

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

### **Subpart P – ACEP-WRE Maintenance, Management, Monitoring, and Enforcement**

#### **528.150 Overview**

A. This subpart provides guidance related to the maintenance, management, monitoring, and enforcement of lands enrolled in the ACEP Wetland Reserve Easements (ACEP-WRE) (see subpart U of this part for the ACEP-WRE business process).

B. “Maintenance” is defined as work performed to keep the enrolled land functioning for program purposes for the duration of the enrollment period. Maintenance includes actions and work performed to—

- (1) Keep the applied conservation practice functioning for the intended purpose during its life span.
- (2) Prevent deterioration of the practice.
- (3) Repair damage.
- (4) Replace conservation practices or eligible activities to their original condition if one or more components fail or as otherwise determined necessary by NRCS.

C. “Management” includes those eligible activities or measures necessary to properly manage wetland functions and values (especially wildlife habitat) for which the land was enrolled in ACEP-WRE, for the duration of the enrollment. Management needs and requirements may change over time depending on the wetland functions and values and habitats on the enrolled area.

D. “Monitoring” includes the periodic review and assessment of how land enrolled in ACEP-WRE is meeting program purposes and objectives, including an assessment of the ecological functioning of the site and the landowner’s program compliance. Guidance regarding monitoring procedures and requirements applicable to ACEP-WRE is in 440-Conservation Programs Manual (CPM), Part 527, Subpart P, and further specified in this part.

E. “Enforcement” includes actions needed to ensure landowners and third parties are not violating, encroaching, or trespassing upon NRCS contractual or easement rights. Guidance regarding enforcement and violations procedures and requirements applicable to ACEP-WRE is in 440-CPM, Part 527, Subpart S, and further specified in this part.

F. For all enrollment types, NRCS will identify all required management and maintenance of conservation practices, components, activities, and measures in the wetland reserve plan of operations (WRPO). These activities must be captured in the WRPO through the narrative portion of the WRPO itself or in associated site-specific management plans, operations and maintenance (O&M) plans, practice specification sheets, or compatible use authorizations (CUAs).

G. For all easement enrollments and for 30-year contracts on non-Tribal trust, allotted, and individual Indian lands, the landowner is required to obtain a CUA (see section 528.152 below) before implementing management or maintenance actions identified in the final WRPO or actions requested by the landowner that are prohibited under the terms of the ACEP-WRE easement or 30-year contract.

- (1) NRCS is responsible for maintenance and management activities on easement enrollments but may authorize the landowner or someone other than the landowner to

perform maintenance and management activities through a CUA issued to the landowner.

- (2) If NRCS determines that payment for certain management or maintenance activities are appropriate and necessary, NRCS may enter into a conservation program contract (CPC) with the landowner, or a contribution agreement, a cooperative agreement, an interagency agreement, or a Federal contract with a qualified partner or third-party vendor. Qualified partners or third-party vendors may include other Federal agencies, State agencies, conservation districts, technical service providers, or other third parties NRCS has determined have the expertise and capacity to implement the required items.

**Note:** Except for establishment costs incurred by the United States and replacement costs not due to the landowner's negligence or malfeasance, all other costs involved in maintenance of fences and similar facilities to exclude livestock are the responsibility of the landowner.

H. On land enrolled through a 30-year contract, the landowner is responsible for maintenance and management activities. The final WRPO is part of the 30-year contract and must describe the management and maintenance activities that the landowner is responsible to implement.

- (1) Contracts for 30-year land use on non-Tribal trust, allotted, and individual Indian lands require a CUA to perform activities and measures described in the WRPO.
- (2) Contracts for 30-year land use on Tribal trust lands do not require separate CUAs to perform activities; however, the principles of compatible and noncompatible uses described in sections 528.152 and 528.153 below must be taken into consideration when developing the final WRPO, including management and maintenance activities.
- (3) States may elect to use CUAs for 30-year contracts on Tribal trust lands to supplement WRPO documentation and authorize various management and maintenance activities. These CUA requests must be signed by the landowner and Bureau of Indian Affairs (BIA) and authorized by NRCS prior to implementation.

I. NRCS must conduct annual monitoring of easements and 30-year contracts as described in section 528.156 below and in 440-CPM-527, Subpart P, to determine if ACEP-WRE purposes and objectives are being met.

J. Delegated Management, Monitoring, and Enforcement Authority

- (1) Under ACEP-WRE, NRCS may, at any time, delegate its easement monitoring or management responsibilities to a conservation organization that has appropriate authority, expertise, and technical and financial resources, as determined by NRCS, to carry out such delegated responsibilities. NRCS may also, at any time, delegate its easement management, monitoring, or enforcement responsibilities under ACEP-WRE to other Federal or State agencies that it determines to have the appropriate authority, expertise, and technical and financial resources to carry out delegated responsibilities. State or Federal agencies may use their general statutory authorities in administering delegated management, monitoring, or enforcement responsibilities for ACEP-WRE easements.
- (2) These delegations are accomplished through the use of a memorandum of understanding or other appropriate written agreement that details the responsibilities of all parties, includes a termination clause, and, with the following exception, may be recorded with the easement. For any conservation organization or Federal or State agency that is the fee title owner of the land subject to the easement, the responsibilities that can be delegated are limited to management or monitoring.

Furthermore, these responsibilities will not be delegated to such a fee title owner in a recorded document, but rather through a nonpermanent agreement that is subject to periodic review, renewal, or amendment as needed and includes a termination clause.

