

## Part 528 – Agricultural Conservation Easement Program (ACEP)

### Subpart M – ACEP-WRE Enrollment and Acquisition

#### 528.120 Overview

A. This subpart provides guidance on administrative activities, procedures, and policy related to the enrollment and acquisition of 30-year contracts, 30-year easements, and permanent easements under ACEP Wetlands Reserve Easement (ACEP-WRE) and provides references to the additional applicable policies located in 440-Conservation Programs Manual (CPM), Part 527, “Easement Common Provisions.”

B. The enrollment and acquisition process proceeds after NRCS determines that the landowner and the land are eligible, and after the onsite visits, including ranking and preparation of the preliminary wetland reserve plan of operations (WRPO), have been completed. Upon NRCS’s execution of the most current version of Form NRCS-LTP-31, “Agreement for the Purchase of Conservation Easement” (APCE), or Form NRCS-LTP-40, “Agreement to Enter Contract for 30-Year Land Use” (AECLU), the acres are considered enrolled in ACEP-WRE. (See subpart U of this part for the ACEP-WRE business process flow chart exhibit.)

#### 528.121 Selection for Enrollment

##### A. General

- (1) Applications are accepted on a continuous basis. The State conservationist may establish one or more application cutoff dates for evaluation, ranking, and funding consideration of those applications received before the cutoff date. The State conservationist may also implement a process to select applications for funding on a continuous basis if they meet threshold requirements established by the State conservationist, with input from the State technical committee (STC).
- (2) All eligible applications must be ranked and placed in priority order based on such ranking, taking ranking pools into account. The State conservationist will select eligible applications for funding based on ranking priority, ranking pools, and allocations available for new enrollment.

**Note:** If an individual appraisal will be used to determine the fair market value of the land, a high-ranking, eligible application may be tentatively selected for funding and the appraisal procured in the fiscal year prior to the fiscal year in which the application may ultimately be enrolled through the execution of the agreement to purchase (APCE or AECLU forms). See paragraph B below for additional detail.

- (3) In general, application selection should proceed in order of ranking; however, if the State does not have sufficient funds to approve the highest-ranked application on the unfunded list, the State may skip to the next-highest-ranked application for which it has sufficient funds. The State conservationist may choose to fund lower-ranked applications in unique circumstances, as identified by the State conservationist in consultation with the STC (subpart L, section 528.113 of this part).
- (4) All eligible applications tentatively selected for funding but requiring an individual appraisal or eligible applications that are not selected or considered during a given evaluation period may be carried over to subsequent evaluation periods through the term of the Farm Bill in which the application was submitted, except for those

cancelled or determined ineligible. States must follow supplemental guidance issued by National Headquarters regarding consideration and selection of existing applications under a subsequent Farm Bill.

- (5) Eligibility determinations must be valid for the fiscal year that the agreement to purchase (APCE or AECLU forms) is executed by NRCS.

**B. Letter of Tentative Selection (Required Only for Projects Needing an Individual Appraisal)**

- (1) For eligible applications tentatively selected for funding, the State conservationist must send a letter of tentative selection if an individual appraisal is required. Use of the letter of tentative selection for applications that do not require an individual appraisal is not required but is recommended. The letter of tentative selection is sent to the landowner by certified mail with return receipt requested.
- (2) The letter of tentative selection must clearly explain that this tentative selection does not bind NRCS or the United States to enroll the proposed project in ACEP-WRE, nor does it bind the landowner to continue with enrollment in the program. The letter must provide the list of materials that the landowner must provide to NRCS before NRCS may proceed with next steps in the enrollment process, such as obtaining an individual appraisal, and a deadline for submitting such materials. (See subpart U of this part for sample letter of tentative selection.)
- (3) For applications tentatively selected for funding that require an individual appraisal, the landowner's acceptance of the tentative selection is required prior to NRCS proceeding with acquiring an appraisal and is indicated by the landowner's providing all of the required materials by the stated deadline. (See subpart U of this part for checklist of items to provide appraiser.)

**Note:** While an individual appraisal may be obtained in the fiscal year prior to enrollment, the effective date of an appraisal must be within 12 months of the date the agreement to purchase (APCE or AECLU form) is executed by the landowner and NRCS unless a shorter useful life is identified by the review appraiser. Once the agreement to purchase is executed by all required parties, the appraisal does not expire. If an approved appraisal has an effective date older than 12 months before the agreement to purchase is executed by all parties, the appraisal is expired and a new, approved appraisal is required before an agreement to purchase may be executed. (See appraisal and appraisal review guidance in 440-CPM, Part 527, Subparts E and F.)

- (4) After NRCS has received the materials needed to proceed with enrollment, including as applicable an acceptable appraisal, and any needed eligibility determinations have been updated for the fiscal year of enrollment, NRCS may proceed with making an offer of enrollment to the landowners, as provided in paragraph C below.

**C. Offer of Enrollment**

After all eligibility and ranking determinations have been made and the easement or 30-year contract compensation value has been determined (see section 528.122 below), the State conservationist may select an application for funding and send an offer of enrollment letter to the landowner. The content of this letter depends upon the selected application's enrollment type, the actions necessary for the application to be considered enrolled in the program, and the amount of funds to be obligated. (See subpart U of this part for sample offer of enrollment letters.)

**(i) Easements**

- The offer of enrollment letter must clearly indicate that the application has been selected for enrollment and that NRCS is making an offer to purchase the easement for the estimated compensation amount indicated on the APCE form provided with the letter. (See subpart U of this part for sample offer of easement enrollment letter.)
- The letter must also indicate that continuing the enrollment process is contingent upon the landowner returning the APCE form with all appropriate signatures within the time period specified in the letter. Generally, the landowner is allowed 15 calendar days to sign and return the document. This deadline may be adjusted by the State conservationist, as necessary. Once the properly executed APCE form is returned by the landowner and signed by the State conservationist, the property is considered enrolled in ACEP-WRE and funds are obligated for the easement acquisition. If the APCE form is not properly executed and returned by the landowner within the required time period, the application must be cancelled.

**Note:** If the landowner is going to secure the easement boundary survey in accordance with the procedure in section 528.123B below, then the survey funds may also be obligated at this time, but not prior to the execution of the APCE form.

(ii) Thirty-Year Contracts on Acreage Owned by Indian Tribes

- For 30-year contract enrollments, the letter must clearly indicate that the application has been selected for enrollment and that NRCS is making an offer to enroll the land in a 30-year contract for the estimated compensation amount indicated in the letter. The actual 30-year contract document and exhibits that are used depend on how the land is owned, specifically whether the lands are held in Tribal trust by the Bureau of Indian Affairs (BIA), are Tribal lands, allotted lands, or are individually held (see section 528.126 below). If the enrolled land is Tribal trust land held by the BIA, the BIA superintendent must also be notified of the contract compensation amount from NRCS. (See subpart U of this part for sample offer of 30-year contract enrollment letter.)
- The letter must indicate that continuing the enrollment process is contingent upon the applicant returning the AECLU form attached to the letter with all appropriate signatures, including any necessary Tribal council resolutions accepting the offer within the time period specified in the letter. This signifies that the landowner accepts the offered compensation. Generally, the landowner is allowed 30 calendar days to sign and return the document. This deadline may be adjusted by the State conservationist, as necessary.
- Once the properly executed AECLU form is returned by the landowner and signed by the State conservationist, the property is considered enrolled in ACEP-WRE and funds are obligated for the estimated 30-year contract compensation amount. If the AECLU form is not properly executed and returned by the landowner within the required time period, the application must be cancelled.

D. Agreement Execution and Extension

- (1) For all enrollment types, the specific standard expiration dates are provided on the agreement to purchase (APCE or AECLU form). The most current version of the agreement to purchase form (APCE or AECLU) available at the time the offer of enrollment is made to the landowner must be used. The agreement to purchase may

be extended one time for a single 12-month period if agreed to by all parties and the one-time extension document is executed by all landowners and NRCS prior to the expiration of the agreement. NRCS must not sign the extension until the fiscal year after the agreement is originally signed. (See subpart U of this part for a sample APCE/AECLU extension letter.)

- (i) For enrollments prior to fiscal year (FY) 2017, the standard expiration date of the agreement (APCE or AECLU form) is August 31 of the year following the fiscal year the agreement is entered into, and the agreement may be extended one time for a 12-month period until August 31 of the year no later than 2 fiscal years following the fiscal year the agreement is entered into.

**Example:** For an agreement entered into in FY 2016, the initial expiration date is August 31, 2017, and the extended expiration date is August 31, 2018. NRCS may not sign the extension prior to September 30, 2016.

- (ii) For enrollments in FY 2017 and later, the initial standard expiration date of the agreement (APCE or AECLU) is February 15 of the second subsequent fiscal year following the fiscal year in which the agreement is entered into, and the agreement may be extended one time for a 12-month period until February 15 of the following fiscal year.

**Example:** For an agreement entered into in FY 2019, the original expiration date is February 15, 2021, and the extended expiration date is February 15, 2022. NRCS may not sign the extension prior to September 30, 2020.

**Figure 528.M1 - ACEP-WRE Agreement to Purchase (APCE or AECLU) Standardized Expiration Dates and Extension Lengths**

<b>Fiscal Year of Agreement Execution</b>	<b>Initial Agreement Expiration Date (No extension)</b>	<b>Final Agreement Expiration Date (Fully executed extension)</b>
FY 2014	August 31, 2015	August 31, 2016
FY 2015	August 31, 2016	August 31, 2017
FY 2016	August 31, 2017	August 31, 2018
FY 2017	February 15, 2019	February 15, 2020
FY 2018	February 15, 2020	February 15, 2021
FY 2019	February 15, 2021	February 15, 2022
FY 2020	February 15, 2022	February 15, 2023
FY 2021	February 15, 2023	February 15, 2024

- (2) The standardized expiration dates in the agreement to purchase forms (APCE or AECLU) (August 31 for agreements enrolled prior to FY 2017 and February 15 for agreements enrolled FY 2017 and later) may not be changed.
- (3) No additional or alternative extension lengths are authorized. States must inform landowners that these standard requirements may not be changed and are a condition of participation in ACEP-WRE. Standardized expiration dates and extension lengths assist NRCS in tracking expiration dates and extension deadlines, reduce the risk and incidences of improper payments on expired agreements, and inform the landowners from the outset of the full extent and limitations of the agreement.
- (4) The extension of the agreement to purchase (APCE or AECLU) requires the mutual agreement of both NRCS and the landowner. NRCS is under no obligation to grant

the one-time extension of the agreement, and the extension of the agreement is not a program entitlement issue.

