitted to the State office, all eligible applications will be listed in rank order based on enrollment type. Based on funding allocations, the State Conservationist will select the applications that can be funded starting with the highest-ranked application.

(3) If the State does not have sufficient funds to approve the highest-ranked application on the unfunded list, the State may skip to the next-highest-ranked application for which it has sufficient funds. The State Conservationist may choose to fund lower-ranked applications in unique circumstances, as identified by the State Conservationist in consultation with the STC (subpart L, section 528.113).

(4) All eligible applications not selected or considered during a given evaluation period will be carried over to subsequent evaluation periods through the term of the Farm Bill in which the application was submitted, except for those cancelled or determined ineligible. Eligibility determinations must be updated for deferred applications considered for funding in a subsequent fiscal year.

(5) If appraisals will be used in determining the fair market value of the land, these appraisals may be secured in the fiscal year preceding the fiscal year when the easement or 30-year contract will actually be selected for funding. The effective date of the appraisal must be within 12 months of the date the offer (APCE or AECLU) is executed by the landowner and NRCS, unless a shorter useful life is identified by the review appraiser. Once the offer is accepted and executed by all required parties, the appraisal will not expire. If an approved appraisal has an effective date older than 12 months before the offer is executed by all parties, the appraisal is expired and a new, approved appraisal is required before an offer can be

extended to the landowner. (See appraisal and appraisal review guidance in 440-CPM, Part 527, Subparts E and F)

B. Letter of Tentative Selection (Required Only for Projects Needing an Individual Appraisal)

If NRCS determines that an application tentatively selected for funding will require an appraisal, the landowners will be sent a letter of tentative selection by certified mail with return receipt requested. This letter is required only for projects needing an individual appraisal.

(i) The letter will clearly explain that this tentative selection does not bind NRCS or the United States to enroll the proposed project in ACEP-WRE, nor does it bind the landowner to continue with enrollment in the program. The letter will also provide the list of materials that the landowner will need to provide to NRCS before the appraisal can begin. (See Subpart U, "Exhibits," for sample letter of tentative selection.)

(ii) The landowner's acceptance of the tentative selection is required prior to NRCS proceeding with acquiring an appraisal and will be indicated by the landowner's providing the required materials. (See Subpart U, "Exhibits," for checklist of items to provide appraiser.) Once it has received an acceptable appraisal, NRCS may proceed with making an offer of enrollment to the landowners, as provided in subsection C, below.

C. Offer of Enrollment

Upon selection of an application for funding, NRCS will send the landowner an offer of enrollment letter. The wording of this letter will depend upon selected application's enrollment type, the actions necessary for the application to be considered enrolled in the program, and the amount of funds to be obligated. (See Subpart U, "Exhibits," for sample offer of enrollment letters.)

(i) Thirty-Year Contracts on Acreage Owned by Indian Tribes

- For 30-year contract enrollments, the letter will clearly indicate that the application has been selected for enrollment and that NRCS is making an offer to enroll the land in a 30-year contract for the compensation amount indicated in the letter. If the enrolled land is Tribal trust land held by the Bureau of Indian Affairs (BIA), the BIA superintendent will also be notified of the contract compensation figures from NRCS. (See Subpart U, "Exhibits," for sample offer of 30-year contract enrollment letter.)
- The letter will indicate that continuing the enrollment process is contingent upon the applicant returning the AECLU (Form NRCS-LTP-40) document attached to the letter with all appropriate signatures, including any necessary Tribal council resolutions accepting the offer within the time period specified in the letter. This will signify that the landowner accepts the offered compensation. Generally, the landowner is allowed 30 calendar days to sign and return the document. This deadline can be adjusted by the State Conservationist, as necessary.
- Once the AECLU is returned and signed by the State Conservationist, the property will be considered enrolled in ACEP-WRE and funds will be obligated for the 30-year contract compensation amount. If the AECLU is not signed and returned within the required time period, the application will be cancelled.

(ii) Easements

- The offer of enrollment letter will clearly indicate that the application has been selected for enrollment and that NRCS is making an offer to purchase the easement for the compensation amount indicated on the APCE (Form NRCS-LTP-31) provided with the letter. (See Subpart U, "Exhibits," for sample offer of easement enrollment letter.)

- The letter will also indicate that continuing the enrollment process is contingent upon the landowner returning the APCE with all appropriate signatures within the time period specified in the letter. If the APCE is not returned within the required time period, the application will be cancelled. Generally, the landowner is allowed 15 calendar days to sign and return the document. This deadline can be adjusted by the State Conservationist, as necessary. Once the APCE is returned and signed by the State Conservationist, the property will be considered enrolled in ACEP-WRE and funds obligated for the easement acquisition. If the APCE is not signed and returned within the required time period, the application will be cancelled.

Note: If the landowner is going to secure the easement boundary survey in accordance with the procedure in section 528.123B, then the survey funds may also be obligated at this time.

D. Agreement Execution and Extension

For all enrollment types, the original expiration date of the agreement (APCE or AECLU) will be August 31 of the year following the fiscal year the agreement is entered into. Prior to the original expiration date, if both parties agree to mutually extend the agreement, the agreement can be extended one time for a period until August 31 of the year no later than 2 fiscal years following the fiscal year the agreement is entered into. (See Subpart U, "Exhibits," for a sample APCE extension letter.)

(i) If the agreement is to be extended, the one-time extension must be signed by the landowner and NRCS prior to the expiration of the agreement. NRCS will not sign the extension until the fiscal year after the agreement is originally signed.

For example, if an agreement is entered into in FY 2015, the original expiration date would be August 31, 2016, and the extended expiration date would be August 31, 2017. NRCS will not sign the extension prior to September 30, 2015.

(ii) States must enter the appropriate years into the agreement; however, the date of August 31 may not be changed. No additional or alternative extension lengths are authorized. States must inform landowners that these standard requirements may not be changed and are a condition of participation in ACEP-WRE. Standardized expiration dates and extension lengths assist NRCS in tracking expiration dates and extension deadlines, reduce the risk and incidences of improper payments on expired agreements, and inform the landowners from the outset of the full extent and limitations of the agreement. The extension of the agreement requires the mutual agreement of both NRCS and the landowner.

(iii) NRCS is under no obligation to grant the one-time extension of the agreement and the extension of the agreement is not a program entitlement issue.

E. NRCS Delegation of Authority for Enrollment

The State Conservationist may delegate, in writing, the authority to sign the APCE or AECLU and any subsequent documents authorizing adjustments to these obligation amounts to the Assistant State Conservationist with responsibility for easement programs. No further delegation of this authority is allowed.

F. Expedited Delivery of Notification of Offer of Enrollment

To expedite the enrollment process, NRCS may deliver the offer of enrollment letter and the APCE or AECLU for signature to the landowner in person. NRCS will document in the case file the date the offer of enrollment letter and associated documents were delivered to the landowner

in person. To minimize the potential for disputes, it is recommended that the landowner sign an acknowledgement confirming the date they received the offer of enrollment and APCE or AECLU for signature.

G. Applications Not Selected

(1) At the end of the fiscal year, applicants not selected for funding will be notified that their application will be deferred to the next fiscal year unless the applicant notifies NRCS in writing that their application should be cancelled.
   (i) Landowners may be notified by a letter, personal contact, or email; notification must be documented in the case file, indicating a landowner's desire to remain on the list or to cancel their application.
   (ii) The notification will inform landowners wishing to cancel their application to notify NRCS promptly and in writing. The written request for cancellation and NRCS letter or contact documentation should be maintained with the application. (See Subpart U, "Exhibits," for a sample deferral letter.)

(2) If applications are carried forward into the next fiscal year, a new landowner eligibility determination must be completed.
   (i) In the national easement tracking tool (currently NEST), these will be considered promoted applications to the new fiscal year and numbered in a manner that facilitates the tracking of funds specific to that transaction.
   (ii) Applications may be carried forward for the term of the Farm Bill under which the application was submitted; if the landowner wishes to participate after this time period has expired, a new application must be submitted.

H. Transfer or Sale of Enrolled Land

(1) Any property enrolled in ACEP-WRE that is sold or transferred (including the participant entering into a contract or purchase agreement to sell the land subject to the ACEP-WRE offer) prior to the easement being perfected or the 30-year contract being executed will result in the APCE or AECLU being cancelled and the acres removed from enrollment unless the new landowner meets the eligibility requirements in subpart K for the fiscal year in which the agreement is transferred and is willing to accept the terms and conditions for the enrollment.

(2) In particular, the new landowner must request an eligibility determination, including submission of any necessary waiver requests, and, if determined to be eligible, they must be willing to execute any contract transfer documents or new agreements or contracts.

(3) If the new landowner is not able to establish eligibility at the time of transfer, sale, or purchase agreement, the enrollment will be cancelled, the acres removed from enrollment, and the new landowner may submit a new application for participation in the future, at which time a new eligibility determination must be made.

I. Withdrawal of Offer by NRCS

Prior to execution by the United States of the warranty easement deed or 30-year contract, NRCS may withdraw the land from enrollment at any time due to the lack of availability of funds, inability of landowner to provide clear title or sufficient legal access, sale of the land, or for other reasons. The offer to the landowner is void if not executed by the landowner within the time specified. States must enter the expiration or cancellation date of the agreement in NEST.

J. Failure to Convey and Cost Recovery

(1) Except for reasons beyond the control of the landowner (as determined by NRCS), if the landowner fails to convey the easement or 30-year contract, the landowner will be in default of the terms and conditions of the APCE or AECLU and may be required to pay NRCS the

amount of costs incurred by NRCS for surveys and all other actions taken in furtherance of the agreement or contract.

(2) The State Conservationist has the discretion to determine the extent of costs to be recovered and whether any portion of those costs will be waived. This determination will be based on an evaluation of the landowner's reason for nonconveyance and NRCS funds expended in an effort to perfect the easement or execute the 30-year contract. For example, the landowner demonstrated a good-faith effort by working extensively with a lien holder but the lien holder was unwilling to subordinate the lien.

528.122 Determining Easement or 30-Year Contract Compensation

A. General

(1) The requirements contained in this section and exhibits are mandatory for all ACEP-WRE easement or 30-year contract acquisitions by NRCS. No modifications to these requirements are permitted without prior written approval from the Deputy Chief for Programs.

(2) The basis for the compensation offer for an easement or 30-year contract enrollment will be the lowest of the following:

(i) The fair market value of the land using either of the following:

- A Uniform Standards for Professional Appraisal Practices (USPAP) appraisal (see section 528.122C)
- An areawide market analysis (AWMA) (see section 528.122B)

(ii) The geographic area rate cap (GARC) (see section 528.122D)

(iii) An amount voluntarily offered by the landowner (see section 528.122E)

(3) In order to ensure compliance with the statutory provisions regarding easement and 30-year contract compensation, **States must determine the fair market value of the land, the GARC value, and the landowner offer (if any) for each transaction prior to enrollment.** If the landowner makes an offer, such offer must be provided in writing by the landowner. The written landowner offer must be uploaded into NEST with the document type "Landowner Offer" and physical copy must be placed prominently in the case file. The easement compensation value must not exceed the fair market value of the land.

(4) The State Conservationist must determine whether to use an AWMA or a USPAP appraisal to determine fair market value. Only one method may be used to determine the fair market value of the offered area.

(5) Obtaining an AWMA is the preferred method for determining fair market value of the land, if sufficient enrollment numbers are anticipated. The fair market values derived from the AWMA provide a primary source of information for use in the development of the GARCs. Use of an AWMA to determine fair market value and subsequent development of the GARCs allows easement or contract compensation values to be reliably estimated early in the process. This enables NRCS to inform potential participants of the compensation values early in the evaluation process and reduces the time spent with applicants who will not accept the compensation offer. In addition, if an applicant withdraws from the program, an offer can immediately be extended to the next eligible applicant on the list.

(6) The compensation amount for less-than-permanent enrollments, including easements with durations limited by State law, 30-year easements or 30-year contracts, must not exceed 75 percent of the easement compensation value determined for a permanent easement according to this subpart. Less-than-permanent enrollments may not be of sufficient duration to achieve full restoration, and do not provide permanent protection of the functions and values obtained.

B. Fair Market Value of the Land Using an Areawide Market Analysis

(1) State Conservationists may obtain one or more AWMAs to establish the fair market value of various lands that are typically enrolled within the State. States may establish multiple market areas to be analyzed, based on counties or other sub-State regions, land uses, land quality categories, soils or crop types, or other considerations, such as development pressure and residual recreational value.

(2) To obtain an AWMA, the State Conservationist must first define the market area or areas to be analyzed, based on similar features, including but not limited to the following:
   (i) Land uses
   (ii) Land productivity
   (iii) Land unit size
   (iv) Soil types and features
   (v) Types and amounts of improvements
   (vi) Potential influence of other factors, such as development pressure
   (vii) General topography and natural features
   (viii) Location
   (ix) Irrigation water rights

(3) The AWMA results should provide fair market value for the types of land typically enrolled or eligible to be enrolled in ACEP-WRE in the NRCS-identified market areas.

(4) The AWMAs will be completed by an independent real estate professional familiar with the area and land use types included in the market area or areas defined by NRCS. The AWMA is not to be completed by NRCS personnel. The AWMA specifications must be reviewed with the selected real estate professional, including specific types of land and land uses to be cited in the report based upon land typically enrolled in ACEP-WRE.

(5) The AWMA must be completed in accordance with the specifications provided by NRCS. (See Subpart U, "Exhibits," for a sample ACEP-WRE AWMA scope of work.) The qualified independent real estate professional conducting the market analysis must provide a written report to the State Conservationist consistent with the requirements in the scope of work. The AWMA report must document—
   (i) The region, market areas, development potential, and land use or land productivity categories and subcategories analyzed.
   (ii) The actual sales data or economic data for each category and subcategory.
   (iii) The source of the data.
   (iv) The qualifications and experience of the qualified real estate professional who conducted the market analysis.

(6) The AWMA areas or categories must be adequately specific and descriptive. For example, land use categories such as irrigated pastureland or irrigated cropland will result in more accurate data than a category of irrigated land used for both. For GARCs developed based on an AWMA, the description of the GARC areas or categories should be consistent with the associated AWMA categories.

(7) NRCS will obtain the AWMAs through an appropriate procurement method and following proper contracting rules and procedures. Review and acceptance of the AWMA must be completed by an authorized official prior to submission to the EPD for approval. For the purposes of AWMA review, an authorized official is an NRCS employee who is not themselves and is not formally supervised or evaluated by any person authorized to process, negotiate, or approve any easement or 30-year contract that will use the AWMA results.

(8) The State Conservationist must submit an electronic copy of the AWMA report and accompanying documentation, including the date the fair market values were reviewed with the State Technical Committee, to the Easement Programs Division's (EPD) director for final concurrence and approval. These will be submitted at the same time the GARC recommendations are submitted.

(9) All fair-market-value determinations using AWMAs must be reviewed each enrollment fiscal year and have approval of the EPD director prior to being used in the enrollment process. If no significant changes are anticipated in the AWMA fair market values from the previous year, States may obtain a review and written statement from the original qualified real estate professional who prepared the previous year's AWMA documenting that the previous year's AWMA fair market values have not changed significantly (no more than plus or minus 10 percent) and are still valid. The statement must explain the process used by the qualified real estate professional to make the determinations. If it is confirmed and documented that there are no significant changes, the State Conservationist may request approval from the EPD director to use an extension to the prior fiscal year's AWMA rather than obtaining a new AWMA report for that fiscal year. The AWMA fair market values must remain the same and the applicable GARC values must remain at the same value or lower as the previous year. An AWMA may only be reviewed and extended for 1 fiscal year following the original AWMA report.

C. Fair Market Value of the Land, Using an Appraisal

(1) USPAP appraisals may be used to determine fair market value of the land instead of AWMA. Use of individual appraisals may be warranted for reasons that may include but are not limited to the following:
   (i) States with limited ACEP-WRE enrollment
   (ii) Areas with limited enrollment within a State
   (iii) Areas with significant complexity that do not allow for a more general evaluation—for example, property-by-property value differences due to water rights, or extreme variability in values over a small area due to development pressure
   (iv) Land uses or areas not included in the market areas of the AWMA—for example, the property is geographically located within an AWMA market area (Smith County) but does not contain one of the analyzed land uses (offered area is irrigated cropland but only rangeland was included in the AWMA)
   (v) Size of the property is significantly larger or smaller than the typical used to develop the AWMA values
   (vi) Other special situations

(2) Guidance for conducting appraisals and appraisal reviews is located in 440-CPM, Part 527, Subpart E and F.

(3) If an individual appraisal is used to determine fair market value, a percentage GARC and not-to-exceed dollar value are still required.

D. Geographic Area Rate Caps (GARCs)

(1) Each State Conservationist, in consultation with the State Technical Committee (STC), must adopt at least one GARC for his or her State.
   (i) States may establish multiple GARCs based on counties or other sub-State geographic regions, land use or quality categories, corresponding AWMA areas, or other considerations, such as development pressure and residual recreational value.
   (ii) The GARCs for each State should be set at a rate that does not overcompensate landowners and that encourages the enrollment of the types and classes of lands with superior restoration potential. **The GARCs should reflect the value that the State Conservationist determines to be fair compensation for the rights being acquired.** Although NRCS is acquiring a majority of the property rights associated with the land, the landowner still retains certain reserved rights; as a result, the GARCs will always be less than the fair market value as determined by the AWMA or appraisal.

(2) In order to establish the GARCs, States should use the best readily-available information to determine fair compensation for the rights being acquired through the easement or contract. The best data source is the fair market value determined in the corresponding AWMAs. Other data that should be used to develop the GARCs include the following:
(i) Data sets of previously obtained ACEP-WRE appraisals
(ii) Local real estate market values, tax rates, and assessments
(iii) Location of the land
(iv) Soil types and productivity
(v) National, State, or local agricultural statistics
(vi) Local information about the value of land leases for the rights being acquired by the Federal government
(vii) Historic values accepted and rejected by landowners for program participation
(viii) Rates paid by other conservation easement programs that have similar purposes
(ix) Neighboring geographic areas

Note: GARCs must not have the effect of eliminating types or classes of lands on which the wetland and wildlife restoration potential is superior to other types or classes of lands enrolled in the State.

(3) If AWMAs are used to determine fair market value, specific GARC dollar values should be established that correspond to the AWMA categories and subcategories. If USPAP appraisals are used to determine fair market value, the GARCs must be set as a percentage of fair market value and must include a not-to-exceed dollar value. The GARCs must result in an easement compensation value that is fair compensation for the rights being acquired through the easement or 30-year contract.

(4) The State Conservationist must document the following in writing:
(i) The process used to determine the area for each GARC
(ii) The process and rationale used to determine the dollar or percent value of each GARC
(iii) The geographic area, development potential, land use, or land productivity categories considered
(iv) The corresponding GARC from adjacent states with an explanation of any significant (20 percent or more) differences
(v) The sources of the data
(vi) The date the proposed GARC values were reviewed with the State Technical Committee
(vii) For GARCs greater than $5,000 per acre, an evaluation and justification of the ecological importance of enrolling these high-cost lands

(5) For each fiscal year, the State Conservationist must submit an easement compensation proposal package that includes a discussion on the approaches used to obtain fair market values (AWMA, appraisals, or both), copies of any AWMA reports, the proposed GARCs, and the supporting GARC rationale documentation. The proposal must be submitted to the director of the EPD for final concurrence and approval. Easement compensation proposals will be evaluated on the following criteria:
(i) Was there a logical, defensible, and well-documented process?
(ii) Was the AWMA procured from an independent real estate professional with experience in the market area?
(iii) Is the fair market value of the land greater than the GARC?
(iv) Were the results reviewed by the State Technical Committee?
(v) Were the results certified by the State Conservationist?
(vi) Were the GARC values consistent with neighboring areas or were there explainable differences?

Note: Neighboring GARC values with a variation greater than 20 percent will not be approved unless they are accompanied by a statement from the State Conservationists explaining why neighboring GARC values vary so greatly.

(vii) For GARCs greater than $5,000 per acre, is there a statement from the State Conservationist justifying the ecological importance of enrolling these high-value lands?

(6) All easement compensation proposals must be updated each fiscal year and have the approval of the EPD director prior to being used in the enrollment process. Upon approval, States will publish the GARC values on the State Web site for informational purposes.

E. Landowner Offer

At any time during the application or prior to easement closing or contract execution, the landowner may voluntarily offer to accept a value less than is being offered by NRCS. If the landowner's offer is made at the time of application and ranking, this may enhance the probability of enrollment. A landowner's willingness to accept a lower easement or 30-year contract compensation amount will not automatically grant the landowner expedited access to the program, but will be factored into the overall application evaluation process. An offer to accept a lower compensation amount will be documented in writing with the landowner's signature or signatures and placed prominently in the case file.

F. Making an Offer

(1) Once NRCS has calculated the appropriate easement or 30-year contract compensation value for a particular transaction, it may make an offer to an eligible landowner using the APCE or, for acreage owned by an Indian Tribe, the AECLU. The offer will be made based on the lowest of the following:
(i) The fair market value, as determined by the individual USPAP appraisal or AWMA
(ii) The GARC
(iii) The landowner's offer

(2) States must document in the individual case file how the compensation value was determined for each individual offer. This documentation may include maps or tables and must identify the total acres, the number of acres of each applicable fair market value (FMV) or GARC category, the per acre values of each applicable FMV or GARC category, the total easement compensation value, and the total, weighted per acre easement value.
For example:

FMV/GARC Land Use	**Acres of Land Use**	**GARC Per Acre Value**	**Easement Compensation Value**
Irrigated Cropland	100	$2,000	$200,000
Forestland	100	$500	$50,000
Totals and Total Per Acre Value*	**200**	**$1,250**	**$250,000**

* The total, weighted per acre easement value is calculated by dividing the total acres into the total easement compensation value.

(3) If a landowner offer is made, the documentation must include a determination that the landowner offer is lower than the fair market values and GARC values.

(4) States must follow the most current easement acquisition internal controls policy prior to obligating funds for the agreement. Once an offer is made and accepted by the landowner, the fair market value and GARC values used to calculate the original offer will be used in any future adjustments. Compensation values will be based on the year of enrollment and will not

be recalculated using fair market values or GARC values from a subsequent year. Adjustments to an accepted offer will only occur as a result of changes in surveyed or offered acres as described in paragraph G, or if the landowner makes a written offer that is lower than the amount originally agreed to.

G. Final Acreage and Compensation Amounts

(1) Based upon the easement boundary survey (for an easement) or GPS survey (for a 30-year contract), NRCS will determine the final easement or 30-year contract acreage and compensation amount. If the surveyed acres are within 10 percent of the acreage estimated at the time the offer was made, the easement compensation value will be adjusted using the total per acre easement value (weighted per acre value) calculated at the time the offer was made. If the change in the surveyed acres is within the scope of the original agreement but is more than 10 percent of the originally estimated acreage, the fair market value determination must be reviewed, either through a revised appraisal report or based on the AWMA values from the year of enrollment (see 440-CPM, Part 527, Subpart E). The applicable GARCs from the year of enrollment will be applied to the revised fair market value determination.