- (3) The authority to subordinate, modify, exchange, or terminate the easement is reserved for the Chief and may not be vested in a delegated agency or organization. See subpart R of this part for the policy and procedure related to easement administration actions, which include subordination, modification, exchange, and termination of the easement.

## **528.151 Management**

### **A. General**

The State conservationist, in consultation with the State technical committee (STC), will ensure that easements and 30-year contracts are being properly monitored and managed, deficiencies are identified and corrected, and additional work is completed in a timely manner. This includes documenting, certifying, and spot checking to ensure that all phases of enrolled ACEP-WRE projects are being managed to maximize wetland functions and values and accomplish the goals and objectives of the warranty easement deed or 30-year contract and the final WRPO. Easements and 30-year contracts will be monitored at least annually as specified in 440-CPM-527-P, for ecological and compliance purposes.

### **B. Management Plans**

- (1) State conservationists must ensure that site-specific management plans are included in the final WRPO. These plans are subject to change over time and prescribe how lands will be managed and how restoration practices, components, measures, and activities will be implemented to maximize wetland functions and values, such as wildlife habitat benefits and water quality. To accomplish this, management plans should address activities including—
  - (i) Hydrology management objectives and methods, including, as applicable, target water depths, drawdown rates and timing, and flooding schedules.
  - (ii) Vegetation management objectives and methods, including burn plans, noxious weed control, irrigation schedules, and management practices such as grazing, disking, burning, mowing, haying, or timber management.
- (2) The landowner implementation of conservation practices, components, measures, and activities prescribed in the final WRPO requires an approved CUA unless the practices are being implemented as part of an approved CPC (see section 528.152 below). These include, but are not limited to—
  - (i) Managed timber harvest.
  - (ii) Hydrology management.
  - (iii) Pest management.
  - (iv) Invasive species control.
  - (v) Periodic haying or grazing.
- (3) Conducting any hydrology manipulation, vegetation manipulation, or other management activities outside of the WRPO and any applicable CUAs is a violation of the easement or 30-year contract and is prohibited. For ACEP-WRE, States must follow the procedures in section 528.157 below and in 440-CPM-527-S, to address potential or confirmed violations.

## 528.152 Compatible Uses

### A. General

- (1) ACEP-WRE lands may be used for compatible economic uses, if such use is permitted by the warranty easement deed or 30-year contract, or authorized by NRCS, in its sole discretion, under the WRPO and applicable CUAs. Undeveloped hunting and fishing conducted pursuant to applicable Federal, State, and Tribal regulations and in a manner consistent with the terms of the ACEP-WRE is a right reserved to the landowner subject to the terms of the deed or 30-year contract. All rights not specifically reserved to the landowner under the warranty easement deed or 30-year contract require site-specific evaluation and specific authorization from NRCS prior to implementation.
- (2) Under the terms of the warranty easement deed or 30-year contract, NRCS may, in its sole discretion, authorize the landowner to conduct compatible uses on the easement or contract area. Such authorizations are time-limited and may be modified or rescinded at any time by NRCS. In evaluating and authorizing compatible uses of the easement or contract area, NRCS will:
  - (i) Consider whether the use will facilitate the practical administration and management of the land subject to the easement or 30-year contract; and
  - (ii) Ensure that the use furthers the functions and values for which the easement was enrolled, including long-term protection and enhancement of the wetland and other natural values of the enrolled area.
- (3) The State conservationist, with advice from the STC, will establish guidelines for compatible uses that may be authorized in their State. Approved activities must provide for the full array of wetland functions and values, including the wetland and associated habitat types for which the enrollment was established, unless changes in habitat or management objectives are identified by NRCS with input from U.S. Fish and Wildlife Service (FWS). CUAs must not adversely affect habitat for migratory birds, at-risk species, and threatened or endangered species.
- (4) On easements and 30-year contracts on non-Tribal trust, allotted, and individual Indian lands, CUAs are required any time a landowner is affecting the hydrology or vegetation of the enrollment area, even when the landowner is carrying out management activities determined necessary by NRCS and outlined in the WRPO. If the landowner is implementing conservation practices or activities identified and being funded through a CPC, a separate CUA for those practices is not required. If a landowner activity will occur outside the enrolled area but will affect the hydrology or vegetation within the easement area or 30-year contract area, a CUA is also required; however, NRCS cannot provide ACEP funds for such activities.
- (5) Since wetland and biological systems are dynamic and resource conditions change over time, NRCS will not determine that any use is permanently compatible with the project. A landowner will not be assured of any specific level or frequency of such use that extends for the duration of the enrollment period. All CUAs must identify the length of time for which the authorization is valid and an expiration date. No CUA may be granted for more than a 10-year length of time.
- (6) To the extent possible, NRCS will address CUAs in a comprehensive manner to minimize administrative burden to NRCS and the landowner. Therefore, one CUA may identify several activities and associated terms and conditions for each authorized activity. Similarly, a CUA may simply reference and provide supplemental detail to an adequately detailed site-specific management plan, which may be incorporated into the CUA by reference. The comprehensive treatment of

these activities through multi-use CUAs does not limit the ability of NRCS to subsequently modify or cancel a particular prescribed activity.