E. NRCS Delegation of Authority for Enrollment

The State conservationist may delegate, in writing, to the assistant State conservationist with responsibility for easement programs the authority to sign the following enrollment and enrollment-related documents: the APCE or AECLU forms; supplements to the APCE or AECLU forms for preliminary obligation of restoration funds or landowner procurement of easement boundary surveys; addendums or amendments related to land ownership as described below in section 528.121H(2) for corrections to landowners identified on the APCE or AECLU form; agreement to extend the easement duration; and any subsequent documents authorizing adjustments to the amounts obligated under any of the above-listed documents. No further delegation of this authority is allowed.

F. Expedited Delivery of Notification of Offer of Enrollment

To expedite the enrollment process, NRCS may deliver the offer of enrollment letter and the APCE or AECLU form for signature to the landowner in person or by email. NRCS must document in the case file the date the offer of enrollment letter and associated documents were delivered to the landowner. To minimize the potential for disputes, the landowner should sign an acknowledgement confirming the date they received the offer of enrollment and APCE or AECLU form for signature.

G. Applications Not Selected

- (1) At the end of the fiscal year, applicants with eligible applications that were not selected for funding must be notified that their application will be deferred to the next fiscal year unless the applicant notifies NRCS in writing that their application should be cancelled.
  - (i) Landowners may be notified by a letter, personal contact, or email. Notification must be documented in the case file, indicating a landowner's desire to cancel their application.
  - (ii) The notification informs landowners wishing to cancel their application to notify NRCS promptly and in writing. The written request for cancellation and NRCS letter or other documentation of contact should be maintained with the application. (See subpart U of this part for a sample deferral letter.)
- (2) If applications are carried forward into the next fiscal year, a new landowner eligibility determination must be completed.
  - (i) In the easement business tool (e.g., the National Easement Staging Tool (NEST)), these will be considered promoted applications to the new fiscal year and numbered in a manner that facilitates the tracking of funds specific to that transaction.
  - (ii) Applications may be carried forward for the term of the Farm Bill under which the application was submitted; if the landowner wishes to participate after this time period has expired, the submission of a new application may be required.

H. Documenting Landowner Changes After Enrollment

- (1) Preacquisition: Transfer or Sale of Land Under an Active Easement Purchase Agreement
  - (i) Any land enrolled in ACEP-WRE under an active, unexpired easement purchase agreement (APCE or AECLU) that is sold or transferred by any or all landowners of record (including the current landowner entering into a contract to sell the land subject to the ACEP-WRE offer) prior to the easement being perfected or the 30-

- year contract being executed results in the APCE or AECLU being terminated and the acres removed from enrollment unless the new landowner meets the eligibility requirements in subpart K, section 528.103 of this part, and is willing to accept the terms and conditions of the enrollment.
- (ii) The evidence for the sale or transfer of fee or title interest to land subject to an active easement purchase agreement is a new deed of ownership (or contract for sale or other evidence of ownership document) dated after the date the APCE or AECLU form was executed by NRCS.
  - (iii) Before a new landowner may proceed with enrollment into ACEP-WRE, they must request an eligibility determination, including submission of any necessary documents and waiver requests, must be determined eligible, and must execute the Form NRCS-CPA-1253, “Transfer of Purchase Agreement for Easement Programs” (TOPA) and any other documentation requested by NRCS to ensure eligibility of the transferee or to further program implementation. The landowner must meet all landowner eligibility criteria for the fiscal year in which the NRCS will execute (sign) the TOPA form. NRCS will execute the TOPA form only after all landowners have been determined eligible and have signed the TOPA form. (See subpart U of this part for the Form NRCS-CPA-1253.)
  - (iv) If the change in ownership of property enrolled in ACEP-WRE under an active easement purchase agreement is the result of the death of the landowner (transferor) prior to the easement closing, the current landowner portion of the TOPA must identify the decedent or their estate and be signed by an appropriately authorized representative. Information, such as the last will and testament, court orders, affidavit of heirship, trust agreements, or other legal documents, may be needed for NRCS, in consultation with the Office of General Counsel (OGC), to establish signatory authority for the appropriately authorized representative of the deceased individual.
  - (v) If the current landowner (transferor) or the new landowner (transferee) is unwilling or unable to execute the TOPA or the new landowner is unable to establish eligibility for the fiscal year in which the TOPA is to be executed by NRCS, then the TOPA must not be executed by NRCS, and the original APCE or AECLU must be terminated and the acres removed from enrollment. The original parties to the easement purchase agreement must be notified of the decision to terminate the easement purchase agreement and any cost recovery actions that will be taken and provided appeal rights. The easement purchase agreement must be terminated within 30 days of such notification or after the conclusion of any exercised appeal options. The new landowner may submit a new application in the future, at which time a new eligibility determination must be made. (See subpart U of this part for example APCE/AECLU termination letter.)
  - (vi) If the TOPA is executed by all required landowners and NRCS, the obligation of acquisition funds in the Financial Management Modernization Initiative (FMMI) and the landowner identification and ownership shares in the easement business tool (e.g., NEST) must then be updated to reflect the actual ownership and ownership shares based on the most current evidence of land ownership. As soon as possible after execution of the TOPA, a copy must be provided to the appropriate financial specialist to make the adjustments in FMMI.
  - (vii) A copy of the fully executed TOPA document must be included in any prepayment internal control review document packages.
  - (viii) The TOPA may only be used if the fee or title interest ownership to the land is transferred or sold after the easement purchase agreement is executed by NRCS.

If there has been no change in fee or title interest ownership of the land under an active easement purchase agreement, but the correct landowners did not sign the easement purchase agreement, follow the procedure described below in paragraph H(2) of this section to correct the easement purchase agreement itself and the associated FMMI obligations and easement business tool (e.g., NEST) records.

- (ix) The TOPA form is only to be used for the transfer of an active, valid, unexpired purchase agreement (APCE or AECLU form). The TOPA form is not to be used if the easement purchase agreement is expired or if the easement is closed or the 30-year contract has been executed.
- (2) Preacquisition: Corrections to Landowner Acknowledgments Under an Active Purchase Agreement
- (i) Any land enrolled in ACEP-WRE under an active, unexpired easement purchase agreement must have the APCE or AECLU form updated where it is discovered, prior to easement closing or 30-year contract execution, that the original APCE or AECLU form does not identify correctly or accurately all of the landowners that held a fee or title interest in the subject property at the time the APCE or AECLU form was executed, and have at all times since that execution continued to hold that same fee or title interest in the subject property. Based on the enrollment type (easement or 30-year contract) the update to the APCE or AECLU form must be documented using the appropriate “Addendum to Add Newly-Identified Landowner” or the “Amendment to Correct Landowner Acknowledgements.” (See subpart U of this part for these documents.)
  - (ii) The “Addendum to Add Newly-Identified Landowner” and the “Amendment to Correct Landowner Acknowledgements” are only to be used if the fee or title interest ownership of the subject property itself has not changed after the easement purchase agreement was fully executed.
  - (iii) To minimize the occurrences of these corrections, it is imperative that NRCS obtain the preliminary title commitment, title report, or equivalent title evidence prior to executing the easement purchase agreement as described in subpart K, section 528.103E of this part. NRCS must compare the land ownership information from such preliminary title documents with the evidence of ownership documentation provided by the landowner during the application process. All known landowners must have eligibility determinations complete prior to executing the APCE or AECLU. NRCS relies on the most current ownership documents to identify correctly and accurately all of the fee or title interest landowners at the time the APCE or AECLU is executed. If the preliminary title commitment, title report, or equivalent title evidence is not obtained prior to executing the APCE or AECLU, NRCS and the landowner must make every effort to review the available records to ensure that the landowner eligibility determinations and the identification of the landowners on the APCE or AECLU form completely and accurately reflects the fee or title interest ownership of the subject property at the time the easement purchase agreement is executed.
  - (iv) Addition of Newly Identified Landowners Only
    - If NRCS discovers that there are landowners of record that are not party to the APCE or AECLU that held a fee or title interest in the subject property at the time the APCE or AECLU was executed and have at all times since that execution continued to hold that same fee or title interest in the subject property, such newly identified landowners must have their eligibility

- reviewed and determined in accordance with subpart K, section 528.103 of this part for the fiscal year the APCE or AECLU was originally executed.
- If the newly identified landowners are determined eligible, then the “Addendum to Add Newly Identified Landowner” (addendum) must be signed by the newly identified landowners. Once properly executed by all required newly identified landowners, the addendum may then be executed by NRCS.
  - The “Addendum to Add Newly Identified Landowner” is only to be used if the only change is the addition of a newly identified landowner as described above. The original landowners identified on the APCE or AECLU do not sign the addendum but should be provided a copy once executed by the newly identified landowner and NRCS.
- (v) Corrections to Landowner Acknowledgements for Addition, Removal, or Other Change
- If NRCS discovers that the APCE or AECLU form does not correctly or accurately identify all of the landowners of record that held a fee or title interest in the subject property at the time the APCE or AECLU was executed and have at all times since that execution continued to hold that same fee or title interest in the subject property, the APCE or AECLU form may be corrected through the completion and execution of the appropriate “Amendment to Correct Landowner Acknowledgements” (amendment).
  - The “Amendment to Correct Landowner Acknowledgments” may be used to address the following corrections to the identification of landowners on the APCE or AECLU form:
    - To remove any landowner incorrectly included in the APCE or AECLU form.
    - To correctly document the capacity in which a landowner identified on the APCE or AECLU form actually held and holds the fee or title interest to the subject property (e.g., signed as an individual, but actually holds title as a trust).
    - To add a newly identified landowner (when that is not the only change).
  - All landowners identified on the amendment who were not identified or were identified differently on the APCE or AECLU form must have their eligibility reviewed and determined in accordance with subpart K, section 528.103 of this part for the fiscal year the APCE or AECLU was originally executed.
  - The “Amendment to Correct Landowner Acknowledgements” must be signed by all of the parties identified as landowners on the original APCE or AECLU form and all of the parties identified as landowners on the amendment. Once properly executed by all required landowners, the amendment may then be executed by NRCS.
- (vi) If all of the required landowners are unwilling or unable to execute the addendum or amendment or are unable to establish eligibility for the fiscal year of enrollment, then the addendum or amendment must not be executed by NRCS, and the original APCE or AECLU must be terminated and the acres removed from enrollment. The original parties to the easement purchase agreement must be notified of the decision to terminate the easement purchase agreement and any cost recovery actions that will be taken and provided appeal rights. The easement purchase agreement must be terminated within 30 days of such notification or after the conclusion of any exercised appeal options. The



