

## 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 eligible land by limiting nonagricultural uses of that land that negatively affect the agricultural uses and conservation values, and to protect grazing uses and related conservation values by restoring or 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 that negatively affect the agricultural uses and conservation values and for grassland enrollments, must also limit the nongrassland uses of the land.
- (2) Activities that meet the definition of agricultural uses provided in 7 CFR Section 1468.3 and as described in subpart D, section 528.33D(3) of this part, are deemed agricultural uses of the land for the purposes of ACEP-ALE. Activities that do not meet the definition of agricultural uses provided in 7 CFR Section 1468.3 and negatively affect the agricultural uses and conservation values must be limited or prohibited to protect the future viability of these uses and values.
- (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 in coordination with the eligible entity, the conditions on the property, including preexisting rights in the property, such as mortgages, liens, and leases, to ensure there are not onsite or offsite conditions that would preclude or interfere with the ability of the parcel to meet program purposes.
  - (iii) Identifying the regulatory deed requirements that must be addressed 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 an eligible entity to place, monitor, and enforce appropriate prohibitions and limitations on nonagricultural and other incompatible uses in the deed terms. The eligible entity's deed terms must prohibit or limit nonagricultural uses that negatively affect the agricultural uses and conservation values. Nonagricultural uses that have a negative affect are those that are incompatible with agricultural uses and uses that involve a relatively irretrievable commitment of agricultural resources. For grassland enrollments, the deed must also prohibit or limit conversion to nongrassland uses.
- (5) An 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. An agricultural land easement may be held by one or more eligible entities. In addition to the identified eligible entities, the agricultural land easement deed may also identify co-holders or third-party right holders as described below:

- (i) Co-Holders.—An eligible entity may identify in the agricultural land easement deed, other legal entities that will co-hold the agricultural land easement with the eligible entity. A legal entity that is functioning as a co-holder (rather than an eligible entity), is subject to the following requirements and limitations:
- Must be identified as a grantee on the agricultural land easement deed;
  - May not receive direct payment of the Federal share provided by NRCS;
  - Does not have to meet the requirements of being an eligible entity;
  - Is considered a beneficiary of the Federal funds;
  - Must have current registration in the Dun and Bradstreet Data Universal Numbering System (DUNS) and the System for Award Management (SAM); and
  - Is required to comply with the terms of the ALE-agreement and must acknowledge their agreement to comply with the terms of the ALE-agreement by:
    - Signing the ALE-agreement in their capacity as a co-holder; or
    - For ACEP-ALE cooperative or grant agreements only, the co-holding entity may provide NRCS sufficient documentation of their status as subrecipient of Federal funds and acknowledgement of the requirement to comply with the terms of the ALE-agreement.
- (ii) Third-Party Right Holders.—An eligible entity may identify in the agricultural land easement deed a third-party right holder that has specific rights or responsibilities but is not listed as grantee. These may include, but are not limited to, appropriately qualified third parties identified on the deed as having responsibilities to monitor or enforce the easement for specific purposes (such as historic or archaeological resources), to conduct monitoring of an ALE plan because they have a specific resource background (such as species monitoring or grassland monitoring), or the United States, which possesses a third-party right of enforcement. A third-party holder does not have to be party to the ALE-agreement, may not receive direct payment of the Federal share provided by NRCS, is not considered a beneficiary of Federal funds, and is not required to be registered in DUNS or SAM.
- (6) When negotiating the terms of a conservation easement deed, the eligible entity and landowner should consult with their own attorneys and other technical and financial advisors to ensure that all legal requirements and any applicable Internal Revenue Service requirements are met as NRCS makes no representations and will not provide advice regarding the tax implications of these transactions.
- (7) Section 1265(a) of subtitle H of the Food Security Act of 1985 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 policy. 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 from the 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 parcel. Existing legal descriptions or surveys of the boundary of the ACEP-ALE parcel and the appropriate record book and page,

as well as the tax parcel number where required, must be referenced in the conservation easement deed.

- (2) The legal description 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 legal description of the ACEP-ALE funded easement area is different than 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 that would be relied upon for the ACEP-ALE parcel is not accurate.
  - (iii) The ACEP-ALE funds are being used to protect less than the entire area protected by a larger conservation easement and the current legal description does not match the ACEP-ALE portion.
  - (iv) The State conservationist has for their State established conditions under which a new or updated survey or legal description is required.

#### 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 of this part for baseline documentation example). The baseline documentation report must be appended to the agricultural land easement deed or incorporated by reference.
- (2) The baseline documentation report must contain maps and full descriptions and pictures of items including but not limited to:
  - (i) Property location
  - (ii) Land use, land cover, and its condition
  - (iii) Crops and crop rotations
  - (iv) All physical structures, infrastructure, and improvements, including barns, sheds, corrals, fences, ponds, watering facilities, and roads
  - (v) Irrigation rights and volume of irrigation water rights to be retained for the easement
  - (vi) Any problem areas
  - (vii) Any special features for which the parcel is being protected, such as historical or archaeological resources or habitat, species, or sensitive natural resources identified for protection
  - (viii) For grassland enrollments: the condition of the grassland, pasture, range, hay or forest lands; animal inventories and waste storage facilities; and any critical nesting habitat for declining populations of grassland dependent birds.