- (7) The CUA process may be initiated by a landowner request or from NRCS-initiated discussions and subsequent agreement with the landowner. CUAs are subject to routine revisions and are not recorded with the warranty easement deed. All CUAs will stipulate that NRCS retains the right to modify or cancel the authorization at any time NRCS determines the use does not further the protection and enhancement objectives of the enrollment or the landowner has failed to comply with the CUAs terms and conditions. CUAs do not vest any right of any kind with the landowner. If a CUA is authorized, the landowner is not under any obligation to implement the activities; however, if the landowner chooses to implement the activities, they must be conducted in accordance with the terms of the CUA.
- (8) Approved CUAs must be documented in the easement business tools (e.g., National Easement Staging Tool (NEST)). States must conduct additional onsite monitoring on enrollments with active CUAs in accordance with 440-CPM-527-P.

#### B. Prescribing Compatible Uses

- (1) All CUAs must be in writing and supported by a technical determination in the case file that clearly documents the basis for the determination that the authorized activities meet compatibility requirements and the guidelines for implementation.
  - (i) NRCS will provide the FWS, conservation district, and State wildlife agency the opportunity to provide input, but the details of CUAs are determined by NRCS at its sole discretion.
  - (ii) The method by which input from these partners is sought is at the discretion of the State conservationist, and may occur on a project-by-project basis or on a broader basis, such as by geographic area, compatible use activity, wetland type, or habitats with similar functions and characteristics.
  - (iii) The State-specific wetland restoration criteria and guidelines (WRCG) document should describe technical parameters, in addition to those provided in this part, that States will use as a reference in reviewing, prescribing, and monitoring CUAs activities. These technical parameters should incorporate where appropriate the input provided by the partners.
  - (iv) Materials provided by these partners on a project-by-project basis should be kept in the individual case file.
- (2) Compatible use authorizations are subject to requirements of the National Environmental Policy Act (NEPA). States must analyze and document the proposed compatible use activities including alternatives and the associated effects on a completed Form NRCS-CPA-52, “Environmental Evaluation Worksheet,” or successor form. States must also document how the activity furthers the long-term protection and enhancement of the wetland functions and values of the site, including the impact to habitat for migratory birds, at-risk species, and endangered or threatened species. When evaluating the effects an action will have on the enrolled area, a determination of “no adverse impact” is insufficient justification for authorizing an activity.
  - (i) A Form NRCS-CPA-52 is required for each CUA; however, if a new CUA is comprised of activities that have been previously analyzed in an existing Form NRCS-CPA-52 for that individual easement or 30-year contract area, a separate Form NRCS-CPA-52 is not required if all of the following conditions are met:
    - The activity as prescribed in the new CUA was analyzed and documented in an existing Form NRCS-CPA-52 completed for the final WRPO,

- management plan, or previously authorized CUA for that individual enrollment;
- The existing Form NRCS-CPA-52 analyzes the actions specifically described in the new CUA to which it is being applied. If there are changes or differences in the alternatives described in the benchmark conditions on the site or in the effects of the actions, a new Form NRCS-CPA-52 is required for that CUA; and
  - The existing Form NRCS-CPA-52 was originally signed by the NRCS responsible Federal official (RFO) no more than 5 years prior to the date any subsequent CUA relying on such Form NRCS-CPA-52 is authorized by NRCS.
- (ii) States must document their determination and findings on the Form NRCS-CPA-52 that is associated with each individual CUA, including input received from regulatory agencies consulted during the NEPA process, and retain a copy of the environmental evaluation and associated materials in the individual easement case file or in the appropriate easement business or planning tool.
- (3) A CUA will specifically describe the allowed use in terms of the following:
- (i) The person requesting the compatible use
  - (ii) The activity being authorized and its purpose
  - (iii) A description of the land to be utilized
  - (iv) The beginning conditions of the site when the compatible use was authorized
  - (v) A statement of affect and compatibility
  - (vi) Method of implementation
  - (vii) Frequency of the authorized activity
  - (viii) Timing and intensity of implementation
  - (ix) Location where the authorized activity may occur
  - (x) Duration of the authorization
  - (xi) Statement that NRCS has the right to modify or cancel CUAs at any time to protect the functions and values of the enrollment area (e.g., if necessary to respond to changing vegetative successional patterns, hydrology, rainfall patterns, and the general response of the easement area to the activity)
  - (xii) Signatures of the landowner and NRCS representative issuing the authorization
- (4) The CUA must clearly reserve to the United States the right to modify or cancel the CUA therefore the following statement must be incorporated in every CUA:
- “NRCS retains the right to modify or cancel this compatible use authorization at any time if the NRCS determines that such activities do not further the protection and enhancement objectives of the easement (or 30-year contract area), or that the landowner has failed to comply with specified terms and conditions. The landowner engages in such activities at his or her own risk. This authorization does not vest any right of any kind in the landowner. This authorization is null and void after the expiration date specified above. By signing this document, the landowner agrees to the terms described above and on referenced documents.” (See subpart U of this part for Form AD-1160, “Compatible Use Authorization.”)
- (5) Economic returns that are realized by the landowner as a result of a CUA being implemented are acceptable.
- (6) The State conservationist makes the final determination of compatibility and is the NRCS RFO accountable for all such determinations. The State conservationist may delegate this authority to the assistant State conservationist or area conservationist, but this authority may not be delegated any further. NRCS personnel at the State or field level may develop the terms and conditions that are considered for final

incorporation into a particular CUA. Only a CUA executed by the State conservationist or the appropriate assistant State conservationist or area conservationist will be recognized as an action of the agency.