- landowners may submit a new application for participation in the future, at which time a new eligibility determination must be made. (See subpart U of this part for example APCE/AECLU termination letter.)
- (vii) The easement purchase agreement addendum or amendment documents described in this section are only to be used to make corrections to an active, unexpired purchase agreement (APCE or AECLU). The easement purchase agreement addendum or amendment documents are not to be used if the APCE or AECLU is expired or if the easement is closed or 30-year contract has been executed.
  - (viii) If the above requirements are met and an easement purchase agreement addendum or amendment is fully executed by all required landowners and then executed by NRCS, the obligation of acquisition funds in FMMI and the landowner identification in the easement business tool (e.g., NEST) must be updated to reflect the actual ownership and ownership shares based on the most current evidence ownership documents. As soon as possible after execution of the addendum or amendment, a copy must be provided to the appropriate financial specialist to make the adjustments in FMMI.
  - (ix) A copy of the fully executed addendum or amendment document must be included in the prepayment internal control review documents packages.
  - (x) Under no circumstances may an easement purchase agreement addendum or amendment be used if the fee or title interest ownership of the land has changed after the easement purchase agreement was executed by NRCS as the result of a land transfer, which includes a transfer as result of the death of the original landowner. The procedure for a preacquisition transfer or sale of land described above in paragraph H(1) of this section must be used.
- (3) Preacquisition: Changes in Composition of a Landowner-Legal Entity Under an Active Easement Purchase Agreement
- (i) For land enrolled in ACEP-WRE under an active, unexpired easement purchase agreement (APCE or AECLU) with a landowner that is a legal entity or general partnership, the eligibility of the landowner-legal entity and any required members is determined at the time of enrollment in accordance with subpart K, section 528.103 of this part. The adjusted gross income (AGI) determination, including an approved AGI waivers, for the landowner-legal entity at the time of enrollment remains in effect for the duration of the enrollment unless there is a change in the membership of the landowner-legal entity. The highly erodible land/wetland conservation (HELC/WC) eligibility is determined at the time of enrollment and again at the time of each payment.
  - (ii) Changes in the membership of a landowner-legal entity must be documented by the landowner-legal entity submitting a revised Form CCC-901, “Member’s Information,” or CCC-902E, “Farm Operating Plan for an Entity,” to the Farm Service Agency (FSA). The terms of the Form CCC-901 or CCC-902E require the landowner-legal entity to provide timely written notification to FSA of any changes in the information provided on the Form CCC-901 or CCC-902E, including changes in the composition of the entity.
  - (iii) Prior to payment, NRCS must check the most current Form CCC-901 or CCC-902E on file with FSA to determine if there has been a change in entity membership since the time of enrollment. If there has been a change in the entity membership since the time of enrollment, the landowner-legal entity and any new members of that entity must submit the documentation required to determine AGI and HELC/WC eligibility and must be determined AGI and HELC/WC eligible by FSA for the fiscal year in which the easement or 30-year contract

payment will be made. The eligibility for the landowner-legal entity and any new members must be determined to confirm that the landowner-legal entity is still eligible and whether any commensurate reductions for AGI must be applied to the easement or 30-year contract payment. If a landowner-legal entity has an existing AGI waiver and the only change is to the landowner-legal entity membership, and FSA determines the landowner-legal entity includes members that do not meet the AGI provisions, the existing AGI waiver can be used. If a landowner-legal entity, including all required members, met the AGI limitation at the time of enrollment but due to changes in its entity membership is subsequently determined by FSA to not meet the AGI provisions, such landowner-legal entity may request an AGI waiver at the time the revised AGI determination is made (see subpart K, section 528.103C of this part). HELC/WC will be rechecked for the landowner-legal entity for each fiscal year in which a payment is to be made.

- (iv) It is not necessary to complete a “Transfer of Purchase Agreement” or an addendum or amendment to the APCE or AECLU if only the membership of the landowner-legal entity has changed. It is necessary for the landowner-legal entity and all entity members to submit updated eligibility paperwork even if there is an existing approved AGI waiver.
- (4) For each scenario described above, if the landowner is a legal entity or general partnership, NRCS must notify the landowner if the applicable AGI eligibility determination requires a commensurate reduction to the easement or 30-year contract payment, unless a waiver of the AGI limitation is requested by the landowner-legal entity and granted by NRCS in accordance with subpart K, section 528.103C of this part. This notification should also identify the commensurately reduced amount that may be issued at the time of payment if such AGI waiver is not requested or is not granted by NRCS. (See subpart U of this part for sample letter notifying landowner of commensurate reduction.)
- (5) If the specific circumstances of a landowner change after enrollment are outside of the scenarios identified in this section, States must contact the Easement Programs Division (EPD) for guidance on whether the change may be made and how it must be documented.
- (6) Postacquisition: Transfer or Sale of Land After Easement Closing or 30-year Contract Execution
  - (i) If there are changes in fee or title ownership after an easement has closed, the land remains subject to the easement, and the ownership changes are a matter of public record. The Form NRCS-CPA-1253 (TOPA) and the conservation program contract transfer agreement (Form NRCS-CPA-152, “Conservation Program Contract Transfer Agreement”) are not used for this purpose. Documentation of changes in ownership of an existing easement should be based on new evidence of ownership documents provided by the new landowners or obtained by NRCS. Requirements for documenting changes in ownership after the easement has closed or the 30-year contract has been executed are in subpart O, section 528.143D of this part and in 440-CPM, Part 527, Subpart P.
  - (ii) Form NRCS-CPA-152, “Conservation Program Contract Transfer Agreement,” must be used to document any transfers of a conservation program contract (CPC) if there is a subsequent change in land ownership after the easement has closed and there is an active CPC in place for restoration (see subpart O for additional information on CPCs for restoration).
  - (iii) For lands under an existing contract for 30-year land use, the Form NRCS-CPA-152 must be used to document any transfers of land ownership. In accordance

with the terms of the 30-year contract, if the new landowner is unwilling to accept the terms of the existing 30-year contract, the prior landowner may be required to repay NRCS (see subpart O, section 528.147 of this part for additional information).

I. Withdrawal of Offer by NRCS

Prior to execution by the United States of the warranty easement deed or 30-year contract, NRCS may withdraw the land from enrollment at any time due to the lack of availability of funds, inability of landowner to provide clear title or sufficient legal access, sale of the land, or for other reasons. The offer to the landowner is void if not executed by the landowner within the time specified. States must enter the expiration or cancellation date of the agreement in the easement business tool (e.g., NEST).

J. Failure to Convey and Cost Recovery

- (1) Except for reasons beyond the control of the landowner (as determined by NRCS), if the landowner fails to convey the easement or 30-year contract, the landowner is in default of the terms and conditions of the APCE or AECLU and may be required to pay NRCS the amount of costs incurred by NRCS for surveys and all other actions taken in furtherance of the agreement or contract.
- (2) The State conservationist has the discretion to determine the extent of costs to be recovered and whether any portion of those costs will be waived. This determination will be based on an evaluation of the landowner's reason for nonconveyance and NRCS funds expended in an effort to perfect the easement or execute the 30-year contract. For example, if the landowner demonstrated a good-faith effort by working extensively with a lien holder but the lien holder was unwilling to subordinate the lien.

## **528.122 Determining Easement or 30-Year Contract Compensation**

A. General

- (1) The requirements contained in this section and exhibits are mandatory for all ACEP-WRE easement or 30-year contract acquisitions by NRCS. No modifications to these requirements are permitted without prior written approval from the Deputy Chief for Programs.
- (2) The basis for the compensation offer for an easement or 30-year contract enrollment is the lowest of the following:
  - (i) The fair market value of the land using either of the following:
    - A Uniform Standards for Professional Appraisal Practices (USPAP) appraisal (see section 528.122C below).
    - An areawide market analysis (AWMA) (see section 528.122B below).
  - (ii) The geographic area rate cap (GARC) (see section 528.122D below).
  - (iii) An amount voluntarily offered by the landowner (see section 528.122E below).
- (3) In order to comply with the statutory provisions regarding easement and 30-year contract compensation, States must determine the fair market value of the land, the GARC value, and the landowner offer (if any) for each transaction prior to enrollment. The easement compensation value must not exceed the fair market value of the land.
- (4) The State conservationist must determine whether to use an AWMA or a USPAP appraisal to determine the fair market value of the land offered for enrollment. Only one method may be used to determine the fair market value of the offered area.

**Note:** For ACEP-WRE, the AWMA or USPAP appraisal is used to determine the fair market value of the land as required by statute. This is in contrast to ACEP-ALE, which requires the USPAP appraisal or AWMA to determine the fair market value of the easement, which requires a determination of the fair market value of the land unencumbered by the ACEP-ALE easement (before value) and the fair market value of the land encumbered by the ACEP-ALE easement (after value) in order to determine the value of the conservation easement (before value minus after value). Under ACEP-WRE, the AWMA or USPAP appraisal does not include a determination of the ‘before value’ or ‘after value’ of the land or the value of the conservation easement itself.

- (5) Obtaining an AWMA is the preferred method for determining fair market value of the land, if the characteristics of the land are homogenous enough to provide fair market values applicable to the land uses and types in the identified market area and sufficient enrollment of such lands is anticipated. The fair market values derived from the AWMA provide a primary source of information for use in the development of the associated GARCs. Use of an AWMA to determine fair market value and subsequent development of the associated GARCs allows easement or contract compensation values to be reliably estimated early in the process. This enables NRCS to inform potential participants of the compensation values early in the evaluation process and reduces the time spent with applicants who will not accept the compensation offer.
- (6) The compensation amount provided by NRCS for less-than-permanent enrollments, including easements with durations limited by State law, 30-year easements, or 30-year contracts, must not exceed 75 percent of the easement compensation value determined for a permanent easement according to this subpart. Less-than-permanent enrollments may not be of sufficient duration to achieve full restoration, and do not provide permanent protection of the functions and values obtained.

#### B. Fair Market Value of the Land Using an Areawide Market Analysis

- (1) State conservationists may obtain one or more AWMA to establish the fair market value of various lands that are typically enrolled within the State. States may establish multiple market areas to be analyzed, based on counties or other sub-State regions, land uses, land quality categories, soils or crop types, or other considerations, such as development pressure and residual recreational value.
- (2) To obtain an AWMA, the State conservationist must first define the market area or areas to be analyzed, based on similar features, including but not limited to the following:
  - (i) Land uses
  - (ii) Land productivity
  - (iii) Land unit size
  - (iv) Soil types and features
  - (v) Types and amounts of improvements
  - (vi) Potential influence of other factors, such as development pressure
  - (vii) General topography and natural features
  - (viii) Location
  - (ix) Irrigation water rights
  - (x) Common recorded or unrecorded encumbrances
- (3) The AWMA results should provide fair market value for the types of land typically enrolled or eligible to be enrolled in ACEP-WRE in the NRCS-identified market areas.