Example 1: Within 10 percent change: 200 acres original offer, 220 acres final surveyed acreage

FMV/GARC Land Use	**Acres of Land Use**	**GARC Per Acre Value**	**Easement Compensation Value**
*Original Totals and Total Per Acre Value**	*200*	*$1,250*	*$250,000*
Final Totals using Original Total Per Acre Value	**220**	**$1,250**	**$275,000**

Example 2: Greater than 10 percent change: 200 acres original offer, 230 acres final surveyed acreage

FMV/GARC Land Use	**Acres of Land Use**	**GARC Per Acre Value**	**Easement Compensation Value**
*Original Totals and Total Per Acre Value**	*200*	*$1,250*	*$250,000*
Irrigated Cropland	110	$2,000	$220,000
Forestland	120	$500	$60,000
Final Totals and Revised Total Per Acre Value	**230**	**$1,217**	**$280,000**

(2) This final easement or 30-year contract acreage (rounded to the nearest tenth of an acre) and the adjusted compensation amount will be documented on the final warranty easement deed or 30-year contract (rounded to the nearest dollar), the landowner's acceptance of which will be documented upon execution of those documents. Amendments to the APCE or AECLU and landowner signatures are not required to document adjustments to the acreage or compensation amount based on acreage changes due to surveys.

(3) Guidance on obtaining easement boundary surveys is provided in section 528.123. Boundary surveys for 30-year contracts will be based on a GPS survey conducted by NRCS. NRCS will coordinate with the landowner to ensure that the appropriate acres are included in the survey area, and will review the 30-year contract boundary survey with the landowner ensure that it accurately and correctly delineates the area of enrollment

(4) Upon determination of the final acreage and compensation amount, the State program manager will provide this information to the financial officer to ensure that the obligation will be adjusted in the Financial Management Modernization Initiative (FMMI), as necessary. States must conduct reviews of obligations and adjustments in accordance with the most current easement acquisition internal controls policy. (See Subpart U, "Exhibits," for sample easement/contract compensation adjustment note to file.)

(5) It is recommended that if the change in final acres differs by more than 10 percent of the originally estimated enrollment acreage, a copy of any acreage and easement compensation adjustment documentation should be provided to the landowner for their information.

528.123 Easement Boundary Survey

A. General

(1) As an integral part of the easement acquisition process, the boundary of the proposed easement area must be delineated in a manner that is suitable for recording. The exact recording requirements will vary from State to State. At a minimum, NRCS policy, NRCS easement programs land survey specifications, and State code must be met.

(2) **Easement boundary descriptions and easement boundary maps are based upon a legal land survey and are required for all easement transactions.** Knowing exactly where the recorded easement acres are located will assist NRCS with its monitoring, management, and enforcement responsibilities to protect the Federal property investment. Additionally, ingress and egress to the easement area will be described on the easement boundary survey.

Note: It is the landowner's responsibility to provide a sufficient right of ingress and egress to the easement area, as described in subpart K. The landowner providing NRCS with sufficient ingress and egress to the easement site is a condition of land eligibility. Additionally, the fair market value of the land determined through an appraisal or AWMA includes an assumption that the land has sufficient legal access, therefore, NRCS will not provide any additional or separate payments for a route of ingress and egress.

(3) Within 30 calendar days following recordation of the easement, the digitized boundaries and polygon attributes will be transmitted to the NRCS National Geospatial Center of Excellence (NGCE). This information must be transmitted to NGCE as easements are recorded. These digital layers will, in combination with others, support local, regional, and national program management and ecosystem planning. NGCE will load these digital layers into the national geospatial data base when received. (See Subpart U, "Exhibits," for instructions for digitizing and transmitting easement boundaries.)

B. Procuring the Easement Boundary Survey

(1) After the APCE has been signed by the landowner and NRCS, an easement boundary survey will be ordered. The easement boundary survey must be based upon a land survey conducted by a State-certified professional land surveyor. The surveys will be obtained using an appropriate procurement method and funds for easement boundary surveys must be obligated to budget object class 3214. Use of a blanket purchase agreement or indefinite delivery and indefinite quantity contract for easement boundary surveys is recommended.

(2) In some cases, it may be more efficient or cost effective for the landowner to secure the easement boundary survey. If this option is used, the landowner must secure a written bid for the easement boundary survey from a State-certified and licensed professional surveyor that is based on the NRCS easement programs' land survey specifications (See Subpart U, "Exhibits," for land survey specifications). The funds should be obligated to the landowner as the vendor using a supplement to the APCE, these funds may be obligated at the time the

easement acquisition funds. (See Subpart U, "Exhibits," for APCE supplement for landowners to procure easement boundary surveys.)

(3) NRCS will ensure that all easement boundary surveys are completed and digitized according to the NRCS easement programs' land survey specifications. NRCS will ensure that all easement boundary markers and witness posts with easement boundary signs are installed at the time the easement boundary survey is accepted as correct by NRCS.

(4) The use of the NRCS easement programs' land survey specifications is required unless a modification to the national specification is approved by the national ACEP-WRE manager. Use of these national specifications will ensure a consistent product nationally and allow for the most efficient uploading of data to the national ACEP-WRE boundary shapefile maintained by the NGCE.

Note: The easement boundary signs may be ordered free of charge from the NRCS National Publications and Forms Distribution Center-LANDCARE. These can be ordered online by visiting https://nrcspad.sc.egov.usda.gov/DistributionCenter/ and typing "sign" in the "Enter keyword" box and then clicking the "search" button and selecting "Agricultural Conservation Easement Program - Wetland Reserve Easements Boundary Sign*", by telephone by calling 1 (888) LANDCARE (1 (888) 526-3227) and pressing "2," or by emailing nrcsdistributioncenter@ia.usda.gov. Please note on your order that these signs will be used in the ACEP-WRE. Signs may be shipped directly to the survey vendor or local USDA service center. All orders must include name, company, shipping address, email address, and contact telephone number.

C. Acceptance of Easement Boundary Survey

(1) After the easement boundary survey is complete the surveyor must provide a preliminary survey submittal that is acceptable to NRCS in accordance with the land survey specifications. Upon receipt of an acceptable preliminary survey submittal, the NRCS representative, the landowner, and the surveyor, will conduct an on-site easement boundary field review to ensure that—

(i) The area delineated was the area that the landowner intended to place under the easement.

(ii) The area delineated was the area identified and agreed to by NRCS.

(iii) The access route is accurate and acceptable.

(iv) The easement boundary monuments and witness posts have been installed as required.

(2) The on-site post-survey field review will be documented using the easement boundary survey field review memorandum to the file. A copy of the memorandum to the file may be provided to the landowner. (See Subpart U, "Exhibits," for the easement boundary field review memorandum to the file.)

(3) Following the NRCS review and receipt of an acceptable preliminary survey submittal and the completion of the on-site field review of the surveyed area, NRCS will instruct the surveyor to submit the final easement boundary survey materials to NRCS. NRCS will review the final boundary survey submittal to ensure that it accurately and correctly describes the area of enrollment and satisfies the requirements of the land survey specifications.

(4) Payment for the easement boundary survey may only be issued after the on-site easement boundary field review is completed and the final survey submittal has been reviewed and approved by NRCS.

(5) See section 528.122G for information on incorporating the final easement boundary survey information into the warranty easement deed.

528.124 Finalizing Preliminary Investigations for Easements and 30-Year Contracts

A. General

(1) States will finalize title and environmental due diligence investigations prior to easement closing or 30-year contract execution to conclude preliminary investigations and make final recommendations for acquisition. These investigations must include a thorough examination of both unrecorded and recorded exceptions to the title and a limited phase I. These investigations are to determine whether any existing exceptions to the title, encumbrances, agreements, leases, easements, other clouds on the title, or other circumstances exist that would in any way undermine NRCS's capability to achieve the purposes of the program or exercise the rights being acquired through the warranty easement deed or 30-year contract.

(2) Title review includes an examination of both recorded and unrecorded exceptions to the title of the offered area and will result in findings and recommendations that will be documented by NRCS on Form NRCS-LTP-23, "Certificate of Use and Consent," and the Form NRCS-LTP-27, "Preliminary Certificate of Inspection and Possession" and addenda.

(i) Recorded exceptions will be identified in the title search and underlying documents, typically provided by a closing agent; unrecorded exceptions will be identified during interviews with the landowner and onsite investigations.

(ii) A title search and underlying documents must be obtained and reviewed prior to obligating funds to the APCE or AECLU unless there are extenuating circumstances such as allocations provided with less than 45 business days remaining in the fiscal year. A thorough review of all exceptions must be completed prior to easement closing or 30-year contract execution.

(iii) Additional information on the title review process is provided in the subsections below and in the Subpart U, "Exhibits," on common real estate transaction terms and title exception guide.

(3) At a minimum, States are required to complete a limited phase I prior to obligation of the easement or 30-year contract funds. The limited phase I must include an environmental records search, landowner interviews, and an onsite visit to view present conditions. All three must be completed prior to obligating funds to the APCE or AECLU, unless there are extenuating circumstances, such as allocations provided with less than 45 business days remaining in the fiscal year. The hazardous substance environmental record search must be obtained and reviewed prior to easement closing or 30-year contract execution.

(i) Should the limited phase I reveal issues requiring further investigation, States should complete this themselves or obtain from a qualified outside vendor, a full phase I environmental site assessment that meets the requirements of 40 CFR Part 312. A full phase I, when conducted and provided by qualified, non-NRCS personnel, will use financial assistance funds.

(ii) If, after the completion of the full phase I, it is determined that a phase II environmental site assessment or site remediation is necessary, the application will be determined ineligible. If an APCE or AECLU has been entered into, the agreement will be terminated pursuant to the general provisions of the agreement. The landowner will be informed of the determination and that the application will not be reconsidered until the landowner provides sufficient documentation that all necessary investigations have been completed and that the site has been fully remediated to allow for restoration, inundation, and management of the site consistent with the wetland restoration objectives of the program.

(iii) NRCS will not close on an easement or execute a 30-year contract on property where hazardous substance concerns are identified and are determined by NRCS to pose an unacceptable risk or are sufficient to make restoration unfeasible.

(4) States will finalize title and environmental due diligence investigations to determine impacts and document recommendations as to how to address any existing recorded or unrecorded exceptions to title or environmental due diligence issues. States will provide these findings and recommendations as part of the package requesting a title opinion from OGC, for easements, or EPD approval, for 30-year contracts, as described in the sections below.

B. Identifying Unrecorded Exceptions

(1) Unrecorded exceptions include leases, claims, encumbrances, options, and other evidence that someone other than the landowner has an interest in the property. Information on these unrecorded exceptions will be found through interviews with the landowner or others parties associated with the property and through physical inspections of the property.

(2) At the time of application and prior to entering into an agreement, States must use the landowner disclosure worksheet to prompt the landowner to disclose information about the property that may not be revealed in the title search. (See Subpart U, "Exhibits," for a sample landowner disclosure worksheet.)

(3) States are required to use the Form NRCS-LTP-27, "Preliminary Certificate of Inspection and Possession" and addenda, which provides a mechanism for NRCS to verify and document that there are no apparent, visible activities or uses observed or disclosed that indicate the presence of unrecorded liens, leases, options, or other claims against the property that could impede the landowner's ability to provide clear title to the property or NRCS ability to achieve program purposes. (See Subpart U, "Exhibits," for a NRCS-LTP-27.)

(4) States must complete the most current version of the Form NRCS-LTP-27, "Preliminary Certificate of Inspection and Possession" form and addenda no more than 6 months prior to the easement closing date to verify that:

(i) NRCS has visually and physically inspected the property.

(ii) No work of labor has been performed or any materials furnished in connection with the making of any repairs or improvements to the property that would entitle any person to a lien upon the property for the work or labor performed or materials furnished.

(iii) There are no persons or entities (corporations, partnerships, etc.) which have any rights of possession or other interest in the property adverse to the rights of the landowner or the United States.

(iv) There are no vested or accrued water rights for mining, agricultural, manufacturing, or other purpose; nor any ditches or canals constructed by or being used on the property under authority of the United States, nor any exploration or operations whatever for the development of coal, oil, gas or other minerals on the property; and there are no possessory rights now in existence owned or being actively exercised by any third party under any reservation contained in any patent or patents heretofore issued by the United States for the property except as identified on the certificate.

(v) The there is no unauthorized occupancy of the land.

(5) NRCS should ask the landowner whether there are any existing options or leases on the property for development of any type, including minerals, energy infrastructure, windmills, solar panels, transmission lines, or others. When the property is encumbered by an agricultural lease, NRCS should encourage the landowner to notify the lessee to work with FSA because enrollment in ACEP-WRE may result in payment issues. NRCS must request copies of any written leases or other agreements the landowner identifies during the landowner interviews used to complete the landowner disclosure worksheet or Form NRCS-LTP-27, "Preliminary Certificate of Inspection and Possession" form and addenda or the.

NRCS should be in possession of these items prior to executing the agreement and must be in receipt of these items prior to closing. Unrecorded exceptions must be documented on the Form NRCS-LTP-23, "Certificate of Use and Consent."

C. Identifying Recorded Exceptions

Recorded exceptions to the title will be identified in title search and underlying documents, usually provided by a closing agent. Each recorded exception to the title will have an associated underlying document. All title search and underlying documents must be evaluated by NRCS and a determination made as to the acceptability of each existing recorded exception to the title. States will determine acceptability based on the impact of these exceptions on NRCS's ability to achieve the purposes of the program or the potential of these exceptions to interfere with the rights the United States is acquiring under the warranty easement deed or 30-year contract. States will document the determinations on Form NRCS-LTP-23, "Certificate of Use and Consent."

D. Evaluation of Unrecorded and Recorded Exceptions

(1) The "Certificate of Use and Consent" form must be completed for all easements and 30-year contracts. Each exception must be fully documented as either acceptable or required to be removed or subordinated, or other appropriate remedy. For each exception provide a description of the exception, the recommendation for addressing the exception, and the basis for the recommendation on the Form NRCS-LTP-23, "Certificate of Use and Consent" form. See subpart U's title exception guide for further discussion on making these determinations.

(2) Below are examples of recommendations, brief descriptions, and rationales that may appear on the "Certificate of Use and Consent" form:

(i) Acceptable: Existing 30-foot-wide power line right-of-way on southerly easement boundary, power line located in upland area, no long-term negative impacts anticipated to result from presence or maintenance of power line.

(ii) Must be subordinated or removed: Existing county flowage easement, allows county to remove all vegetation on 5 acres interior to easement, determination that vegetation removal would negatively impact ACEP-WRE habitat restoration.

(iii) Must be subordinated or removed: mortgages.

(iv) Must be removed: judgments, mechanics, or tax liens.

(3) Landowners should be notified of unacceptable exceptions that must be removed or subordinated, leases that must be terminated, or options that must be cancelled early in the investigation processes to allow adequate time for landowners to achieve resolution prior to easement closing or contract execution.

528.125 Easement (Permanent and 30-year) Closing Process

A. General

Once NRCS has concluded eligibility determinations, surveys, easement compensation, investigations, and document preparation, States will prepare the preliminary title opinion request to submit to OGC. Easement closing may proceed only after a preliminary title opinion has been provided by OGC and closing instructions have been provided by NRCS. Easement closing will generally be executed through the use of a closing agent. NRCS will prepare the warranty easement deed and necessary exhibits for recordation. Once the easement has been recorded, NRCS must obtain and review the final title insurance policy and request a final title opinion from OGC. The easement acquisition process is complete when OGC issues its final title opinion to NRCS, confirming that title is vested in the United States.

Note: Each OGC office has its own procedures for issuing preliminary title opinions and final title opinions. Pursuant to 40 U.S.C. Section 3111, NRCS is not authorized to issue an easement payment until OGC has approved the sufficiency of title to the land for the purpose for which it is being acquired. Therefore, the procedures described in this section may be modified to meet OGC requirements.

B. Closing Agents

(1) The term "closing agent" refers to the person or entity that prepares and provides the documents and services needed to complete the easement acquisition transaction. While in transactions between private parties the closing agent is typically not an agent of either party, in ACEP-WRE easement transactions between NRCS and the landowner, the closing agent is hired by NRCS and thus is considered a buyer's agent. The closing agent may be a title company, escrow company, qualified private attorney, abstractor, or Federal employee familiar with the preparation of such evidence in the jurisdiction in which the lands are situated.

(2) Closing agent services for easement transactions typically include the following:

(i) Providing title search and underlying documents

(ii) Providing a commitment to provide title insurance (title commitment binder or other acceptable document)

(iii) Obtaining signatures on "Subordination Agreement and Limited Lien Waiver," Form AD-1158 or successor form or equivalent subordination document approved by OGC

(iv) Obtaining signatures on warranty easement deed

(v) Ensuring that exceptions are addressed according to NRCS and OGC instructions

(vi) Recording easements and other documents

(vii) Issuing the easement payment through an escrow account

(viii) Issuing the appropriate Internal Revenue Service (IRS) Form 1099 to the landowner for the easement transaction

(ix) Providing the ALTA closing protection letter and ALTA U.S. Policy Form 9-28-91 (Revised 12/3/2012) title insurance policy

(x) Other functions, as necessary, or which may be required by State law or by the OGC title opinion to finalize the easement transaction, as detailed in the closing instructions provided by NRCS to the closing agent (see Subpart U, "Exhibits," for examples of closing instructions)

(3) Secure closing agent services through an appropriate procurement method and following proper contracting rules and procedures. NRCS may work with the OGC to develop a task order from a blanket purchase agreement or a statement of work for acquiring closing agent services (see Subpart U, "Exhibits," for closing services scope of work and closing agent requirements). The task order must list all necessary closing agent responsibilities, qualifications, and conditions.

(4) The State Conservationist will ensure that the closing agent is qualified and certified by law to perform the required services in the State in which the land lies, and that he or she is experienced, financially responsible, and reputable. Prior to issuing funds, the State Conservationist must obtain countersigned closing instructions in which the closing agent certifies these requirements are met.

C. Title Search Documents and Commitments

(1) The closing agent will provide the title search, underlying documents, and a commitment to provide title insurance. Commitments, binders, preliminary reports, or other forms of preliminary title evidence are acceptable if they—

(i) Are customarily used in the location.

(ii) Are acceptable to the reviewing attorney.
(iii) Are issued by a qualified closing agent.
(iv) Are based upon a preliminary title search.
(iv) Commit the company to issue the approved American Land Title Association (ALTA) U.S. Policy Form 9-28-91 (Revised 12/3/2012) title insurance policy.

(2) The title search documents provide information necessary for NRCS to—
(i) Make eligibility determinations related to the impacts of title encumbrances.
(ii) Complete Form NRCS-LTP-23, "Certificate of Use and Consent."
(iii) Identify actions the landowner must take to resolve exceptions and provide clear title.
(iv) Prepare any necessary Form AD-1158, "Subordination Agreement and Limited Lien Waiver," or successor form.
(v) Prepare the warranty easement deed.

D. Title Insurance

(1) Prior to closing, closing agents will be required to submit an ALTA closing protection letter or its equivalent (see Subpart U, "Exhibits," for a sample closing protection letter).

(2) An ALTA title insurance policy on the ALTA U.S. Policy Form 9-28-91 (Revised 12/3/2012) will be acquired on all easements, including the ingress and egress routes. The closing agent must ensure that the ALTA title insurance policy—
(i) Includes only those title exceptions approved in advance by NRCS and OGC.
(ii) Is written for the full amount of the easement acquisition compensation identified in the warranty easement deed.
(iii) Identifies "The United States of America" as the insured party.
(iv) Declares that the interest being insured is an easement.
(iv) Is acquired from a source qualified and authorized by law to issue title insurance policies and approved by the State insurance commissioner or equivalent in the State in which the land is located.

(3) Title insurance will be obtained through an appropriate procurement method and following proper contracting rules and procedures. Costs for title insurance will not exceed what is considered fair and reasonable.

E. Easement Preparation

(1) The warranty easement deed, exhibits to the deed, and any applicable "Subordination and Limited Lien Waiver" (AD-1158 or successor form) will be prepared by NRCS and reviewed by OGC based on information received on the following:
(i) The title review process.
(ii) Form NRCS-LTP-23, "Certificate of Use and Consent."
(iii) Exhibits A and B: easement boundary and ingress and egress legal surveys and description.
(iv) Exhibit C.—Part II, subpart E (subsurface resource restrictions) of the warranty easement deed, if applicable, to explain how oil, mineral, and gas resources may be extracted from the easement area such that adverse impacts to the habitat functions and values are avoided or minimized.
(v) Exhibit D.—Water rights and water uses, if applicable, will be investigated and any water rights necessary to accomplish the objectives of the easement will be identified, negotiated, and captured in exhibit D, to be recorded with the warranty easement deed.
(vi) Exhibit E.—Reserved grazing rights, if applicable, a grazing management plan will be developed and benefits, extents, and purposes will be captured in exhibit E, to be recorded with the warranty easement deed.
(vii) Basis for the easement compensation amount.

(2) Special provisions may only be inserted in the warranty easement deed for unique legal issues, as determined necessary by the national ACEP-WRE manager and OGC in Washington, DC. Special provisions are not to be used for management or compatible uses.

F. Transmitting Documents to OGC for Preliminary Title Opinion (PTO)

(1) 40 U.S.C. Section 3111 provides that public money may not be expended to purchase land or any interest in land unless the Attorney General (or his or her delegate) gives prior written approval of the sufficiency of the title to the land for the purpose for which the Federal Government is acquiring the property. OGC is the delegate of the Attorney General for approving the sufficiency of title for easements acquired by USDA agencies. Title review, issues and topics are governed by U.S. Department of Justice regulations, DOJ Title Standards 2001, and applicable program requirements.

(2) To comply with these requirements, upon completion of NRCS investigations, the documents as listed on the OGC "Preliminary Title Opinion Docket Checklist" will be assembled and transmitted to the regional OGC office for issuance of a preliminary title opinion (PTO). (See Subpart U, "Exhibits," for OGC PTO checklist) The PTO reveals the current status of title, sets forth requirements, and documents OGC's approval of title subject to the satisfaction of any requirements contained in the PTO and closing instructions. The regional OGC may further specify the format and any additional content necessary for their review.

(3) The PTO issued by OGC will—

(i) List exceptions to clear title, if any, which must be resolved prior to recording the easement and making payment to the landowner.

(ii) Provide information for closing instructions.

(iii) Document that OGC approved the sufficiency of title to the land for the purpose for which the agency is acquiring the easement and authorize the agency to proceed with the acquisition subject to the satisfaction of the requirements contained in the PTO and closing instructions.

(4) Only OGC has authority to provide a title opinion to NRCS. The transaction must be closed in accordance with the PTO and closing instructions. Only those title exceptions approved by OGC and NRCS may appear on the final policy of title insurance.

G. Issuing the Easement Payment and Perfecting the Easement

(1) Easements must not be closed and no payments shall be made unless and until OGC issues a PTO and all requirements in the PTO are completed. NRCS will not expend WRE funds to acquire land or an interest in land unless the sufficiency of title has first been approved by OGC. To the extent that title exceptions arise prior to closing that were not considered by OGC in the PTO, those exceptions must be removed prior to closing. If necessary to address new title exceptions, States must seek an amended PTO from OGC.

(2) Upon receipt of the PTO from OGC, NRCS will provide the closing instructions and PTO to the closing agent and copies for the landowner and the local NRCS office. Upon receipt of the PTO and closing instructions, the closing agent must provide NRCS with a completed and signed ALTA closing protection letter.

(3) The APCE specifies that NRCS may provide payment to the landowner through an escrow account managed by NRCS's selected closing agent. The landowner approves the payment to the escrow account through the execution of the APCE, and, therefore, a separate Form NRCS-CPA-1236, "Assignment of Payment," does not need to be executed by the landowner. The landowner's receipt of a copy of the closing instructions will notify the landowner of the identity of the closing agent selected to handle the easement transaction. The financial officer will identify the closing agent as the assignee for payment in FMMI.