- (7) All current and active CUA information must be entered into the current easement business or planning tool (e.g., NEST). A copy of the executed CUA document must be uploaded into the easement business tool (e.g., NEST) prior to the end of the fiscal year in which the CUA is signed by NRCS.
- (8) NRCS will not record or in any manner participate in the potential recording by others, of CUAs in the land records.

#### C. Acceptable Compatible Uses

- (1) The types of practices, components, activities, or measures that are allowed through the compatible use process may include—
  - (i) Installation and maintenance of acceptable structures (see section 528.152D below).
  - (ii) Haying or mowing under certain conditions (see section 528.152E below).
  - (iii) Grazing to establish or maintain wildlife habitat or wetland functions and values (see section 528.152F below).
  - (iv) Forest management activities including timber harvest, for the specific purpose of restoring, protecting and enhancing optimum wildlife habitat and wetland functions and values, especially for migratory birds and at-risk species. (See section 528.152G below.)
  - (v) Maintenance of private drainage systems, but only if the activity does not adversely affect the functions and values of the wetland.
  - (vi) Wildlife food plots under certain conditions (see section 528.152H below).
  - (vii) Managing water levels. NRCS will provide management guidelines to persons receiving the CUA to manage water levels. Manipulating water levels outside of the compatible use process is prohibited.
  - (viii) Applying pest management activities.
  - (ix) Managing for carbon sequestration.
  - (x) Other conservation practices, components, activities, or measures needed to protect or enhance wildlife habitat and other functions and values of the wetland as approved by the State conservationist with advice from the STC or with input from the Easement Programs Division.
- (2) States are encouraged to include in their State-specific WRCG document as described in subpart N, section 528.131B of this part, the technical considerations and parameters developed in coordination with the STC related to the authorization of compatible uses on ACEP-WRE easements and 30-year contracts in the State. These considerations should include common management methods and techniques used to maximize functions and values on wetland and associated habitat types found on ACEP-WRE enrollments in the State, the conditions under which certain uses may or may not be authorized, scenarios under which exceptions may be appropriate and the limits and applicability of such exceptions, and other technical provisions that will facilitate the analysis, decision-making, prescription, documentation, and authorization of compatible uses.

#### D. Acceptable Structures

- (1) The right to undeveloped recreational use of the easement or 30-year contract area is reserved to the landowner subject to the rights conveyed to the United States and subject to the terms specified in the warranty easement deed or 30-year contract. The landowner's exercise of this right as reserved is not subject to the CUA process, but

must be consistent with the long-term protection and enhancement of the wetland and other natural values of the easement or 30-year contract and any other limitations specified in the warranty easement deed or 30-year contract (for example, undeveloped recreational uses may include use of hunting or observation blinds that will accommodate no more than four people and are temporary, nonpermanent, and easily assembled, disassembled, and moved without heavy equipment).

- (2) In contrast to nonpermanent hunting or observation blinds that may be placed on the easement or 30-year contract area within the limits of the landowner's reserved right to undeveloped recreational uses, which are not subject to the CUA process, NRCS may authorize through the CUA process individual semipermanent hunting or observation blinds for undeveloped recreational use. The semipermanent hunting or observation blinds are subject to the following requirements:
  - (i) May have external dimensions of no more than 80 square feet and 8 feet in height.
  - (ii) The CUA will describe the number, locations, and features of blinds.
  - (iii) Disturbance to wildlife from location, placement, installation, maintenance, and use, especially during critical periods such as night roosting and nesting season, must be kept to a minimum.
  - (iv) May require heavy equipment to remove, but must be able to be removed from the enrolled area with minimal ground or vegetation disturbance
  - (v) The CUA must stipulate that the landowner is responsible for all costs associated with the removal of the blind and the repair of any impacts to the easement or 30-year contract area as a result of the removal.
  - (vi) The blind is only authorized so long as a valid CUA is in place. If the CUA is not renewed, the blind must be removed from the easement or 30-year contract area by the date of expiration of the CUA.
  - (vii) Must be consistent with the long-term protection and enhancement of the wetland and other natural values of the easement or 30-year contract area.
  - (viii) All other applicable limitations must be described in the CUA.

#### E. Haying or Mowing Requirements

- (1) The United States possesses the right to prohibit all haying and mowing unless NRCS determines that such haying or mowing will further the protection and enhancement of the wildlife habitat and wetland functions and values.
- (2) Approved haying or mowing will be identified in a CUA and as appropriate, in the WRPO. Any haying or mowing must be scheduled and subject to the following limitations:
  - (i) Must occur between July 15 and September 1.
  - (ii) Must ensure there is adequate regrowth of vegetation to provide winter cover and early spring nesting cover.
  - (iii) Must ensure maintenance of adequate wildlife habitat quality and other wetland functions and values.
  - (iv) Not allowed in areas where woody vegetation is being established or maintained.
  - (v) Limited to mowing for access to manage and maintain such structures as levee tops and nature trails, or as prescribed to restore and maintain native plant communities or manage succession for special-status species.
  - (vi) Grazing is not allowed in the same year on the same acreage that is hayed or mowed.
- (3) Exceptions to the timing and frequency of haying or mowing may be considered by the State conservationist. The evaluation must include input from the FWS, State



wildlife agency, and conservation district. These exceptions must comply with statewide program guidelines that may be established by the State conservationist with advice from the STC. It is recommended States identify the conditions under which such exceptions may be authorized in their State-specific WRCG document. The decision must ensure the habitat needs of ground-nesting bird species are fully protected and enhanced.