- (4) The AWMA will be completed by an independent real estate professional familiar with the area, land use types, and other characteristics included in the market area or areas defined by NRCS. The qualifications required of the independent real estate professional are identified in the AWMA specifications and statement of work. The AWMA is not to be completed by NRCS personnel. The AWMA specifications must be reviewed with the selected real estate professional, including specific types of land, land uses, and other characteristics to be cited in the report based upon land typically enrolled in ACEP-WRE.
- (5) The AWMA must be completed in accordance with the specifications provided by NRCS. (See subpart U of this part for the ACEP-WRE AWMA specifications and statement of work.) The qualified independent real estate professional conducting the market analysis must provide a written report to the State conservationist consistent with the requirements in the specifications and statement of work. The AWMA report must document—
  - (i) The region, market areas, development potential, and land use or land productivity categories and subcategories analyzed.
  - (ii) The actual sales data or economic data for each category and subcategory.
  - (iii) The source of the data.
  - (iv) Limitations in the application of the values identified in the market analysis.
  - (v) The qualifications and experience of the qualified real estate professional who conducted the market analysis.
- (6) The AWMA areas or categories must be adequately specific and descriptive. For example, land use categories, such as irrigated pastureland or irrigated cropland, will result in more accurate data than a category of irrigated land used for both. For GARCs developed based on an AWMA, the description of the GARC areas or categories should be consistent with the associated AWMA categories.
- (7) The qualified real estate professional may contact the contracting officer and suggest modifications to the market area, land uses, or other attributes of the land included within a market area, if they determine that there is insufficient data available to conclude typical values for the market area or land uses as identified by NRCS. An NRCS national appraiser may be consulted for guidance in making changes to market areas or land uses. The contracting officer or NRCS national appraiser may also consult with the State easement specialist. The contracting officer will provide guidance to the contractor after consultation and concurrence to the modification from either an NRCS national appraiser or State easement specialist.
- (8) NRCS will obtain the AWMA through an appropriate procurement method and following proper contracting rules and procedures. Review and acceptance of the AWMA must be completed by an authorized official prior to submission to the EPD for approval. For the purposes of AWMA review, an authorized official is the FPAC-BC or NRCS contracting officer, in consultation with the State easement specialist as needed, or the agency contact identified in an agreement if the AWMA is procured through a cooperative agreement.
- (9) The State conservationist must submit an electronic copy of the AWMA report and accompanying documentation, including the date the fair market values were reviewed with the STC, to the EPD director for final concurrence and approval. These will be submitted at the same time the proposed GARCs are submitted.
- (10) All fair market value determinations using AWMA must be reviewed for each enrollment fiscal year and have EPD director approval prior to being used in the enrollment process. If no significant changes are anticipated in the AWMA fair market values from the previous fiscal year, States may obtain a review and written statement from the original qualified real estate professional who prepared the

previous fiscal year's AWMA documenting that the previous fiscal year's AWMA fair market values have not changed significantly (no more than plus or minus 10 percent) and are still valid. The statement must explain the process used by the qualified real estate professional to make the determinations. If it is confirmed and documented that there are no significant changes, the State conservationist may request approval from the EPD director to use an extension to the prior fiscal year's AWMA rather than obtaining a new AWMA report for that fiscal year. The AWMA fair market values must remain the same and the applicable GARC values must remain at the same value or lower as the previous fiscal year. An AWMA may only be reviewed and extended for 1 fiscal year following the original AWMA report. (See subpart U of this part for a sample statement of work and specifications for a review of WRE areawide market analysis.)

C. Fair Market Value of the Land, Using an Appraisal

- (1) An individual USPAP appraisal may be used to determine fair market value of the land instead of AWMA. Use of individual appraisals may be warranted for reasons that may include but are not limited to the following:
  - (i) States with limited ACEP-WRE enrollment.
  - (ii) Areas with limited enrollment within a State.
  - (iii) Areas with significant complexity that do not allow for a more general evaluation—for example, property-by-property value differences due to water rights or extreme variability in values over a small area due to development pressure.
  - (iv) Land uses or areas not included in the market areas of the AWMA—for example, the property is geographically located within an AWMA market area (Smith County) but does not contain one of the analyzed land uses (offered area is irrigated cropland but only rangeland was included in the AWMA).
  - (v) Properties possessing characteristics that significantly deviate from those used to develop the AWMA values such that the deviating characteristic is likely to have an effect on value and render the AWMA value inapplicable to that particular property, such as:
    - The size of the property is beyond the scope of the parameters identified in the AWMA values,
    - The property has existing encumbrances that would not be removed or subordinated as part of the easement acquisition process and are beyond those considered common or typical or otherwise taken into account in determining the AWMA values, or
    - Access issues beyond the typical conditions used to develop the AWMA values.
  - (vi) Other special situations.
- (2) Guidance for conducting appraisals and appraisal reviews is located in 440-CPM, Part 527, Subparts E and F.
- (3) If an individual appraisal is used to determine fair market value, a percentage GARC and not-to-exceed dollar value are required.

D. Geographic Area Rate Caps (GARCs)

- (1) Each fiscal year, the State conservationist, in consultation with the STC, must adopt at least one GARC for their State.
  - (i) States may establish multiple GARCs based on counties or other sub-State geographic regions, land use or quality categories, corresponding AWMA areas,

or other considerations, such as development pressure and residual recreational value.

- (ii) GARCs for each State should be set at a rate that does not overcompensate landowners and that encourages the enrollment of the types and classes of lands with superior restoration potential. **GARCs should reflect the value that the State conservationist determines to be fair compensation for the rights being acquired.** Although NRCS is acquiring a majority of the property rights associated with the land, the landowner still retains certain reserved rights; as a result, GARCs will always be less than the fair market value of the land as determined by the AWMA or appraisal.
- (2) In order to establish GARCs, States should use the best readily available information to determine fair compensation for the rights being acquired through the easement or 30-year contract. The best data source is the fair market value determined in the corresponding AWMA. Other data that should be used to develop GARCs include—
- (i) Data sets of previously obtained ACEP-WRE appraisals.
  - (ii) Local real estate market values, tax rates, and assessments.
  - (iii) Location of the land.
  - (iv) Soil types and productivity.
  - (v) National, State, or local agricultural statistics.
  - (vi) Local information about the value of land leases for the rights being acquired by the Federal Government.
  - (vii) Historic values accepted and rejected by landowners for program participation.
  - (viii) Rates paid by other conservation easement programs that have similar purposes.
  - (ix) Neighboring geographic areas.

**Note:** GARCs must not have the effect of eliminating types or classes of lands on which the wetland and wildlife restoration potential is superior to other types or classes of lands enrolled in the State.

- (3) If AWMA are used to determine fair market value, specific GARC dollar values should be established that correspond to the AWMA categories and subcategories. If USPAP appraisals are used to determine fair market value, the GARC must be set as a percentage of fair market value and must include a not-to-exceed dollar value.
- (4) The State conservationist must document the following in writing:
- (i) The process used to determine the area for each GARC.
  - (ii) The process and rationale used to determine the dollar or percent value of each GARC.
  - (iii) The geographic area, development potential, land use, land productivity categories, or other characteristics considered.
  - (iv) The corresponding GARC from adjacent States with an explanation of any significant (20 percent or more) differences.
  - (v) The sources of the data.
  - (vi) The date the proposed GARC values were reviewed with the STC.
  - (vii) For GARCs greater than \$5,000 per acre, an evaluation and justification of the ecological importance of enrolling these high-cost lands.
- (5) Each fiscal year, the State conservationist must submit an easement compensation proposal package that includes a discussion of the approaches used to obtain fair market values (AWMA, appraisals, or combination), copies of any AWMA reports, the proposed GARCs, and the supporting GARC rationale documentation. The

proposal must be submitted to the EPD director for final concurrence and approval. Easement compensation proposals will be evaluated on the following criteria:

- (i) Was there a logical, defensible, and well-documented process?
- (ii) Was the AWMA procured from a qualified real estate professional with experience in the market area?
- (iii) Is the fair market value of the land greater than the GARC?
- (iv) Were the results reviewed by the STC?
- (v) Were the results certified by the State conservationist?
- (vi) Were the GARC values consistent with neighboring areas or were there explainable differences?

**Note:** Neighboring GARC values with a variation greater than 20 percent may only be approved when they are accompanied by a statement from the State conservationists explaining why neighboring GARC values vary so greatly.

- (vii) For GARCs greater than \$5,000 per acre, is there a statement from the State conservationist justifying the ecological importance of enrolling these high-value lands?
- (6) All easement compensation proposals must be updated each fiscal year and have the written approval of the EPD director prior to being used in the enrollment process. Upon approval, States publish the GARC values on the NRCS State web site for informational purposes.

#### E. Landowner Offer

- (1) At any time during the application or prior to easement closing or 30-year contract execution, the landowner may voluntarily offer to accept a value less than that being offered by NRCS. If the landowner makes an offer, such offer must be provided in writing by the landowner. The written landowner offer must be uploaded into the easement business tool (e.g., NEST) with the document type “Landowner Offer” together with all applicable data fields entered, and a physical copy must be placed prominently in the case file.
- (2) The offer from the landowner must be on a per-acre basis for all or a portion of the proposed easement or 30-year contract area and NRCS must explain to the landowner that the final easement or 30-year contract compensation amount will be adjusted based on the final surveyed acres multiplied by the per-acre landowner offer amount, in accordance with the terms of the APCE or AECLU.

**Example:** For a 100-acre easement with an applicable GARC value of \$1,000 per acre, the landowner may offer to accept \$800 per acre for the entire easement area, which would result in an easement compensation value of \$80,000. Alternatively, the landowner may offer to accept \$0 per acre for 10 acres within the easement area and accept the \$1,000 per acre GARC value for the remaining 90 acres, which would result in an easement compensation value of \$90,000. Either offer is acceptable as it is lower than the \$100,000 easement compensation value based on the GARC rate alone.

- (3) All land enrolled in ACEP-WRE must meet all program requirements irrespective of whether the landowner offers to enroll all or a portion of the land at a reduced cost or at no cost to NRCS. As determined by NRCS, all eligibility, due diligence, valuation, and other requirements of this part must be met on the entire area that will be encumbered by the easement or subject to terms of the 30-year contract.
- (4) If the landowner’s offer is made at the time of application and ranking, this may be included as a positive attribute in the ranking score. A landowner’s willingness to



accept a lower easement or 30-year contract compensation amount does not ensure an application will be selected or otherwise grant a landowner expedited access to the program.