Note: If a landowner is executing a 1031 exchange, the closing agent should be identified as an alternate payee in FMMI.

(4) The closing agent will handle the funds in the escrow account in accordance with the OGC PTO and closing instructions provided by NRCS for ultimate disbursement of the proceeds to the landowner. The escrow account must be fully insured by the closing agent to ensure that Federal funds are not lost due to bank failure or otherwise.

(5) NRCS will order the easement funds disbursed to the closing agent no more than 30 calendar days prior to scheduled easement closing. The closing agent may not hold the funds in escrow for more than 30 calendar days. If the easement cannot be closed within 30 calendar days, the closing agent must return the funds (and any accrued interest) to NRCS in accordance with NRCS instructions. When closing does not occur within 30 days of an advance payment, the State program manager should notify financial management staff immediately. Financial staff will follow current policy regarding cost recovery of an advance payment.

(6) The easement payments must be issued through an escrow account unless State laws prohibit this method or the State, EPD, and the regional OGC office have agreed to an alternative method. In those cases, NRCS may issue the easement payment directly to the landowner. If NRCS issues the easement payment directly, NRCS must generate and issue the appropriate IRS-1099 forms or inform the landowners in writing that the landowner is responsible for correctly reporting any the easement compensation amount as identified in the warranty easement deed and any payments received, even if an IRS Form 1099 is not issued.

(7) The closing agent will close the easement in accordance with the closing instructions.

(8) Upon receipt of the recorded documents and final ALTA U.S. Policy Form 9-28-91 (Revised 12/3/2012) title insurance policy from the closing agent, NRCS will execute Form NRCS-LTP-22, "Final Certificate of Inspection and Possession," to verify that the OGC title opinion and NRCS closing instructions were followed, verify that there are no new exceptions to the title, and determine the current ownership configuration.

(9) NRCS will then transmit copies of the recorded easement documents, copies of the recorded releases, subordinations or other resolutions required by the PTO, a copy of the final title insurance policy, and Form NRCS-LTP-22, "Final Certificate of Inspection and Possession," and addenda to the OGC regional attorney. The OGC regional attorney will review the submitted documents and inform NRCS if additional documents are needed before issuing a final title opinion (FTO).

(10) Payment will be processed to the closing agent for the closing services upon verification that all NRCS closing instructions and OGC title option instructions have been followed and the final ALTA U.S. Policy Form 9-28-91 (Revised 12/3/2012) title insurance policy is correct.

H. Reporting Easement Actions with Farm Service Agency (FSA)

(1) Once NRCS executes the APCE, NRCS will provide to the local and state FSA office in writing the information needed for FSA to track the 25-percent county cropland acreage cap of land enrolled in the ACEP-WRE and the Conservation Reserve Program. This information will include a map of the easement area and accompanying soils information if the easement area includes "subclass w" soils in the land capability classes IV through VIII. NRCS must ensure the 10-percent county cropland acreage cap on land enrolled in an ACEP-WRE easement is not exceeded. FSA county cropland records will be the basis for tracking ACEP-WRE acreage percentages. ACEP-WRE easements enrolled on noncropland acres or on cropland situated on exempted "subclass w" soils, as determined by NRCS, do not count against the 10-percent cropland limitation.

(2) Once NRCS has recorded the warranty easement deed, it will notify the local and state FSA office of the date that the easement was recorded and the total acreage enrolled and will

document such notification in the case file. (See Subpart U, "Exhibits," for sample FSA notification.)

(3) The landowner is responsible for working with FSA to retire or transfer base acres associated with the easement area prior to closing the ACEP-WRE easement. In situations in which the landowner has the option to transfer base acres to another farm or tract, those landowners will work directly with FSA to facilitate the exchange.

528.126 Thirty-Year Contract Execution Process

A. Thirty-Year Contract Preparation

(1) The actual 30-year contract document and exhibits will vary based on how the land is owned, specifically whether the lands are held in Tribal trust by the Bureau of Indian Affairs, are Tribal lands, allotted lands, or are individually held. States should contact the Easements Program Division (EPD) early in the enrollment process to determine the correct 30-year contract document needed based on the ownership of the individual enrollment.

(2) States must assemble a 30-year contract package for each 30-year contract that will contain copies of the following documents and transmit the package to the EPD for review and approval:

(i) Unsigned 30-year contract and completed exhibits

(ii) Boundary description and map of the contract area and access route (GPS)

(iii) Form NRCS-LTP-27, "Preliminary Certificate of Inspection and Possession" form and addenda with attachments

(iv) Landowner Disclosure Worksheet

(v) Form NRCS-LTP-23, "Certificate of Use and Consent"

(vi) Limited phase I that includes an "Environmental Records Search" report, the hazardous materials landowner interview, and the hazardous materials field inspection checklist

(vii) Title search or title status report with copies of underlying documents

(viii) Any appropriate title clearance documents or explanation of acceptance related to the title search report

(ix) The signed AECLU and any extension

(3) The transmittal of the 30-year contract package to EPD should be completed at least 30 days prior to the anticipated date for signing the contract. Upon review of the 30-year contract package, the EPD will issue an acceptance and approval-to-pay notification.

B. Issuing the 30-year Contract

There is no title insurance policy obtained on 30-year contracts; therefore, an updated title search report must be obtained and reviewed by the State no more than 3 months prior to the landowner signing the 30-year contract. This is to ensure that no changes to the title have occurred since the initial report was reviewed that would impact NRCS's entering into a 30-year contract on the property. If the updated title search reveals that unacceptable changes have occurred since the EPD approval was received, the new title report must be sent to EPD for review.

C. Issuing the 30-year Contract Payment

Once the landowner signs the 30-year contract, no Form AD-1161 is necessary. The signed 30-year contract will serve as authorization to issue payment to the landowner. Contract payment will be reduced by the amount identified in the final WRPO as the landowner's share of the restoration costs. By signing the AECLU, the landowner agrees that NRCS will withhold from the contract payment an amount equivalent to 25 percent of the projected restoration costs.

528.127 Records Management

A. The following materials related to acquiring, monitoring and enforcing an ACEP-WRE easement must be maintained in a secure fireproof file area at the NRCS State office:

(1) The title folder containing acquisition documents and acquisition-related correspondence, including, at a minimum, all application, eligibility determination, and waiver requests and findings, all items included in the OGC PTO docket package, the OGC title opinions, closing instructions, the final title insurance policy, a copy of the recorded deed and all exhibits, and any easement or related cost payment documents.

(2) Documentation of easement compensation determination, including any GARC worksheets or if an individual appraisal was used, any agency-approved appraisal reports, administrative appraisal reviews, and technical appraisal review reports that must be retained in the official NRCS file associated with the easement.

(3) Copies of monitoring records and any records generated as a result of violations or enforcement proceedings. See subpart P of the Common Easement Provisions Manual for more detail (440 CPM 527).

B. Easement acquisition, monitoring and enforcement materials must be retained in the NRCS State office for the duration of the easement. Do not send ACEP-WRE easement acquisition files to the archives, as monitoring and maintenance requires access to file documents for the life of the easement.

C. Copies of easement acquisition documents may be kept in the field office.

D. Cancelled files will be kept for the term of the Farm Bill under which they applied.

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart N – ACEP-WRE Restoration

528.130 Overview

A. This subpart provides guidance related to the development of a wetland reserve plan of operations (WRPO) for all enrollment types. The WRPO will be established and maintained in the designated NRCS conservation planning system, as applicable, and conform to the Title 180, National Planning Procedures Handbook (NPPH), Part 600. See Subpart U, "Exhibits," for the ACEP-WRE business process.

B. For all lands in the ACEP-WRE, NRCS must develop a WRPO, requesting input from the landowner and partners. It is NRCS's intent to engage the landowner in implementing the WRPO. It must be clear to the landowner that the WRPO does not supersede or modify the rights acquired by the United States by and through NRCS under the terms of the warranty easement deed. NRCS will explain to the landowner the ACEP-WRE purposes and objectives to be achieved through the WRPO and how the conservation practices and activities identified in the WRPO will result in a project that both NRCS and the landowner can consider successful.

C. NRCS will provide funds towards establishing conservation practices, measures, and activities on the easement or 30-year contract lands necessary to protect the wetland's functions and values, including necessary maintenance activities, to the extent that NRCS determines that funding is appropriate. Funding for practices, measures, or activities, outside the easement or 30-year contract is not authorized or allowed.

D. To enroll in ACEP-WRE, a landowner must agree to the implementation of a WRPO, the effect of which is to restore, protect, enhance, maintain, and manage hydrology, native vegetation, natural topography, and other landscape features of eligible lands. The landowner's agreement to the implementation of a WRPO is documented in the document used to enroll the land into ACEP-WRE. The terms of the warranty easement deed and 30-year contract continue such agreement for the duration of the enrollment.

528.131 General

A. Purpose

(1) The WRPO will specify the manner in which ACEP-WRE land will be restored, protected, enhanced, maintained, and managed to accomplish the goals of the program. It will be developed to ensure that cost-effective restoration and maximization of wildlife benefits and wetland functions and values will result. NRCS may review, revise, and supplement the WRPO, as needed, to ensure that program goals are fully and effectively achieved.

(2) Specifically, the WRPO will consider and address, to the extent practicable, the onsite alterations and the offsite watershed conditions that adversely impact the hydrology and associated wildlife and wetland functions and values.

(3) The wetland, upland, and other habitat components of the ACEP-WRE easement or contract area will be restored, as defined below, to the maximum extent practicable. NRCS will work with the landowner, the U.S. Fish and Wildlife Service (FWS), and other conservation partners to restore the native plant communities and hydrologic regimes that maximize the habitat benefits for wetland-dependent wildlife in a cost-effective manner.

B. Definition of Restoration

(1) The ACEP-WRE regulation defines wetland restoration as "the rehabilitation of degraded or lost habitat in a manner such that:
   (i) The original vegetative plant community and hydrology are, to the extent practicable, reestablished; or
   (ii) A community different from what likely existed prior to degradation of the site is established. The hydrology and native self-sustaining vegetation being established will substantially replace original habitat functions and values and does not involve more than 30 percent of the easement (enrolled) area."

(2) This flexibility exists to do the following:
   (i) Enable NRCS to assist landowners with meeting their wetland and wildlife habitat goals.
   (ii) Provide for a full array of varying wetland conditions that existed in the local area, even if they cannot be shown to have existed on a particular site.
   (iii) Conduct restoration activities that provide valuable wildlife habitat and wetland functions in locations where it is impossible to establish the original community or hydrologic regime.

(3) Information on historic, original, and alternative communities should be documented to aid in restoration and enhancement design considerations.

(4) When special-status species, such as at-risk, endangered, threatened, or species of concern, or unique, rare, or declining habitat types are used for ranking purposes, an appropriate extent of the restoration will be targeted to provide suitable habitat for those species or to restore the identified habitat types. The restoration of these special-status species habitats and unique habitat types may be part of the restoration of the original or alternative communities.

C. Partnerships

(1) NRCS—
   (i) Will develop and maintain partnerships that will contribute to the restoration, management, and monitoring of wetland and ecosystem functions and values during and beyond the life of the ACEP-WRE easement or 30-year contract.
   (ii) Will request input from the FWS, State wildlife agencies, and the local conservation district to obtain restoration planning and implementation technical assistance to achieve maximum restoration potential.
   (iii) May enter into agreements with Federal or State agencies, conservation districts, and private conservation organizations to assist NRCS with program implementation, including the provision of technical assistance for development and implementation of restoration plans and management and monitoring of existing ACEP-WRE lands.

(2) To the extent possible, NRCS will work with landowners and other partners who can contribute resources to the ACEP-WRE project. However, NRCS is ultimately responsible for ensuring that ACEP-WRE objectives are fully met and is the final authority regarding the use of ACEP-WRE funds and the practices and activities prescribed on ACEP-WRE lands.

528.132 Restoration Requirements

A. General

(1) The landowner will be provided the opportunity to participate in the development of restoration, management, maintenance, and any future enhancement plans for the easement or 30-year contract. NRCS is the final decision-maker for WRPO development and content.

(2) The WRPO will—
   (i) Be consistent with resource-conservation planning requirements contained in 180-NPPH, Part 600, except where modified by the requirements of this part.

(ii) Include practices meeting NRCS standards and specifications developed for the local Field Office Technical Guide (FOTG), including approved interim standards.

(iii) Have conservation practices, extents, schedule, and geospatial data entered in Customer Service Toolkit and uploaded to the National Conservation Planning Database.

(iv) Focus on providing maximum habitat benefits for migratory birds and other wetland-dependent wildlife, including special-status species.

(v) Include necessary management, operations, and maintenance practices, activities, and guidelines.

(3) Restoration practices, whether completed by the landowner or NRCS, should begin within 1 year of the easement recording or the date the 30-year contract is signed by the State Conservationist. **Restoration activities will be completed within 3 years of such date unless there are extenuating circumstances approved and documented by the State Conservationist.**

(4) Practices will be maintained for the useful life of the practice, as designated in the FOTG.

(5) NRCS will identify in the WRPO whether the landowner has agreed to assume operations and maintenance (O&M) responsibilities or how such responsibilities will be met. If the landowner or a partner is unable or unwilling to perform necessary O&M activities, restoration practices and extents may need to be modified to accommodate NRCS's capacity to conduct O&M.

B. Restoration of Hydrology

(1) The WRPO will address the restoration and enhancement of hydrology to provide the greatest environmental benefits for the funds expended. State Conservationists will consider and address, to the extent practicable, the landscape throughout the watershed that has been adversely impacted and maximize opportunities to enhance wetland functions and values.

(2) Hydrology restoration will reestablish the conditions that existed prior to manipulation to the maximum extent practicable. NRCS will examine direct onsite manipulations and offsite watershed effects when determining hydrology restoration potential. In cases in which either onsite or offsite alterations have diminished hydrology (i.e., timing, duration, depth, and extent of inundation) of the enrollment area, it may be necessary to implement structural measures to establish hydrologic conditions that mimic predisturbance characteristics had these onsite or offsite effects not existed.

(3) Hydrology restoration measures taken to compensate for onsite or offsite hydrologic effects are considered appropriate restoration measures and will be eligible for funding on the enrollment area. These measures may include but are not limited to the removal of fill from former temporary or seasonal wetland depressions and historical oxbows, complete ditch filling, macro and micro topography development, riparian dike removal, or installation of dikes or water-control structures.

(4) WRPOs with structural practices must address hydrology management (i.e., temporary flooding of wetlands and draw-down periods) that replicates the wetland hydrology and supports the wetland and habitat types that existed prior to manipulation. Hydrology restoration and management for wetland types different from what likely existed prior to degradation of the site will not involve more than 30 percent of the enrollment area.

(5) If active management of hydrology is necessary, the WRPO will specify the management objectives, guidelines, and activities. The management component of the WRPO will outline the appropriate amount of water to be available during key periods for targeted wildlife species and habitat objectives throughout the year.

Examples: Water levels will be managed to ensure that early fall migrants and late spring migrants have water. Water drawdown may be required to provide shorebird feeding areas.

In addition, resident species, such as amphibians, reptiles, fish, and nesting birds, should have water available during their breeding cycle.

(6) If hydrology management will be conducted by the landowner, the WRPO will also describe the requirement and process for the landowner to obtain any necessary compatible use authorizations needed to implement the activities, more fully described in subpart P, section 528.152.

C. Alternative Communities

(1) An alternative community is an assemblage of plant and animal species that occurs naturally in the general landscape area in which the easement or 30-year contract site is located. It is not the community that would occur naturally on the specific site being restored.

(2) **No more than 30 percent** of the easement or 30-year contract area may be established to an alternative community. The establishment of alternative communities is optional and not required. The purpose of the alternative community should be to—

(i) Substantially replace original habitat functions and values of the site.

(ii) Provide habitat types or elements limited in the area.

(iii) Address limiting conditions for wildlife.

(iv) Establish enhanced habitat conditions for special status species.

(v) Establish unique, rare, or declining habitat types.

(3) Examples of alternative communities include the following:

(i) Rather than restore a bottomland hardwood site to all trees, a portion of the site could be restored to an emergent marsh condition.

(ii) A portion of the area may be managed for early successional habitat if it provides a missing habitat element for the targeted species. Management could include such actions as mowing or burning.

(4) Measures taken to counteract offsite hydrologic effects are not counted against the 30 percent. For example, a watershed's hydrology may be significantly modified by the presence of flood-control levees or dams such that the site cannot return to its historic, hydrologic regime without additional manipulation of onsite hydrology to mimic those historic conditions.

528.133 Restoration Practices

A. The State Conservationist will identify, with advice from the State Technical Committee, FWS, State wildlife agency, and conservation districts (CDs), practices and activities that are eligible for cost-share assistance. With consideration of the initial installation cost and long-term maintenance costs, any reasonable practice or activity needed to restore and enhance ACEP-WRE lands is eligible.

B. When associated with an ACEP-WRE restoration project, wetland enhancement or creation practices on upland acres are considered eligible conservation practices for funding when they contribute to the restoration objectives and are technically feasible.

C. Installation of fences, including boundary fences, to control the access of livestock to the easement or 30-year contract area is an appropriate restoration practice when the fence is justified based on the impacts livestock will have on the area's wetland functions and values. When NRCS determines a fence to be necessary, the fence must be designed to enable wildlife movement into and out of the enrolled area.

D. Cross-fencing and livestock-watering facilities to manage grazing within the easement area are not eligible practices unless authorized by the State Conservationist.

528.134 Preliminary and Final Wetland Reserve Plan of Operations (WRPO)

A. WRPO: Purpose and Development

(1) The development of the preliminary WRPO begins during the onsite ranking visits with the landowner and NRCS, with input from FWS requested. Other partnering agencies, such as the State wildlife agency and CD representatives, should be included in the planning process, if available. The preliminary WRPO is developed concurrently with the ranking process described in subpart L.

(2) The purpose of the preliminary WRPO is to provide sufficient information to allow the landowner to understand the project's anticipated scope and effect, including habitat objectives and anticipated restoration, management, and O&M requirements, and to allow NRCS to develop a reasonable cost estimate for ranking purposes. This basic information is necessary for both parties to determine whether to proceed in the enrollment process.

(3) If, at this point in the process, the landowner and NRCS cannot come to agreement on the practices and on the management, operation, and maintenance activities that will be applied to restore, protect, and maintain the wetland and wildlife values, the process should be ended and the application cancelled. NRCS is the final decisionmaking authority regarding what will be contained in the preliminary WRPO.

(4) Depending on the enrollment type, the extent of the completion of the WRPO at different points in the enrollment process will vary, as follows:

(i) For all permanent easements:

- Prior to Easement Fund Obligation.—The preliminary WRPO must provide sufficient information for cost estimation for ranking purposes, landowner concurrence with the conceptual plan, and initial obligation of restoration funds.
- Prior to Easement Closure.—The preliminary WRPO may be further refined during the acquisition process and must include all elements listed below prior to easement closure.
- Prior to Final Obligation of Restoration Funds.—The final WRPO and associated contracts are required to obligate restoration funds to the obligating documents through which the funds will be paid.

(ii) For all 30-year contracts, 30-year easements, or less than permanent easements due to maximum duration allowed by State law:

- Prior to Easement or 30-year Contract Fund Obligation.—The preliminary WRPO must provide sufficient information for cost estimation for ranking purposes, landowner concurrence with the conceptual plan, and initial obligation of restoration funds.
- Prior to 30-Year Easement Closure or 30-Year Contract Execution.—A final WRPO must be developed and signed by all parties. NRCS will withhold from the easement or contract payment an amount equal to 25 percent of the final WRPO restoration costs.

B. Preliminary WRPO: Plan Elements

(1) The exact content and format of the preliminary WRPO will be established by the State Conservationist to address specific needs in the State.

(2) The preliminary WRPO—

(i) Will provide sufficient information to—

- Allow the landowner to understand the project's anticipated scope and effect.
- Allow NRCS to develop a reasonable cost estimate for ranking purposes.

(ii) Identify restoration and wildlife habitat improvement goals and objectives (e.g., identify species being targeted), such as the approximate acres of various habitats to be restored and enhanced; any unique project characteristics, such as threatened and endangered species habitat; and the associated management needs.

(iii) Identify conservation practices and includes sufficient engineering and design to reasonably estimate practice costs. However, such details as timing of installation, species composition for plantings, exact lengths and widths of dikes, or specifications for water control structures should be left to the final WRPO planning phase.

(iv) Describe partner contributions, including funds and in-kind services.

(v) Include an NRCS environmental evaluation using Form NRCS-CPA-52, which should be completed as part of the planning process and should include any necessary associated documentation to comply with National Environmental Policy Act (NEPA) requirements.

(vi) Broadly outline anticipated management, operations, and maintenance activities based on planned habitat objectives and anticipated practices.

C. Preliminary WRPO: Map Elements

At minimum, the preliminary WRPO plan map will consist of—

(i) An aerial photo and map that identify the offered land, ingress, egress, and the approximate location of practices that will be established.

(ii) Acres of various existing and planned habitats. (See Subpart U, "Exhibits," for habitat classification information.)

(iii) A soils map.

D. Final WRPO Contents

(1) The exact content of the final WRPO will be established by the State Conservationist to address specific needs in the State and to meet the restoration, enhancement, and protection goals and management and maintenance needs of the enrolled area.

(2) State Conservationists must ensure that the WRPO is developed, to the extent possible, in a manner that provides for cost-effective restoration, enhancement, management, and maintenance that maximizes natural wildlife benefits and wetland functions and values. At minimum, the conservation practices, extents, and schedule will be entered into Customer Service Toolkit.

(3) The State Conservationist will review, revise, and supplement the WRPO as needed throughout the duration of the enrollment to ensure that program goals are fully and effectively achieved.

(4) The final WRPO—

(i) Does not have to be completed prior to the closing of a permanent easement.

(ii) Must be completed prior to the closing of less than permanent easement (either a 30-year easement or maximum duration allowed by State law).

(iii) Must be completed prior to the execution of a "30-year Contract for Land Use with Tribes" and will be attached as an exhibit to the 30-year contract.

(iv) Plan extents and cost estimates serve as the basis for the funds to be withheld from the 30-year or maximum duration easements or 30-year contract payment to the landowner as described in section subpart O.

(iv) Must be completed prior to the final obligation of restoration funds for all enrollment types.

(5) The State Conservationist will establish a review process to ensure that final WRPOs—

(i) Achieve program goals and objectives, including ensuring long-term wetland protection and cost-effective restoration that maximizes natural wildlife benefits and wetland functions and values.

(ii) Incorporate specific goals, objectives, and practices to address the restoration and management of the habitat and species for which it was ranked.

Example: If the site scored high because of the potential or presence of a rare plant, the site must be restored and managed consistent with the protection of that plant.

(iii) Include specific wildlife measures, including measures for endangered and threatened or at-risk species when appropriate.

(iv) Comply with NEPA, the Endangered Species Act (ESA), and other applicable Federal requirements.

(v) Consider State and local requirements.

(vi) Identify management and O&M activities for planned practices, and, if known, describe anticipated compatible-use activities, such as grazing and mowing, periodic vegetation management activities, and manipulation of water levels (see subpart P).

(6) At a minimum, each plan should be reviewed by persons having expertise in wetland ecology, wildlife management, and engineering.