- (4) Except where authorized in writing by the national ACEP-WRE manager in consultation with the NRCS national biologist, grazing is not permitted in the same year and on the same acreage as haying or mowing.

#### F. Grazing Requirements

- (1) Except as prescribed and authorized through a WRPO, applicable CUA, or an Exhibit E to a Form NRCS-LTP-33, “Warranty Easement Deed with a Reservation of Grazing Rights,” and associated grazing management plan, all grazing must cease after the easement is recorded or the 30-year contract is executed.
- (2) Grazing may only be used as a vegetation management tool when it is appropriate based on the wetland and habitat objectives identified in the WRPO and is prescribed and conducted in a manner that has the primary purpose of supporting or improving the identified wetland functions and values on the easement or 30-year contract area. Additionally, grazing may only be permitted when—
  - (i) Restoration of woody vegetation is not a component of the restoration plan, unless use can be prescribed so the timing and intensity will improve the overall habitat in the woody vegetation area and will not negatively impact establishment and survival of woody vegetation.
  - (ii) Site-specific grazing guidelines are developed to manage the vegetation to ensure the long-term functioning of the enrolled area or to restore and maintain the native plant communities on the enrolled area.
  - (iii) It contributes to establishment, maintenance, or improvement of wildlife habitat quality or other identified wetland functions and values.
  - (iv) It is timed to ensure adequate regrowth of vegetation for winter and spring habitats, as appropriate.
  - (v) There are no adverse effects on ground-nesting birds and other wildlife.
- (3) NRCS may vary the intensity and timing of (or terminate, if necessary) approved grazing authorizations to ensure that optimum functions and values are achieved on the enrolled area. As wetland hydrology and adjacent lands are restored and protected, the vegetation will change in composition and quality, which may necessitate modifying the grazing management plan and associated CUAs from year to year. See subpart Q of this part for details on the reservation of grazing rights enrollment option.
- (4) The local NRCS representative, with input from the landowner, FWS, conservation district, and State wildlife agency, will develop grazing guidelines for the individual site. The site-specific grazing guidelines must comply with any statewide program guidelines established by the State conservationist, in consultation with the STC. It is recommended these statewide grazing guidelines be documented in the State-specific WRCG document.
- (5) Except where authorized in writing by the national ACEP-WRE manager, in consultation with the NRCS national biologist, grazing is not permitted in the same year and on the same acreage as haying and mowing.

#### G. Forest Management

- (1) The United States possesses the right to prohibit all forest management activities on the easement or 30-year contract area, unless NRCS determines that forest management activities will further the wildlife habitat and wetland functions and values of the easement or 30-year contract. Before forest management activities, including timber harvest, may be authorized on an ACEP-WRE through a CUA, a forest management plan must be developed and appended to the WRPO.
- (2) The primary goal of the forest management plan component of the WRPO is to restore, protect, and enhance wildlife habitat and wetland functions and values within the forested portions of the easement. A forest management plan must be developed by an NRCS forester, or the landowner may obtain a forest management plan at their own expense from a professional, certified forester, and provide it to NRCS for review and approval. The completion of an NRCS-approved forest management plan alone does not guarantee that forest management activities will be authorized on the easement area. Forest management activities described in the forest management plan that are approved by NRCS for implementation must be identified in a CUA and are subject to the following limitations:
  - (i) Forest management activities must be implemented in a manner and during timeframes that will minimize impacts to forest-nesting birds.
  - (ii) Maximization of timber harvest for economic gain is not a consideration in developing the forest management plan or authorizing a CUA; however, any proceeds derived from the sale of timber harvested in compliance with the forest management CUA, may be kept by the easement owner.
  - (iii) NRCS must inspect any timber harvest operation during implementation to ensure the CUA is being implemented as written.
  - (iv) Other State-specific parameters are addressed.
- (3) NRCS will not authorize forest management activities that may negatively impact at-risk or listed species or fragile or rare habitats found on the easement.
- (4) It is recommended States identify any additional parameters related to the authorization of forest management activities in their State-specific WRCG document.
- (5) Except where authorized by the national ACEP-WRE manager in consultation with the NRCS national biologist, clearcutting of forested habitat is not permitted. Clearcutting may only be considered in unique situations where NRCS wildlife and forestry professionals agree that forest conditions or special wildlife habitat needs require such a measure.

#### H. Wildlife Food Plot Requirements

- (1) State conservationists may issue CUAs for wildlife food plots. CUAs authorized for wildlife food plots should include a statement that landowners are responsible for being aware of and in compliance with all applicable State and Federal wildlife baiting laws applicable to local and migratory wildlife species.
- (2) Food plots may be authorized subject to the following conditions:
  - (i) The food plot is determined necessary by NRCS to complete the planned functions and values of the enrolled area.
  - (ii) Wildlife food plots cannot be harvested as a commodity crop.
  - (iii) Location, configuration, spatial arrangement, and other details are prescribed by NRCS for the specific site.
  - (iv) Food plots must be limited to not more than 5 percent of the total acreage of the enrolled area.
  - (v) Food plots will be located or configured to avoid or minimize habitat fragmentation.

- (vi) Other State-specific considerations and parameters are addressed.
- (3) State conservationists are encouraged to be flexible in allowing the use of food plots and to coordinate use restrictions with neighboring States. State conservationists should work with FWS, State wildlife agencies, wildlife organizations, and other members of the STC to tailor the use of food plots to align with Federal and State law. It is recommended States identify any additional parameters related to the authorization of wildlife food plots in their State-specific WRCG document.

