

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart C – ACEP Appeals

528.20 Appeals

A. Appeal Process

This section identifies the different programmatic relationships that NRCS has with landowners 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. The “Appeals and Mediation” policy found at 440-CPM, Part 510, and the FPAC-BC Appeals and Litigation Division customer guide, provide information on appropriate contacts within NRCS, the FPAC-BC, and the National Appeals Division (NAD).
- (ii) Under ACEP-ALE, NRCS enters into ALE-agreements, and as applicable associated cost-share contracts, 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 highly erodible land conservation (HELCS) and wetland conservation (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 easement 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 postclosing determinations as described in paragraph D below.
- (iv) Notwithstanding paragraph (iii) above and paragraph D below, for ACEP-WRE only, subsequent to closing the easement, NRCS may enter into a conservation program contract with the landowner to implement restoration on the easement. Parties to an approved, valid conservation program contract for restoration implementation have certain appeal rights limited to the terms and conditions of the specific conservation program contract (see 440-CPM, Part 527). The conservation program contract is a separate contractual arrangement between the landowner and NRCS for the implementation of specific conservation practices or activities as prescribed and authorized by NRCS. The conservation program contract is strictly a contractual mechanism for NRCS to obtain the implementation of the restoration on the easement, and it does not afford the landowner any appeal rights with respect to the easement itself as described in paragraph B below.

- (v) All appeals must be requested in writing and submitted by the appellant in accordance with 7 CFR Parts 11 and 614. The appellant is responsible to furnish facts and evidence for consideration.
- (vi) All information generated as part of an appeal action must be incorporated into the official easement case file maintained at the State office and included in the agency record as needed.

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—
 - (i) Easement or restoration payment 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) Program ranking or screening criteria.
 - (vii) Published soil surveys.
 - (viii) Fund availability.
 - (ix) Mathematical- or science-based formulas and criteria.
 - (x) 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) Decisions issued by the USDA Office of the General Counsel, in the exercise of authority delegated to it by the U.S. Attorney General, concerning the application of real property title standards issued by the U.S. Attorney General.
 - (iii) 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-agreement
 - (iv) 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 agreement to purchase conservation easement (APCE) or agreement to enter contract for 30-year land use (AECLU)
 - NRCS decision not to extend an APCE or AECLU
- (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 restore, protect, manage, maintain, monitor, 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 does 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 within 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 development or modification of wetland reserve plans of operation or 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 paragraphs B(2)(i) and (ii) above.
- (ii) A determination by NRCS that a landowner has violated HELC or WC provisions under 7 CFR Part 12.

D. Postclosing Determinations

- (1) Except for violations of 7 CFR Part 12 identified above, NRCS determinations that are made after easement closing and payment of easement compensation are not subject to the formal 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. The WRE landowner or ALE easement holder may be provided the opportunity to request in writing an informal review by the appropriate State conservationist. There is no further appeal available.
- (3) The State conservationist will review 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 document their findings and decisions for inclusion in the administrative record should legal action become necessary.