

**DEPARTMENT OF AGRICULTURE****Commodity Credit Corporation****7 CFR Part 1468**

[Docket ID NRCS-2019-0006]

RIN 0578-AA66

**Agricultural Conservation Easement Program**

**AGENCY:** Natural Resources Conservation Service (NRCS) and the Commodity Credit Corporation (CCC), U.S. Department of Agriculture (USDA).

**ACTION:** Interim rule.

**SUMMARY:** The Agriculture Improvement Act of 2018 (the 2018 Farm Bill) made changes to ACEP. This interim rule makes conforming changes to the ACEP policies and procedures in the regulations.

**DATES:**

*Effective:* December 30, 2019.

*Comment date:* Submit comments on or before March 6, 2020.

*Comment date for Environmental Review:* Submit comments on the draft Environmental Analysis (EA) and Finding of No Significant Impact (FONSI) on or before February 5, 2020.

**ADDRESSES:** We invite you to submit comments on this document. In your comments, include the date, volume, and page number of this issue of the **Federal Register**, and the title of this document. You may submit comments by the following method:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and search for Docket ID NRCS-2019-0009. Follow the online instructions for submitting comments.

All written comments received will be publicly available on [www.regulations.gov](http://www.regulations.gov).

A copy of the draft Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) may be obtained from either of the following websites: [www.regulations.gov](http://www.regulations.gov) or <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/farmbill/?cid=nrcseprd1504015>. A hard copy may also be requested in one of the following ways:

- *Via mail:* [karen.fullen@usda.gov](mailto:karen.fullen@usda.gov) with "Request for EA" in the subject line; or

- *A written request:* Karen Fullen, Environmental Compliance Specialist, Natural Resources Conservation Service, 9173 W Barnes Dr., Suite C, Boise, ID 83709.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey White, 202-720-1882; email:

[Jeffrey.White2@usda.gov](mailto:Jeffrey.White2@usda.gov). Persons with disabilities who require alternative means for communication should contact the USDA Target Center at (202) 720-2600 (voice).

**SUPPLEMENTARY INFORMATION:****Background**

The Agricultural Conservation Easement Program (ACEP) is a voluntary program to help farmers and ranchers preserve their agricultural land and restore, protect, and enhance wetlands on eligible lands. The program has two easement enrollment components:

- Agricultural land easements (ACEP-ALE); and
- Wetland reserve easements (ACEP-WRE).

Under ACEP-ALE, NRCS provides matching funds to State, Tribal, and local governments, and nongovernmental organizations with farm and ranch land protection programs to purchase agricultural land easements. Agricultural land easements are permanent or for the maximum duration authorized by State law. Under ACEP-WRE, NRCS protects wetlands on eligible lands by purchasing an easement directly from eligible landowners or entering into 30-year contracts on acreage owned by Indian Tribes, in each case providing for the restoration, enhancement, and protection of wetlands and associated lands. Wetland reserve easements may be permanent, 30-years, or the maximum duration authorized by State law.

ACEP was originally authorized by the Agricultural Act of 2014 (the 2014 Farm Bill) and NRCS administers ACEP pursuant to regulations at 7 CFR part 1468 issued as a final rule on October 18, 2016.

**The 2018 Farm Bill**

The 2018 Farm Bill made changes to the ACEP authorizing legislation in the Food Security Act of 1985, including:

- Identifying and protecting agricultural land by limiting nonagricultural uses that negatively affect the land's agricultural uses and conservation values as an ACEP purpose.
- Removing the requirement that NRCS seek input from the Secretary of the Interior at the local level in the determination of eligible land.
- Defining the term "monitoring report."
- Removing the requirement that an agricultural land easement be subject to an agricultural land easement plan but retaining the requirement that there be a conservation plan on any portion of

the easement area that is highly erodible cropland.

- Identifying for agricultural land easements that the U.S. right of enforcement does not extend to a right of inspection except under certain circumstances.

- Introducing new considerations for certification of eligible entities, including whether the entity is an accredited land trust or is a State department of agriculture.

- Adding improving water quality to the priority considerations for acquiring wetland reserve easements.

- Adding additional criteria and parameters for the authorization of compatible economic uses on wetland reserve easements.

- Adding further specificity to considerations made in developing a wetlands reserve easement plan.

- Authorizing the Secretary to enter into a legal arrangement with an eligible entity that is interested in a "buy-protect-sell" transaction for the acquisition of an agricultural land easement.

- Removing the requirement that 50 percent of the non-Federal share for an agricultural land easement be provided by cash resources of the eligible entity and identifying the extent to which the non-Federal share can be comprised by other sources, such as a qualified charitable donation by the landowner.

- Specifying the existing policy of the Secretary to adjust agricultural land easement ranking and evaluation criteria for geographic differences and to give priority to applications that maintain agricultural viability.