(7) The final WRPO must consist of the following:

(i) Resource inventory

(ii) Description of the objectives of restoration

(iii) Acres of various existing and planned habitats (See Subpart U, "Exhibits," for habitat classification information) (iv) Description of habitat types and functions being restored or enhanced, including any unique habitat types and target species for which the restoration is designed

(v) Habitat needs of migratory birds and other species identified during the ranking process, including at-risk species and threatened and endangered species

(vi) Management of hydrology and vegetation to maximize wildlife benefits throughout the year, as appropriate for the wetland type being restored

Note: Compatible use authorizations (CUAs) are required for implementation of such management activities, but detailed descriptions in the WRPO provide a comprehensive description of the overall management objectives of the enrolled area and allows for easy cross reference between the WRPO and the applicable CUAs.

(vii) Description of conservation practices and activities required for restoration, enhancement, and protection of the site, such as planting plans, water control structure locations and capacities, cut-and-fill re-contouring designs, levee locations, management tools, and schedules

(viii) Schedule of dates for implementing practices and activities

Note: The first practice should be scheduled within 1 year of closing the easement or executing the contract, and restoration should be scheduled for completion within 3 years of that date.

(ix) Payment rates, practice costs, and partner contributions

(x) Date that FWS, State wildlife agency, and CD technical assistance was requested, and a brief summary of any input received

(xi) Restoration plan map, following guidance in 180-NPPH, Part 600, Subpart C, Section 600.31, which includes:

- Field numbers
- Boundaries of the easement or contract area
- Acres of the easement or contract area
- Practice locations
- Land uses

- Restored wetlands
- Other lands
- Access routes
- Utility locations
- Cultural resource locations
- Planned wetland system

(xii) Photographs that document site conditions before, during, and after restoration, with location points of photography recorded on a map of the easement or contract area, and with the points located to adequately serve as future monitoring photo points,

(xiii) Documentation required for implementation and maintenance of the required practices, including job sheets, engineering designs, and O&M sheets,

(xiv) Noxious weed and pest control strategies,

Note: The landowner is responsible for noxious weed control and emergency control of pests, as required by all Federal, State, and local laws. A control plan using integrated pest management strategies (IPM) must be approved in writing by NRCS prior to implementation by the landowner. A compatible use authorization is required for implementation of the IPM.

(xv) Management plan and O&M guidelines and requirements.

Note: See subpart P for specific policy requirements on NRCS management and maintenance responsibilities.

E. WRPO Revisions

(1) The State Conservationist may approve changes to the WRPO that do not affect provisions of the easement or 30-year contract. The State Conservationist will seek input from the landowner and consider site-specific technical input from FWS and the conservation district. Any changes to the WRPO must meet ACEP-WRE program objectives and must result in equal or greater wildlife benefits, wetland functions and values, and ecological and economic values.

(2) A revision to the final WRPO may result in the addition of new conservation practices or activities required for enhancement, maintenance, management, or repairs to protect the functions and values of the enrollment that were not included in the original copy of the final WRPO. Any new conservation practices will be entered into Customer Service Toolkit and reflected on the Customer Service Toolkit map.

528.135 Compliance With Other Requirements

A. General

(1) The simple purchase of an ACEP-WRE easement from a landowner does not require compliance, including mandatory consultation with State historic preservation officers (SHPOs) and federally recognized Tribes or their Tribal historic preservation officers (THPOs) under section 106 of the National Historic Preservation Act (NHPA). This is because such action, in and of itself, is not a Federal undertaking that has the potential to affect historic properties (defined as historic or cultural sites, buildings, objects, and landscapes that meet the criteria for listing in the National Register of Historic Places).

(2) When NRCS plans to perform restoration activities or permit any actions on a ACEP-WRE easement that has the potential to result in a direct or indirect physical change to a historic property, NRCS will comply with the section 106, as outlined in the implementing regulations (36 CFR Part 800) or State office procedures negotiated under a State-level

agreement with SHPO and State Tribal consultation protocols required for other NRCS-assisted projects, as outlined in Title 190, National Cultural Resources Procedures Handbook, Part 601.

(i) NRCS field personnel must follow their State procedures and work with their cultural resources specialists or coordinator to identify, evaluate, and protect historic properties that are in the area of potential effect for any restoration or enhancement activities.

(ii) Under no circumstances may NRCS personnel delegate these section 106 compliance responsibilities to a partner or other non-NRCS entity.

(3) When a project raises complex cultural or archaeological resource-protection issues, NEPA issues, or ESA issues, the State Conservationist is encouraged to contact the National ACEP-WRE Manager, who will consult with the appropriate NRCS National Headquarters specialist regarding the utilization of financial assistance funds to address such issues.

B. Public Drainage Systems

(1) The restoration plan will include the full extent of such public drainage rights and any specific agreements that may have been developed during the title-clearance process relative to how the public drainage entity plans to exercise those rights.

Example: A county drainage commissioner may have the full right to maintain a major drain through the easement. However, during restoration planning, the commissioner may agree to specific maintenance approaches that would reduce the impact on wetlands restoration needs. Such agreements should be confirmed through a consent agreement or a similar document.

(2) The State Conservationist will ensure that the ACEP-WRE restoration requirements do not conflict with public drainage rights, when applicable, and will clearly note the presence of such rights in the WRPO.

(3) NRCS assumes full responsibility for its actions to restore the easement or 30-year contract lands. However, NRCS will not assume any responsibility that the fee owner or other holder of the public drainage rights may have for carrying out subsequent drainage responsibility of those that fall outside of the possessory interests that the United States has obtained through easement or 30-year contract.

528.136 Design and Implementation

A. Design Requirements

(1) The engineering design and surveys required for installation of conservation practices or measures may be provided by NRCS, a qualified vendor, or a technical service provider (TSP). Design work provided by a vendor or TSP is considered a technical assistance activity. Financial assistance funds may not be used for engineering design and survey expenses. Services may be acquired through Federal contracts or cooperative, contribution, or interagency agreements.

(2) Conservation practice design and implementation will be accomplished in accordance with all NRCS policy and procedures, including applicable practice standards contained in the Field Office Technical Guide.

(3) The design must utilize conclusions from the ACEP-WRE site evaluation to prescribe and specify through the use of drawings, written specifications, instructions, and related documents, the implementation requirements for all conservation practices, components, measures, and activities included in the final WRPO.

(4) Structural measures must be designed and installed such that the reach and flow of water on flood plains is not significantly altered. Structural measures will also be designed to minimize future NRCS technical and financial costs for maintenance and repair.

(5) All manageable water-control structures must be accompanied by specific operation plans including any requirements and limitations that will ensure that the hydrology restoration benefits being assigned in ranking will be fully achieved to the extent practical. Designs will contain hydrology restoration and enhancement features on the landscape that minimize the risk for mismanagement and vandalism problems and require only cost-effective, long-term management or maintenance.

(6) Where dikes and water control structures are being installed as an integral part of hydrology restoration plans, the engineering design should ensure that needed permanent and semi-permanent water areas cannot be inappropriately drained during the period the area is intended to be flooded if the structure is opened or otherwise vandalized.

Example: If flashboard riser structures are being installed, the risers will be located in a landscape position and at an elevation that will not defeat efforts to provide for permanent or semi-permanent water areas.

B. Management Plan Requirements

All management activities and measures implemented by the fee title landowner must be pursuant to a compatible use authorization. However, to the extent possible, these activities should be handled in a comprehensive manner to minimize the administrative burden to the landowner and to NRCS. Therefore, the management plan component of the WRPO may serve as the basis for which a compatible use authorization is provided. See subpart P for more information about management plan requirements and the compatible use authorization process.

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart O – Contract Administration

528.140 Overview

This subpart provides guidance on the administration of ACEP-WRE easements and contracts, including contracting and fund management activities. In particular, this subpart addresses topics related to the development of easement restoration agreements, payments, contract and easement modifications, annual contract reviews, cancellations, and terminations. All easement and 30-year contract obligations and payments for the acquisition of the easement or contract itself will comply with the most current Easement Acquisition Enhanced Internal Controls policy. Notwithstanding the payment type, NRCS will not provide tax advice, including any representations about the tax implications of any easement, contract, or financial transaction. Several topics addressed in this subpart are covered in greater detail in other agency policy. Wherever possible, these policies have been cross-referenced.

528.141 Contracts to Implement the Wetland Reserve Plan of Operations (WRPO)

A. Overview of Contractual Arrangements to Implement the WRPO

(1) NRCS will provide funding for implementing the WRPO, to the extent that NRCS determines that it is appropriate and in the public interest, based on the availability of funds. NRCS will provide technical and financial assistance for implementing and establishing conservation practices, components, measures, and activities necessary for the restoration and enhancement of all enrollment types. NRCS also has authority to provide technical and financial assistance for management and maintenance on existing easements and repairs for all enrollment types.

(2) To provide this technical and financial assistance, NRCS may use different procurement and payment methods, depending upon the individual enrollment type, service being obtained, phase of the project, and nature of the payment being made.

(3) In general, NRCS may obtain WRPO implementation from a vendor, through partners or other agencies, or through the landowner using appropriate methods, including but not limited to the following:

(i) Federal contracts, such as blanket purchase agreements, indefinite quantity and indefinite delivery contracts, or cost-type contracts (see Federal Acquisition Regulation (FAR)).

(ii) Such agreements as cooperative agreements, contribution agreements, or interagency agreements (see Title 120, Federal Grants and Cooperative Agreements Handbook (FGCAH), Part 600; Title 120, Contribution Agreements Handbook (CAH), Part 610; or National Instruction (NI)-120-301, Processing Grants, Agreements, and Memorandums of Understanding).

(iii) Conservation program contracting with the landowner.

(4) Policy and procedures unique to ACEP-WRE regarding conservation program contracting with the landowner are specified in this section and will prevail; additional information on landowner contracting procedures can be found in Title 440, Conservation Program Manual (CPM), Part 512. ACEP-WRE contracts are not developed or executed in Protracts.

(5) The Conservation Program Contract (CPC) is the collective term for the set of documents that comprise the agreement with the landowner, which include—

(i) The Form NRCS-CPA-1202 “Conservation Program Contract,” or successor form, which sets forth contract length and parties, and identifies attachments.

(ii) The Form NRCS-CPA-1202-Appendix, "Appendix to the Conservation Program Contract," or successor appendix form, which identifies terms, special provisions, and violations.

(iii) The Form NRCS-CPA-1155, "Conservation Plan Schedule of Operations" or successor form, along with required signature pages, and any applicable, Form NRCS-CPA-1156, "Revision of Plan/Schedule of Operations or Modification of a Contract," or successor form, which set the practices, extents, and costs.

(iv) Standard Form (SF)-1199, "Direct Deposit," which is needed for obligation of funds.

(v) The approved CPC documents package can be found in the exhibits in subpart U.

B. Contractual Arrangements for WRPO Implementation

(1) WRPO implementation (including restoration, enhancement, management, maintenance and repair practices, components, measures, and activities) is conducted through an easement restoration agreement for all easement enrollments and for 30-year contract enrollments with Indian tribes.

(2) Easement Restoration Agreement

(i) Under the terms of the easement and 30-year contract, NRCS acquires from the landowner the right to implement the restoration practices and activities identified in the WRPO through an agreement with the landowner or through someone other than the landowner, as determined by NRCS. NRCS may use CPCs, Federal contracts (FAR), contribution agreements, cooperative agreements, or other appropriate procurement methods to secure implementation of restoration practices and activities on easement and 30-year contract lands. NRCS refers to the documents used to secure restoration implementation on land enrolled through either the easement or 30-year contract enrollment type as the "easement restoration agreement."

(ii) When working with a landowner through a CPC, the costs identified in the Form NRCS-CPA-1155, "Conservation Plan Schedule of Operations" will be based on actual contractor's bids, if available, or on the engineers' cost estimate developed, based on the final restoration design.

(iii) The CPC must be signed by all landowners or the appropriately authorized representative. Prior to approval by the State Conservationists, the CPC must be reviewed to ensure that it is properly completed, has all required landowner signatures secured, and includes the start and end dates of the contract. Restoration activities must have a restoration practice commenced in the first year of the easement recordation or execution of the 30-year contract, and should have all restoration practices completed within the first 3 years from easement recordation or 30-year contract execution.

(iv) When NRCS decides to implement the WRPO's restoration activities through a contribution, cooperative, interagency, or other agreement, the agreement must include the specific work to be completed, amount and cost of work to be completed, and the period of performance, and be signed by the person or persons with authority to sign the agreement documents for the partner. The restoration costs will be based on estimated quantities included in the final WRPO and on the budget estimate submitted by the partner at the time of selecting the partner and developing the agreement. The agreement will be reviewed by appropriate NRCS contracting or agreements staff to ensure its proper completion.

(v) Once the appropriate documents are reviewed, determined complete and proper, and funds availability is verified, the State Conservationist will sign the appropriate obligating document. Funds are then obligated in FMMI or successor system, or in the Integrated Acquisition System (IAS) for Federal acquisitions.

C. Authorized Payment Levels by Enrollment Type

NRCS may share the costs of establishing or implementing conservation practices, components, measures, or activities specified in the WRPO. Unless a partner or landowner donation applies, the amount, terms, and conditions of the assistance will be subject to the following restrictions:

(i) For perpetual easement enrollments, NRCS will pay not less than 75 percent, but not more than 100 percent of the costs.

(ii) For 30-year easement or less-than-permanent easements due to maximum duration allowed by State law and 30-year contract enrollments, NRCS will pay not less than 50 percent, but not more than 75 percent of the costs, except as described below.

(iii) For all easement enrollment types, NRCS may pay up to 100 percent of the costs for the replacement of an eligible conservation practice, if NRCS determines the practice is still needed and the failure of the original practice was beyond the control of the participant.

528.142 Contract Development for WRPO Implementation

A. General

(1) NRCS may use any appropriate procurement method to implement the easement restoration agreement. The primary factor in determining the amount and type of funds to use is when the actual "bona fide need" for the funds exists. Allowance holders and fund certifiers must determine if the bona-fide needs rule is satisfied prior to entering into each obligation. Funds cannot be obligated without a documented bona fide need.

(2) The bona fide need for NRCS to conduct restoration exists at the time APCE or AECLU is signed. Therefore, NRCS may obligate funds for restoration at the time the acquisition funds are obligated. Prior to executing the APCE or AECLU and obligating acquisition funds, States will complete, at a minimum, a preliminary WRPO that includes costs estimates sufficient to serve as the basis for the initial obligation of funds for restoration. The initial obligation of restoration funds based on the preliminary WRPO cost estimates is for internal NRCS accounting purposes only, therefore, no payments will be made based on this obligation, no obligation documents will be signed by anyone other than NRCS, and no one is authorized to incur restoration costs, initiate restoration activities, or implement restoration practices.

(3) The final WRPO developed by NRCS is the basis for the easement restoration agreement. Upon development of the final WRPO, any existing obligations for restoration will be adjusted accordingly in the financial system. The fully executed easement restoration agreements will constitute the final obligating documents through which restoration funds may be expended only after the easement is recorded or 30-year contract is executed. A final WRPO and fully executed easement restoration agreements must be in place before any restoration payments can be processed. Since a landowner, vendor, or partner may not be capable of implementing all the restoration practices required under the WRPO, there may be one or more active easement restoration agreements for a given specific enrollment.

Example: NRCS may work directly with the landowner for tree planting under a CPC and with a construction firm under a Federal contract for installing water control structures. Both the CPC and the Federal contract are considered easement restoration agreements. The basis for each will be the final WRPO or a properly completed and documented modification to the WRPO.

(4) Restoration funds may be obligated to an easement restoration agreement based on a final WRPO prior to easement closing or 30-year contract execution. However, States must advise landowners that any practices commenced prior to the easement's closing or 30-year

contract's execution will not be eligible for payment without a waiver, as described in paragraph C of this section.

(5) Participating partners may provide financial assistance or in-kind services for restoration implementation. In cases where landowner contribution is required, any financial contributions by a partner may be considered as all or a portion of the landowner's share of the costs. Total restoration assistance from all sources must not exceed 100 percent of the actual cost of installing the practice. ACEP-WRE does not prohibit the use of other non-USDA Federal funds as a match, though the other awarding Federal agency may.

B. WRPO Contract Practice Implementation Schedule

Restoration practices and activities authorized through any contracting method must commence within 12 months from the date the easement is recorded or the 30-year contract is signed by NRCS, and should have all restoration practices scheduled to be completed within the first 3 years of the contract. If the contract holder fails to commence during this time period, a waiver or extension may be granted if requested by the contract holder and approved by NRCS. If at any time the landowner, vendor, or partner fails to complete the agreed-to items, as scheduled, NRCS may terminate the contractual agreement in accordance with the applicable procedures. NRCS may select a different contracting method by which to secure implementation of the easement restoration agreement.

C. Practices Commenced Prior to WRPO Contract Approval

(1) Practices started or completed before easement recording or 30-year contract execution and easement restoration agreement approval are not eligible for ACEP-WRE payments. Starting a practice or engaging the services of a technical service provider before the applicable agreement is approved by NRCS renders an applicant ineligible for payment for those practices unless the State Conservationist grants a waiver. The waiver must be granted after application for the program has been made but before starting the practice.

(2) Requests for a waiver must be made by the landowner in writing. Waivers may be considered in special cases and for meritorious reasons for applications that meet all ACEP-WRE land and landowner eligibility requirements. Meritorious reasons may include the following:

(i) Alleviation of imminent and significant environmental problems

(ii) Prevention of damage to life or property

(iii) Seasonal weather constraints

(3) If a waiver is granted, the State Conservationist will advise the landowner that—

(i) Funding will only be provided after the easement is closed or 30-year contract is executed and only if all other conditions are met.

(ii) The applicant is liable for all costs incurred if an easement restoration agreement is not signed by both parties.

(iii) Work must be applied according to NRCS-approved standards and designs.

(iv) Work must be completed in accordance with an approved final WRPO.

(v) The waiver will expire on a date determined by the State Conservationist, but no later than 12 months after the waiver is granted.

(4) The landowner must sign the following acknowledgment statement (See Subpart U, "Exhibits," for sample early-implementation waiver letter), which will be filed in the official enrollment file:

"I/We acknowledge that the implementation of restoration practices on the land enrolled in ACEP-WRE is at my/our own risk and that my/our ability to receive ACEP-WRE funding for such practices is contingent upon NRCS and the landowner [closing on the easement or executing the 30-year contract] and entering into an easement restoration agreement. I/we

understand that payment may only be provided based on NRCS determination that the practices are established according to the final wetlands reserve plan of operations and NRCS standards and specifications. I/We further understand that we are responsible for obtaining all necessary Federal, State, and local authorizations and permits needed to implement such wetland restoration activities."

(5) Restoration payments for practices certified by NRCS or a technical service provider are not issued until after the easement is recorded or the 30-year contract is executed and easement restoration agreement is signed by the landowner and the State Conservationist. Notwithstanding the waiver, NRCS will not make payment for practices or components if any of the following apply:
(i) The intended acreage is determined ineligible for program participation.
(ii) NRCS does not record the easement or execute the 30-year contract.
(iii) NRCS and the landowner fail to enter into an easement restoration agreement.
(iv) The practices or components are not applied according to NRCS standards and specifications or final WRPO provisions.

D. Procurement of Compliance Activities Related to the National Environmental Policy Act, the National Historic Preservation Act, and the Endangered Species Act

(1) Identification and evaluation of historic, cultural, and other environmental resources within an ACEP-WRE project area is an essential component of NRCS conservation planning and environmental compliance responsibilities. State Conservationists use technical assistance funds for these activities within a project's area of potential effect. Technical assistance activities include resource identification and the evaluation of significance. Technical assistance funds are also to be used for any follow up activities that include cultural resources investigations and biological assessments that may be needed before applying the conservation practice.

(2) In circumstances where the conservation planning process reveals that a particular project will require unusual, extensive, or complex investigations or assessments to meet NRCS environmental compliance responsibilities, the State Conservationist may use ACEP-WRE financial assistance funds to obtain these services when this work is being performed by non-NRCS personnel. These compliance activities would normally occur during step 8 (implementation) of the conservation planning process. For example, ACEP-WRE financial assistance funds may be used for—
(i) Extended cultural resource evaluation studies, resource treatment, and data recovery, including site excavation and recording.
(ii) Meeting terms and conditions identified in a memorandum of agreement or programmatic memorandum of agreement with the State historic preservation officer, Tribal historic preservation officer, or the Advisory Council on Historic Preservation, in accordance with 36 CFR Part 800.
(iii) Conducting studies related to the potential for bird strikes due to easement locations near airport facilities.
(iv) Meeting terms and conditions identified in a biological opinion.
(v) Meeting mitigation measures identified in an environmental evaluation.

(3) All cultural, historic, and other environmental resource compliance services that will use financial assistance funds will be procured by NRCS. The use of landowner CPCs for implementing these services is not authorized. It is not appropriate to use financial assistance funds for services and activities typically provided by NRCS personnel.

(4) In all cases in which financial assistance funds are to be used for cultural, historic, or other environmental resource compliance, the State Conservationist must explicitly approve, in

writing, the expenditure and ensure that the costs are reasonable, appropriate, and consistent with NRCS policy. The State Conservationist may not delegate this decision.

528.143 Payments

A. Easement and 30-Year Contract – Acquisition Payments

(1) General

(i) State Conservationists, with support from State and national easement and financial staff, are responsible for ensuring the easement acquisition internal controls are implemented pursuant to applicable laws and policy.

(ii) After completion of internal control reviews, funds for the easement or 30-year contract payment will be obligated directly to the landowner through the appropriate Agreement for the Purchase of Conservation Easement (APCE, Form NRCS-LTP-31) or Agreement to Enter Contract for 30-Year Land Use (AECLU, Form NRCS-LTP-40). Easement payments will be issued through a closing agent unless an alternative method has been agreed to by the State, EPD, and OGC per section 528.125G(6); 30-year contract payments will be issued directly to the landowner. Payments will be made using electronic fund transfers (EFTs). See subpart M for additional information.

(iii) NRCS will make payment for an easement or 30-year contract in the amount agreed to and specified in APCE or AECLU or as modified based on the final determination of acreage. Adjustment to acreage or compensation amount stated on the APCE or AECLU based on final determination of acreage will be documented in the easement case file and reflected in the final "Warranty Easement Deed" or "30-year Contract" (see section 528.122G). Documentation identifying the final acreage and compensation amount will be submitted to the financial management staff for adjustment of funds. (See Subpart U, "Exhibits," for sample easement and contract compensation adjustment document.)

(iv) The APCE authorizes NRCS to provide payment to the landowner through an escrow account managed by the closing agent. The landowner approves payment to the escrow account through the execution of the APCE; therefore, a separate "Assignment of Payment" form (Form NRCS-CPA-1236 or successor form) does not need to be executed by the landowner.

(v) Easement payment may only be issued after NRCS has received a title opinion from OGC setting forth the requirements to secure sufficient title to the land and NRCS has determined that the requirements set forth in the OGC title opinion can be satisfied. A copy of the OGC title opinion must be provided to the financial officer for easement payment processing. A separate "Application for Payment" form (Form NRCS-CPA-1245 or successor form) is not required in order to process the easement payment.

(vii) A completed copy of the ACEP-WRE "Easement Acquisition Internal Controls Review Certification Checklist" is required to process the easement payment. The financial officer will identify the closing agent as an assignee or alternate payee in FMMI.

(viii) The closing agent will handle the funds in the escrow account and issue the appropriate Internal Revenue Service (IRS) Form 1099 in accordance with NRCS closing instructions and OGC title opinion for ultimate disbursement of the proceeds to the landowner and provide NRCS documentation of disbursement of those funds, such as a HUD-1 Form or closing disbursement statement. See subpart M for more detailed information about the closing process.