**Note:** See subpart U of this part for baseline documentation report items.

- (3) An eligible entity operating under an ACEP-ALE cooperative agreement must provide NRCS a draft baseline documentation report at least 90 days prior to the planned closing date of the agricultural land easement. A certified eligible entity operating under an ACEP-ALE grant agreement must provide NRCS the baseline documentation report at the time payment request is submitted. Under an ACEP-ALE program agreement, the eligible entity must provide the draft or final baseline documentation report as specified in the terms of the agreement.

#### D. Regulatory 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 ACEP-ALE funds meet the following requirements:

- (i) Address all of the regulatory deed requirements as published in 7 CFR Section 1468.25(d).

**Note:** All ALE-agreements originally executed under the 2014 Farm Bill are subject to the regulatory deed requirements in 7 CFR Section 1468.25(d) in effect prior to the date of enactment of the 2018 Farm Bill (December 20, 2018), unless an earlier version of the regulation was identified in the originally executed ALE-agreement.

- (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 or does not authorize a permanent easement, for the maximum duration allowed under State law (see paragraph E below).
- (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 or conserving eligible land, including:
- Identification of building envelopes and associated limitations on new construction on the easement area, also referred to as “protected property” (see paragraph G below).
  - Specific protections related to the specific purposes for which the parcel was ranked or 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) Include the required United States right of enforcement language that is specified by NRCS (see paragraph (4) below), including a provision that such interest remains in effect for the duration of the easement, and any changes that affect NRCS’s interest in the agricultural land easement must be reviewed and approved by NRCS.
- (vii) Provide the United States access to the easement area sufficient to ensure compliance pursuant to its right of enforcement.
- (viii) Include 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.
- (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 surface and subsurface mineral development unless the required provisions for surface or subsurface mineral exploration and extraction are included in the deed terms (see paragraph I below).
- (xii) Prohibit or limit the subdivision of the property subject to the agricultural land easement (see paragraph H below).
- (xiii) Include applicable agricultural land easement and highly erodible land (HEL) conservation plan requirements and provisions as follows:

- 2014 Farm Bill enrollments: subject the parcel to an approved agricultural land easement plan.
  - 2018 Farm Bill enrollments:
    - For parcels that contain highly erodible cropland, include terms that ensure compliance with the HEL conservation plan that will be developed and managed in accordance with the Food Security Act of 1985, as amended, and its associated regulations.
    - Include language requiring the development and maintenance of an agricultural land easement plan, if agreed to by the eligible entity as a condition of selection and funding.
- (xiv) Include an amendment clause requiring changes to the easement deed after its recordation be consistent with ACEP-ALE purposes and subject to NRCS approval prior to such amendment (see subpart R of this part for requirements applicable to easement administration actions).
- (xv) Include terms, if required by the eligible entity, that identify an intent to keep the land subject to the agricultural land easement under ownership of a farmer or rancher.
- (xvi) Include other minimum deed terms specified by NRCS to ensure that ACEP-ALE purposes are met.
- (2) For ACEP-ALE cooperative agreements and as authorized, ACEP-ALE program agreements, the ACEP-ALE minimum deed terms addendum, or EPD-approved entity-specific deed template (see section 528.61 below) that addresses the regulatory deed requirements will be included as an attachment to the agreement. Each individual 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 for review and approval.
- (3) For ACEP-ALE grant agreements or as authorized, ACEP-ALE program agreements, with certified eligible entities, the certified eligible entity is responsible to ensure the terms of their agricultural land easement deed addresses the regulatory deed requirements as identified in the agreement. NRCS’s 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) The standard required United States right of enforcement clause that must be included in all agricultural land easement deeds is provided as follows:
- (i) For ALE-agreements executed under the 2014 Farm Bill, the terms of the United States right of enforcement clause are subject to the regulatory deed requirements in 7 CFR Section 1468.25(d) as published January 1, 2018, unless an earlier version was included in the originally executed ALE-agreement. The specific language of the United States right of enforcement clause that must be used in the deeds of agricultural land easements enrolled under such agreements is limited to the language provided by NRCS in the versions of the standard ACEP-ALE minimum deed terms addendum, or for certified eligible entities in the terms of the ACEP-ALE grant agreement that were approved for use under the 2014 Farm Bill.
- (ii) For ALE-agreements executed under the 2018 Farm Bill, the standard United States right of enforcement clause provided below and in the executed ALE-agreements must be included in the agricultural land easement deeds of all agricultural land easements acquired under such agreements:
- “Pursuant to 16 U.S.C. Section 3865 et seq., the United States is granted the right of enforcement that it may exercise only if the terms of the ALE Deed are not

enforced by the Grantee. The Secretary of the United States Department of Agriculture (the “Secretary”) or the Secretary’s assigns, on behalf of the United States, may exercise this right of enforcement under any authority available under State or Federal law if the Grantee, or its successors or assigns, fails to enforce any of the terms of this ALE Deed, as determined in the sole discretion of the Secretary.

In the event the United States exercises this right of enforcement, it is entitled to recover any and all administrative and legal costs associated with any enforcement or remedial action related to the enforcement of this ALE Deed from the Grantor, including, but not limited to, attorney’s fees and expenses related to Grantor’s violations. In the event the United States exercises this right of enforcement, it is entitled to recover any and all administrative and legal costs associated with any enforcement of this ALE Deed from the Grantee, including, but not limited to, attorney’s fees and expenses related to Grantee’s violations or failure to enforce the ALE Deed against the Grantor, up to the amount of the United States’ contribution to the purchase of the ALE.