F. Making an Offer

- (1) Once NRCS has calculated the appropriate easement or 30-year contract compensation value for a particular transaction based on the enrollment type, it may make an offer to an eligible landowner using the APCE, or for acreage owned by an Indian Tribe, the AECLU. The offer will be made based on the lowest of the following:
  - (i) The fair market value of the land, as determined by the individual USPAP appraisal or AWMA.
  - (ii) The GARC.
  - (iii) The landowner’s offer.
- (2) States must document in the individual case file how the compensation value was determined for each individual offer. This documentation may include maps or tables and must identify the enrollment type, the total acres, the number of acres of each applicable fair market value (FMV) and GARC category, the per-acre values of each applicable FMV and GARC category, the total easement compensation value, and the total weighted per-acre easement value. (See subpart U of this part for an example easement compensation calculation worksheet.)

**Example:**

<b>FMV/GARC Land Use Category</b>	<b>Acres of Land Use</b>	<b>Per-Acre FMV</b>	<b>Per-Acre GARC Value</b>	<b>Easement Compensation Value (Acres x GARC)</b>
Irrigated Cropland	100	\$2,500	\$2,000	\$200,000
Forestland	100	\$625	\$500	\$50,000
<b>Totals and Total Per-Acre Value*</b>	<b>200</b>	<b>\$1,562.50</b>	<b>\$1,250.00</b>	<b>\$250,000</b>
<b>Maximum Easement Compensation Value for a Permanent Easement (NTE 100%)</b>				<b>\$250,000</b>
<b>Maximum Easement Compensation Value for a less-than-Permanent Easement (e.g. 30-year easement, easement of maximum duration allowed under State law, 30-year contract) (NTE 75%)</b>				<b>\$187,500</b>

\* The total weighted per-acre easement value is calculated by dividing the total acres into the total easement compensation value.

- (3) If a landowner offer is made, the documentation must include a determination that the landowner offer is lower than the applicable per-acre fair market values and GARC values.
- (4) States must follow the most current easement acquisition internal controls policy prior to obligating funds for the agreement. Once an offer is made and accepted by the landowner, the fair market value, GARC values, or landowner offer value used to calculate the original offer will be used in any future adjustments. Compensation values will be based on the fiscal year of enrollment and will not be recalculated using fair market values or GARC values from a subsequent fiscal year. Adjustments to an accepted offer will only occur as a result of changes in surveyed or offered acres as described in paragraph G below, or if the landowner makes a written offer that is lower than the applicable easement compensation values.

G. Final Acreage and Compensation Amounts

- (1) Based upon the easement boundary survey (for an easement) or GPS survey (for a 30-year contract), NRCS will determine the final easement or 30-year contract acreage and compensation amount as follows:
- (i) If the change in the surveyed acres is within the scope of the original agreement and is within 10 percent of the acreage estimated at the time the offer was made, the easement compensation value will be adjusted using the total per-acre easement value (weighted per-acre value) calculated at the time the offer was made (see example 1 below). If the fair market value of the land was determined using an individual USPAP appraisal, the additional steps in the administrative adjustment procedure in 440 CPM-527, Subpart E, Section 528.47(G) must also be followed.

**Example 1:** Within 10-percent change: 200 acres original offer, 220 acres final surveyed acreage

FMV/GARC Land Use Category	Acres of Land Use	GARC Per-Acre Value	Easement Compensation Value
Original Totals and Total Per-Acre Value*	200	\$1,250	\$250,000
<b>Final Totals Using Original Total Per-Acre Value</b>	<b>220</b>	<b>\$1,250</b>	<b>\$275,000</b>
<b>Maximum Easement Compensation Value for a Permanent Easement (NTE 100%)</b>			<b>\$275,000</b>
<b>Maximum Easement Compensation Value for a less-than-Permanent Easement (e.g., 30-year easement, easement of maximum duration allowed under State law, 30-year contract) (NTE 75%)</b>			<b>\$206,250</b>

- (ii) If the change in the surveyed acres is within the scope of the original agreement but is more than 10 percent of the originally estimated acreage, the fair market value determination must be reviewed, as follows:
- If the fair market value was determined using an individual USPAP appraisal, an updated appraisal report is needed (see 440-CPM-527-E, 527.47(G)(4) and 527.48).
  - If the fair market value was determined based on the AWMA, the number of acres of each AWMA FMV land use category within the surveyed area must be determined and the applicable per-acre AWMA fair market value from the year of enrollment applied to the acres in each land use category (see example 2 below).

**Example 2:** Greater than 10-percent change: 200 acres original offer, 230 acres final surveyed acreage

FMV/GARC Land Use Category	Acres of Land Use	GARC Per-Acre Value	Easement Compensation Value
Original Totals and Total Per-Acre Value*	200	\$1,250	\$250,000
Irrigated Cropland	110	\$2,000	\$220,000
Forestland	120	\$500	\$60,000
<b>Final Totals and Revised Total Per-Acre Value</b>	<b>230</b>	<b>\$1,217</b>	<b>\$280,000</b>
<b>Maximum Easement Compensation Value for a Permanent Easement (NTE 100%)</b>			<b>\$280,000</b>

FMV/GARC Land Use Category	Acres of Land Use	GARC Per-Acre Value	Easement Compensation Value
<b>Maximum Easement Compensation Value for a less-than-Permanent Easement (e.g., 30-year easement, easement of maximum duration allowed under State law, 30-year contract) (NTE 75%)</b>			<b>\$210,000</b>

- (iii) The applicable GARCs from the year of enrollment will be applied to the revised fair market value determination to calculate the easement or 30-year contract compensation amount based on the GARC. If a landowner offer has been made, such offer will be applied to the final surveyed acreage to calculate the easement or 30-year contract compensation amount based on the landowner offer. The basis for the final compensation amount is the lowest of either the fair market value, the GARC, or applicable landowner offer, amount for the enrollment type as calculated based on the final surveyed acreage and as described in this section.
- (2) This final easement or 30-year contract acreage (rounded to the nearest hundredth of an acre) and the adjusted compensation amount will be documented on the final warranty easement deed or 30-year contract (rounded up to the nearest dollar for an amount \$0.50 or greater and rounded down to the nearest dollar for an amount less than \$0.50), the landowner’s acceptance of which will be documented upon execution of those documents. Amendments to the APCE or AECLU forms and landowner signatures are not required to document adjustments to the acreage or compensation amount.
- (3) Guidance on obtaining easement boundary surveys is provided in section 528.123 below. Boundary surveys for 30-year contracts are based on a GPS survey conducted by NRCS. NRCS coordinates with the landowner to ensure that the appropriate acres are included in the survey area and reviews the 30-year contract boundary survey with the landowner ensure that it accurately and correctly delineates the area of enrollment.
- (4) Upon determination of the final acreage and compensation amount, the easement program specialist provides this information to a financial specialist, who will adjust the obligation in FMVI, as necessary. States must conduct reviews of obligations and adjustments in accordance with the most current easement acquisition internal controls policy. (See subpart U of this part for sample easement/contract compensation adjustment note to file.)
- (5) If a within-scope change in final acres differs by more than 10 percent from the originally estimated enrollment acreage, a copy of any acreage and easement compensation adjustment documentation should be provided to the landowner for their information.
- (6) If the change to the proposed easement area is determined to be outside the scope of the original agreement, the agreement must be terminated pursuant to the general provisions of the agreement. Out-of-scope changes typically include changes in the area of land offered for enrollment after the WRE agreement is executed or after an appraisal is completed, including acreage substitutions, additions, or deletions affecting more than 10 percent of the original acreage. If the landowner is interested in enrolling the proposed easement area as revised, then a separate determination of eligibility and selection for funding must be made before acquisition of the easement or 30-year contract can continue. Depending on the timing and circumstances of the out-of-scope change, the revised proposed easement area may need to have a new application submitted, be reranked, and have updated title and environmental due

diligence work completed. Before any new agreement may be entered into, the land and landowner eligibility determinations must be made for the current fiscal year and the easement compensation value determination must be made based on the revised proposed easement area using the compensation values applicable to the fiscal year in which the new agreement will be entered. (See subpart O, section 528.144 of this part for additional guidance on the principles of making scope determinations.)

### 528.123 Easement Boundary Survey

#### A. General

- (1) As an integral part of the easement acquisition process, the boundary of the proposed easement area must be delineated in a manner that is suitable for recording in the public record. The exact recording requirements vary by State. At a minimum, NRCS policy, NRCS easement programs land survey specifications, and State code must be met.
- (2) **Easement boundary descriptions and easement boundary maps are based upon a legal land survey and are required for all easement transactions.** Knowing exactly where the recorded easement acres are located will assist NRCS with its monitoring, management, and enforcement responsibilities to protect the Federal investment and ensure program purposes are achieved. Additionally, ingress and egress to the easement area will be described on the easement boundary survey.

**Note:** It is the landowner's responsibility to provide a sufficient right of ingress and egress to the easement area, as described in subpart K of this part. The landowner providing NRCS with sufficient ingress and egress to the easement site is a condition of eligibility. Additionally, the fair market value of the land determined through an appraisal or AWMA includes an assumption that the land has sufficient legal access, therefore, NRCS will not provide any additional or separate payments for a route of ingress and egress.

- (3) Following recordation of the easement, the digitized easement boundaries and polygon attributes are transmitted to the NRCS National Geospatial Center of Excellence (NGCE) in accordance with the guidance in place at the time the easement is recorded. These digital layers, in combination with others, support local, regional, and national program management and ecosystem planning. NGCE loads these digital layers into the national geospatial database when received. (See subpart U of this part for instructions for digitizing and transmitting easement boundaries and the applicable specific guidance on submitting spatial boundaries and attributes provided through regularly updated national bulletins or instructions.)

#### B. Procuring the Easement Boundary Survey

- (1) After the APCE has been signed by the landowner and NRCS, an easement boundary survey is ordered. The easement boundary survey must be based upon a land survey conducted by a State-certified and licensed professional land surveyor. The surveys are obtained using an appropriate procurement method and funds for easement boundary surveys must be obligated to budget object class 3214. Use of a blanket purchase agreement or indefinite delivery and indefinite quantity contract for easement boundary surveys is recommended.
- (2) In some cases, it may be more efficient or cost-effective for the landowner to secure the easement boundary survey.

- (i) If this option is used, the landowner must secure a written bid for the easement boundary survey from a State-certified and licensed professional land surveyor that is based on the NRCS easement programs' land survey specifications (see subpart U of this part for NRCS easement programs land survey specifications).
  - (ii) The funds should be obligated to the landowner as the vendor using a supplement to the APCE, these survey funds may be obligated at the time the easement acquisition funds are obligated. (See subpart U of this part for APCE supplement for landowners to procure easement boundary surveys.)
- (3) NRCS must ensure that all easement boundary surveys are completed and digitized according to the NRCS easement programs' land survey specifications. NRCS ensures that all easement boundary markers and witness posts with easement boundary signs are installed at the time the easement boundary survey is accepted as correct by NRCS.
  - (4) The use of the NRCS easement programs' land survey specifications is required unless a modification to the national specification is approved by the national ACEP-WRE manager. Use of these national specifications ensures a consistent product nationally and allows for the most efficient uploading of data to the national ACEP-WRE boundary shapefile maintained by the NGCE.