#### I. Commercial Shooting Preserves

- (1) Commercial shooting preserves may be operated on an ACEP-WRE easement or 30-year contract if all of the following apply:
  - (i) The commercial shooting preserve is licensed by a State agency, such as the State fish and wildlife agency or State department of natural resources.
  - (ii) The commercial shooting preserve is operated in a manner consistent with the applicable State agency rules governing commercial shooting preserves.
  - (iii) The management and maintenance of the cover, vegetation, and hydrology on the easement or 30-year contract area, as determined by the State conservationist in consultation with the STC, must—
    - Be conducted in accordance with the final WRPO and all applicable CUAs.
    - Provide benefit and enhancement to all native wildlife typical to the area.
    - Be conducted outside the primary nesting or brood-rearing season.
    - Not adversely impact the cover, vegetation, or hydrology on the enrolled area.
    - Further the wildlife habitat benefits, water quality benefits, or other wetland functions and values identified in the WRPO.
    - Ensure other State-specific considerations and parameters are addressed as identified in the State-specific WRCG.
  - (iv) No barrier fencing or boundary limitations exist that prevent wildlife access to or from the easement or 30-year contract area.
- (2) The construction of camping facilities, wildlife pens, parking lots, or other related structures or infrastructure is not allowed on the land enrolled in ACEP-WRE.

### **528.153 Prohibited and Noncompatible Uses**

#### A. In General

Prohibited and noncompatible uses include those activities that NRCS determines will not further the protection and enhancement of the functions and values of the enrolled area. When determining if a use would be noncompatible, evaluate the impact on the present functions and values, and any potential impact, constraint, or limitation that the use would have on subsequent efforts to achieve maximum wildlife benefits and wetland value and functions. Such activities are not limited to, but may include—

- (i) Infrastructure projects (see section 528.153B below).
- (ii) Placing prohibited structures on the enrollment area (see section 528.153C below).
- (iii) Planting and harvesting crops for human or domestic animal consumption (see section 528.153D below).
- (iv) Grazing, unless authorized in an Exhibit E to a grazing reserved right enrollment or authorized as a compatible use (see section 528.152F above).
- (v) Surface mining, including mining for peat and other organic materials.

- (vi) Water supply, waste treatment, and incompatible water conveyance systems (e.g., irrigation withdrawal or return flow of contaminated water).
- (vii) Crayfish, catfish, and baitfish production where the intensity of management would undermine the functions and values of the wetland.
- (viii) Hunting and fishing where the intensity would undermine the functions and values of the wetland.
- (ix) Commercial seed production or harvest.
- (x) Biomass production.
- (xi) Commercial wild rice or cranberry production.
- (xii) Development of road or other transportation systems that fragment the easement area, alter surface hydrology patterns, modify topography, or otherwise diminish the wetland functions and values or constrain restoration or enhancement efforts.
- (xiii) Drainage development or maintenance that would adversely affect wetland functions and values on the site.
- (xiv) Any activity performed outside the parameters of an authorized, valid CUA including manipulation of water levels.
- (xv) Any activities to be carried out on the land owned or operated by the fee title landowner of the enrolled area that is immediately adjacent to and functionally related to the land subject to the ACEP-WRE enrollment if such activities alter, degrade, or otherwise diminish wildlife habitat benefits or wetland functions and values of the enrolled land.
- (xvi) The installation or use of fences that have the effect of preventing wildlife use and access onto or off of the enrolled area are prohibited on the enrolled area, the boundary of the enrolled area, or on the landowner's land that is immediately adjacent to, and functionally related to, the enrolled area.

#### B. Infrastructure Projects

Infrastructure projects must be handled through the easement administration action process identified in subpart R of this part. NRCS will not authorize infrastructure projects through the CUA process.

#### C. Prohibited Structures

- (1) The construction or placing of any structures or buildings, temporary or permanent, is prohibited, except for those temporary or semi-permanent structures for undeveloped recreational uses that meet the "Acceptable Structure" requirements in section 528.152D above, are authorized by NRCS, and are consistent with the terms of the deed or 30-year contract and the WRPO.
- (2) Structures that are always prohibited include but are not limited to—
  - (i) Buildings used for residence, overnight occupancy, commercial uses, or agricultural production, such as—
    - Houses.
    - Trailers.
    - Hunting and fishing lodges.
    - Cabins and yurts.
    - Fishing huts.
    - Barns and outbuildings.
    - Storage facilities.
    - Workshops.
    - Fabrication facilities.

- Sawmills.
- (ii) Any other structure that puts a lasting footprint on the easement and does not further the wildlife habitat benefits and wetland values and functions.
- (3) Conservation practices, measures, activities, and components that are prescribed by NRCS in the WRPO or through a CUA are not considered prohibited structures. Additionally, hunting and observation blinds for undeveloped recreation consistent with the provisions stated in the terms of the recorded warranty easement deed or executed 30-year contract and described in section 528.152D above may be permissible.