The Grantee will annually monitor compliance and provide the United States with an annual monitoring report that documents that the Grantee and Grantor are in compliance with the ALE Deed. If the annual monitoring report is insufficient or is not provided annually, or if the United States has a reasonable and articulable belief of an unaddressed violation, as determined by the Secretary, the United States may exercise its right of inspection. For purposes of inspection and enforcement of the ALE Deed and the United States ALE-Agreement with the Grantee, the United States will have reasonable access to the Protected Property. Prior to its inspection of the Protected Property, the United States shall provide advance notice to Grantee and Grantor and provide Grantee and Grantor a reasonable opportunity to participate in the inspection.

In the event of an emergency, the United States may enter the Protected Property to prevent, terminate, or mitigate a potential or unaddressed violation of the ALE Deed and will give notice to Grantee and Grantor at the earliest practicable time.”

- (5) NRCS may request the Office of General Counsel’s (OGC) assistance with agricultural land easement deed reviews.

#### E. Agricultural Land Easement Duration

ACEP agricultural land easements must be perpetual or for the maximum duration allowed 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, 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 the 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. (See subpart U of this part for the “ACEP-ALE Worksheet for 2-Percent Impervious Surface Waiver Determinations” provided as an example.)
  - (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 extent of impervious surfaces within the easement area.

#### G. Building Envelope

- (1) A parcel may include one or more building envelopes as defined in subpart T, section 528.190 of this part. Building envelopes must be reasonable in size, number, and location, such that they are able to accommodate all existing building and structures and future construction, except for certain agricultural structures and utilities, while not being so large, numerous, or situated in a manner that may interfere with the agricultural operations or conservation values of the parcel. If the parcel will contain building envelopes, then the number, total acres, boundaries, and locations of existing and any future building envelopes must be identified and addressed in the deed under either a fixed or floating option:
  - (i) Fixed option.—All building envelopes are identified and agreed upon prior to closing. The deed terms identify the number and total acres of the building envelopes and the boundaries and locations of the building envelopes are identified in an exhibit attached to and recorded with the agricultural land easement deed; or
  - (ii) Floating option.—The deed terms will identify the number and total acres of the building envelopes but allow the boundaries and locations of such building envelopes to be determined after the easement has closed with the prior written approval of the eligible entity and the State conservationist. After approval, the agricultural land easement deed must be amended to add an exhibit which identifies the approved boundaries and location of the building envelopes.

- (2) The agricultural land easement deed may also allow adjustments to the boundaries and location of building envelopes with prior written approval of the eligible entity and the State conservationist. After approval of such an adjustment, the agricultural land easement deed must be amended to add an exhibit which identifies the approved boundaries and locations of the building envelopes. However, the number and total acres of the building envelopes may not be increased after the easement has closed.
- (3) If there are no existing structures on the easement area and the construction of new structures on the easement area will be prohibited, the entity must provide to NRCS a statement that the easement will have no building envelope and must address this prohibition in the agricultural land easement deed.
- (4) For each parcel that will contain one or more building envelopes, the eligible entity must identify the number and total acres of the building envelopes in the agricultural land easement deed. Additionally, if the fixed option is selected, the eligible entity must also prepare and provide to NRCS a map of the location and boundaries of such building envelopes. Under ACEP-ALE cooperative agreements, or program agreements where authorized, the eligible entity must provide this information to NRCS no less than 90 days prior to the planned closing date. For ACEP-ALE grant agreements, or program agreements where authorized, the certified eligible entity must provide this information to NRCS within 30 days of recording the easement or requesting reimbursement, whichever is sooner.
- (5) State conservationist approval of the location of future building envelopes under the floating option, or any adjustments to building envelopes after easement closing, will be conditioned on locating and sizing 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) The eligible entity must address the potential for future subdivision in each agricultural land easement deed by including provisions to prohibit subdivision of the easement area entirely or limit the subdivision of the easement area.
- (2) 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 are individually eligible and rank high enough to be selected for funding, separate agricultural land easements may be purchased on the individual parcels.
- (3) If the eligible entity includes provisions to prohibit subdivision of the easement area entirely, the provision may include an exception to address State or local regulations that explicitly require subdivision to construct residences for employees working on the agricultural land easement area.
- (4) 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, the terms required for the future conveyance of approved parcels, and identify the boundaries of the proposed subdivisions as follows—
  - (i) If Identified Prior to Closing.—Prior to closing, the eligible entity must provide NRCS a map of the proposed subdivision of the protected property. The individual parcels resulting from the proposed subdivision of the protected property must each meet the ACEP-ALE land eligibility requirements and



program purposes, as determined by NRCS. Both the approved number and boundaries of the proposed subdivided parcels as approved by the State conservationist prior to closing 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) If Identified After Closing.—The eligible entity must submit a request to the State conservationist for approval prior to authorizing a subdivision. The eligible entity must certify that the requested subdivision is required to keep all resulting farm or ranch parcels in production and viable for agricultural use. 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 USDA’s most recent National Agricultural Statistical Survey (NASS).