**Note:** The easement boundary signs may be ordered free of charge from the NRCS National Publications and Forms Distribution Center-LANDCARE by—

- Visiting <https://nrcspad.sc.egov.usda.gov/DistributionCenter/> and typing “sign” in the “Enter keyword” box and then clicking the “search” button and selecting “Agricultural Conservation Easement Program - Wetland Reserve Easements Boundary Sign\*.”
- Telephone calling 1-(888)-LANDCARE (1-(888)526-3227) and pressing “2.”
- Emailing [nrcsdistributioncenter@ia.usda.gov](mailto:nrcsdistributioncenter@ia.usda.gov).

Please note on your order that these signs will be used in the ACEP-WRE. Signs may be shipped directly to the survey vendor or local USDA service center. All orders must include name, company, shipping address, email address, and contact telephone number.

#### C. Acceptance of Easement Boundary Survey

- (1) After the easement boundary survey is complete, the surveyor must provide a preliminary survey submittal that is acceptable to NRCS in accordance with the land survey specifications. Upon receipt of an acceptable preliminary survey submittal, the NRCS representative and the landowner conduct an onsite easement boundary field review to ensure that—
  - (i) The area delineated is the area that the landowner intends to place under the easement.
  - (ii) The area delineated is the area identified and agreed to by NRCS.
  - (iii) The access route is accurate and acceptable.
  - (iv) The easement boundary monuments and witness posts have been installed as required.
- (2) The onsite postsurvey field review is documented using the easement boundary survey field review memorandum to the file. A copy of the memorandum to the file may be provided to the landowner. (See subpart U of this part for the easement boundary field review memorandum to the file.)

**Note:** During the onsite visit for postsurvey field review, the NRCS representative should also review the previously completed land eligibility documentation, onsite field inspections (Hazardous Materials Field Inspection, Landowner Disclosure, Physical Features Map, and others) and update as needed to capture changes and document that the entirety of the acres as configured in the final easement boundary survey have been evaluated. Form NRCS-LTP 27, “Preliminary Certificate of Inspection and Possession,” should also be completed during the onsite visit for the postsurvey field review (see section 528.124B below).

- (3) Following the NRCS review and receipt of an acceptable preliminary survey submittal and the completion of the onsite field review of the surveyed area, NRCS instructs the surveyor to submit the final easement boundary survey materials to NRCS. NRCS reviews the final boundary survey submittal to ensure that it accurately and correctly describes the area of enrollment and satisfies the requirements of the land survey specifications.
- (4) Payment for the easement boundary survey may only be issued after the onsite postsurvey easement boundary field review is completed and the final survey submittal has been reviewed and approved by NRCS.
- (5) See section 528.122G above for information on incorporating the final easement boundary survey information into the warranty easement deed.

## **528.124 Finalizing Preliminary Investigations for Easements and 30-Year Contracts**

### **A. General**

- (1) The preliminary investigations, including obtaining and reviewing the preliminary title search and underlying documents and completing the limited phase-I, must be completed prior to NRCS execution of the agreement to purchase (APCE or AECLU). If there are extenuating circumstances and the State has received written authorization from the EPD director to obligate acquisition funds prior to completing all preliminary investigations, the preliminary investigation activities must be completed as soon as possible after the execution of the APCE or AECLU (see subpart K, section 528.103E of this part).
- (2) Prior to easement closing or 30-year contract execution, States must finalize the title and environmental due diligence investigations. These investigations must include a thorough examination of both unrecorded and recorded exceptions to the title and a limited phase-I for the entire surveyed area. These investigations are to conclusively 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, preclude, or interfere with NRCS’s ability to achieve the purposes of the program or exercise the rights being acquired through the warranty easement deed or 30-year contract.
- (3) Title review includes an examination of both recorded and unrecorded exceptions to the title of the offered area and results in findings and recommendations that are documented by NRCS on Form NRCS-LTP-23, “Certificate of Use and Consent,” and Form NRCS-LTP-27, “Preliminary Certificate of Inspection and Possession.”
  - (i) Recorded exceptions are identified in the title search and underlying documents, which are typically provided by a closing agent; unrecorded exceptions are identified during interviews with the landowner or others knowledgeable about the land and onsite investigations.

- (ii) A thorough review of all exceptions must be completed prior to easement closing or 30-year contract execution. Additional information on the title review process is provided in the paragraphs below and in the subpart U of this part on common real estate transaction terms and title exception guide.
- (4) The limited phase-I must include an environmental records search, landowner interviews, and an onsite visit to view present conditions. Prior to easement closing or 30-year contract execution, all limited phase-I materials must be completed, reviewed, and updated as needed based on final configuration of the surveyed easement boundary.
  - (i) Should the limited phase-I reveal issues requiring further investigation, NRCS staff may complete a full phase-I environmental site assessment that meets the requirements of 40 CFR Part 312 or obtain one from a qualified outside vendor. A full phase I, when conducted and provided by qualified, non-NRCS personnel, uses financial assistance funds.
  - (ii) If after the completion of the limited phase-I or full phase-I it is determined that a phase-II environmental site assessment or site remediation is necessary, the application must be determined ineligible. If an APCE or AECLU has been entered into, the agreement to purchase must be terminated pursuant to the general provisions of the agreement. The landowner must be informed of the determination and that the offered area may not be reconsidered until the landowner provides sufficient documentation that all necessary investigations have been completed and that the site has been fully remediated to allow for restoration, inundation, and management of the site consistent with the wetland restoration purposes and objectives of the program.
  - (iii) NRCS may not close on an easement or execute a 30-year contract on property where hazardous materials concerns are identified and are determined by NRCS to pose an unacceptable risk or are sufficient to make restoration unfeasible.
- (5) States must finalize title and environmental due diligence investigations to determine impacts and document recommendations as to how to address any existing recorded or unrecorded exceptions to title or environmental due diligence issues. These findings and recommendations must be included in the packages submitted to request a title opinion from OGC for easements or to request EPD approval for 30-year contracts which must be obtained prior to easement closing or 30-year contract execution and as described in the sections below.

#### B. Identifying Unrecorded Exceptions

- (1) Unrecorded exceptions include leases, claims, encumbrances, options, and other evidence that someone other than the landowner has an interest in the property. Information on these unrecorded exceptions is found through interviews with the landowner or other parties associated with the property and through physical inspections of the property.
- (2) At the time of application and prior to entering into an agreement to purchase, States must use the landowner disclosure worksheet to prompt the landowner to disclose information about the property that may not be revealed in the title search. The landowner disclosure worksheet should be completed onsite as part of the onsite determinations described in subpart K, section 528.105 of this part. (See subpart U of this part for landowner disclosure worksheet.)
- (3) States must use Form NRCS-LTP-27 which provides a mechanism for NRCS to verify and document that there are no apparent, visible activities or uses observed or disclosed that indicate the presence of unrecorded liens, leases, options, or other claims against the property that could impede the landowner's ability to provide clear

- title to the property or NRCS ability to achieve program purposes. (See subpart U of this part for the current approved Form NRCS-LTP-27.)
- (4) States must conduct an onsite visit to complete Form NRCS-LTP-27 within 12 months of the easement closing date to verify that—
- (i) An NRCS employee has visually and physically inspected the property.
  - (ii) NRCS is aware of the legal boundaries of the property.
  - (iii) There are no persons or business entities (corporations, partnerships, etc.) other than the landowner that may have or claim rights that would conflict with the interest to be acquired by the United States.
  - (iv) No work of labor has been performed or materials furnished in connection with repairs or improvements on the property within a span of time that may entitle any person to a lien upon the property for the work or labor performed or materials furnished.
  - (v) The property to be acquired by the United States is unimproved, unoccupied, and vacant unless otherwise indicated on the certificate. That any occupants have been identified and disclaimers of interest have been obtained for any occupants of the land.
  - (vi) There are no rights in, or claimed by, parties other than the landowner, except as identified on the certificate, in any of the following:
    - Water rights for mining, agricultural, manufacturing, or other purpose
    - Ditches or canals constructed by or being used on the property under authority of the United States
    - Exploration for or removal of coal, oil, gas, sand, gravel, timber, or any other substance
    - Possessory rights claimed or being exercised by under any reservation contained in a patent previously issued by the United States
  - (vii) The NRCS inspection of the property has found no evidence of potential hazardous materials on, near, or adjacent to the proposed easement area that would be detrimental to the acquisition, restoration, or management of the easement.
- (5) The onsite visit to complete the Form NRCS-LTP-27 should be conducted at the same time as the onsite visit for the postsurvey field review.
- (6) NRCS must ask the landowner whether there are any existing options or leases on the property for development or extraction of any type, including minerals, timber harvest, energy infrastructure, windmills, solar panels, transmission lines, or others. When the property is encumbered by an agricultural lease, NRCS should encourage the landowner to notify the lessee to work with FSA because enrollment in ACEP-WRE may result in payment issues. NRCS must request copies of any written leases or other agreements the landowner identifies during the landowner interviews used to complete the landowner disclosure worksheet, the hazardous materials landowner interview, or Form NRCS-LTP-27. NRCS should be in possession of the written leases or agreements prior to executing the APCE or AECLU and must be in receipt of these items prior to closing. Unrecorded exceptions must be documented on Form NRCS-LTP-23.

### C. Identifying Recorded Exceptions

Recorded exceptions to the title are identified in title search and underlying documents, usually provided by a closing agent. Each recorded exception to the title has an associated underlying document. All title search and underlying documents must be evaluated by NRCS and a determination made as to the acceptability of each existing recorded exception to the title. NRCS determines acceptability based on the impact of



these exceptions on NRCS's ability to achieve the purposes of the program and the potential of these exceptions to undermine or interfere with the rights the United States is acquiring under the warranty easement deed or 30-year contract. States should consult with OGC during this evaluation and determination phase as necessary. NRCS documents the determinations on Form NRCS-LTP-23.