D. Planting and Harvesting Crops

- (1) Operation of the land, including planting and harvesting of crops, is under the control of the landowner until the ACEP-WRE easement is recorded or the 30-year contract is executed. Any crops planted before the easement is recorded or 30-year contract is executed may be harvested if authorized in writing by NRCS (see subpart U of this part for a sample preacquisition crop harvest authorization letter).
- (2) If authorized through a CUA, landowners may also plant a crop during the spring following the easement recordation or 30-year contract execution when such recordation or contract execution occurs after October 1, provided the crop is planted before July 1. The harvest of the crop will be under the control of the landowner. A subsequent planting of a crop for harvest is prohibited.
  - (i) Example 1.—ACEP-WRE easement is filed on July 20, 2020. The participant may harvest crops planted before the easement was filed if authorized in writing by NRCS.
  - (ii) Example 2.—ACEP-WRE easement is filed on October 4, 2020. The participant may harvest crops planted before the easement was filed if authorized in writing by NRCS and plant crops for crop year 2021 if authorized by NRCS in a CUA and planted before July 1, 2021. The participant is prohibited from planting crops beginning July 1, 2021.
- (3) The State conservationist will—
  - (i) Provide each affected landowner with the appropriate written notification of authorization for cropping.
  - (ii) Provide a copy of the authorization to the Farm Service Agency (FSA).
  - (iii) Advise the landowner to contact FSA regarding the impact the ACEP-WRE easement or 30-year contract will have on any base acres, allotment history, and payments.
- (4) In limited situations, NRCS may authorize through a CUA the temporary permission to crop all or a portion of an easement or 30-year contract subject to the following conditions:
  - (i) NRCS determines there would be a substantial savings in restoration costs due to reduced site preparation costs and increase site preparation benefits as a result of authorizing cropping on the area to be restored;
  - (ii) The authorization to crop is limited to one cropping season immediately prior to the date the restoration work is to commence on that area of the easement or 30-year contract;
  - (iii) The cropping is done in a manner that is acceptable to NRCS as specified in the CUA;
  - (iv) All reasonable efforts have been made to initiate the restoration in a timely manner;
  - (v) When the restoration action will be delayed, cessation of cropping is required and may not be reauthorized until the cropping season immediately prior to the date

the restoration work is to commence. The cessation of cropping provides a wide variety of wetland, wildlife, and water quality benefits; therefore, continued cropping until the actual restoration work commences is a violation of program authority. Therefore, landowners must be advised that any cropping authorized under the CUA is exercised at the landowner's own risk.

- (5) NRCS must also advise landowners to consult FSA and that they may not be entitled to any USDA benefits related to such cropping.

### **528.154 Reserved Rights**

The landowner reserves certain rights on the sale of an easement or signing of a 30-year contract. These reserved rights are subject to the rights purchased by the United States. The rights reserved to the landowner are as follows:

- (1) Title.—Record title, along with the landowner's right to convey, transfer, and otherwise alienate title to these reserved rights.
- (2) Quiet Enjoyment.—The right of the landowner to enjoy the rights reserved on the easement area without interference from others.
- (3) Control of Access.—The right to prevent trespass and control access by the general public, subject to the operation of State and Federal law.
- (4) Recreational Uses.—The right to undeveloped recreational uses, including undeveloped hunting and fishing and leasing of such rights for economic gain, pursuant to applicable State and Federal regulations that may be in effect at the time. Undeveloped recreational uses may include use of hunting or observation blinds that will accommodate no more than four people and are temporary, nonpermanent, and easily assembled, disassembled, and moved without heavy equipment. Undeveloped recreational uses must be consistent with the long-term protection and enhancement of the wetland and other natural values of the easement area.
- (5) Subsurface Resources.—The right to oil, gas, minerals, and geothermal resources underlying the easement area, provided that any drilling or mining activities are to be located outside the boundaries of the easement area, unless activities within the boundaries are specified in accordance with the terms and conditions of exhibit C, which is appended to and made a part of the warranty easement deed or 30-year contract, if applicable.
- (6) Water Uses and Water Rights.—The right to water uses and water rights identified as reserved to the landowner are set forth in an exhibit, which is appended to and made a part of the easement deed, or 30-year contract, if applicable.
- (7) Traditional Cultural Uses.—For 30-year contract enrollments only, the ability to engage in noncommercial traditional cultural activities is permitted to the extent that such activities do not interfere with the long-term protection and enhancement of the wetland and other natural values on the property.

### **528.155 Operation and Maintenance (O&M)**

A. Landowners agree to the O&M of the easement areas in accordance with the final WRPO, including maintenance of all structural practices in good operating condition for the duration of the easement or at a minimum, for the life expectancy of the practice. NRCS may enter into agreements with the landowner, other Federal agencies, State agencies, conservation districts, or other cooperating partners to assist with O&M activities. When the landowner has agreed to perform these activities, an agreement will be developed in accordance with the CUA process, as appropriate.

B. When a natural disaster, such as an earthquake, devastating fire, or severe flood event occurs, the local NRCS representative must notify the State conservationist and give status reports on the condition of the site.

C. The State conservationist has authority to determine whether implementation of any repair, maintenance, or replacement of any conservation practice, measure, or activity is appropriate, regardless of whether the practice life expectancy has expired or the practice was damaged by a major storm or other natural disaster.

D. The State conservationist has discretion to use funds allocated to the State for such use or may request additional funds from the National Headquarters (NHQ). Upon the request of the State conservationist, the Chief may approve additional funding, based on availability of funds, to replace or repair practices destroyed by unusual circumstances beyond the control of the landowner. Contact the national ACEP-WRE manager when funding is needed to repair or reestablish a damaged site.