#### I. Surface and Subsurface Mineral Exploration and Extraction

The agricultural land easement deed must prohibit exploration and extraction of surface and subsurface minerals unless the required provisions for such exploration and extraction are included in the agricultural land easement deed as follows:

- (i) The eligible entity may include deed terms that allow limited mining activities for materials used to facilitate the agricultural operations on the easement area, provided the extraction is limited, localized, occurs on a small area, does not harm the purposes of the agricultural land easement, and is approved in advance by the eligible entity.
- (ii) The eligible entity may elect to allow subsurface mineral extraction to occur on the easement area in accordance with applicable State law if the agricultural land easement deed includes the following terms:
- For ALE-agreements executed under the 2014 Farm Bill, the language included in those agreements at the time of execution, including the attached minimum deed terms for ACEP-ALE cooperative agreements, subject to updates or amendments to such language as authorized for 2014 Farm Bill enrollments, must be included in all agricultural land easements deeds acquired under such agreements.
  - For ALE-agreements executed under the 2018 Farm Bill, the standard subsurface mineral development language provided by NRCS in the executed ALE-agreements, must be included in the agricultural land easement deeds of all agricultural land easements acquired under such agreements. These provisions allow for the subsurface mineral development on the easement area if approved by the eligible entity and NRCS, and require the eligible entity and the landowner to demonstrate prior to the initiation of mineral development activity that such subsurface mineral development, as determined by the eligible entity and NRCS, shall—
    - Be conducted in accordance with applicable State law.
    - Have a limited and localized impact.
    - Not harm the agricultural use and conservation values of the land subject to the easement.

- Not materially alter or affect the existing topography, as determined by the eligible entity and the NRCS.
- Comply with a subsurface mineral development plan for the remediation of impacts to the agricultural use and conservation values of the easement area, which includes reclaiming and restoring all areas on the easement that are impacted by the subsurface mineral development and such plan is approved by the eligible entity and NRCS prior to the initiation of mineral development activity.
- Not be accomplished by any surface mining method.
- Be within the impervious surface limits described in the agricultural land easement deed.
- Use practices and technologies that minimize the duration and intensity of impacts to the agricultural use and conservation values of the agricultural land easement.
- Additionally, all areas of the protected property impacted by subsurface mineral development must be reclaimed and restored within a reasonable time, as determined by the eligible entity and NRCS, at cessation of subsurface mineral development activities.

#### J. 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 set forth 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 deed to give rise to the United States right of enforcement. No representative of USDA will sign the ACEP-ALE funded agricultural land easement deed or other acceptance document unless signature by a third-party right-of-enforcement holder is required by State law and such requirement has been verified by OGC. 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.

**Note:** Due to implementation of ACEP-ALE in fiscal year (FY) 2014 under the existing FRPP regulations, the agricultural land easement deeds funded through ALE-agreements executed in FY 2014 must be signed by NRCS.

### **528.61 Guidelines for Agricultural Land Easement Deed Review**

#### A. NRCS Review of Agricultural Land Easement Deeds

- (1) Although an 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 to address the regulatory deed requirements and ensure the deed terms are 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 of this part for the “ALE Minimum Deed Terms” addendums). The ALE Minimum Deed Terms addendum is a standard exhibit to the ACEP-ALE cooperative agreement and to the ACEP-ALE program agreement where authorized and when used with noncertified eligible entities. The ALE Minimum Deed Terms addendum must be used as described in this section by all eligible entities for all easements acquired under such agreements.

**Note:** Subpart H of this part, provides the development and review requirements for agricultural land easement deeds used by eligible entities that have been certified and have entered into an ACEP-ALE grant agreement, or where authorized, an ACEP-ALE program agreement, that includes the agreement terms specific to certified eligible entities.

- (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. The ALE minimum deed terms addendum identifies the terms that will prevail in the event of a conflict between the eligible entity’s own deed terms and the ALE minimum deed terms. The ALE minimum deed terms themselves may not be modified except for appropriate changes to address drafting needs and 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 by the eligible entity to NRCS 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 as follows:
  - (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 or as applicable, the Easement Acquisition Branch (EAB) team, 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.
    - Appropriate drafting instructions were followed, and optional deed term selections were made to reflect the land eligibility of the parcel.
    - Paragraph below is inserted at the bottom of the agricultural land easement deed:

This **[INSERT DEFINED TERM FOR 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 **[SELECT ONE: *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, 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 in EXHIBIT\_\_\_\_ entitled “Minimum Deed Terms For The Protection Of Agricultural Use”, 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 incorporated into the body of the 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) An eligible entity may request and be authorized by NRCS to use an entity-specific ALE deed template, provided the template is determined by NRCS to address all of the regulatory deed requirements, is approved by EPD director, and following such EPD director approval is attached to the ACEP-ALE cooperative agreement or where authorized, ACEP-ALE program agreement, at the time of the original execution of the ALE-agreement or through a subsequent amendment or modification thereto, as follows:
  - Eligible entities seeking approval of an entity-specific ALE deed template must review the regulatory deed requirements and the ALE minimum deed terms. Entities should notify the State conservationist whether they will request an entity-specific ALE deed template as early in the process as possible, preferably prior to ranking. Such entities are likewise encouraged to submit the proposed entity-specific ALE deed template as early in the process as possible, preferably in the fiscal year prior to submitting an application and whenever possible prior to entering into the ALE-agreement.
  - The entity will draft a proposed entity-specific ALE deed template addressing all of the regulatory deed requirements, incorporating the required United States right of enforcement language without alteration, and to the greatest extent practicable incorporating the ALE minimum deed terms as written. The entity will identify in their request for approval the specific terms within the proposed entity-specific ALE deed template that meet the regulatory deed requirements by citation and where applicable the ALE minimum deed terms.
  - Eligible entities will submit the proposed entity-specific ALE deed template to NRCS.
  - The State conservationist or, as applicable, the EAB team will review the proposed entity-specific ALE deed template for conformance with program requirements and submit the template to EPD director for review.
  - The EPD director will review the proposed entity-specific ALE deed template and then approve, reject, or approve with required changes.
  - The EPD director decision will be communicated in writing to the eligible entity, the State conservationist and as applicable, the EAB Team. Only after written approval is received may ALE-agreements, including amendments or modifications thereto, that authorize the use of the EPD-approved entity-specific ALE deed template be executed by NRCS.
  - Eligible entities with an EPD-approved entity-specific ALE deed template must use the language of the template as approved, and if further changes are made to an already approved template, the deed must be resubmitted for EPD director approval and will be treated as an individual deed for review.
  - If the eligible entity uses the EPD-approved entity-specific ALE deed template without changing any terms or conditions, review of the individual, final agricultural land easement deeds by EPD is not required; instead, the State conservationist or, as applicable, the EAB Team will review and verify