(ix) NRCS will not acquire any easement or 30-year contract unless the landowner accepts the amount of the easement or 30-year contract payment that NRCS offers. The easement payment may or may not equal the fair market value of the interests and rights to be conveyed by the landowner under the easement. The acquisition payment for 30-

year easements, less than permanent easements due to maximum duration allowed by State law, and 30-year contracts will not exceed 75 percent of the value determined for a permanent easement.

(2) Withholding Landowners Restoration Costs from the Acquisition Payment

(i) For all non-permanent easements and 30-year contract enrollments, sufficient funds must be withheld from the easement or contract payment to cover the landowner's share of the restoration costs based on the final WRPO. The easement will not be closed or the 30-year contract will not be executed until a final WRPO has been completed and the easement restoration agreement cost estimates have been determined.

(ii) Based on the final restoration cost estimates, NRCS will hold the landowner's share of the restoration cost in an appropriate account. Funds withheld from the easement payment for the landowner's share of restoration costs will be documented on the closing or settlement statement.

(iii) Financial management staff will follow current policy on processing and monitoring easement payment withholdings for landowners' restoration costs. States will coordinate with financial management to administer the payment and tracking of these funds. Any excess funds remaining at the completion of the restoration will be issued to the landowner.

Note: If NRCS determines during implementation that the restoration costs will be higher than originally estimated, NRCS must obtain the proportional additional funds from the landowner prior to proceeding with the practices or activities that will incur the additional costs.

(iv) The IRS Form 1099 received by the landowner must reflect the full amount of the consideration identified on the warranty easement deed or 30-year contract. The value stated on Form 1099 will not be reduced by the amount held in reserve for restoration.

(3) Easement or 30-Year Contract Payment Schedule

(i) For easements or 30-year contracts valued at $500,000 or less, NRCS will provide a single payment or up to 10 annual payments, as requested by the landowner and as specified in the APCE or AECLU.

(ii) For easements or 30-year contracts valued at more than $500,000, NRCS will make a single payment unless installment payments are requested by the landowner. If installment payments are requested by the landowner, a minimum of 5 to a maximum of 10 installment payments may be made. The applicable payment schedule will be specified in the APCE or AECLU.

(iii) When the landowner elects installment payments, after the first installment payment, subsequent annual installment payments will be paid as soon as possible after October 1 of the calendar year following the first installment payment.

(iv) All landowners of a single easement must agree on a consistent payment method. Payments cannot be split between lump sum single payments and annual installments. Only one method will be utilized to make payment to the landowners.

B. Easement and 30-Year Contract – Other Related Costs

(1) NRCS may pay up to 100 percent of costs related to acquiring and perfecting an easement or 30-year contract, such as preliminary title searches, environmental record searches, areawide market analysis, USPAP appraisals, closing costs, legal boundary surveys and descriptions, and final title insurance. NRCS may procure these services by contracting directly with the vendor, entering into an agreement with a partner or other agency or, for certain items, through an agreement with the landowner. All related-cost products completed by qualified non-NRCS personnel will use financial assistance funds.

(2) Payments for these related costs should be issued only after the product has been delivered to and reviewed by appropriate NRCS personnel and a determination has been made that the product meets the applicable specifications, scope of work, task order, agreement terms, or other NRCS instructions. For example, payments for—

(i) Preliminary title search information should only be provided after the title document has been reviewed to determine, at minimum, that the correct and entire offered area has been searched and that all underlying documents identified in the search have been received.

(ii) Areawide market analysis should only be issued after the product has been reviewed by an authorized official who has confirmed that it meets applicable NRCS policy and scope of work.

(iii) Individual appraisals should only be issued after acceptance by a technical reviewer or National Headquarters (NHQ) staff appraiser.

(iv) Easement boundary surveys should only be issued after the meeting in the field with the surveyor and landowner to confirm that the surveyed area is correct, the verification has been documented to the file, and all paper and electronic copies of the boundary survey have been received and reviewed to determine compliance with specifications and scope of work for easement boundary surveys.

(v) Closing services should only be provided after the final title insurance policy has been reviewed to determine compliance with NRCS closing instructions and OGC title opinion.

(3) A copy of an invoice or receipt and any required acceptance or review documentation must be included with the appropriate payment request form. The individual payment request forms will depend on the type of procurement method used. Refer to relevant agency policy governing either Federal contracts (FAR) or agreements (120-FGCAH, Part 600; 120-CAH, Part 610; or NI-120-301), depending upon the procurement method. If items were obtained through an agreement with the landowner, such as the easement boundary survey, a Form NRCS-CPA-1245, “Application for Payment” or successor form and a copy of the receipts or invoices must be submitted by the landowner.

C. WRPO Implementation Payments

(1) Restoration payments for conservation practices, components, or activities—

(i) Are made only after NRCS certifies that the conservation practices, functional components, or activities are completed satisfactorily, either in accordance with standards and specifications for conservation practices or components, or in accordance with the WRPO for activities.

(ii) Are based on the actual cost at the time the practice is installed.

(iii) Must be accompanied by supporting receipts or invoices.

(2) Partial practice payments are not allowed; therefore, incremental payments may not be made if the practice does not function until fully installed. However, a single practice with either multiple functional components, or extents that can be completed and certified as functional as installed, may be scheduled and paid for as separate line items in a contract.

(i) Example 1, Partial Payment.—If the wetland restoration design calls for a dike to be installed around the perimeter of a 50-acre wetland unit, payment may not be issued at the 50-percent completion point when the dike has only been completed on two sides of the field, as it will not function as designed.

(ii) Example 2, Component.—If the wetland restoration design calls for a dike to be installed on a 50-acre parcel that will create two 25-acre wetland units, payment could be issued when the dike around one of the 25-acre wetland units has been completed, as it would be a functional unit as designed and installed.

(3) Conservation Program Contract (CPC)

Payments made for conservation practices or activities implemented through CPCs with the landowner will be based on the information provided on the "Application for Payment" form (Form NRCS-CPA-1245 or successor form). The form will be prepared by NRCS and signed by the landowner or authorized representative. The landowner will be established as the vendor in FMMI and payments will be made to the vendor, unless payment has been assigned through a properly executed "Assignment of Payment" form (Form NRCS-CPA-1236 or successor form) to another person or entity.

(4) Contribution, Cooperative, and Interagency Agreements

Payments for conservation practices or activities completed through—

- A contribution agreement will be made as stipulated in 120-CAH, Part 610, Subpart C, Section 610.42, "Payment Approval."
- A cooperative agreement will be made by submitting a completed SF-270 with specific documentation, as stipulated in 120-FGCAH, Subpart D.
- An interagency agreement will be made in accordance with guidance in the standard operating procedures issued with NI-120-301.

(5) Federal Contracts

Federal contracts must be entered through IAS. FAR and IAS policy and procedures will be followed regarding what forms and documents are required to initiate and issue a payment.

D. Application of Adjusted Gross Income (AGI) and Highly Erodible Land Conservation/Wetland Conservation (HEL/WC) Payment Eligibility Criteria and Payment Limitations to Landowners and Others

(1) Payments to Landowners

NRCS first determines a landowner's eligibility for payment under the AGI provisions and the HEL/WC provisions at the time of application to ensure that NRCS is working with an eligible landowner. The landowner's AGI determination is rechecked at the time of enrollment and remains in effect for the duration of the enrollment. The landowner's HEL/WC determination must be rechecked at the time of each payment, as provided below.

- Easement and 30-Year Contract Payments
  - When an easement payment or 30-year contract payment is to be made to any landowner, the landowner's eligibility under the HEL/WC provisions is rechecked to ensure that all landowners on the deed are eligible for the payment. NRCS will not make the easement or 30-year contract payment if the landowner or landowners are not compliant with the HEL/WC provisions when payment is requested.
  - A landowner may request to withdraw from program enrollment at the time of easement payment or 30-year contract payment if NRCS determines that the landowner is ineligible for payment under the HEL/WC provisions. If a landowner withdraws from ACEP-WRE enrollment based upon the NRCS determination of ineligibility for payment under the HEL/WC provisions, the landowner will be determined to be in violation of APCE or AECLU.
- Easement Restoration Agreement through CPC
  - NRCS does not need to revisit the landowner's AGI eligibility determination if NRCS enters into an easement restoration agreement with the participant through a CPC, since the AGI determination is in effect for the duration of the program enrollment. However, NRCS must revisit the landowner's HEL/WC eligibility at the time an easement restoration agreement is entered through a CPC. If a landowner is determined ineligible under the HEL/WC provisions after easement

closing, NRCS may obtain any necessary WRPO implementation through a Federal contract or agreement arrangement with a partnering organization. (See paragraph (2) below).

- When an easement restoration agreement payment is made to a landowner through a CPC, the landowner's eligibility under the HEL/WC provisions is rechecked to ensure that all landowners are eligible for the payment. If the landowner or landowners are not compliant with the HEL/WC provisions when payments are requested, NRCS will not pay the participants, and payments for practices completed by the participant during the period of ineligibility are forfeited, unless a good-faith exemption has been granted in accordance with 7 CFR Part 12. Modification of the contract or agreement to reschedule practices to avoid forfeiture of payment because of HEL/WC compliance issues is not allowed.

(2) Payments to Others

(i) Under ACEP-WRE, a landowner must meet the AGI and HEL/WC provisions of the Food Security Act of 1985, as amended, to be eligible for payment, as described above.

(ii) Subsequent to easement recordation or 30-year contract execution and payment, the eligibility of the landowner or ownership of the land may change. However, it does not further the purposes of the program to acquire permanent or long-term protection on an area that is not able to be restored due to post-closing changes in the circumstances of the landowner or the fee title ownership. Therefore, NRCS and the landowner agree that, at the time of enrollment, under the terms of the warranty easement deed or 30-year contract, NRCS may restore, protect, enhance, maintain, and manage activities on the easement or contract area by providing financial assistance directly to the landowner, or as determined necessary by NRCS, through another person or entity.

(iii) NRCS may make payments to restore and maintain the easement or 30-year contract area to someone other than the original landowner, even if that other person or entity does not meet payment eligibility criteria. In particular, NRCS may make payments to others without regard to any other provision of law and in a manner NRCS determines is fair and reasonable. In this way, NRCS is able to ensure that all properties enrolled through an easement or 30-year contract are able to be restored as contemplated by the ACEP-WRE statute, despite events subsequent to easement recordation or 30-year contract execution.

(iv) Therefore, if NRCS enters into a CPC with a subsequent landowner, a Federal contract with a vendor, a cooperative agreement with a partner, or a contribution agreement with a partner, NRCS may make payment under the terms of those types of easement restoration agreements without regard to the whether the payment recipient would meet the payment eligibility provisions of the Food Security Act of 1985.

Example: A State's department of natural resources (DNR) purchases fee title from the original ACEP-WRE participant. NRCS may enter into an easement restoration agreement with the DNR to implement the restoration practices and make payment to that agency, even though DNR is a State agency and would not have been eligible for enrollment.

(3) 30-Year Easement and 30-Year Contract Restoration Payment Limitations

(i) Restoration payments remain subject to the statutory limitations regarding the level of assistance that may be made, whether such assistance is made directly to the person or through another person or entity. Therefore, for non-permanent easements and 30-year contracts, NRCS may not provide more than 75 percent of the cost of conservation practices or components implemented for the purpose of establishing the restoration, as specified in the WRPO, without regard to ownership or payee.

(ii) NRCS may pay up to 100 percent of the repair costs associated with non-permanent easements. NRCS has discretion to pay up to 100 percent of repair costs on these easements only after the implementation and establishment period has ended and if NRCS determines the practice is still needed and the failure of the practice was beyond the control of the landowner.

528.144 Modifications to the Easement Restoration Agreement

A. Modifications to the WRPO

A revision of the WRPO may be required before a modification to the easement restoration agreement can be completed. If particular practices or activities are not already identified in the WRPO, a revision to the WRPO may be needed to prepare new easement restoration agreements for new work, such as enhancements, maintenance, and repairs. See section 528.134E for guidance.

B. Modifications to Easement Restoration Agreements – Processing Contract Change Requests

(1) General – Determination of Scope

(i) For purposes of this section, the term "contract" means any conservation program contract, cooperative, contribution or interagency agreement, or Federal contract used to implement an easement restoration agreement.

(ii) When the original terms of a contract obligation need to be altered, a contract change request must be made. The request must be analyzed by the State program manager or contracting officer to determine if the change or changes requested are within the scope of the original contract or are of sufficient magnitude to be considered outside the scope of the original contract. The basis for the change must be clearly stated in the contract change request.

(iii) The determination of scope is the key to selecting the proper contracting procedures to be used to accommodate the request and the proper funds to be provided for the request. Contract change requests that are generally considered within scope are those that—

- Are used to carry out the original intent of the contract.
- Will treat the originally identified resource concerns.
- Are of a reasonable magnitude.

(iv) Contract change requests that are generally considered outside the scope of the original contract are those that—

- Change or add resource concerns and the practices and activities to treat them.
- Are repairs, replacement, or maintenance of existing, established practices.
- Were never contemplated in the original contract.
- Are of a magnitude that is beyond the scope of what was contemplated in the original contract.

(2) Contracting Procedure Based on Scope Determination

(i) If a change request is determined to be within the scope of the existing contract, then a modification may be completed to make the changes. If the change request is determined to be outside the scope of the original contract, then a new contract must be used to accomplish the work or task.

(ii) Executing modifications to existing contracts for approved in-scope changes will depend upon the specific contract vehicle, as indicated below. Modifications to existing contracts have the same signatory requirements as the original contract.

- Federal contract modifications will be entered into IAS in accordance with appropriate FARs. Funds are obligated once the authorized NRCS official signs the necessary paperwork.
- CPC modifications will be completed on a "Revision of Plan/Schedule of Operations or Modification of a Contract" form (Form NRCS-CPA-1156) or successor form. Funds for the contract change, if needed, are obligated once the landowner and authorized NRCS official signs the form.
- Contribution agreement modifications will be made on the appropriate forms and according to procedures in 120-CAH.
- Cooperative agreement modifications will be in accordance with 120-FGCAH.

(iii) Contract change requests determined to be outside the scope of the original contract require a new contract to be generated. The contract type and any competition requirements will depend upon the contract vehicle used.

- Federal Contracts.—If the proposed change is determined to be "out of scope," either a new contract for the changed portion must be competed or the entire contract with the addition of the changes must be re-competed in accordance with FAR by an authorized contracting officer. If deemed appropriate by the contracting officer, there may be instances in which an out-of-scope modification may be authorized, based upon the concept of different site conditions or other criteria
- CPC With the Landowner.—A new CPC, consisting of all component documents, the contract (Form NRCS-CPA-1202, "Conservation Program Contract," or successor form), NRCS-CPA-1202 appendix, and schedule of operations (Form NRCS-CPA-1155 or successor form), must be generated, a new CPC contract number provided, and signatures obtained from the landowner. Funds may be obligated once the landowner and NRCS authorized officials' signatures are obtained.
- Contribution Agreements—A new agreement must be generated according to procedures in 120-CAH.
- Cooperative Agreements.—A new agreement must be generated and possibly competed according to procedures in 120-FGCAH.

(3) Funding Change Requests

(i) Once a determination has been made regarding scope by the authorized official, then a determination can be made as to which funds may be used for the request. ACEP-WRE funds are no-year funds.

(ii) States will track the purpose (e.g., maintenance, repairs, enhancement, etc.) and amount funds obligated each year for costs outside the scope of existing contracts. The States will notify NHQ of this information, as requested, to assist NHQ tracking of how much of funding is being used for new enrollments and support of existing enrollments.

(iii) State program staff and administrative staff will coordinate and follow current FNM policies for funding and deobligation procedures. For all ACEP-WRE obligations, any excess funds are to be deobligated from contracts once the work for which they were obligated is completed. When all scheduled restoration practices have been completed, any remaining funds will be deobligated from the contract.

(4) Types of Contract Changes and the Authorizing Official

(i) State Conservationists must establish procedures and identify staff to perform initial scope determinations and second-level reviews of in-scope determinations. Although the State Conservationist is responsible for the second-level review and concurrence, he or she may delegate this authority. The authority may not be delegated lower than the member of the State management team responsible for ACEP-WRE, which in most States is the Assistant State Conservationist. Additionally, to comply with the principles of separation of duties, this authority must not be given to the same person who enters the obligation in

FMMI. Figure 528-O1 below provides examples of change requests and whether they are generally considered within-scope or outside-of-scope requests.

(ii) It is critical to remember that the types of **situations identified below as outside-of-scope requests may not be considered within-scope requests.** However, it is possible that a change request shown below as generally being a within-scope request would be considered an outside-of-scope request when applying the "reasonable" test.

(iii) For example, a cost overrun due to inflation is generally considered within the scope request. However, it is possible that the magnitude of the change could cause the request to fail the reasonable test, so the request would be considered an outside-of-scope request.

(iv) All requests for additional funds for practices once the existing contract has been completed are new procurements and require the use of new contract instruments. This includes requests for "enhancement" practices or when the initial restoration did not adequately restore the site as anticipated, provided this determination is made after the original contract is completed.

(v) Figure 528-O1 below is primarily focused on restoration-type activity however the same principles apply to any contract for any service in ACEP-WRE, including closing services, acquisition, surveys, appraisals, etc. It also applies to contracts and agreements with third parties to conduct activities for NRCS.

Example: NRCS has a signed APCE, but prior to easement closing the landowner decides to offer twice the amount of acres for enrollment. This increase was never considered by the landowner at the time of application and would double the size of the easement. This would be considered an outside-the-scope change.

(vi) In the chart below—

- All determinations in the "within scope" or "outside-of-scope" columns are based on passing the reasonable test.
- All determinations in the funds columns assume that funds are not cancelled and are available for use.
- "Practice" should be read as "practice, component, or activity."

Figure 528-O1

Type of Request	**Additional Examples or Description**	**Within Scope**	**Outside of Scope**
Inflation	Cost of the practice increases due to inflation in cost of materials or labor.	Yes	
Increase in quantity	Quantity of a practice increases over the original estimated amount, which includes increased acreage of easement purchase due to final boundary survey.	Yes	
Reapplication	Practice is completed but not certified as fully functional and has failed due to no fault of the landowner. This will generally only apply to vegetative practices that require a period of time before determining that the practice was successful.	Yes	
Repair	A practice is completed and certified as complete. Practice is damaged or destroyed later through no fault of the landowner. For example, a dike is installed, certified, and paid for, and 2 weeks later it is washed out by flood waters.		Yes
Maintenance	Practice has been installed and certified as complete. Over		Yes

Type of Request	Additional Examples or Description	Within Scope	Outside of Scope
	time, rodent damage has occurred and needs to be corrected to protect the integrity of the structure. This does **not** include damage done through landowner violation, such as tree planting destroyed by unauthorized grazing.		
Management	Practices not originally scheduled but later determined necessary to manage the vegetation and hydrology of the site, such as prescribed burning.		Yes
Substitution	Practice planned in the existing contract will be replaced with a practice that serves the same purpose but does it more efficiently, more economically, etc. It could also be that the original, planned practice was found on final design to be infeasible and that the current practice will serve the same purpose and is feasible.	Yes	
New Practice	This includes practices for enhancement of the original restoration or because original restoration did not meet expectations. It includes practices inadvertently omitted from the existing contract that are not necessary for proper functioning of practices in the existing contract.		Yes
Facilitating Practice	Practice was omitted from existing contract but is necessary for the proper functioning of one or more practices in the existing contract.	Yes	

528.145 Contract Status Review

A. Easement restoration agreements that have open obligations will be reviewed annually until all scheduled practices have been implemented. Contract reviews will be conducted onsite to assess current conditions and progress in implementing the easement restoration agreement. Contract reviews should be done late enough in the calendar year to allow for the observation of performance of scheduled practices and should include the landowners to the extent possible.

B. During restoration implementation, the ACEP-WRE area may be visited one or more times during a year; however, the annual contract review is the occasion for careful evaluation and recording of the participant's needs and the status of the contract and operations. Findings are to be recorded on "Contract Review" form (Form NRCS-CPA-13). This contract review is independent of the required annual monitoring of easements and 30-year contracts; although the activities could be performed concurrently. (See 440-CPM, Part 527, Subpart P.)

C. At a minimum, the following are to be checked or reviewed, as appropriate:

(1) Maintenance of practices previously applied
(2) Application of practices scheduled in the current year
(3) Items in noncompliance
(4) Need for changes in time schedule or practices
(5) Adequacy of applied conservation practices in relation to the programs objectives and the WRPO and associated plans
(6) Determination of whether land under contract is still under the participant's control
(7) Items needing attention next year

(8) Agreement items not carried out as scheduled will be noted on the NRCS-CPA-13 along with the reason, if delayed
(9) Non-cost-shared items will be noted
(10) Contract disbursements and remaining estimated obligations

D. The contract review form must be signed by the designated conservationist who conducted the review. When the review is made with the participant, he or she should sign or initial to indicate concurrence. A copy of the contract review form is to be sent to the state office and retained in the official casefile. A copy should be provided to the landowner.

E. See 440 CPM 527, Subpart P for information on annual monitoring requirements.

528.146 Cancellation and Termination of Conservation Program Contracts

A. General

A CPC may be cancelled by both parties or terminated for cause by NRCS. In either event, the obligations contained in the CPC are ended through action that annuls the responsibilities of both parties to the contract. There is a slight, but significant difference in the terminology used when CPC obligations are ended.

(i) Cancellation.—A cancellation is an equitable remedy that allows both parties to the contract to mutually revoke the contractual relationship (a cancellation may also be referred to as a "termination for convenience"). A recovery of costs may or may not be appropriate, as determined by the State Conservationist, depending upon the circumstances included in the program participant's written request for cancellation. The participant is not afforded appeal rights, since cancellations are mutually agreed upon by the participant and NRCS.
(ii) Termination.—A contract is subject to termination as a result of a material breach of the terms and conditions included in the CPC (may also be referred to as terminations for cause). As such, a contract termination meets the definition for an adverse decision in accordance with 7 CFR Section 11.1, "National Appeals Division Rules of Procedure." The cause for termination and the procedure used by NRCS to ensure that the landowner has been provided an opportunity to remedy the violation as required by the specific program regulation must be fully documented. Terminations for cause will usually result in an assessment of damages for recovery of costs associated with the administration of the breached contract.

B. Cancellation of CPC

(1) Cancellation of CPCs for easement restoration agreements must follow guidance given in 440-CPM, Part 512. Contract landowners may request that a contract be cancelled. Landowners must request cancellation in writing, provide reasons for the cancellation, and, if applicable, provide information on availability of any transferees.
(2) If a contract is cancelled, the landowner forfeits all rights to any payments under the contract and may be required to refund payments as described in the CPC appendix. When a contract is cancelled, the State Conservationist will—
(i) Document the effective date of cancellation on the contract documents,
(ii) Fully document the reasons for the contract cancellation,
(iii) Inform the landowner, in writing, of the approval of the cancellation request, including the forfeiture of all future payments under the contract and repayment requirements to complete the process. (See Subpart U, "Exhibits," for a sample cancellation letter.)

C. Termination of CPC

(1) Termination of CPCs for easement restoration agreements will follow guidance given in 440-CPM, Part 512. Documentation of termination should include Form NRCS-CPA-13, "Contract Reviews," and Form NRCS-CPA-153 "Agreement Covering Non-Compliance with Provision of Contract" if a breach of contract is involved; the latter should be signed by the participant. (See Subpart U "Exhibits," for a sample termination letter.)