D. Evaluation of Unrecorded and Recorded Exceptions

- (1) The Form NRCS-LTP-23 must be completed for all easements and 30-year contracts. Each exception must be fully documented as either acceptable or required to be removed or subordinated, or other appropriate remedy. For each exception, provide a description of the exception, the recommendation for addressing the exception, and the basis for the recommendation on the Form NRCS-LTP-23. (See subpart U of this part for a title exception guide with further discussion on making these determinations.)
- (2) Below are examples of recommendations, brief descriptions, and rationales that may appear on the Form NRCS-LTP-23:
  - (i) Acceptable.—Existing 30-foot-wide power line right-of-way on southern easement boundary, power line located in upland area, no long-term negative impacts anticipated to result from presence or maintenance of power line.
  - (ii) Must be Subordinated or Removed.—Existing county flowage easement, allows county to remove all vegetation on 5 acres that would be interior to easement, determination that vegetation removal would negatively impact ACEP-WRE habitat restoration.
  - (iii) Must be Subordinated or Removed.—Mortgages.
  - (iv) Must be Removed.—Judgments, mechanics, or tax liens. Access exceptions unless explicitly approved by OGC in their title opinion.
- (3) Landowners should be notified of unacceptable exceptions as early in the investigation processes as possible to enable the landowner to take timely action to resolve unacceptable exceptions, such as items that must be removed or subordinated, leases that must be terminated, or options that must be cancelled. NRCS may require certain exceptions to be resolved prior to entering into an agreement to purchase (APCE or AECLU) as a matter of eligibility or valuation. All unacceptable exceptions as identified by NRCS or OGC must be resolved by the landowner prior to the easement closing or 30-year contract execution.

## 528.125 Easement Closing Process

A. General

Once NRCS has concluded eligibility determinations, boundary surveys, easement compensation determinations, due diligence investigations, and document preparation for all easement transactions, NRCS will prepare the preliminary title opinion request to submit to OGC. Easement closing may proceed only after a preliminary title opinion has been provided by OGC and closing instructions have been provided by NRCS. Easement closing will generally be executed through the use of a closing agent. NRCS will prepare the warranty easement deed and necessary exhibits for recordation. Once the easement has been recorded, NRCS must obtain and review the final title insurance policy and request a final title opinion from OGC. The easement acquisition process is complete when OGC issues its final title opinion to NRCS, confirming that title is vested in the United States.

**Note:** Each OGC office has its own procedures for issuing preliminary title opinions and final title opinions. Pursuant to 40 U.S.C. Section 3111, NRCS is not authorized to issue an easement payment until OGC has approved the sufficiency of title to the land for the purpose for which it is being acquired. Therefore, the procedures described in this section (528.125) may be modified to meet OGC requirements.

**B. Closing Agents**

- (1) The term “closing agent” refers to the person or entity that prepares and provides the documents and services needed to complete the easement acquisition transaction. While in transactions between private parties the closing agent is typically not an agent of either party, in ACEP-WRE easement transactions between NRCS and the landowner, the closing agent is hired by NRCS and thus is considered a buyer’s agent. The closing agent may be a title company, escrow company, qualified private attorney, abstractor, or Federal employee familiar with the preparation of such evidence in the jurisdiction in which the lands are situated.
- (2) Closing agent services for easement transactions typically include the following:
  - (i) Providing title search and underlying documents.
  - (ii) Providing a commitment to provide title insurance (title commitment binder or other acceptable document).
  - (iii) Obtaining signatures on Form AD-1158, “Subordination Agreement and Limited Lien Waiver,” or successor form or equivalent subordination document approved by OGC.
  - (iv) Obtaining signatures on warranty easement deed.
  - (v) Ensuring that exceptions are addressed according to NRCS and OGC instructions.
  - (vi) Recording easements and other documents.
  - (vii) Issuing the easement payment through an escrow account.
  - (viii) Issuing the appropriate Internal Revenue Service (IRS) Form 1099 to the landowner for the easement transaction.
  - (ix) Providing the American Land Title Association (ALTA) closing protection letter, or OGC-approved equivalent, and ALTA U.S. Policy Form 9-28-91 (Revised 12/3/2012) title insurance policy.
  - (x) Other functions, as necessary, or which may be required by State law or by the OGC title opinion to finalize the easement transaction, as detailed in the closing instructions provided by NRCS to the closing agent (see subpart U of this part for examples of closing instructions).
- (3) Closing agent services are secured through an appropriate procurement method and following proper contracting rules and procedures. NRCS may work with the OGC to develop a task order from a blanket purchase agreement or a statement of work for acquiring closing agent services (see subpart U of this part for closing services scope of work and closing agent requirements). The task order must list all necessary closing agent responsibilities, qualifications, and conditions.
- (4) Closing agents providing easement acquisition services to NRCS for ACEP-WRE must obtain a valid Dun and Bradstreet Data Universal Numbering System (DUNS) number and meet the Central Contractor Registration (CCR) requirements through registration or annual renewal in the System for Award Management (SAM) or successor registry. Registration in SAM must be maintained for the duration of any procurement contracts or agreements with the closing agent. Evidence of current active registration must be checked at the time the procurement contract or agreement is entered into and must be valid at the time of obligation of funds to the closing agent services contract or agreement and at the time of each payment. NRCS

provides the closing agent with specific requirements for entering bank account and escrow account information into SAM in accordance with current FPAC-BC Payment Operations Section (POS) guidance.

- (5) NRCS must ensure that the closing agent is qualified and certified by law to perform the required services in the State in which the land lies, and that he or she is experienced, financially responsible, and reputable. Prior to issuing funds, NRCS must obtain countersigned closing instructions in which the closing agent certifies these requirements are met.

C. Title Search Documents and Commitments

- (1) The closing agent provides the title search, underlying documents, and a commitment to provide title insurance. Commitments, binders, preliminary reports, or other forms of preliminary title evidence are acceptable if they—
  - (i) Are customarily used in the location.
  - (ii) Are acceptable to the reviewing OGC attorney.
  - (iii) Are issued by a qualified closing agent.
  - (iv) Are based upon a preliminary title search.
  - (v) Commit the company to issue the approved American Land Title Association (ALTA) U.S. Policy Form 9-28-91 (Revised 12/3/2012) title insurance policy.
- (2) The title search documents provide information necessary for NRCS to—
  - (i) Confirm current fee title ownership of the property in order to verify all of the following:
    - Landowner eligibility has been confirmed for all required individuals, legal entities, and required entity members, based on the most current Form CCC-901 or CCC-902E.
    - All documents are executed by the sufficiently authorized individuals.
    - Easement acquisition funds are appropriately obligated in FMML.
  - (ii) Make eligibility determinations related to the impacts of title encumbrances and exceptions.
  - (iii) Complete Form NRCS-LTP-23.
  - (iv) Identify actions the landowner must take at or prior to closing, including the execution of any instruments necessary to cure title defects or access rights, to resolve exceptions and provide clear title.
  - (v) Prepare any necessary Form AD-1158, “Subordination Agreement and Limited Lien Waiver,” or successor form.
  - (vi) Prepare the warranty easement deed.

D. Title Insurance

- (1) Prior to closing, closing agents must submit an ALTA closing protection letter or OGC-approved equivalent, for the full amount of the easement compensation amount. The ALTA “Closing Protection Letter – Single Transaction” (revised 4/2/2014, 12/1/18, or successor version) is satisfactory to meet this condition of responsibility. Any insurance, bond, or other indemnification proposed by the closing agent as an equivalent must be submitted as part of the preliminary title opinion (PTO) request under section 528.125F below and confirmed by OGC as acceptable in the PTO. Any account in which the easement funds are to be deposited must be insured for the full amount of the funds deposited, providing for reimbursement to NRCS for any loss of Federal funds caused by errors, omissions, fraud, dishonesty, negligence, or failure by the attorneys, agents, or closing agent employees to comply with NRCS’s written closing instructions (see subpart U of this part for a sample closing protection letter).

- (2) An ALTA title insurance policy on the ALTA U.S. Policy Form 9-28-91 (Revised 12/3/2012) is required on all easements, including the ingress and egress routes. The closing agent must ensure that the ALTA title insurance policy—
  - (i) Includes only those title exceptions approved in advance by NRCS and OGC.
  - (ii) Is written for the full easement compensation amount identified in the warranty easement deed.
  - (iii) Identifies “The United States of America” as the insured party.
  - (iv) Declares that the interest being insured is an easement.
  - (v) Is acquired from a source qualified and authorized by law to issue title insurance policies and approved by the State insurance commissioner or equivalent in the State in which the land is located.
- (3) Title insurance is obtained through an appropriate procurement method and following proper contracting rules and procedures. Costs for title insurance must not exceed what is considered fair and reasonable.

#### E. Easement Deed Preparation

- (1) The warranty easement deed, exhibits to the deed, and any applicable Form AD-1158, “Subordination and Limited Lien Waiver,” or successor form, is prepared by NRCS and reviewed by OGC based on the following information and documentation:
  - (i) The findings of the title review and due diligence process.
  - (ii) Form NRCS-LTP-23.
  - (iii) Exhibits A and B.—Easement boundary and ingress and egress legal surveys and description.
  - (iv) Exhibit C.—Part II, Subpart E (subsurface resource restrictions) of the warranty easement deed, if applicable, to explain how oil, mineral, and gas resources may be extracted from the easement area such that adverse impacts to the habitat functions and values are avoided or minimized.

**Note:** An Exhibit C should be attached to and recorded with the warranty easement deed. In the event there are no specific provisions to be included in the Exhibit C, the Exhibit C should simply state “Not Applicable” unless the local OGC attorney instructs otherwise.

- (v) Exhibit D.—Water rights and water uses, if applicable, must be investigated and any water rights necessary to accomplish the objectives of the easement must be identified, negotiated, and captured in exhibit D, to be recorded with the warranty easement deed.
  - (vi) Exhibit E.—For the reserved grazing rights option only, a grazing management plan must be developed, and benefits, extents, and purposes must be captured in exhibit E, to be recorded with the warranty easement deed (see subpart Q, section 528.162 of this part).
  - (vii) Basis for the easement compensation amount.
- (2) Special provisions may only be inserted in the warranty easement deed for unique legal issues, as determined necessary by the national ACEP-WRE manager and OGC in Washington, DC. Special provisions are not to be used for management or compatible uses.

#### F. Transmitting Documents to OGC for Preliminary Title Opinion

- (1) 40 U.S.C. Section 3111 provides that public money may not be expended to purchase land or any interest in land unless the U.S. Attorney General (or his or her delegate) gives prior written approval of the sufficiency of the title to the land for the purpose for which the Federal Government is acquiring the property. OGC is the delegate of

the U.S. Attorney General for approving the sufficiency of title for easements acquired by USDA agencies. Title review, issues and topics are governed by U.S. Department of Justice (DOJ) regulations, DOJ Title Standards 2016, and applicable program requirements.