- Introducing additional terms and conditions that may be included in the agricultural land easement deed.

- Specifying the existing policy of the Secretary to ensure that the grazing uses on a wetland reserve easement with a reservation of grazing rights comply with a grazing management plan, that is reviewed and modified as needed at least every 5 years.

- Identifying the criteria under which NRCS may authorize the restoration of the wetland reserve easement area to hydrologically appropriate native vegetative communities or alternative naturalized vegetative communities, subject to certain requirements.

- Incorporating changes to NRCS's subordination, modification, exchange, or termination of ACEP easements.

**USDA 2018 Farm Bill Listening Session**

On February 14, 2019, the Farm Service Agency (FSA), NRCS, and the Risk Management Agency (RMA) published a notice in the **Federal Register** (84 FR 4041-4044) announcing

a listening session for initial public input on the changes to existing programs implemented by the agencies. The listening session was held on February 26, 2019. The Commodity, Credit, and Crop Insurance titles, and parts of the Conservation, Energy, and Miscellaneous titles were covered during the listening session. The agencies also announced an opportunity for the public to make written statements through March 1, 2019. Each agency will take into account stakeholder input when making discretionary decisions on program implementation.

FSA, NRCS, and RMA received 183 written comments from individuals, trade groups, other organizations, and State entities. All written comments are available to the public for review at: <https://www.regulations.gov/document?D=USDA-2019-0001-0001>. In addition to program-specific comments, there were recurring overarching comments about placing a priority on information sharing between agencies for data collection regarding soil health and conservation practices.

NRCS received a number of comments regarding the Agricultural Conservation Easement Program (ACEP), with the majority of those comments pertaining to the ACEP-ALE and a smaller number pertaining to ACEP-WRE. Among the comments submitted, NRCS received 11 comments recommending a more streamlined and efficient easement application and enrollment process across ACEP.

NRCS received 12 comments regarding the elimination of the requirement for an agricultural land easement plan on ACEP agricultural land easements. Most of these 12 comments called for the immediate implementation of this new Farm Bill provision in FY 2019, while others pushed for the prioritization of easements that have strong conservation planning.

NRCS received 10 comments seeking for additional guidance on the buy-protect-sell provisions of the Farm Bill. Most of the comments asked the Agency to “clearly outline the scenario where one eligible entity owns the land and another eligible entity acquires the conservation easement.” Other comments urged flexibility in the consideration of extensions to the timing requirements for land transfer under buy-protect-sell transactions, to help beginning and young farmers acquire lands.

NRCS received 10 comments regarding allocation and expenditure of funding across ACEP, of which 5 comments recommended an annual

allocation of \$30 million for the partnership arrangements under the wetland reserve enhancement partnership (WREP) option in FY 2019. Other comments recommended that funding allocations for ACEP follow historical program demand, providing at least two-thirds of the funding for wetland reserve easements and the rest for agricultural land easements.

On the Farm Bill provisions related to ACEP-ALE cost-share requirements, NRCS received 10 comments recommending that the elimination of minimum cash contribution amount from the eligible entity as a component of the non-federal share of an agricultural land easement not be subject to geographic limits. Other comments highlighted that cash contributions provided by the eligible entity should be prioritized and that closing costs be included under the permissible forms of non-federal share.

NRCS received eight comments that advocate for establishing an efficient process for granting waivers of the Adjusted Gross Income (AGI) limitation as it relates to the funding of conservation easements that will result in the protection of environmentally sensitive land of special significance, with a focus on easements that will help protect migratory birds, conserve wetlands, secure habitat connectivity, improve water quality, or contribute to conservation objectives identified in wildlife, landscape, or watershed plans and initiatives.

NRCS received seven comments recommending increased flexibility in ACEP-ALE deed term requirements and streamlined process for accredited land trusts to become certified entities. There were also seven comments seeking clarification whether agricultural land easements can be up to 100 percent forest land, given the provision on “nonindustrial private forest land” under the eligible land definition.

NRCS received six comments recommending that the Agency work with regional, state and local wildlife agencies on ACEP-WRE enrollment and implementation, and on the determination of “alternative plant communities.” Other comments underlined the importance of science-based forest and vegetation management in the restoration of new and the maintenance of existing wetland reserve easements.

NRCS received four comments urging the stringent application of the statutory requirements in the approval of subsurface mineral development projects on agricultural land easements and for the use of diverse native plants in remediation and restoration plans.

NRCS received three comments recommending that “grasslands of special environmental significance” include native grasslands at risk of conversion and those that provide habitat for threatened and endangered species. Including a recommendation for the prioritization of those on which the benefits of the grassland will be maximized through robust conservation management activities.

NRCS received three comments that recommended setting an annual date for FSA to provide NRCS the 25 percent cropland compliance report and releasing state and county-level data regarding closed ACEP easements to the public. NRCS received three comments recommending increased tracking and reporting of conservation and environmental outcomes related to land protected by conservation easements under ACEP.