(2) If NRCS terminates a CPC, the landowner will forfeit all rights to future payments under the easement restoration agreement, and may be required to refund all or part of the payments received, plus interest. In addition, NRCS is entitled to recover any and all administrative and legal costs, including attorney's fees or expenses, associated with any enforcement or legal action related to the termination.

(3) A CPC termination is effective immediately upon a determination by the State Conservationist that the participant has—

(i) Submitted false information

(ii) Filed a false claim

(iii) Engaged in any act for which a finding of ineligibility for payments is permitted under this part

(iv) Taken actions (or inactions) that NRCS deems to be sufficiently purposeful or negligent to warrant a termination without delay

528.147 30-Year Contract Modification, Cancellation, and Termination Policy

A. Cancellation (Termination) of the 30-Year Contract

In accordance with the terms of the 30-year contract, if NRCS determines that a landowner is in violation of the terms of the 30-year contract, or the terms of any documents incorporated by reference into the contract, the landowner must be given reasonable notice and an opportunity to voluntarily correct the violation within 30 calendar days of the date of notice or such additional time as the State Conservationist determines is necessary to correct the violation. If there is a continued failure of the landowner to comply with any provision of the contract, NRCS or other delegated authority will have any legal or equitable remedy provided by law and right to—

(i) Enter upon the property to perform necessary work for the prevention of or remediation of damage to wetland or other natural values.

(ii) Assess all expenses incurred by NRCS (including any legal fees or attorney fees) against the landowner, to be owed immediately to the United States.

(iii) Terminate the contract and require repayment by the landowner of costs incurred by NRCS in furtherance of the contract.

B. Modification of the 30-Year Contract or WRPO

For lands held by the Bureau of Indian Affairs (BIA), modification of the 30-year contract or WRPO will require an amendment to the 30-year contract and will require the approval of the landowner, NRCS, and the designated BIA official. For boundary modifications to 30-year contracts considerations will be similar to criteria for easement administrative actions affecting the easement boundary or terms (see Subpart R, "ACEP Easement Subordination, Modification, Exchange, and Termination"). Coordinate with EPD on information and steps required to modify and amend the 30-year contract.

528.148 Converting an Existing 30-Year Easement to a Permanent Easement

A. At the time of recording the 30-year easement, the easement payment provided to the landowner was not to exceed 75 percent of the easement value for a perpetual easement. At the time of the

conversion from a 30-year to a permanent easement, the landowner will be compensated for the remainder of the easement value by providing 25 percent of the current year's geographic area rate cap (GARC) applicable to the easement area being converted to a permanent easement.

Example: Land enrolled in a 30-year easement in FY 2012 was paid 75 percent of the $1,600 per acre easement value, or $1,200 per acre. In FY 2016, the landowner requests conversion to a permanent easement. That same land in FY 2016 has an established GARC of $2,000 per acre. The payment to the landowner to convert from a 30-year to a permanent easement will be 25 percent of the current fiscal year GARC value of $2,000 per acre, which is $500 per acre.

B. To request an increase in easement duration from 30-year to permanent, the landowner will sign a new application, Form NRCS-CPA-1200, and indicate on it the desire to increase the easement duration to a permanent easement. A new application record will not be entered into NEST, but instead the request must be noted in the existing 30-year easement record. The request does not have to be ranked with applications for new enrollment for that year.

C. If the landowner proposes to convert less than the entire existing 30-year easement area to a permanent easement, NRCS must first determine whether the reduced area still meets the required land eligibility criteria. If NRCS determines the portion of the existing 30-year easement area to be converted to a permanent easement meets all of the eligibility criteria, NRCS must also obtain a new easement boundary survey to describe the perpetual easement area and ensure there is sufficient access to the permanent easement area. No new acres may be included in the easement area.

D. The standard ACEP-WRE easement acquisition activities and requirements in subparts K and M must be followed including, but not limited to, onsite visits, updated title search and review, an updated title opinion from OGC, necessary title clearances, and use of a closing agent to ensure the deed is closed and recorded in accordance with the OGC title opinion and NRCS closing instructions.

E. The perpetual easement will be recorded using the most current version of the Form NRCS-LTP-30, "Warranty Easement Deed in Perpetuity."

F. If all land and landowner eligibility and acquisition and program requirements are met, the State Conservationist may approve the conversion if it is determined the additional protection to be of significant environmental value. The request may only be approved by the State Conservationist, and this authority may not be delegated.

G. The obligation will be made using funds from the fiscal year when the State Conservationist signs the agreement to extend the easement duration. (See Subpart U, "Exhibits," for the agreement to extend easement duration).

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.

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart Q – Special Enrollment Options

528.160 Overview

This subpart provides implementation guidance for the Wetland Reserve Enhancement Partnership (WREP) enrollment option and the Reservation of Grazing Rights enrollment option.

528.161 Wetland Reserve Enhancement Partnership (WREP) Enrollment

A. General

(1) WREP enrollment is a part of the ACEP-WRE and is administered by NRCS in consultation with the U.S. Fish and Wildlife Service (FWS), with advice from the State Technical Committee and other cooperating agencies and organizations.

(2) Easements and 30-year contracts developed through the WREP process have the same enrollment, acquisition, restoration, managing, monitoring, and maintenance requirements as standard ACEP-WRE. Wetland restoration and enhancement actions will continue to be designed to maximize wildlife habitat values in accordance with the ACEP regulation, 7 CFR Part 1468, and NRCS standards and specifications. Proposals related to easement management must conform to the ACEP-WRE guidelines for managing lands subject to an ACEP-WRE easement. Funds for WREP proposals are derived from funds available for ACEP.

(3) The Chief may enter into agreements with States (including a political subdivision or agency of a State), nongovernmental agencies, or Indian Tribes to carry out WREP partnership projects.

(4) Partners are required to provide matching funds; the specific requirements for level, type, and use of matching funds will be provided in an annual announcement. In general, contributions provided by the partners can be in-kind services or cash and may be used for technical or financial assistance activities related to the acquisition or restoration of new enrollments or enhancement and management of existing enrollments or monitoring.

(5) Benefits to the partners in WREP agreements include—

(i) Involvement in wetland protection, restoration, and enhancement in high priority areas.

(ii) Opportunity to use innovative restoration methods and practices.

(iii) Opportunity to leverage funding to critical resource concerns.

(iv) Opportunity to target outreach and enrollment based on priorities identified by partners and supported by NRCS.

(v) Ability to maximize habitat benefits on new and existing enrollments.

B. Program Purpose and Objectives

The purpose of WREP enrollment is to target and leverage resources to address high-priority wetland protection, restoration, and enhancement objectives through agreements with States (including a political subdivision or agency of a State), nongovernmental organizations, and Indian Tribes (7 CFR Section 1468.35). Under WREP enrollment, State Conservationists enter into agreements with eligible partners. Additionally, NRCS may use WREP enrollment to obtain assistance with easement management activities from those who have the appropriate expertise, as determined by the Chief of NRCS.

C. NRCS Responsibilities

The responsibilities for WREP are the same as the regular ACEP-WRE with the following exceptions:

(i) National Headquarters (NHQ)

In addition to ACEP-WRE responsibilities, national leadership for WREP enrollment is provided by the Chief and the Chief's designee. The Chief will—

- Determine the funding level for WREP proposals on a periodic basis and will notify State Conservationists about—
  - -- The level of funding available for WREP proposals in that fiscal year.
  - -- The priorities for funding.
  - -- Required level of partner matching funds.
  - -- Ranking criteria.
  - -- Additional criteria, as determined by the Chief.
- Select proposals for funding.
- Work with State Conservationists and partners to develop guidelines for implementing selected proposals.

(ii) State Offices

- In addition to ACEP-WRE responsibilities, State leadership for WREP enrollment is provided by the State Conservationist. The State Conservationist will—
  - Upon notice by NHQ, announce availability for submission of WREP project proposals.
  - Develop WREP partnership project proposals with eligible partners in their State.
  - Coordinate with neighboring States on proposals that include more than one State, including designation of a lead state for the proposal.
  - Submit project proposals to NHQ when project proposals are requested.
- Once a project has been selected by the Chief for funding, the State Conservationist will—
  - Publish a signup announcement to make information regarding availability of WREP funding to the public in the selected proposal areas.
  - Work with partners to develop a partnership agreement and ensure that it is consistent with the announcement of funding, the proposal, and the ACEP regulations.
  - Ensure all program eligibility criteria and policies are met for all applications and enrollments that may result.

(iii) Field Offices and ACEP-WRE Teams

Field offices and ACEP-WRE teams will assist partners with implementing the partnership agreement to the extent specified in the agreement.

D. Partner Responsibilities

Partner responsibilities include—

(i) Developing a partnership agreement and ensuring that it is consistent with the announcement of funding and the ACEP regulations.
(ii) Performing activities as outlined in the agreement.
(iii) Ensuring availability of resources to be contributed to WREP projects, including all matching funds.
(iv) Providing outreach to potential participants.

528.162 Reservation of Grazing Rights Option

A. General

(1) The reservation of grazing rights is a separate enrollment option available under the ACEP-WRE component. As a component of ACEP-WRE, NRCS will implement a reservation of grazing rights enrollment option where landowner may reserve the grazing rights on the lands subject to the easement or 30-year contract. This option is only available for unique wetland ecosystems where grazing is the appropriate vegetation management or disturbance activity tool needed to maintain the long-term viability of the unique attributes of that particular wetland ecosystem. Grazing is the only additional right that may be reserved to the landowner and the extent of the reserved grazing right is identified in Form NRCS-LTP-33, "Warranty Easement Deed with Reservation of Grazing Rights," and is further described in the Exhibit E to the deed and the grazing management plan that will be a component of the wetland reserve plan of operations (WRPO).

(2) A State Conservationist, in consultation with the State Technical Committee, may consider offering the reservation of grazing rights enrollment option within their State. If enrollment will be offered, the State Conservationist will identify the unique wetland ecosystems that will be made part of the enrollment effort and the geographic extent within which the unique wetland ecosystems exist that will be designated.

(3) Under the reservation of grazing rights enrollment option, NRCS works directly with landowners. Landowners will submit applications directly to NRCS once a reservation of grazing rights enrollment area has been announced. Landowners applying for this enrollment option in a selected reserved rights area must meet the eligibility requirements in sections 528.104. Lands that are enrolled under this option must meet the ACEP-WRE eligibility requirements in section 528.105.

(4) Lands where woody vegetation was a dominant part of the historic plant community are not eligible for the reserved rights enrollment option unless a waiver is granted by the national ACEP-WRE manager. Examples include woody riparian, bottomland hardwoods, or other forested wetland systems.

(5) Easements and 30-year contracts developed through the reserved rights enrollment process have the same enrollment, acquisition, restoration, management, monitoring, and maintenance requirements as standard ACEP-WRE. Wetland restoration and enhancement actions will continue to be designed to maximize wildlife habitat values in accordance with the ACEP regulation, 7 CFR Part 1468, and NRCS standards and specifications. These practices, components, measures, and activities will be documented in the WRPO.

(6) NRCS may offer a 30-year easement, permanent easement, or 30-year contract for the reserved rights enrollment option in selected areas. This enrollment option may only be offered where the State Conservationist determines that the reservation and use of grazing rights—

(i) Is compatible with the land subject to the easement or 30-year contract.

(ii) Is necessary for the restoration and management of the land subject to the easement or 30-year contract.

(iii) Is consistent with the long-term wetland protection and enhancement goals for which the easement or 30-year contract was established.

(iv) Complies with a WRPO grazing management plan developed by NRCS in consultation with FWS that outlines the location, timing, intensity, frequency, and duration of the grazing.

(v) Supports the habitat needs of the target species, including plant height, structure and spatial considerations for nesting, food, cover, or brood-rearing habitat.

(7) The landowner must acknowledge acceptance of the terms and conditions of the grazing right by signing the WRPO grazing management plan prior to easement closing or contract execution by NRCS. Monitoring of the grazing effects on the habitat objectives will determine if adjustments to the grazing management plan are necessary. Additional grazing, as determined by NRCS based on site conditions, can only be provided through an approved compatible use authorization.

B. NRCS Responsibilities

The responsibilities for the reserved rights enrollment option are the same as regular ACEP-WRE with the following additions:

(i) NHQ

In addition to ACEP-WRE responsibilities, national leadership for the reserved rights enrollment option is provided by the Chief and the Chief's designee. The Chief will—

- Determine the reduction in the value of the retained grazing rights.
- Develop guidelines for appropriate use of the reservation of grazing rights enrollment option.
- Make available a Form NRCS-LTP-33, “Warranty Easement Deed with Reservation of Grazing Rights” template and a template exhibit E.
- Review and approve the exhibit E version that will be used in each grazing reserved rights enrollment area.

(ii) Regional Conservationists (RCs)

In addition to ACEP-WRE responsibilities, Regional Conservationists provide leadership to the States regarding implementation of the reserved rights enrollment option.

(iii) State Offices

In addition to ACEP-WRE responsibilities, State leadership for the reserved rights enrollment option is provided by the State Conservationist. The State Conservationist will—

- Determine if and where the reservation of grazing rights enrollment option will be offered in that State and the level of funding available.

  Note: No special funds will be allocated for this enrollment option of ACEP-WRE. Applications will be funded from the State’s annual ACEP-WRE allocation. Up to 50 percent of the State's annual allocation may be used for this enrollment option. Enrollment obligations in excess of 50 percent of the State’s annual allocation must be approved by the Deputy Chief for Programs.

- Work with the State Technical Committee to provide recommendations on unique wetland ecosystems for participation in this enrollment option, including the types of grazing management conditions that contribute to the wetland functions and values of the unique wetland ecosystem.
- Complete exhibit E to the Form NRCS-LTP-33, “Warranty Easement Deed with Reservation of Grazing Rights” for each area selected, based upon the template version provided by NHQ, and submit the exhibit E to NHQ for review and approval.
- Provide public notice of the availability of the reserved rights enrollment option and the Form NRCS-LTP-33, “Warranty Easement Deed with Reservation of Grazing Rights.”

- Review and approve the WRPO grazing management plan. The State Conservationist may delegate this authority to the State ACEP-WRE manager or coordinator.
- Develop guidelines for the development of grazing management plans that will be incorporated into the WRPO.
- Ensure appropriate implementation of the reservation of grazing rights enrollment option. This option will only be offered where grazing is necessary to achieve the desired wetland functions and values of a unique wetland type on the ACEP-WRE easement or 30-year contract area.
- Certify, by signing the ACEP-WRE easement or contract, that the reservation of the grazing right is compatible with the land subject to the easement or 30-year contract.
- Assess grazing impacts to determine if additional grazing, as determined by NRCS based on site conditions, can be provided through an approved compatible use authorization. (See subpart P of this manual for guidance on compatible use.)

(iv) Field Offices and ACEP-WRE Teams

In addition to ACEP-WRE responsibilities, responsibilities of the designated conservationists or local NRCS representative, as determined by the State Conservationist, are to—

- Coordinate with FWS, State wildlife agency, conservation district (CD), and other appropriate agencies, organizations, or cooperating partners to market and deliver the reservation of grazing rights enrollment option.
- Determine site eligibility based on appropriate ecological conditions and plant communities historically represented within the proposed easement or contract area.
- Develop the WRPO grazing management plan. The terms and conditions of the grazing management plan must be based upon guidance provided by the State office and developed in consultation with FWS and other partners as appropriate and will be compatible with the habitat and species goals and objectives.
- Develop WRPO modifications, as necessary. (See subpart O of this manual for guidance on WRPO and contract modifications.)
- Provide onsite annual monitoring for the first 3 years of the easement or contract. Due to the nature of the enrollment option, onsite monitoring will be necessary to fully gauge the habitat response to the prescribed grazing regime. Monitoring will be performed at critical times to measure the success in attaining the identified habitat and species goals and objectives.

C. FWS Responsibilities

FWS is an integral partner to NRCS implementation of the reserved rights enrollment option. In addition to ACEP-WRE responsibilities, NRCS will include FWS in the following:

(i) Assisting NRCS with land eligibility and appropriate ecological site determinations for the reserved rights enrollment option

(ii) Assisting NRCS with the WRPO grazing management plan prescription necessary to achieve the desired wetland functions and values and vegetative structure for which the easement is being established

(iii) Providing recommendations to NRCS regarding timing, duration, frequency, and intensity of the grazing activity

(iv) Providing outreach to potential participants

D. Compensation

Compensation for easements or 30-year contracts entered into under the reservation of grazing rights enrollment option will be based on the method and values determined in accordance with guidance in this part, except that the geographic area rate cap (GARC) determined for regular ACEP-WRE is reduced by an amount representative of the value of the retained grazing rights, as determined by the Chief.

E. Authorized Funding Levels

(1) NRCS may provide assistance for establishing or implementing practices, measures, or activities specified in the final WRPO. These practices and components must be necessary to achieve the desired wetland functions and values and will be provided at the conventional ACEP-WRE rate (up to 100 percent for permanent easements and up to 75 percent for nonpermanent enrollments).

(2) Financial assistance is authorized for necessary wildlife friendly fences detailed in the final WRPO grazing management plan. Additionally, financial assistance is authorized to modify existing fences to wildlife-friendly specifications. Livestock watering facilities as part of the final WRPO grazing management plan are also authorized for financial assistance.

Part 528 – Agricultural Conservation Easement Program

Subpart R – ACEP Easement Subordination, Modification, Exchange, and Termination

528.170 Overview of Easement Administration Action Authority

A. Easement Administration Action Terms

(1) "Easement administration action" means subordination, modification, exchange, or termination of rights of the United States in an ACEP easement.

(2) "Modification" means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, agrees to adjust the boundaries or terms of an easement that will result in equivalent or greater conservation value, acreage, and economic value to the United States, and the modification only involves lands within or physically adjacent to the original easement area.

(3) "Exchange" means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, relinquishes all or a portion of its real property rights or interests in an easement that are replaced by real property rights or interests granted through an easement that has equivalent or greater conservation value, acreage, and economic value to the United States on land that is not adjacent to the original easement area.

(4) "Subordination" means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, agrees to subordinate its real property rights or interests on all or a portion of an easement as part of an easement exchange or easement modification. The subordinated rights will be replaced by rights that are of equivalent or greater conservation value, acreage, and economic value to the United States.

(5) "Termination" means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, agrees to terminate its rights or interests in an easement or portion thereof to facilitate a project that addresses a compelling public need for which there is no practicable alternative and such termination action will result in equivalent or greater conservation value and economic value to the United States, and NRCS is provided compensation for such termination.

B. Threshold Criteria

(1) This subpart implements easement administration action provisions in accordance with 7 CFR Section 1468.6. When prudently implemented, the authority at 7 CFR Section 1468.6 provides NRCS the necessary flexibility to ensure that the long-term viability of agricultural land, grazing uses and related conservation values and wetland restoration and protection efforts through NRCS conservation easements will be achieved.

(2) Once an ACEP easement is in place, including easements enrolled under predecessor programs, the United States retains vested rights and interests that authorize NRCS to make determinations necessary to administer easement interests on behalf of the United States. Any easement administration action decision affecting these vested rights and interests are made at the sole discretion of NRCS, and the consideration of an easement administration action does not vest any rights or privileges in the landowner, an ACEP-ALE eligible entity or easement holder, or third party, and are thus are not program benefits subject to appeal.

(3) After an ACEP easement has been recorded, NRCS will not consider any request for an easement administration action except where NRCS has first determined that the criteria 7 CFR Section 1468.6 and outlined in this Title 440, Conservation Programs Manual (CPM), Part 528, Subpart R, are met. The requestor of the easement administration action (project

proponent) is responsible to provide all required documentation to NRCS, and NRCS must determine that the easement administration action—

(i) Is in the Federal Government's interest.

(ii) Is concurred with in writing by the landowner, and, if ACEP-ALE, the eligible entity who holds title to the easement.

(iii) Addresses a compelling public need for the easement administration action or will further the practical administration of the program and for which there is no practicable alternative that will avoid impacting the easement area.

(iv) Will result in equal or greater conservation functions and values to the United States. This will require that if there are no practicable alternatives that do not impact the conservation functions and values of the easement area, that such impacts have been minimized to the greatest extent practicable, and any remaining adverse impacts will be mitigated by enrollment of other lands that provide equal or greater conservation functions and values, as determined by NRCS, at no cost to the Government.

(v) Will result in equal or greater economic value to the United States.

(vi) Will result in no net loss of acres in the program, except in the case of a termination.

(vii) Will not affect more than 10 percent of the original easement area, except under specific circumstances described in section D(2) below.

(vii) Meets all other requirements of 7 CFR Section 1468.6 and this subpart.

(4) NRCS is not required to take any easement administration action with respect to any of its rights or interests in an easement and easement administration actions are discretionary, voluntary, real estate transactions between the United States, landowner, and other parties that are subject to the requirements of 7 CFR Section 1468.6 and 440-CPM, Part 528.

(6) Unless and until the parties enter into a binding easement administration action agreement, any party may withdraw from and terminate a proposal for an easement administration action at any time during the process.

C. Federal Action and NEPA Sequencing

(1) This part clarifies the preferred easement administration action is always avoidance of impacts to the easement area, followed by minimization of impacts to the easement area or rights and interests held by the United States.

(2) An easement administration action affecting an ACEP easement constitutes a Federal action that may adversely affect the environment, and, therefore, NRCS must evaluate any easement administration action under the National Environmental Policy Act (NEPA) found at 42 U.S.C. Section 4321 et seq. In addition to NEPA regulations promulgated by the Council of Environmental Quality, NRCS has supplemental NEPA regulation at 7 CFR Part 650 and its NEPA policy at Title 190, General Manual (GM), Part 410. Under NEPA, NRCS must evaluate the consequences of, and alternatives to, the requested easement administration action.

(i) Because any easement administration action of an ACEP-ALE easement constitutes a Federal action that has the potential to convert important farmland to nonfarm use, NRCS also has a responsibility to evaluate any ACEP-ALE easement administration action under the Farmland Protection Policy Act at 7 U.S.C. Section 4201 et seq. and 7 CFR Part 658.

(ii) Because any easement administration action of an ACEP-WRE easement constitutes a Federal action that may have an adverse impact on wetland resources, NRCS also has a responsibility to evaluate any ACEP-WRE easement administration action request under Executive Order 11990.

(3) NRCS must adhere to a clearly established evaluation sequence when deciding whether to approve or deny a request for an easement administration action, including whether there are practicable alternatives to the easement administration action and the project proponent is

willing to adjust the requested action to avoid, minimize, or compensate for the impacts to the easement area. The preferred alternative is always to avoid the easement area. If the easement area cannot be avoided entirely, then the preferred alternative must be based on least impact to the original easement area.

(i) Avoidance.—If there are practicable alternatives or other measures that will avoid impacts of the proposed activity on the ACEP easement, NRCS must deny the easement administration action request.

(ii) Minimization.—If a practicable alternative is not available that avoids adverse impacts to the ACEP easement, then NRCS will identify and inform the project proponent about measures that may minimize adverse impacts to the ACEP easement, and may request the project proponent also provide minimization options. If the project proponent is willing and able to minimize impacts to the ACEP easement, then NRCS may continue to evaluate the merits of the easement administration request. If there are practicable alternatives or other measures that will minimize the adverse impacts of the proposed activity on the ACEP easement, and the project proponent does not select such alternatives or measures, then NRCS must deny the request easement administration action request.