### **528.156 Monitoring**

A. Once the easement has closed or 30-year contract has been executed, all ACEP-WRE enrollments will be monitored annually in accordance with 440-CPM-527-P. Prior to the end of each fiscal year, the monitoring information will be entered into the easement business tool (e.g., NEST), and a copy of the completed annual monitoring worksheet will be retained for the duration of the enrollment according to records management requirements in subpart M, section 528.127 of this part, and 440-CPM-527-P.

B. Additionally, while restoration is being implemented under an easement restoration agreement, annual review and monitoring pursuant to the terms of the easement restoration agreement is required to ensure the proper implementation of planned conservation practices, components, measures, and activities and compliance with the terms of the easement restoration agreement (see subpart O, section 528.145 of this part).

### **528.157 Violations and Enforcement**

A. The purpose of monitoring and enforcement activity is to ensure program purposes are achieved on the enrollment area over the life of the enrollment and to prevent violations. The keys to successfully preventing violations are—

- (1) Maintaining an ongoing, good relationship with the landowner. There is no substitute for frequent, direct interaction with the landowner to reinforce the provisions of the easement and answer questions that may arise or address issues in a timely manner.
- (2) An easement or contract document with clear and enforceable conditions and restrictions.
- (3) A comprehensive WRPO including, as appropriate, CUAs, landowner management plans, and O&M plans that have been reviewed with and are understood by the landowner.
- (4) A history of regular, systematic, and well-documented monitoring occurrences and as applicable, contract status reviews.
- (5) Timely contact with new or prospective landowners regarding ACEP-WRE “Warranty Easement Deed” language, allowances, restrictions, and responsibilities.

B. For ACEP-WRE enrollments, the handling of violations and enforcement of the terms of the deed or 30-year contract will be conducted in accordance with the policy and procedures provided in “Violations and Enforcement” in 440-CPM 527-S.

C. Visits to the easement or 30-year contract area to investigate suspected violations and such observations as wildlife usage, water conditions, land use practices, and other items of interest concerning the easement must be thoroughly documented. The individual making the report should date and sign each entry on each item of documentation. Reports documenting no evidence of violation are just as important as those reports confirming and documenting violations. See 440-CPM-527, Subpart Y, “Exhibits,” for the easement violation worksheet for guidance on what information to collect.

## **528.158 Other Considerations**

### **A. Mitigation**

- (1) ACEP funds may not be used to acquire easements to establish protections or to implement conservation practices that the landowner is required to establish as a result of a court order or to satisfy any mitigation requirement for which the ACEP landowner is otherwise responsible.
- (2) ACEP-WRE easements and contracts provide authority to protect, restore, enhance, and improve enrolled wetlands and associated habitats in a manner that will maximize wildlife habitat and other wetland functions and values. The assumption is that ACEP-WRE lands will receive the conservation attention necessary to achieve this full degree of protection, restoration, enhancement, and improvement. It is not permissible to enter into ACEP-WRE easements or contracts and not implement, to the maximum extent practicable, all needed land treatment conservation actions.
- (3) It is not appropriate to allow another entity to expend mitigation funds on any of the land treatment conservation actions that would be practicable to fund under ACEP-WRE. This policy extends to any compensatory action taken by an entity to mitigate adverse ecological impacts, including but not limited to, the Clean Water Act of 1972, the Endangered Species Act of 1973, and the Marine Mammal Protection Act of 1972. Section 1222(f)(2) of the Food Security Act of 1985, as amended, does not allow wetlands restored with Federal funds to be utilized for the Food Security Act wetland mitigation purposes.
- (4) There may be limited opportunities when enhancement activities under a mitigation project would go beyond those land treatment conservation actions normally carried out under ACEP-WRE. Landowners who wish to enter into mitigation arrangements should be made aware that if they enter into an agreement with a third party that requires the exercise of rights held by the United States, such actions will be subject to the CUA process and WRPO modification process, both of which are subject to NRCS review, approval, modification or cancellation. NRCS will amend the WRPO and prescribe CUAs at its sole discretion and in accordance with the compatible use process identified in section 528.152 above. (See subpart U of this part for sample limitations to use of ACEP-WRE area for mitigation letter.)

### **B. Ecosystem Services Credits for Conservation Improvements**

- (1) USDA recognizes that environmental benefits will be achieved by implementing conservation practices, components, measures, and activities funded through ACEP-WRE, and that environmental credits may be gained as a result of implementing activities compatible with the purposes of an ACEP-WRE easement or contract.



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- (i) Landowners may obtain environmental credits under other programs if one of the purposes of such program is the facilitation of additional conservation benefits that are consistent with the conservation purposes for which the easement was acquired, and such action does not adversely affect the rights or interests granted under the easement to the United States. NRCS asserts no direct or indirect interest in credits generated by activities not funded through ACEP-WRE.
  - (ii) Activities required under an environmental credit agreement that affect land cover, vegetation, or hydrology on an ACEP-WRE easement or 30-year contract may require an amendment to the WRPO, to the 30-year contract, or a CUA.
  - (iii) All agreements and instruments filed on the land for environmental credits are subordinate to the ACEP-WRE and are not binding to the United States.
  - (iv) Landowners should be cautioned that any applicable credits may be subject to additional requirements and may not be possible on certain ACEP-WRE lands.
- (2) Amendments to the WRPO and any applicable CUAs are at the sole discretion of NRCS. The agency will only consider such amendments when the amendment does not infringe on the rights of the United States and when the amendment furthers the wetland and wildlife functions and values being achieved on the easement or 30-year contract area.