that the individual, final agricultural land easement deed is the same as the EPD-approved template. Verification by the State conservationist or, as applicable, the EAB team must be completed prior to the eligible entity requesting an advance of the Federal share or closing on the easement.

- If an entity is provided ranking points for having an EPD-approved entity-specific ALE deed template, that template must have EPD approval in the fiscal year prior to providing such ranking points to an individual parcel for which the template will be used to acquire the ACEP-ALE.
- (5) State conservationists, in consultation with the State technical committee, may propose additional minimum deed terms that are State-specific to address actual, local concerns that are not adequately encompassed by the standard set of minimum deed terms provided in the nationally available “Minimum Deed Terms” addendum. The proposed State-specific terms cannot modify any of the standard ALE minimum deed terms but may be State-specific terms that are in addition to the nationally required minimum deed terms. The proposed State-specific terms must be submitted by the State conservationist to the EPD director for review and approval. EPD-approved State-specific terms would then be used uniformly throughout the State as the standard “State-specific ALE Minimum Deed Terms” addendum for that State. Submissions for additional State-specific minimum deed terms must occur in the fiscal year prior to the fiscal year of their proposed use to ensure adequate time for review and approval. Prior to their use, the approved State-specific minimum deed terms must be included as an attachment to the ACEP-ALE cooperative agreement or where authorized, the ACEP-ALE program agreement, either at the time of the original execution of the ALE-agreement or through a subsequent amendment or modification thereto.
- (6) NRCS will conduct quality assurance reviews on the agricultural land easements acquired by the eligible entity. If the final deeds contain modifications to the ALE minimum deed terms, or EPD-approved entity-specific ALE deed templates, NRCS may require the deeds to be remedied and may terminate the ALE-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 a 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 all ACEP-ALE cooperative agreements, and where authorized, ACEP-ALE programs 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 eligible entity prior to closing the easement.
  - (ii) For ACEP-ALE grant agreements with certified eligible entities and where authorized, ACEP-ALE program 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 eligible 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 eligible 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 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 deed's ability to protect the agricultural uses by limiting the nonagricultural uses and for grassland enrollments, also limiting the nongrassland uses of the land.
  - (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 in order 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.
    - (i) For agricultural land easements acquired pursuant to an ACEP-ALE cooperative agreement, or where authorized an ACEP-ALE program agreement with a noncertified eligible entity, States are required to use form NRCS-LTP-27, "Preliminary Certificate of Inspection and Possession (PCIP)" (or approved successor forms). The "PCIP" form must be completed by NRCS prior to the easement closing.
    - (ii) For agricultural land easements acquired pursuant to an ACEP-ALE grant agreement, or where authorized an ACEP-ALE program agreement with a certified eligible entity, the terms of the ALE-agreement require the certified eligible entity to identify, consider, document, and address such unrecorded interests.
  - (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 form NRCS-LTP-23, "Certificate of Use and Consent" (or successor form) 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 of this part 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 Right.— 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 may include defined rights of way or 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 paragraph B below that is an alternative to 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 more than 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 are not limited to—
- Liens against the property (mortgages, mechanic’s liens).
  - Right-of-way or 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 easement’s ability to protect the agricultural uses by limiting the nonagricultural uses and, for grassland enrollments, to protect the grazing uses and related conservation values by limiting nongrassland 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 that have entered into an ACEP-ALE grant agreement or where authorized an ACEP-ALE program agreement, the

certified eligible entity rather than NRCS must 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 must provide the NRCS State office a copy of the final recorded agricultural land easement deed, a copy of the final policy of title insurance, and a copy of the completed 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 or lessee of the preexisting rights.
  - (ii) Terminating or cancelling leases or options.
  - (iii) Prior to acquisition, reconfiguring the boundaries of the parcel to eliminate or reduce to a minimal extent 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 reranked and may need an updated appraisal in accordance with 440-CPM, Part 527, Subpart E, Section 527.47. The reconfigured parcel may not be funded if the ranking score of the reconfigured parcel is below the lowest scoring parcel funded in the applicable funding pool for that fiscal year.
- (7) The eligible entity must provide NRCS with documentation that all unacceptable exceptions have been remedied. For ACEP-ALE cooperative agreements and where authorized, ACEP-ALE program agreements with 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 of this part). The State conservationist may not disburse funds or approve the closing of an agricultural land easement if there are any unacceptable outstanding rights to the parcel. For certified eligible entities acquiring easements under an ACEP-ALE grant agreement or where authorized an ACEP-ALE program agreement, 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 agreement.