(iii) Compensation.—If NRCS determines that adverse impacts cannot be avoided or minimized, then NRCS may only continue to evaluate the merits of the easement administration request if the project proponent is willing and able to compensate for lost ACEP conservation and economic value by providing lands or measures that provide equivalent or greater conservation value and equivalent or greater economic value to the United States and result in no net loss of acres enrolled in the program. Compensation may include, but is not limited to, enrolling new acres in ACEP or increasing the protection and function of already enrolled acres. If adverse impacts cannot be avoided, minimized, or adequately compensated for, NRCS must deny the easement administration action request.

D. Additional Criteria

(1) Easement modifications, including subordinations, that only involve the easement area itself or land physically adjacent to the easement area, are preferred to easement exchanges that involve lands that are not physically adjacent to the original easement area. Easement exchanges are limited to circumstances where there are no available lands adjacent to the original easement area that will result in equal or greater conservation and economic values to the United States.

(2) The scope of the easement area that may be affected by an easement administration action is limited to 10 percent of the easement area. NRCS may only exceed 10 percent of the easement area if NRCS determines it is impracticable to achieve the purposes for which the easement was acquired on the original easement area. NRCS may make such determination if there are offsite landscape changes such as catastrophic changes to hydrology, complete loss of agricultural infrastructure, or contamination from hazardous materials from adjacent properties.

(3) To meet the “compelling public need” criterion, the resulting easement configuration must not only address a compelling public need, but demonstrate that there is a compelling public need for the easement administration action itself. For example, a proponent seeks to modify an easement boundary to construct a commercial office building and parking lot. The building and parking lot would be constructed on a portion of the existing easement area that includes endangered species habitat. The proponent proposes to replace the acres removed from the easement area with twice as many acres that also offer endangered species habitat. In this example, there may be a compelling public need for the resulting easement configuration by expanding the protection of endangered species habitat, but there is not a

compelling public need for the easement administration action itself that would relinquish existing protection for endangered species on the existing easement area for the purposes of a private business enterprise. NRCS will not relinquish Federal protection on a particular land area unless the activity that will replace the Federal ACEP protection of that land area is also for purposes of a compelling public need.

(4) NRCS will make the determination of equal or greater economic value to the United States based upon an approved easement valuation methodology in place at the time of the easement administration action request unless the terms of the easement require a different methodology, in which case NRCS will comply with the terms of the easement.

(5) To further ensure that the easement administration action will result in equal or greater conservation functions and values to the United States, the replacement of easement acres as part of an easement exchange must occur in the same eight-digit watershed and within the same State.

(6) Because easement administration actions could impact the total acres enrolled in the program, all easement administration actions, with the exception of terminations, must result in no net loss of acreage enrolled in the program.

(7) ACEP easements represent a significant public investment in agricultural land and wetland protection and, therefore, easement administration actions are a limited exception to normal business processes and should rarely be recommended or approved under ACEP.

528.171 Easement Administration Action Procedural Requirements

A. Procedural Requirements

(1) Easement administration actions generally evolve from situations that could not be anticipated when the easement was established, such as a new highway or bridge construction project.

(2) Easement administration actions may be initiated by NRCS or proposed by a landowner, an ACEP-ALE easement holder, or a third party project proponent able to demonstrate that it has the concurrence of the landowner and for ACEP-ALE easements, the ACEP-ALE easement holder, to submit a request for the easement administration action. The ability of a landowner or third party to request an easement administrative action does not create any new rights or benefits in a landowner, easement holder, or in an authorized third party, and there is no right of approval created in the landowner, easement holder, or authorized third party. This guidance simply acknowledges the sources of information by which NRCS may consider easement administration actions and that the landowner's concurrence, and for ACEP-ALE easements, the ACEP-ALE easement holder's concurrence, is a necessary precondition for NRCS to consider approval of any easement administration action.

(3) The party requesting the easement administration action (project proponent) is responsible for providing a project proposal with all necessary supporting documentation to NRCS.

(4) All criteria and requirements outlined this part must be met before an easement administration action request may be recommended or approved. Evaluation of an easement administration action request should be conducted in a stepwise manner as outlined below, such that if the request does not meet one of the criteria, there is no need to continue the evaluation of the remaining criteria as the request cannot be approved. Before an easement administration action request may be recommended for approval, the State Conservationist must—

(i) Have written concurrence from the landowners, and easement title holders, if ALE, that they concur with the proposed easement administration action.

(ii) Determine whether the easement administration action addresses a compelling public need for which there is no practicable alternative to the proposed easement administration action.

(iii) Determine whether the easement administration action will further the practical administration of ACEP in their State.

(iv) Determine if the easement administration action will result in equal or greater conservation functions and value.

(v) Evaluate any easement administration action request under the National Environmental Policy Act (NEPA), NRCS NEPA compliance policy at 190-GM, Part 410, and this part, including the consequences of, and alternatives to, the requested easement administration action. NRCS must conduct an environmental evaluation (EE) (Form NRCS-CPA-52) to determine the level of NEPA analysis required according to NRCS policy and regulations. The project proponent must provide sufficient information for NRCS to conduct the necessary NEPA analysis and may request the project proponent to provide additional information.

Note: If NRCS finds under the NEPA analysis that the easement administration action has not been sufficiently analyzed and an environmental analysis (EA) or environmental impact statement (EIS) is required, then the project proponent must provide all of the necessary environmental compliance documentation allow NRCS to evaluate the proposed action under NEPA, NRCS NEPA compliance policy at 190-GM, Part 410, and this part. Failure by NRCS to complete the EE (NRCS-CPA-52) correctly will not eliminate the need for EA by the project proponent and may delay NRCS's response to the project proponent.

(vi) Evaluate any ACEP-ALE, including FRPP considered enrolled in ACEP-ALE, easement administration action under the Farmland Protection Policy Act found at 7 U.S.C. Section 4201 et seq. as described in paragraph (6) below, and evaluate any ACEP-WRE easement administration action under Executive Order 11990.

(vii) Determine if the easement administration action results in equal or greater economic value to the United States.

(viii) Determine whether the easement administration action is appropriate, considering the purposes of the program and the facts surrounding the request for easement administration action.

(7) Additionally, easement administration actions affecting an ACEP-ALE easement have the potential to convert important farmland to nonfarm use; therefore, under the FPPA, the State Conservationist is required to use the land evaluation and site assessment (LESA) system to establish a farmland conversion impact rating score on the portion of ACEP-ALE parcel that could foreseeably be converted to nonfarm use as a direct or indirect result of the easement administration action. The State Conservationist must also score the alternatives to the easement administration actions demonstrated by the project proponent and any other practicable alternatives proposed by NRCS.

(i) The State Conservationist will use these scores as an indicator of whether an easement administration action will have adverse impacts on the farmland greater than those of any demonstrated or practicable alternative or exceed the recommended allowable level.

(ii) NRCS will not relinquish Federal protection on a protected parcel if the easement administration action will have an adverse impact on the farmland greater than those of a practicable alternative or exceed the recommended allowable level.

(iii) The project proponent must demonstrate—

- What alternatives to the easement administration action were considered and whether the alternative actions would lessen the adverse impact to farmland based on their farmland conversion impact rating score.

- The easement administration action, to the extent practicable, is compatible with State, local government, and private programs and policies to protect farmland.

(8) The State Conservationist will determine whether the requested easement administration action is appropriate.

(i) If the State Conservationist decides the easement administration action is not appropriate, the State Conservationist will notify the project proponent that the request is denied and no appeal is available.

(ii) If the State Conservationist determines the easement administration action is appropriate, then the project proponent's request, along with all supporting documentation from the State Conservationist, will be submitted to the director of EPD. The supporting documentation for the request must include, at minimum—

- A letter of determination and findings from the State Conservationist, including a summary of the proposal, impacts to the easement, and a statement from the State Conservationist concurring with proposed easement administration action and recommending its approval.
- Evaluation under NEPA, providing a copy of the NEPA analysis and applicable FPPA or Executive Order 11990 documentation.
- A map and description of the proposed easement administration action.
- Evidence that easement administration action meets all of the requirements outlined in this part.
- Written support from the local conservation district and for ACEP-WRE, the USFWS, in support of the easement administration action.
- Evidence that the easement administration action is appropriate, considering the requirements and purposes of the program and the facts surrounding the request for easement administration action.
- Concurrence of the landowner, and for ACEP-ALE easements only, the concurrence of the ACEP-ALE easement holder.
- Any additional materials necessary to provide sufficient information for EPD to determine that the request is consistent with ACEP.

(9) The EPD director will review the submitted materials and make the determination to approve or deny the easement administration request. The EPD director has delegated authority to approve or deny subordination, modification or exchanges and to deny termination requests. If termination is requested, the EPD director will review the submitted materials and if the EPD director recommends approval, her or she will provide the materials to the Chief for final determination. Easement termination may only be approved by the Chief, and such approval may not be delegated. At least 90 days prior to taking any termination action, written notice of such termination action will be provided to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate.

(10) The project proponent is responsible for all costs associated with actions involved in the easement administration actions. Easement administration actions may involve many of the same processes that were necessary when the original easement was recorded, including a determination of value, easement boundary description, title search, subordination of any intervening liens, a new policy of title insurance, and recording of the deed of easement amendment.

(11) Approved easement administration actions made in an amended easement or an subordination agreement, must be duly prepared and recorded in conformity with standard real estate practices, including requirements for title approval, subordination of liens, and recordation.

(12) If NRCS denies an easement administration action request at any level, the State Conservationist will notify the project proponent that the request will not be approved. A decision to deny an easement administration action request is not appealable as such decision is in the sole discretion of NRCS and does not affect any right or benefit of the landowner, title holder, third party, or the project proponent has in ACEP.

528.172 Infrastructure Project Requests

A. Infrastructure project requests are subject to the same easement administration action requirements as any other easement administration action request, but given the involvement of a project proponent other than the original landowner, further information to address this type of request is provided herein.

B. As NRCS increases the acreage enrolled in ACEP, the number of requests to allow infrastructure projects will increase as well. Infrastructure projects may include, but are not limited to—

(1) Overhead and buried electrical transmission lines.
(2) Transportation projects.
(3) Airport expansion or installation.
(4) Wind and solar power generation farms.
(5) Various types of pipelines, such as crude oil, natural gas, water supply, or carbon dioxide.

C. The first response to a request for an easement administration action to allow any infrastructure project is a request from the State Conservationist to the proponent to avoid NRCS easement lands. The infrastructure project proponent is responsible for providing sufficient evidence to NRCS that all criteria for an easement administration action have been met, including that the easement lands cannot be avoided. In circumstance where it has been clearly demonstrated that avoidance of the ACEP easement is not practicable, NRCS may consider easement administration action request affecting an ACEP easement, on a case-by-case basis, using the same procedures as identified in section 528.171.

D. NRCS will review an easement administration action request for infrastructure projects the same as any other request, including whether practicable alternatives exist to avoid the impacts to the ACEP easement. However, NRCS will minimize the potential for conflict with infrastructure projects by coordinating with applicable agencies regarding propose routes, rights-of-way, and NRCS enrollment activities. If NRCS at any level is provided notice of an infrastructure project that has the potential to affect one or more NRCS easements, the State program manager in the affected State must be notified immediately. The State program manager will consult with the State Conservationist, EPD, and the State program managers in other affected States as necessary and will provide direction to the field on how to proceed.

E. NRCS will avoid enrolling land into ACEP where the intended purpose of the enrollment is to interfere with a proposed infrastructure project. To assist potential project proponents in similarly avoiding existing NRCS easements, each NRCS State office should share Geographic Information System (GIS) shapefiles showing closed easement locations with electrical companies, gas pipeline companies, States' departments of transportation, and other Federal agencies on an annual basis for planning purposes and to facilitate avoidance of ACEP easements when planning for infrastructure. Any information shared must be in accordance with the guidance provided in subpart A, section 528.02.

F. States should notify EPD and the regional OGC office immediately of any eminent domain proceedings. NRCS easement lands are not subject to condemnation through eminent domain proceedings, except Federal transportation projects where the U.S. Department of Transportation (DOT) has specific authority to set aside Federal lands (23 U.S.C. Section 317) for such Federal

transportation projects. State Conservationists should confer with DOT regarding any potential actions and request that DOT not exercise that authority on existing ACEP easements.

G. The right to grant a right-of-way for a proposed infrastructure project that may cross land encumbered by a WRE easement resides primarily with NRCS as the holder of the majority of the surface rights and partly with the landowner as the remaining fee title owner. The rights and interests conveyed to the United States under a WRE easement give NRCS authority to restrict projects from and on easement lands, and WRE lands may not be condemned by State or local entities. NRCS must ensure that lands subject to WRE easements support the intended conservation purposes for which the easements were acquired.

H. The right to grant a right-of-way for an infrastructure project to go across land encumbered by an agricultural land easement is often addressed in the terms of the agricultural land easement deed itself, and involve rights and interests of the landowner, the easement holder, and NRCS under the United States right of enforcement. Where a right-of-way may impact the scope of the United States' right of enforcement, NRCS will notify the project proponent of this easement administration action process and that NRCS will address its interests in the land according to these policies and procedures.

I. Projects permitted by such Federal agencies as the Federal Energy Regulatory Commission, Federal Aviation Administration, Department of Energy, Department of State, US Army Corps of Engineers, US Bureau of Reclamation, or others, require analysis of environmental impacts, in accordance with NEPA. Under these circumstances, NRCS may request cooperating agency status and participate in the permitting agency or Department's NEPA process. NRCS must conduct an EE (Form NRCS-CPA-52) to determine the level of NEPA analysis required according to NRCS policy and regulations. If NRCS is not a cooperating agency, it must conduct its own independent NEPA analysis. Instances in which NRCS is not a cooperating agency will likely occur when permitting of infrastructure is done by a State or local government agency, and there is no Federal permitting agency. Under these circumstances, NRCS must comply with all Federal laws, including NEPA, if it considers taking any action relative to ACEP easements. Again, the proponent of the infrastructure project must provide the documentation needed for NRCS to complete its environmental review.

J. EPD will contact the appropriate Federal permitting agency or Department and will notify State Conservationists of new infrastructure projects and proposed multistate infrastructure routes. If a State is contacted by a Federal permitting agency, Department, or infrastructure project proponent, it will notify EPD immediately. State offices will maintain contacts with appropriate Federal, State, and local permitting agencies.

K. In cooperation with the permitting agency, States will ascertain whether proposed infrastructure routes will impact existing easements, and will notify EPD and OGC of any projects that may be impacted.

L. When the proposed infrastructure lies entirely within the boundaries of a single State, the State Conservationist or his or her designee serves as the responsible Federal official (RFO). When the proposed infrastructure crosses multiple States, EPD and the appropriate Regional Conservationist will coordinate with the affected States to determine which State Conservationist will serve as the agency RFO.

528.173 Minor Administrative Corrections

The State Conservationist may approve minor administrative corrections without seeking approval from EPD director, including—

(1) Typographical errors.

(2) Minor changes in legal descriptions as a result of survey or mapping errors.
(3) Address changes.

Part 528 – Agricultural Conservation Easement Program

Subpart T – ACEP Definitions

528.190 Definitions

A. "30-year contract" means an ACEP-WRE contract that is for a duration of 30 years and is limited to acreage owned by Indian Tribes.

B. "Access" means legal and physical ingress and egress to the entire easement area over adjacent or contiguous lands for the exercise of any of the rights or interests under the easement for the duration of its term for the purposes of the program. Access for easement enrollments must be described in the easement deed.

C. "Acreage owned by Indian Tribes" means lands held in private ownership by an Indian Tribe or individual Tribal member and lands held in trust by a native corporation, a Tribe, or the Bureau of Indian Affairs.

D. "Active agricultural production" means that on lands that meet the definition of being in agricultural use, agricultural or forest-related products or livestock are being produced or have been produced within 1 year of the date of application by an eligible entity for funding under ACEP-ALE. Land may also be considered in active agricultural production if it is current or former CRP land that is planted, considered planted, or in conserving use as determined by NRCS.

E. "Agreement" means the document that specifies the obligations and rights of NRCS and any person, legal entity, or eligible entity who is participating in the program or any document that authorizes the transfer of assistance between NRCS and a third party for provision of authorized goods and services associated with program implementation. Agreements may include but are not limited to an agreement to purchase, a wetland reserve easement restoration agreement, a cooperative agreement, a partnership agreement, or an interagency agreement.

F. "Agreement to purchase" means the legal document that is the equivalent of a real estate purchase and sale contract. The landowner signs the agreement to purchase, which is the authorization for NRCS to proceed with the ACEP-WRE acquisition process and to incur costs for surveys, title clearance, due diligence activities, and closing procedures on the easement.

G. "Agricultural commodity" means any agricultural commodity planted and produced in a State by annual tilling of the soil, including tilling by one-trip planters or sugarcane planted and produced in a State.

H. "Agricultural uses" means those activities defined by a State's farm or ranch land protection program, or, where no program exists, by the State agricultural use tax assessment program. However, if NRCS determines that a State definition of agricultural use is so broad that an included use would constitute a violation of Federal law or degrade soils, the agricultural nature of the land, or the related natural resources, NRCS reserves the right to impose greater deed restrictions on the property to be subject to an agricultural land easement. These deed restrictions would narrow the State definition of agricultural use in order to meet Federal law or to protect soils, the agricultural nature of the land, or related natural resources.

I. "Agricultural land easement (ACEP-ALE)" means an easement or other interest in eligible land that is conveyed under ACEP-ALE for the purposes of protecting natural resources and the agricultural nature of the land, and of promoting agricultural viability for future generations, and permits the landowner the right to continue agricultural production and related uses subject to an agricultural land easement plan.

J. "Agricultural land easement plan (ALEP)" means the document developed by NRCS or provided by the eligible entity and approved by NRCS, in consultation with the eligible entity and landowner, that describes the activities which promote the long-term viability of the land to meet the ACEP-ALE purposes for which the easement was acquired. The agricultural land easement plan includes a description of the farm or ranch management system, conservation practices that address the resource concerns for which the easement was enrolled, and any required component plans such as a grasslands management plan, forest management plan, or conservation plan as defined in this part. Where appropriate, the agricultural land easement plan will include conversion of highly erodible cropland to less intensive uses.

K. "At-risk species" means any plant or animal species listed, or proposed or candidate to be listed, as endangered or threatened or endangered under the Endangered Species Act, a species listed as endangered or threatened or endangered under State law, a State species of conservation concern, or any other plant or animal species or community, as determined by the State Conservationist with advice from the State Technical Committee, that has undergone, or is likely to undergo, population decline or may become imperiled without direct intervention.

L. "Bargain sale" means a real estate transaction in which the landowner donates part of the value of the conservation easement by accepting a purchase price less than appraised fair market value.

M. "Beginning farmer or rancher" means an individual or legal entity who—

(1) Has not operated a farm or ranch, or who has operated a farm or ranch for not more than 10 consecutive years and who will materially and substantially participate in the operation of the farm or ranch. This requirement applies to all members of a legal entity.
(2) In the case of an individual, individually or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch consistent with the practices in the county or State where the farm is located.
(3) In the case of a legal entity or joint operation, all members must materially and substantially participate in the operation of the farm or ranch. Material and substantial participation requires that each of the members provide some amount of the management or labor and management necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.

N. "Building envelope" applies to ACEP-ALE only and means an area within which the structures on the farm or ranch are located and within which building may occur on ACEP-ALE easements. Building envelope limitations and requirements are identified in the agricultural land easement deed. On parcels upon which additional structures will be built after the easement is acquired, the building envelope must be large enough for that construction, the movement of vehicles and farm equipment on impervious surfaces around the structures, and the management of runoff without erosion or flooding. Large farms and ranches may need more than one building envelope to accommodate livestock sheds, equipment sheds, or hay storage structures far from the headquarters building envelope. All impervious surfaces within all of the building envelopes must be within the impervious surface limitation for the ACEP-ALE parcel. Building envelopes are also known as farmstead complexes or farmstead areas.

O. "Certified entity" means an eligible entity that NRCS has determined to meet the certification requirements in 7 CFR Section 1468.27 for the purposes of ACEP-ALE.

P. "Chief" means the Chief of the Natural Resources Conservation Service or the person delegated the authority to act for the Chief.

Q. "Commenced conversion wetland" means a wetland or converted wetland for which the Farm Service Agency (FSA) has determined that the wetland manipulation was contracted for, started, or for which financial obligation was incurred before December 23, 1985.

R. "Commodity Credit Corporation (CCC)" is a wholly-owned Government corporation within the Department of Agriculture.

S. "Compatible use" means a use or activity conducted on a wetland reserve easement that NRCS determines, in its sole discretion, is consistent with the long-term protection and enhancement of the wetland and other natural values of the easement area when performed according to amount, method, timing, frequency, intensity, and duration limitations prescribed by NRCS.

T. "Conservation district (CD)" means any district or unit of State or local government formed under State or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a "conservation district," "soil conservation district," "soil and water conservation district," "resource conservation district," "natural resource district," "land conservation committee," or a similar name.

U. "Conservation plan" is the document that—

(1) Applies to highly erodible cropland.
(2) Describes the conservation system applicable to the highly erodible cropland and describes the decisions of the person with respect to location, land use, tillage systems, and conservation treatment measures and schedules and where appropriate, will include conversion of highly erodible cropland to less intensive uses.
(3) Is developed in accordance with 7 CFR Part 12.

V. "Conservation practice" means a specified treatment, such as a vegetative, structural, or land management practice, that is planned and applied according to NRCS standards and specifications.

W. "Conservation Reserve Program (CRP)" means the program administered by the CCC pursuant to 16 U.S.C. Sections 3831–3836.

X. "Converted wetland (CW or CW+year)" means a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose of, or to have the effect of, making possible the production of an agricultural commodity if such production would not have been possible but for such action, and before such action such land was wetland, farmed wetland, or farmed-wetland pasture and was neither highly erodible land nor highly erodible cropland.

Y. "Cooperative agreement" means the document that specifies the obligations and rights of NRCS and eligible entities participating in the program under ACEP-ALE through either a cooperative agreement with noncertified eligible entities or through a grant agreement with certified eligible entities. Cooperative agreement also means the document that authorizes the transfer of assistance between NRCS and a non-Federal entity associated with implementation of the program under ACEP-WRE.

Z. "Cost-share payment" means the payment made by NRCS to an eligible entity for the purchase of an ACEP-ALE easement.

AA. "Dedicated fund" means an account held by a nongovernmental organization that is sufficiently capitalized for the purpose of covering expenses associated with the management, monitoring, and enforcement of agricultural land easements and where such account cannot be used for other purposes.

BB. "Easement administrative action" means an easement modification, easement exchange, easement subordination, or easement termination as defined in this subpart.

CC. "Easement area" means the portion of a parcel that is encumbered by an ACEP easement.

DD. "Easement exchange" means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, relinquishes all or a portion of its real property rights or interests in an easement that are replaced by real property rights or interests granted through an easement that has equivalent or greater conservation value, acreage, and economic value to the United States on land that is not adjacent to the original easement area. NRCS is not required to exchange any of its rights in an easement, and easement exchanges are discretionary, voluntary real estate transactions between the United States, the landowner, and other parties with an interest in the easement.

EE. "Easement modification" means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, agrees to adjust the boundaries or terms of an easement that will result in equivalent or greater conservation value, acreage, and economic value to the United States, and the modification only involves lands within or physically adjacent to the original easement area. NRCS is not required to modify any of its rights or interests in an easement, and easement modifications are discretionary, voluntary real estate transactions between the United States, the landowner, and other parties with an interest in the easement that are subject to the requirements of this part.