NRCS also received requests for additional guidance on the following issues and provisions:

- Co-eligible entity process used in ACEP-ALE;
- Clear program rules on easement modification and termination;
- Clarification on what constitutes “non-agricultural uses” on eligible land under ACEP-ALE;
- Clear guidance on the “reasonable person” approach to valuation in land appraisals for easements;
- Support for inclusion of water quality improvement in program priorities and in the national ranking criteria; and
- Funding for technical assistance to implement ACEP-ALE.

NRCS evaluated the changes made by the 2018 Farm Bill and the comments received during the listening session and is incorporating changes into the ACEP regulation as discussed below.

### **Discussion of Key Changes Incorporated Into the ACEP Regulation**

Several of the changes require different provisions of the ACEP regulation to be revised. NRCS discusses the key changes first generally depending upon whether the change is ACEP-wide, ACEP-ALE, and ACEP-WRE, and then summarizing any changes to each of the sections has changed.

#### **ACEP-Wide Key Changes**

##### *AGI Waiver*

Section 1001D of the Food Security Act of 1985 specifies that a person or legal entity is not eligible to receive a payment or benefit under Title XII of the Food Security Act of 1985 if the average annual AGI of the person or legal entity

exceeds \$900,000. Section 1704 of the 2018 Farm Bill amended section 1001D to reauthorize a waiver to the application of the AGI limitation to certain conservation program payments, on a case-by-case basis, if environmentally sensitive land of special significance would be protected as a result of such waiver. An AGI waiver provision was authorized under the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) but was removed under the Agricultural Act of 2014 (2014 Farm Bill). This rule incorporates the AGI waiver in § 1468.2.

*Easement Administration Actions: Easement Subordination, Modification, Exchange, and Termination*

The 2014 Farm Bill provided NRCS with flexibility in the long-term administration of easements by authorizing NRCS to approve an easement subordination, modification, exchange, or termination under specified criteria identified in statute. These actions are referred to collectively as easement administration actions. In particular, as originally authorized, NRCS could approve an easement administration action if NRCS determined that the action:

- (1) Was in the Federal Government's interest,
- (2) addressed a compelling public need for which there is no practicable alternative or such action furthered the practical administration of the program,
- (3) resulted in comparable conservation value and equivalent or greater economic value to the United States, and
- (4) other requirements specific to the action type.

NRCS defined each of the easement administration actions in the ACEP regulation to provide a clear distinction between each type of easement administration action and identified the criteria under which these actions are evaluated.

The 2018 Farm Bill modified slightly the criteria under which NRCS may subordinate, modify, exchange, or terminate part or all of an easement. In particular, the 2018 Farm Bill distinguished each of these easement administration actions by providing interrelated but somewhat different criteria for subordination actions, for modification and exchange actions, and for termination actions. The Managers recognized the substantial investment taxpayers make in easements but identified that on limited occasions, there may be justifications for changes to easements. In particular, the Managers identified that terminating an easement should only be done in very

rare cases and that the amendments made by the 2018 Farm Bill did not weaken the current requirements for termination actions.

Because the statute now separates the actions and provides slightly different criteria for each, NRCS has modified the regulation to reflect the changes as follows:

- Defined the term easement administration action to ease readability of the regulation where all four terms are referenced;
- Modified slightly the existing definition of easement subordination to reflect the changes made in the statute;
- Maintained the existing definitions for easement modification, easement exchange, easement termination as these conform to the new statutory language;
- Modified the regulation slightly to clarify which criteria are applicable to each of the types of easement administration actions; and
- Reflected the new statutory provisions that certain easement administration actions may not increase any payment to an eligible entity and that for easement terminations, the United States will be fully compensated for the fair market value of the land and any costs or damages related to the easement termination as determined appropriate by NRCS.

**ACEP–ALE Key Changes**

*ACEP–ALE Non-Federal Contribution Requirements*

The contributions provided by the eligible entity for the purchase of the agricultural land easement from the landowner are comprised of a Federal share and non-Federal share based on the fair market value of the agricultural land easement. The Federal share is limited to 50 percent of the fair market value of the easement and the non-Federal share must be at least equivalent to the Federal share (except for grasslands of special environmental significance (GSS) where the Federal share may be up to 75 percent). This did not change.

Under the 2014 Farm Bill, the non-Federal share provided by the eligible entity could include a charitable donation or qualified conservation contribution from the agricultural landowner, but the eligible entity was required to contribute its own cash resources in an amount of at least 50 percent of the Federal share provided by NRCS.