#### B. Access to Agricultural Land Easements

- (1) Agricultural land easements must have sufficient access as described in this part to be eligible to receive and retain ACEP-ALE cost-share assistance.
- (2) The landowner and eligible entity are responsible to ensure sufficient access to the 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 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 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 as applicable, the agricultural land easement plan (including any component plans such as an HEL 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 subparagraph (ii) above, then they may consider alternative legal access as described in subparagraph (iv) below across lands owned by the United States (Federal lands), such as lands managed by the Bureau of Land Management (BLM), U.S. Fish and Wildlife Service, 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 subparagraph (ii) to the 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 an attempt to acquire access across adjacent non-Federal lands. 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 American Land Title Association (ALTA) title insurance on a standard ALTA owner’s policy for each acquisition for at least 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 per the specific terms of the ALE-agreement.

- The title commitment must be free and clear of any and all outstanding rights or encumbrances on the title except those that NRCS determines 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.
  - Except for approved alternative legal access in accordance with paragraph B(3) above, the title commitment must insure access.
- (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. Applicability**

##### **(1) 2014 Farm Bill Enrollments**

ALE-agreements originally executed under the 2014 Farm Bill remain subject to the authorities and requirements of the statute and regulations in place at the time of enrollment. Therefore, all agricultural land easement deeds for parcels funded through ALE-agreements executed under the 2014 Farm Bill must continue to include the terms that identify that the agricultural land easement is subject to the agricultural land easement plan. Additionally, the development and approval of an agricultural land easement plan and any required component plans must be completed in accordance with paragraph B below.

##### **(2) 2018 Farm Bill Enrollments**

Agricultural land easements acquired pursuant to ALE-agreements executed under the 2018 Farm Bill must have an HEL conservation plan for any portion of a parcel that contains highly erodible cropland, and the agricultural land easement deed must include terms that ensure compliance with the HEL conservation plan that will be developed and managed in accordance with the Food Security Act of 1985, as amended, and its associated regulations. Additionally, an eligible entity may elect to develop a comprehensive agricultural land easement plan and include language in the agricultural land easement deed requiring the development and maintenance of such agricultural land easement plan as a condition of selection and funding. The development and approval of a required HEL conservation plan on highly erodible cropland or an agreed-to agricultural land easement plan must be completed in accordance with paragraph C below.

#### **B. 2014 Farm Bill Enrollments: Agricultural Land Easement Plan Development and Approval Requirements**

- (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 that 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 ALE-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 archaeological 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 cropland, 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 subpart D, section 528.33B(3) of this part, or if the parcel includes one of the eligible land uses identified in subpart D, section 528.33C(1)(ii)-(v) of this part. An ACEP-ALE grasslands management plan must meet the requirements identified in paragraph (7) below.
    - An HEL conservation plan is required if the parcel contains highly erodible cropland. Additionally, where appropriate, the HEL conservation plan may include conversion of highly erodible cropland to less intensive uses. An ACEP-ALE HEL conservation plan must meet the requirements in paragraph (8) below. NRCS or an 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 paragraph (9) below.
- (2) 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 ALEP is developed by NRCS or a third party.
- (3) If the eligible entity requests NRCS to develop the ALEP, this should be identified in the ALE-agreement. NRCS development of the ALEP is at no cost to the eligible

entity. If NRCS develops the ALEP, 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). As part of the NRCS planning process, NRCS will complete the environmental evaluation (Form NRCS-CPA-52, “Environmental Evaluation Worksheet”) and the associated documentation needed to comply with National Environmental Policy Act (NEPA) requirements. State conservationists must work with the entity to ensure NRCS planning assistance is requested and occurs with sufficient time to allow NRCS to complete the ALEP and the associated environmental evaluations and for the entity and landowner to review and sign the plan prior to easement closing.

**Note:** The ALEP does not have to be a resource management system (RMS)-level plan. The landowner or eligible entity may request an RMS-level plan, or an RMS-level plan may be required as a condition of funding if the parcel was ranked and selected or identified as a project of special significance based on the landowner and eligible entity agreement that the ALE would have an RMS-level plan.

- (4) If the eligible entity develops the ALEP, including a third party selected by the eligible entity, it is at the eligible entity’s own expense. NRCS review and approval of the entity-developed ALEP is based on a determination that the ALEP meets the ACEP-ALE program requirements outlined in this section. An environmental evaluation form (NRCS-CPA-52) is not required for an entity-developed ALEP. The timing of the NRCS review and approval of the ALEP is as follows:
  - (i) For ACEP-ALE cooperative agreements, the ALEP must be approved by NRCS and signed by the landowner and the eligible entity prior to easement closing.
  - (ii) For ACEP-ALE 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. For easements requiring an HEL conservation plan component as described in paragraph (8) below, NRCS must approve the HEL conservation plan component prior to closing.
- (5) The ALE plan is a living document that may be adjusted as ownership or landowner operations or objectives change and is intended to provide flexibility for management of the land within the purposes of the easement over the term of the easement. All revisions and updates to the ALE plan must be approved by the landowner, the grantee, and NRCS.
- (6) The eligible entity is responsible to ensure compliance with any required provisions of the agricultural land easement plan.
- (7) Grasslands Management Plan Component Requirements.—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.
  - (i) The grasslands management plan must include—

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- 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.
  - 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, water quality and quantity benefits, or other resource concerns for which the easement was enrolled.
  - The nesting seasons of any grassland-dependent birds whose populations are in significant decline and the associated limitations on timing and location of any haying, mowing, or seed harvest activities.
  - The permissible and prohibited activities.
  - Any associated restoration plan or conservation plan (not limited to HEL conservation plans).
- (ii) 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.
- (iii) 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.
- (8) HEL Conservation Plan Component Requirements.—Where highly erodible croplands are included in the enrollment, an HEL 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 180-NPPH. The eligible entity has the option to request NRCS assistance in developing only the HEL conservation plan component for inclusion in an ALEP that is otherwise developed by the eligible entity.