- (2) To comply with these requirements, upon completion of NRCS investigations, the documents as listed on the OGC “Preliminary Title Opinion Docket Checklist” are assembled and transmitted to the regional OGC office for issuance of a PTO (see subpart U of this part for OGC PTO docket checklist). The PTO reveals the current status of title, sets forth requirements, and documents OGC’s approval of title subject to the satisfaction of any requirements contained in the PTO and closing instructions. The regional OGC may further specify the format and any additional content necessary for their review.
- (3) The PTO issued by OGC—
  - (i) Lists exceptions to clear title, if any, which must be resolved prior to recording the easement and making payment to the landowner.
  - (ii) Provides information for closing instructions.
  - (iii) Documents that OGC approved the sufficiency of title to the land for the purpose for which the agency is acquiring the easement and authorizes the agency to proceed with the acquisition subject to the satisfaction of the requirements contained in the PTO and closing instructions.
- (4) Only OGC has authority to provide a title opinion to NRCS. The transaction must be closed in accordance with the PTO and closing instructions. Only those title exceptions approved by OGC and NRCS may appear on the final policy of title insurance.

#### G. Issuing the Easement Payment and Perfecting the Easement

- (1) Easements must not be closed and no payments may be made unless and until OGC issues a PTO and all requirements in the PTO are completed. NRCS must not expend WRE funds to acquire land or an interest in land unless the sufficiency of title has first been approved by OGC. To the extent that title exceptions arise prior to closing that were not considered by OGC in the PTO, those exceptions must be removed prior to closing. If the new title exceptions will not be removed or if there are other changes not considered by OGC in the PTO, States must seek an amended PTO from OGC.
- (2) Upon receipt of the PTO from OGC, NRCS provides the closing instructions to the closing agent and copies for the landowner and the local NRCS office. The closing instructions must include sufficient detail to ensure that all of the requirements identified in the OGC PTO are addressed. Upon receipt of the closing instructions, the closing agent must provide NRCS with a completed and signed ALTA closing protection letter or an OGC-approved equivalent.
- (3) The APCE specifies that NRCS may provide payment to the landowner through an escrow account managed by NRCS’s selected closing agent. The landowner approves the payment to the escrow account through the execution of the APCE, and, therefore, a separate Form CCC-36, “Assignment of Payment,” (or successor form), does not need to be executed by the landowner. The landowner’s receipt of a copy of the closing instructions will notify the landowner of the identity of the closing agent selected to handle the easement transaction. The financial specialist will identify the closing agent as the assignee for payment in FMMI.

**Note:** If a landowner is executing an exchange of real property under section 1031 of the Internal Revenue Code of 1986, the closing agent may need to be identified as an alternate payee in FMML.

- (4) The closing agent handles the funds in the escrow account in accordance with the closing instructions provided by NRCS, which must include all applicable OGC PTO requirements, for ultimate disbursement of the proceeds to the landowner. The escrow account must be fully insured by the closing agent to ensure that Federal funds are not lost due to bank failure or otherwise.
- (5) NRCS may order the easement funds disbursed to the closing agent no more than 30 calendar days prior to scheduled easement closing. The closing agent may not hold the funds in escrow for more than 30 calendar days. If the easement cannot be closed within 30 calendar days, the closing agent must return the funds (and any accrued interest) to NRCS in accordance with NRCS instructions. When closing does not occur within 30 days of an advance payment, the State or Easement Acquisition Branch (EAB) must notify the FPAC-BC POS immediately. The FPAC-BC POS will follow current policy regarding cost recovery of an advance payment.
- (6) The easement payments must be issued through an escrow account unless State laws prohibit this method or the State, EPD, and the regional OGC office have agreed to an alternative method. In those cases, NRCS may issue the easement payment directly to the landowner. If NRCS issues the easement payment directly, NRCS must generate and issue the appropriate IRS Form 1099 or inform the landowners in writing that the landowner is responsible for correctly reporting the easement compensation amount as identified in the warranty easement deed and any payments received, even if an IRS Form 1099 is not issued.
- (7) The closing agent closes the easement in accordance with the closing instructions.
- (8) NRCS conducts an onsite visit and completes Form NRCS-LTP-22, “Final Certificate of Inspection and Possession” (FCIP). NRCS will follow the instructions provided by their OGC regional attorney in regard to whether the FCIP must be completed prior to or after closing. If prior to closing, the FCIP form must be completed no more than 2 months prior to the closing date, if after closing, the FCIP form must be completed upon receipt of the recorded documents.
- (9) Upon receipt of the recorded documents and final ALTA U.S. Policy Form 9-28-91 (Revised 12/3/2012) title insurance policy from the closing agent, NRCS reviews the policy and the completed FCIP to verify that the OGC title opinion and NRCS closing instructions were followed, verify that there are no new exceptions to the title, and determine the current ownership configuration.
- (10) NRCS will then request a final title opinion (FTO) and transmit copies of the recorded easement documents, copies of the recorded releases, subordinations or other resolutions required by the PTO, a copy of the final title insurance policy, and the completed FCIP form to the OGC regional attorney. The OGC regional attorney reviews the submitted documents and informs NRCS if additional documents are needed before issuing an FTO.
- (11) Payment is processed to the closing agent for the closing services upon verification that all NRCS closing instructions, including OGC title opinion instructions, have been followed and the final ALTA U.S. Policy Form 9-28-91 (Revised 12/3/2012) title insurance policy is correct.

#### H. Reporting Easement Actions With FSA

- (1) Once NRCS executes the APCE, NRCS provides to the local and State FSA office in writing the information needed for FSA to track the 25-percent county cropland

acreage cap of land enrolled in the ACEP-WRE and the Conservation Reserve Program. This information includes a map or shapefile of the proposed easement area and accompanying soils information if the easement area includes “subclass w” soils in the land capability classes IV through VIII. NRCS must ensure the 15-percent county cropland acreage cap on land enrolled in an ACEP-WRE easement is not exceeded. FSA county cropland records are the basis for tracking ACEP-WRE cropland acreage percentages. ACEP-WRE easements enrolled on noncropland acres or on cropland situated on exempted “subclass w” soils, as determined by NRCS, do not count against the 15-percent cropland limitation.

- (2) Once NRCS has recorded the warranty easement deed, it notifies the local and State FSA office of the date that the easement was recorded and the total acreage enrolled, including an updated map or shapefile as needed, and documents such notification in the easement case file. (See subpart U of this part for sample FSA notification.)
- (3) The landowner is responsible to work with FSA to retire or transfer base acres associated with the easement area prior to closing the ACEP-WRE easement. In situations in which the landowner has the option to transfer base acres to another farm or tract, those landowners will work directly with FSA to facilitate the exchange.

## **528.126 Thirty-Year Contract Execution Process**

### **A. Thirty-Year Contract Preparation**

- (1) The actual 30-year contract document and exhibits vary based on how the land is owned, specifically whether the lands are held in Tribal trust by BIA, are Tribal lands, allotted lands, or are individually held. States should contact the national ACEP-WRE manager early in the enrollment process to determine the correct 30-year contract document needed based on the ownership of the individual enrollment.
- (2) Prior to executing the 30-year contract, States must obtain EPD director review and written approval to proceed. To initiate this review, States must assemble and upload to the easement business tool (e.g., NEST) a 30-year contract review package that includes the following documents:
  - (i) Unsigned 30-year contract and completed exhibits
  - (ii) Boundary description and map of the contract area and access route (GPS)
  - (iii) Form NRCS-LTP-27
  - (iv) Landowner disclosure worksheet
  - (v) Form NRCS-LTP-23
  - (vi) Limited phase-I that includes an environmental records search report, the hazardous materials landowner interview, and the hazardous materials field inspection checklist
  - (vii) Title search or title status report with copies of underlying documents
  - (viii) Any appropriate title clearance documents or explanation of acceptance of encumbrances or other issues identified on title search report
  - (ix) The signed AECLU form and any extension
  - (x) The Internal Controls (IC) prepayment checklist with first- and second-level review completed
- (3) For 30-year contracts below the national-level IC review threshold, notification and transmittal of the 30-year contract review package to EPD must be completed at least 30 days prior to the anticipated date for signing the contract.

- (4) For 30-year contracts requiring national-level IC review, notification and transmittal of the 30-year contract review package to EPD must be completed at least 60 days prior to the anticipated date for signing the contract.
- (5) Upon receipt of the EPD director’s written approval of the 30-year contract package and prior to executing the 30-year agreement and making payment, States must complete all required internal control reviews in accordance with National Instruction 300-300, “Instruction and Guidance for State Implementation of Easement Internal Controls Prior to Obligation, Payment, and Closing” (as amended).

B. Issuing the 30-year Contract

There is no title insurance policy obtained on 30-year contracts; therefore, an updated title search report must be obtained and reviewed by the State no more than 3 months prior to the landowner signing the 30-year contract. This is to ensure that no changes to the title have occurred since the initial report was reviewed that would impact NRCS’s entering into a 30-year contract on the property. If the updated title search reveals that unacceptable changes have occurred since the EPD approval was received, the new title report must be sent to EPD director for review.

C. Issuing the 30-year Contract Payment

The fully executed 30-year contract signed by the landowner and then NRCS serves as authorization to issue payment to the landowner, a separate application for payment (Form AD-1161, “Application for Payment,” or successor form) is not needed. The 30-year contract payment is reduced by the amount identified in the final WRPO as the landowner’s share of the restoration costs. By signing the AECLU form, the landowner agrees that NRCS must withhold from the 30-year contract payment an amount equivalent to 25 percent of the projected restoration costs.

## 528.127 Records Management

A. The following materials related to acquiring, monitoring, and enforcing an ACEP-WRE easement must be maintained in a secure fireproof file area at the NRCS State office:

- (1) The title folder containing acquisition documents and acquisition-related correspondence, including, at a minimum, all application, eligibility determination, and waiver requests and findings, all items included in the OGC PTO docket package, the OGC title opinions, closing instructions, the final title insurance policy, a copy of the recorded deed and all exhibits, and any easement or related cost payment documents
- (2) Documentation of easement compensation determination, including any GARC worksheets, or if an individual appraisal was used, any agency-approved appraisal reports, administrative appraisal reviews, and technical appraisal review reports must be retained in the official NRCS file associated with the easement
- (3) Copies of any records generated as a result of violations or enforcement proceedings (see 440-CPM, Part 527, Subpart P, for more detail)

**Note:** Beginning in FY 2020, copies of monitoring reports must be retained in the easement business tool (e.g., NEST). For monitoring conducted prior to FY 2020, copies of monitoring reports must be retained either in the easement business tool (e.g., NEST) or in the NRCS State office files but are not required to be kept in a fireproof file area.



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- B. Easement acquisition, monitoring, and enforcement materials must be retained in the NRCS State office for the duration of the easement. Do not send ACEP-WRE easement acquisition files to the archives, as monitoring and maintenance requires access to file documents for the life of the easement.
- C. Copies of easement acquisition documents may be kept in the field office.
- D. Cancelled files will be kept for the term of the Farm Bill under which they applied.
- E. Documents required to be loaded in easement business tool (e.g., NEST) are identified on the specific checklists for internal controls and internal controls guidance, business tools and associated document management guidance, audit sample requirements, or other specific FPAC-BC customer guides.