FF. "Easement payment" means the consideration paid to a participant or their assignee for an easement conveyed to the United States under the ACEP-WRE, or the consideration paid to an Indian Tribe or Tribal members for entering into 30-year contracts.

GG. "Easement restoration agreement" means the agreement or contract NRCS enters into with the landowner or a third party to implement the WRPO on a wetland reserve easement or 30-year contract enrollment.

HH. "Easement subordination" means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, agrees to subordinate its property rights or interests on all or a portion of an easement as part of an easement exchange or easement modification. The subordinated rights or interests will be replaced by rights or interests that are of equivalent or greater conservation value, acreage, and economic value to the United States. NRCS is not required to subordinate any of its rights or interests in an easement, and easement subordinations are discretionary, voluntary, real estate transactions between the United States, landowner, and other parties with an interest in the easement that are subject to the requirements of this part.

II. "Easement termination" means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, agrees to terminate its rights or interests in an easement or portion thereof to facilitate a project that addresses a compelling public need for which there is no practicable alternative and such termination action will result in equivalent or greater conservation value and economic value to the United States, and the United States is provided compensation for such termination. NRCS is not required to terminate any of its rights or interests in an easement, and easement terminations are discretionary, voluntary, real estate transactions between the United States, landowner, and other parties that are subject to the requirements of this part. Unless and until the parties enter into a binding termination agreement, any party may withdraw its approval of a termination proposal at any time during the termination process.

JJ. "Eligible activity" means an action other than a conservation practice that is included in the Wetland Reserve Plan of Operations (WRPO), as applicable, and that has the effect of alleviating problems or improving the condition of the resources, including ensuring proper management or maintenance of the wetland functions and values restored, protected, or enhanced through an easement or 30-year contract.

KK. "Eligible entity" means an Indian Tribe, State government, local government, or a nongovernmental organization that has a farmland or grassland protection program that purchases agricultural land easements for the purpose of protecting agriculture use and related conservation values, including grazing uses and related conservation values, by limiting conversion to nonagricultural uses of the land. The term eligible entity includes both certified eligible entities and noncertified eligible entities.

LL. "Eligible land" means private or Tribal land that NRCS has determined to meet the land eligibility requirements for ACEP-ALE (section 528.33) or ACEP-WRE (section 528.105).

MM. "Enforcement" means any actions to address violations of the easement or contract, including encroachments or trespasses.

NN. "Enrollment option" means the manner in which land may be enrolled in the ACEP. Under ACEP-WRE, the options are permanent or 30-year easement, easement of maximum duration allowed by State law, or 30-year contract for acreage owned by Indian Tribes. Under ACEP-ALE, the options are permanent easements or maximum duration allowed by State law.

OO. "Environmental benefit" means, for ACEP-WRE, the promotion of habitat for migratory birds and wetland-dependent wildlife, habitat for threatened and endangered or other at-risk species, protection or restoration of native vegetative communities, increased resilience of ecosystems during climatic change, habitat and species diversity and abundance, water quality protection or improvement, attenuation of floodwater flows, and water quantity benefits through increased water storage.

PP. "Environmental threat" means, under ACEP-WRE, onsite or offsite conditions or activities that may have an adverse effect to the wetland restoration process, or interfere with the ability to achieve maximization of wetland functions and values.

QQ. "Fair market value (FMV)" means, for an agricultural land easement, the value of an agricultural land easement as determined using the Uniform Standards of Professional Appraisal Practice, an areawide market analysis or survey, or another industry-approved method approved by the Chief, as established in section 528.52 or, for a wetland reserve easement, the value of the land as determined using the Uniform Standards of Professional Appraisal Practices or areawide market analysis or survey, as established in section 528.122.

RR. "Farm and ranch land of local importance" means farm or ranch land used to produce food, feed, fiber, forage, biofuels, and oilseed crops that are locally important but not identified as having national or statewide importance. Criteria for defining and delineating this land are to be determined by the appropriate local agency or agencies. Farmlands of local importance may include tracts of land that have been designated for agriculture by local ordinance.

SS. "Farm and ranch land of statewide importance" means, in addition to prime and unique farmland, land that is of statewide importance for the production of food, feed, fiber, forage, biofuels, and oil seed crops. Criteria for defining and delineating this land are to be determined by the appropriate State agency or agencies. Generally, additional farmlands of statewide importance include those that are nearly prime farmland and that economically produce high yields of crops when treated and managed according to acceptable farming methods. Some may produce as high a yield as prime farmlands if conditions are favorable. In some States, additional farmlands of statewide importance may include tracts of land that have been designated for agriculture by State law in accordance with 7 CFR Part 657.

TT. "Farm or ranch succession plan" means a general plan to address the continuation of some type of agricultural business on the enrolled land. The farm or ranch succession plan may include specific

intrafamily succession agreements or business asset transfer strategies to create opportunities for veteran farmers or ranchers or other historically underserved landowners.

UU. "Farm Service Agency (FSA)" is an agency of the U.S. Department of Agriculture.

VV. "Field Office Technical Guide (FOTG)" means the official local NRCS source of resource information and interpretations of guidelines, criteria, and requirements for planning and applying conservation practices and conservation management systems. The FOTG contains detailed information on the conservation of soil, water, air, plant, animal, and energy resources applicable to the local area for which it is prepared.

WW. "Fish and Wildlife Service (FWS)" is an agency of the U.S. Department of the Interior.

XX. "Forest land" means a land cover or use category that is at least 10 percent stocked by single-stemmed woody species of any size that will be at least 13 feet tall at maturity. Also included is land bearing evidence of natural regeneration of tree cover (cutover forest or abandoned farmland) that is not currently developed for nonforest use. Ten-percent stocked, when viewed from a vertical direction, equates to an aerial canopy cover of leaves and branches of 25 percent or greater.

YY. "Forest land of statewide importance" means forest land that NRCS, in consultation with the State Technical Committee, identifies as having ecological or economic significance within the State and may include forested areas or regions of the State that have been identified through statewide assessments and strategies conducted pursuant to State or Federal law.

ZZ. "Forest management plan" means a site-specific plan developed or approved by NRCS, in consultation with the eligible entity and the landowner, that describes management practices to conserve, protect, and enhance the viability of the forest land. Forest management plans may include a forest stewardship plan, as specified in section 5 of the Cooperative Forestry Assistance Act of 1978 (16 U.S.C. Section 2103a), another practice plan approved by the State Forester, or another plan determined appropriate by NRCS. The plan complies with applicable Federal, State, Tribal, and local laws, regulations, and permit requirements.

AAA. "Grassland of special environmental significance (GSS)" means grasslands that contain little or no noxious or invasive species, as designated or defined by State or Federal law; are subject to the threat of conversion to nongrassland uses or fragmentation; and the land is:

(1)(i) rangeland, pastureland, or shrubland on which the vegetation is dominated by native grasses, grass-like plants, shrubs, or forbs, or

(ii) Improved, naturalized pastureland and rangeland; and

(2)(i) Provides, or could provide, habitat for threatened or endangered species or at-risk species,

(ii) Protects sensitive or declining native prairie or grassland types, or

(iii) Provides protection of highly sensitive natural resources

BBB. "Grasslands management plan" means the site-specific plan developed or approved by NRCS that describes the management system and practices to conserve, protect, and enhance the viability of the grassland under the ACEP-ALE. The grasslands management plan will include a description of the grassland management system consistent with NRCS practices contained in the FOTG, including the prescribed grazing standard for easements that will be managed using grazing; the management of the grassland for grassland-dependent birds, animals, or other resource concerns for which the easement was enrolled; the permissible and prohibited activities; and any associated restoration plan or conservation plan. The grasslands management plan is a component of either an agricultural land easement plan or wetland reserve plan of operations.

CCC. "Historical and archaeological resources" mean resources that meet any of the following criteria:

(1) Listed in the National Register of Historic Places (established under the National Historic Preservation Act (NHPA), 16 U.S.C. Section 470 et seq.)
(2) Formally determined eligible for listing in the National Register of Historic Places (by the State Historic Preservation Office (SHPO) or Tribal Historic Preservation Office (THPO) and the Keeper of the National Register in accordance with section 106 of the NHPA)
(3) Formally listed in the State or Tribal register of historic places of the SHPO (designated under section 101(b)(1)(B) of the NHPA) or the THPO (designated under section 101(d)(1)(C) of the NHPA)
(4) Included in the SHPO or THPO inventory with written justification as to why it meets National Register of Historic Places criteria.

DDD. "Historically underserved landowner" means a beginning, limited-resource, or socially disadvantaged farmer or rancher.

EEE. "Hydric soil" means is a soil that formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part (Field Indicators of Hydric Soils in the United States, NTCHS, 1994).

FFF. "Imminent harm" means easement violations or threatened violations that, as determined by NRCS, would likely cause immediate and significant degradation to the conservation values for which the easement was acquired.

GGG. "Impervious surface" means surfaces that are covered by asphalt, concrete, roofs, or any other surface that does not allow water to percolate into the soil. Under ACEP-ALE roads and parking lots with soil or gravel surfaces and temporary greenhouses that cover the soil surface for less than 6 months are not considered impervious surfaces. Conservation practices in the NRCS Field Office Technical Guide and an agricultural land easement plan for the subject farm or ranch are not considered in the calculation of impervious surfaces for ACEP-ALE.

HHH. "Indian Tribe" means any Indian Tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Section 1601 et seq.), that is eligible for the special programs and services provided by the United States to Indians because of their status as Indians, including, for the purposes of this part, pueblos.

III. "Invasive species" means an alien species whose introduction does or is likely to cause economic or environmental harm or harm to human health.

JJJ. "Land evaluation and site assessment (LESA) system" means the land evaluation system approved by NRCS and used, when applicable, to rank land for farm and ranch land protection purposes based on soil potential for agriculture, as well as social and economic factors such as location, access to markets, and adjacent land use. For additional information see the Farmland Protection Policy Act regulation at 7 CFR Part 658.

KKK. "Landowner" means a person, legal entity, or Indian Tribe having legal ownership of land and those who may be buying eligible land under a purchase agreement. The term landowner may include all forms of collective ownership including joint tenants and tenants-in-common, and includes heirs, successors, assigns, and anyone claiming under them. State governments, local governments, and nongovernmental organizations that qualify as eligible entities are not eligible as landowners unless otherwise determined by the Chief.

LLL. "Lands substantially altered by flooding" means areas where flooding has created wetland hydrologic conditions which, with a high degree of certainty, will develop and retain wetland soil, hydrology, and vegetation characteristics over time.

MMM. "Land that furthers a State or local policy consistent with the purposes of the program" means land that meets the other criteria of eligible land and meets the policy of a State or local government as certified by the State or local government.

NNN. "Limited-resource farmer or rancher" means either:

(1)(i) A person with direct or indirect gross farm sales not more than the current indexed value in each of the previous 2 fiscal years (adjusted for inflation using Prices Paid by Farmer Index as compiled by National Agricultural Statistical Service), and

(ii) Has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous 2 years (to be determined annually using Commerce Department Data); or

(2) A legal entity or joint operation if all individual members independently qualify under paragraph (1)

OOO. "Maintenance" means work performed to keep the wetland reserve easement functioning for program purposes for the duration of the enrollment period. Maintenance includes actions and work to manage, prevent deterioration, repair damage, or replace conservation practices or activities on a wetland reserve easement, as approved by NRCS.

PPP. "Management" in the context of ACEP-WRE enrollments, means the eligible 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 project.

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

RRR. "Natural Resources Conservation Service (NRCS)" means an agency of the U.S. Department of Agriculture, including when NRCS carries out program implementation using the funds, facilities, or authorities of the CCC.

SSS. "Nongovernmental organization (NGO)" means any organization that for purposes of qualifying as an eligible entity under ACEP-ALE—

(1) Is organized for, and at all times since, the formation of the organization and has been operated principally for one or more of the conservation purposes specified in clause (i), (ii), (iii), or (iv) of section 170(h)(4)(A) of the Internal Revenue Code of 1986.

(2) Is an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 that is exempt from taxation under 501(a) of that code; and

(3) Is described

(i) In section 509(a)(1) and (2) of the Internal Revenue Code of 1986,or

(ii) Is described in section 509(a)(3) of the Internal Revenue Code of 1986 and is controlled by an organization described in section 509(a)(2) of that code.

TTT. "Nonseasonal" refers to a nonpermanent installed structure or cover that will be removed from the soil surface periodically during the growing season.

UUU. "Noxious weed" means any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment. Noxious weeds will generally possess one or more of the characteristics of being aggressive and difficult to manage, parasitic, a carrier or host of deleterious insects or disease, and being non-native, new to, or not common to the United States or parts thereof.

VVV. "Other interests in land" include any right in real property other than easements that are recognized by State law that the Chief determines may be purchased by an eligible entity to further the agricultural use of the land and other ACEP-ALE purposes.

WWW. "Other productive soils" means farm and ranch land soils, in addition to prime farmland soils, that include unique farmland and farm and ranch land of statewide and local importance.

XXX. "Parcel" means the defined area of land and may be a portion or all of the area of land that is owned by the landowner.

YYY. "Participant" means a person, legal entity, Indian Tribe, native corporation, or eligible entity who has been accepted into the program and who is receiving payment or who is responsible for implementing the terms and conditions of an agreement to purchase or 30-year contract, or the cooperative agreement for agricultural land easements.

ZZZ. "Pending offer" means a written bid, contract, or option extended to a landowner by an eligible entity to acquire an agricultural conservation easement before the legal title to these rights has been conveyed for the purposes of protecting the agricultural use and future viability, including the protection of grazing uses and related conservation values, by limiting nonagricultural uses of the land or by restoring and conserving eligible land.

AAAA. "Permanent easement" means an easement that lasts in perpetuity.

BBBB. "Person" means a natural person.

CCCC. "Prairie Pothole Region" means the counties designated as part of the Prairie Pothole National Priority Area for the CRP as of June 18, 2008.

DDDD. "Prime farmland" means land that has the best combination of physical and chemical characteristics for producing food, feed, fiber, forage, oilseed, and other agricultural crops with minimum inputs of fuel, fertilizer, pesticides, and labor without intolerable soil erosion, as determined by NRCS.

EEEE. "Private land" means land that is not owned by a governmental entity and includes acreage owned by Indian Tribes, as defined in this part.

FFFF. "Projects of special significance" means ACEP-ALE projects identified by the Chief using the criteria identified in 528.43 of this part.

GGGG. "Purchase Price" means the appraised fair market value of the agricultural land easement minus the landowner donation.

HHHH. "Right of enforcement" means the right of the United States to inspect the easement area and to enforce the easement entered into under this part in those instances in which the grantee of the easement does not fully protect the interests provided to the grantee under the easement.

IIII. "Rights of the United States" means the interests in a conservation easement held by the United States, which the United States may exercise under specific circumstances in order to take sole ownership of the conservation easement and enforce its terms. This applies only to Farm and Ranch Lands Protection Program (FRPP) conservation easement deeds pursuant to cooperative agreements entered into in 2006 through 2008.

JJJJ. "Riparian areas" means areas of land that occur along streams, channels, rivers, and other water bodies. These areas are normally distinctly different from the surrounding lands because of unique soil and vegetation characteristics, may be identified by distinctive vegetative communities that are reflective of soil conditions normally wetter than adjacent soils, and generally provide a corridor for the movement of wildlife.

KKKK. "Secretary" means the Secretary of the U.S. Department of Agriculture.

LLLL. "Socially disadvantaged farmer or rancher" means a producer who is a member of a group whose members have been subjected to racial or ethnic prejudices without regard to its members' individual qualities. For an entity, at least 50-percent ownership in the business entity must be held by socially disadvantaged individuals.

MMMM. "State Conservationist" means the NRCS employee authorized to direct and supervise NRCS activities in a State, and includes the Directors of the Caribbean Area (Puerto Rico and the Virgin Islands), or the Pacific Islands Area (Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands).

NNNN. "State Technical Committee (STC)" means a committee established pursuant to 16 U.S.C. Section 3861 and 7 CFR Part 610, Subpart C.

OOOO. "Unique farmland" means land other than prime farmland that is used for the production of specific high-value food and fiber crops as determined by NRCS. It has the special combination of soil quality, location, growing season, and moisture supply needed to economically produce sustained high quality or high yields of specific crops when treated and managed according to acceptable farming methods. Examples of such crops include citrus, tree nuts, olives, cranberries, fruits, and vegetables. Additional information on the definition of prime, unique, or other productive soil can be found in 7 CFR Part 657 and 7 CFR Part 658.

PPPP. "Veteran farmer or rancher" means a producer who meets the definition in section 2501(e) of the Food, Agriculture, Conservation, and Trade Act of 1990, as amended (7 U.S.C. Section 2279(e)).

QQQQ. "Wetland" means land that meets all of the following criteria:

(1) Has a predominance of hydric soils
(2) Is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions
(3) Supports a prevalence of such vegetation under normal circumstances

RRRR. "Wetland reserve easement" (ACEP-WRE) means a reserved interest easement, which is an interest in land defined and delineated in a deed whereby the landowner conveys all rights, title, and interests in a property to the United States, but the landowner retains those rights, title, and interests in the property which are specifically reserved to the landowner in the easement deed.

SSSS. "Wetland reserve plan of operations (WRPO)" means the document that is developed or approved by NRCS that identifies how the wetland functions and values and associated habitats on the easement will be restored, improved, and protected to achieve the purposes of the wetland reserve easement enrollment.

TTTT. "Wetland functions and values" means the hydrological and biological characteristics of wetlands and the socioeconomic value placed upon these characteristics, including—

(1) Habitat for migratory birds and other wildlife, in particular at-risk species.
(2) Protection and improvement of water quality.
(3) Attenuation of water flows due to flood.
(4) The recharge of ground water.
(5) Protection and enhancement of open space and aesthetic quality.
(6) Protection of flora and fauna which contributes to the Nation's natural heritage.
(7) Carbon sequestration.
(8) Contribution to educational and scientific scholarship.

UUUU. "Wetland restoration" means the rehabilitation of degraded or lost habitat in a manner such that:

(1) The original vegetation community and hydrology are, to the extent practical, re-established; or
(2) A community different from what likely existed prior to degradation of the site is established. The hydrology and native self-sustaining vegetation being established will substantially replace original habitat functions and values and does not involve more than 30 percent of the easement area.

VVVV. "Wildlife" means nondomesticated birds, fishes, reptiles, amphibians, invertebrates, and mammals.

528.191 Acronyms

A. AAI—all appropriate inquiries

B. ACEP—Agricultural Conservation Easement Program

C. ACEP-ALE—Agricultural Conservation Easement Program – Agricultural Land Easement

D. ACEP-WRE—Agricultural Conservation Easement Program – Wetland Reserve Easement

E. AECLU—agreement to enter contract for 30-year land use (WRE only)

F. AGI—adjusted gross income

G. ALEP—agricultural land easement plan (ALE only)

H. ALTA—American Land Title Association

I. AMA—Agricultural Management Assistance Program

K. APCE—agreement for the purchase of a conservation easement (WRE only)

L. AWMA—areawide market analysis

M. BIA—U.S. Bureau of Indian Affairs

N. BLM—U.S. Bureau of Land Management

O. CAH—NRCS Contribution Agreements Handbook

P. CCC—Commodity Credit Corporation

Q. CCR—Central Contractor Registration

R. CD——conservation district

S. CERCLA—Comprehensive Environmental Response, Compensation, and Liability Act

T. CFDA—Code for Federal Domestic Assistance

U. CFR—Code of Federal Regulations

V. CPC—conservation program contract

W. CPM—Conservation Program Manual

X. CREP—Conservation Reserve Enhancement Program

Y. CRP—Conservation Reserve Program

Z. CSP—Conservation Security Program

AA. CST—Customer Service Toolkit

BB. CUC—certificate of use and consent

CC. CY—calendar year

DD. DOJ—U.S. Department of Justice

EE. DUNS—Dun and Bradstreet Data Universal Numbering System

FF. EIN—employee identification number

GG. ESA—Endangered Species Act of 1973

HH. EFT—electronic fund transfer

II. EPD—Easement Programs Division

JJ. EQIP—Environmental Quality Incentives Program

KK. EWRP—Emergency Wetland Reserve Program

LL. FAADS—Federal Assistance Award Data System

MM. FAR—Federal Acquisition Regulation

NN. FCIP—final certificate of inspection and possession

OO. FIPS—Federal Information Processing Standard

PP. FIRREA—Financial Institution's Reform, Recovery and Enforcement Act of 1989

QQ. FGCAH—Federal Grants and Cooperative Agreements Handbook

RR. FMMI—Financial Management Modernization Initiative

SS. FMV—fair market value

TT. FOTG—NRCS Field Office Technical Guide

UU. FRPP—Farm and Ranch Lands Protection Program

VV. FPP—Farmland Protection Program

WW. FSA—USDA Farm Service Agency

XX. FTO—final title opinion

YY. FWS—U.S. Fish and Wildlife Service

ZZ. FY—fiscal year

AAA. GARC—geographic area rate cap (WRE only)

BBB. GIS—Geographic Information System

CCC. GM—General Manual

DDD. GPS—Global Positioning System

EEE. GRP—Grassland Reserve Program

FFF. GSS—grassland of special environmental significance (ALE only)

GGG. HEL—highly erodible land

HHH. HFRP—Healthy Forest Reserve Program

III. IAS—Integrated Accountability System

JJJ. IBIL—Internet Billing

KKK. IC—internal controls

LLL. IRS—U.S. Internal Revenue Service

MMM. LESA—land evaluation and site assessment

NNN. NAD—USDA National Appeals Division

OOO. NASS—USDA National Agricultural Statistical Survey

PPP. NEPA—National Environmental Policy Act

QQQ. NEST—National Easement Staging Tool

RRR. NFC—National Financial Center

SSS. NFSAM—National Food Security Act Manual

TTT. NGCE—NRCS National Geospatial Center of Excellence

UUU. NGO—nongovernment organizations

VVV. NHPA—National Historic Preservation Act

WWW. NHQ—National Headquarters

XXX. NPPH—National Planning Procedures Handbook

YYY. NRCS—Natural Resources Conservation Service

ZZZ. OGC—Office of the General Counsel

AAAA. O&M—operations and maintenance

BBBB. PCIP—preliminary certificate of inspection and possession

CCCC. PTO—preliminary title opinion (WRE only)

DDDD. RC—Regional Conservationist

EEEE. RFP—request for proposals

FFFF. SAM—System for Award Management

GGGG. SCIMS—Service Center Information Management System

HHHH. SHPO—State Historic Preservation Office

IIII. SSN—Social Security number

JJJJ. STC—State Technical Committee

KKKK. TDR—transfer development rights

LLLL. THPO—Tribal Historic Preservation Office

MMMM. TIN—tax identification number

NNNN. TSP—technical service provider

OOOO. UASFLA—Uniform Appraisal Standards for Federal Land Acquisitions

PPPP. USDA—U.S. Department of Agriculture

QQQQ. USFS—U.S. Forest Service

RRRR. USPAP—Uniform Standards of Professional Appraisal Practices

SSSS. WBS—FMMI work breakdown structure

TTTT. WC—wetland conservation compliance

UUUU. WED—warranty easement deed (WRE only)

VVVV. WHIP—Wildlife Habitat Incentives Program

WWWW. WREP Wetland Reserve Enhancement Partnership

XXXX. WRP—Wetland Reserve Program

YYYY. WRPO—wetland reserve plan of operations