**Note:** 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 Form AD-1026, 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 Form 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.

- (i) The HEL 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. Implementation of any provisions required under the HEL conservation plan must occur within 1 year unless the State conservationist grants an extension due to conditions beyond the landowner’s control.
- (ii) The HEL conservation plan is considered up-to-date as long as there are no changes to the agricultural operations on the parcel and no changes in ownership of the parcel. If there are changes to the agricultural operations on the parcel or ownership of the parcel, the HEL conservation plan must be updated. The

- eligible entity and landowner must obtain an updated HEL conservation plan from NRCS or an NRCS-certified planner in the event of such changes.
- (iii) The eligible entity must report any changes in the agricultural operation or parcel ownership from the previous year on its annual monitoring report. If a change in operations or ownership is reported, the eligible entity must instruct the landowner to schedule an appointment with NRCS or NRCS-certified planner to have the HEL conservation plan updated within 12 months. If at the time of the next annual monitoring report the landowner has not obtained an updated HEL 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.
  - (iv) NRCS will monitor the status of the HEL conservation plan in accordance with HEL/WC status review requirements. Prior to entering the protected property, NRCS will notify the landowner in accordance with 180-NFSAM procedures.
  - (v) A violation of the HEL conservation plan will be considered a violation of the agricultural land easement, once all appeal rights have been exhausted. (See subpart J, section 528.92 of this part, for violation procedures.)
- (9) Forest Management Plan Component Requirements.—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. Therefore, a forest management plan is required when the area of contiguous forest exceeds both 40 acres and 20 percent of the easement area. A forest management plan is not required if the contiguous forest area is less than 40 acres or if the contiguous forest is greater than 40 acres but is less than 20 percent of the easement area.
- (i) 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.
  - (ii) The forest management plan component must 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.
  - (iii) 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.
  - (iv) 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 forest land management is consistent with the plan and the changes to the plan are needed.

#### C. 2018 Farm Bill Enrollments: Agricultural Land Easement Plan Development and Approval Requirements

- (1) An ALEP may be comprised of a general agricultural land easement plan, a grassland management plan, a forest land management plan, an HEL conservation plan, or any combination thereof. An HEL conservation plan is required on those portions of a parcel that contain highly erodible cropland. If the parcel does not contain highly

erodible cropland, the development of an ALEP that includes a general agricultural land easement plan, a grassland management plan, or a forest land management plan is not required unless agreed to by the eligible entity.

- (2) If the eligible entity agrees to develop an ALEP that include a general agricultural land easement plan, a grassland management plan or a forestland management plan, the eligible entity is responsible for the development and maintenance of such plans. If the ALEP includes an HEL conservation plan, NRCS or an NRCS-certified planner is responsible for the development and maintenance of the HEL conservation plan which must meet the requirements in paragraph (4) below.
- (3) States may include considerations for the development and maintenance of an ALEP (not including HEL conservation plans) as part of the State ranking criteria (see subpart E, section 528.41C of this part). Parcels selected for funding that were awarded ranking points based on the eligible entity's agreement to develop and maintain an ALEP must have a general agricultural land easement plan, a grassland management plan, a forest land management plan, or any combination thereof that meets the requirements in paragraph (5) below.

**Note:** Parcels enrolled as grasslands of special environmental significance under ALE-agreements originally executed in FY 2019 must have a grassland management plan, developed by the eligible entity, that meets the requirements of paragraph (6) below.

- (4) HEL Conservation Plan Requirements for Highly Erodible Cropland.—An HEL conservation plan is required on those portions of a parcel that contain highly erodible cropland as follows:
  - (i) 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 Form AD-1026, each landowner certifies that they are in compliance with HEL and WC provisions on all farms or ranches in which the landowner has an interest. The Form AD-1026 gives NRCS authorization to enter upon and inspect the property for the purpose of confirming HEL and WC compliance.

**Note:** NRCS must confirm all landowner HEL/WC eligibility requirements are met at the time of obligation and again prior to payment.
  - (ii) Where highly erodible cropland is included in the enrollment, an HEL conservation plan will be developed by NRCS or an NRCS-certified planner in accordance with the provisions outlined in 7 CFR Part 12, 180-NFSAM, and 180-NPPH. If the eligible entity does not elect to develop a more comprehensive ALEP as described in this section, the HEL conservation plan may comprise the entirety of the ALEP on such parcel.
  - (iii) The HEL conservation plan must be reviewed and approved by NRCS and signed by the landowner and the eligible entity prior to closing. Implementation of any provisions required under the HEL conservation plan must occur within 1 year unless the State conservationist grants an extension due to conditions beyond the landowner's control.
  - (iv) The HEL conservation plan is considered up-to-date as long as there are no changes to the agricultural operations on the parcel and no changes in ownership of the parcel. If there are changes to the agricultural operations on the parcel or ownership of the parcel, the HEL conservation plan must be updated. The eligible entity and landowner must obtain an updated HEL conservation plan from NRCS or an NRCS-certified planner in the event of such changes.

- (v) The eligible entity must report any changes in the agricultural operation or parcel ownership from the previous year on its annual monitoring report. If a change in operations or ownership is reported, the eligible entity must instruct the landowner to schedule an appointment with NRCS or NRCS-certified planner to have the HEL conservation plan updated within 12 months. If at the time of the next annual monitoring report the landowner has not obtained an updated HEL 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.
  - (vi) NRCS will monitor the status of the HEL conservation plan in accordance with HEL/WC status review requirements. Prior to entering the protected property, NRCS will notify the landowner in accordance with 180-NFSAM procedures.
  - (vii) A violation of the HEL conservation plan will be considered a violation of the agricultural land easement, once all appeal rights have been exhausted. (See subpart J, section 528.92 of this part for violation procedures.)
- (5) Entity-Developed Agricultural Land Easement Plan Considerations and Requirements.—For ALEPs that include a general agricultural land easement plan, a grassland management plan, a forest management plan, or any combination thereof, the following requirements apply:
- (i) The eligible entity is responsible for the development of the ALEP at its own expense. The eligible entity may develop the plan itself or have a third party develop the plans. Use of NRCS planning procedures at 180-NPPH-600, or NRCS FOTG is recommended but not required.

**Note:** For 2018 Farm Bill enrollments, NRCS may not provide technical assistance through ACEP for the development of an ALEP, except for HEL conservation plans as described in paragraph (4) above. NRCS may provide direct conservation technical assistance (CTA) as requested by landowners and based on State CTA planning allocations and priorities. Any plans developed for landowners by NRCS using CTA are separate from ACEP-ALE plans, will be developed in accordance with NRCS planning procedures, and may not be used to satisfy the requirement for the development of an ALEP as agreed to by the eligible entity.

- (ii) The ALEP must be reviewed and signed by the eligible entity and the landowner prior to closing and must be submitted to NRCS as part of the payment request package per the terms of the ALE-agreement. For parcels requiring an HEL conservation plan as described in paragraph (4) above, NRCS must approve the HEL conservation plan prior to closing. With the exception of HEL conservation plans, NRCS review of an entity-developed ALEP is not required prior to closing. The eligible entity may request NRCS review of the entity-developed ALEP which States may review as technical resources allow, provided the draft ALEP is submitted to NRCS at least 90 days before the planned closing date or as otherwise specified in the ALE-agreement. NRCS review of the entity-developed ALEP is limited to a determination that the plans address the minimum criteria outlined in this section.

**Note:** For ACEP-ALE grant agreements, or where authorized, ACEP-ALE program agreements, with certified eligible entities, NRCS may review the entity-developed ALEP acquisition after closing as part of the quality assurance review process.



- (iii) If the development and maintenance of an ALEP has been agreed to by the eligible entity or must occur as required for highly erodible cropland, the agricultural land easement deed must include a provision requiring the ALEP to be prepared and updated in the event the agricultural uses or ownership of the protected property change. The eligible entity is responsible to ensure compliance with any required provisions of the ALEP.
  - (iv) An ALEP is a living document that may be adjusted as ownership or landowner operations or objectives change and is intended to provide flexibility for management of the land within the purposes of the easement over the term of the easement. All revisions and updates to the ALEP must be approved by the landowner and the grantee.
  - (v) The ALEP may include a general agricultural land easement plan and may also include component plans to address specific land uses or resource concerns on the parcel. At a minimum, all ALEPs should—
    - Describe the activities that 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.
    - 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.
    - Identify recommended conservation or management practices that may be implemented to address the purposes and resource concerns for which the parcel was selected, such as those identified during the land eligibility determinations or ranking, or in the baselined documentation report, the ALE-agreement, the conservation easement deed, or other supporting 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 archaeological resources.
    - 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.
  - (vi) If the parcel includes grassland or forest land, a grasslands management plan or forestland management plan may be developed by the eligible entity and may comprise the ALEP or be incorporated by reference into an ALEP.
    - A grasslands management plan may be developed if the parcel meets the land eligibility criteria in subpart D, section 528.33B(3) of this part, or if the parcel includes one of the eligible land uses identified in subpart D, sections 528.33C(1)(ii) through (v) of this part. A grasslands management plan must meet the requirements identified in paragraph (6) below.
    - A forest management plan may be developed if the parcel contains forest land as described in subpart D, sections 528.33C(1)(vi) and 528.33C(2) of this part, and must meet the requirements in paragraph (7) below.
- (6) Grasslands Management Plan Requirements

- (i) The grasslands management plan must describe the grassland types on the easement area, and the management systems and practices that conserve, protect, and enhance the viability and functions and values of those grasslands and as applicable any habitat, species, or sensitive natural resources requirements, permissible and prohibited activities, and any associated restoration plans.
  - (ii) 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.
  - (iii) A grasslands management plan should also identify the nesting seasons of any grassland-dependent birds whose populations are in significant decline and any associated limitations on timing and location of any haying, mowing, or seed harvest activities.
  - (iv) Changes to the grasslands management plan must be consistent with maintaining the grassland resources.
- (7) Forest Management Plan Requirements
- (i) The forest management plan must contain a brief description of the forest land on the easement area and the management system and practices that conserve, protect, and enhance the viability of the forest land.
  - (ii) The forest management plan must describe how the forest contributes to the economic viability of the parcel or how the forestland serves as a buffer to protect the parcel from development along with the any management activities needed to maintain the economic viability or buffer status.
  - (iii) 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. The forest management plan may 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.

D. 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).
  - (iii) Conservation Reserve Enhancement Program (CREP) long-term contracts or other noneasement enrollment types under CREP.
  - (iv) Conservation Stewardship Program (CSP).
  - (v) Environmental Quality Incentives Program (EQIP).
  - (vi) 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 planning or the installation or implementation of conservation practices.