The 2018 Farm Bill amended the ACEP–ALE non-Federal share provisions by removing the requirement that the eligible entity contribute its own cash resources in an amount that

is at least 50 percent of the Federal share. Additionally, the 2018 Farm Bill specified the permissible sources that could be considered part of the non-Federal share, including cash resources provided by the eligible entity, a charitable donation or qualified conservation contribution from the landowner, costs associated with securing an ACEP–ALE deed, and other costs as determined by NRCS.

The removal of a specified cash contribution amount to be provided by the eligible entity creates the potential for the only actual payment provided to an agricultural landowner for the sale of the easement to be the funds provided by NRCS subject to the limits of the Federal share. To address the potential for reduced contributions from the eligible entity and the resultant reduction in compensation paid to the agricultural landowner for the sale of an easement, NRCS considered whether it should establish by regulation a different or tiered cash contribution requirement for eligible entities seeking ACEP funding. In particular, NRCS considered whether the regulation should maintain some level of required eligible entity cash contribution (for example, 10 to 25 percent) with the flexibility to waive the requirement in areas of historically low ACEP–ALE enrollment, if the landowner was not a historically underserved producer, or for projects of special significance.

However, given the intent of the Managers to broaden the ability of eligible entities to participate in ACEP–ALE across a more diverse geography, NRCS did not incorporate or specify an eligible entity cash contribution level in this interim rule. Instead, NRCS will consider a cash contribution provided by an eligible entity as a National ranking matter.

Additionally, NRCS determined that certain procured costs, such as appraisals, boundary surveys, and closing costs, incurred by the eligible entity to secure the easement deed may be considered as meeting the non-Federal share. NRCS has limited the consideration of “other nonprocured costs,” such as stewardship expenses, to circumstances when the other sources of the non-Federal share, including entity cash contribution toward the easement payment and entity costs for procured items, are not sufficient to meet the non-Federal share requirement. NRCS anticipates that in general, the contribution of an eligible entity's cash resources toward the purchase of the easement itself in combination with any qualified landowner donation will satisfy the extent of the non-Federal contribution requirement. NRCS

anticipates that consideration of other costs associated with securing the deed or stewarding the easement will not be needed frequently for the eligible entity to meet the non-Federal contribution requirement. Therefore, to minimize the administrative burden to all parties to the ACEP–ALE enrollment, NRCS will identify the documentation the eligible entity must provide based on the level of reliance on those other costs in the calculation of the non-Federal share.

Also, the cost benefit analysis for this rule assessed whether the lack of a specified eligible entity cash contribution requirement would result in increased cost to ACEP and a commensurate reduction in acreage enrollment in ACEP. This analysis determined that this change will likely result in reduced leveraging of Federal funds by the eligible entity, but may provide better access to ACEP–ALE in areas where non-Federal farm and ranch land preservation funding is not readily available.

#### *ACEP–ALE Plan*

As originally authorized under the 2014 Farm Bill, all ACEP–ALE enrollments required that the agricultural land easement be subject to an ACEP–ALE plan. The plan incorporated any required component plans needed to address particular land types or resource issues on the enrolled parcel, such as a grasslands management plan on grassland, a forest management plan for certain forest land, or a conservation plan for highly erodible cropland.

The 2018 Farm Bill removed the requirement that the agricultural land easement be subject to an ACEP–ALE plan but continues to require a conservation plan for any highly erodible cropland. Given that the 2018 Farm Bill identified that NRCS could give priority to an application for the purchase of an agricultural land easement that maintains agricultural viability, and to encourage eligible entities and NRCS to work with landowners to undertake conservation planning on their land in order to maximize the environmental value of the protected land, NRCS considered how best to encourage continued resource management planning on ACEP–ALE lands.

In particular, NRCS considered whether to:

(1) Continue to require a grassland management plan for GSS given the greater Federal investment (that is, 75 percent of fair market value) and the ability of the plan to help ensure the landowner has the best available

information to manage these sensitive grasslands;

(2) Authorize NRCS at the State level to consider certain planning activities as an eligibility consideration; or

(3) Not require any planning, other than a conservation plan on highly erodible land, but authorize the inclusion of a ranking factor that recognizes agreement by the eligible entity to develop an agricultural land easement plan.

This rule changes various sections of the regulation to remove the requirement that the easement to be subject to an ACEP–ALE plan, except for the compliance requirements associated with a conservation plan on highly erodible cropland. This rule removes the requirement for the development of an ACEP–ALE plan. However, to encourage continued planning on ACEP–ALE lands where a conservation plan is not required, the regulation specifies that the development and maintenance by the eligible entity of an ACEP–ALE plan, including a grassland or forest management plan, can be a ranking consideration at the State level to prioritize applications from eligible entities committed to ensuring conservation planning activity occurs on lands to be enrolled in ACEP–ALE. The decision to adopt a planning requirement is made by the NRCS State Conservationist, in consultation with the State Technical Committee. If such ranking is adopted at the State level and a parcel enrolled accordingly based on that ranking, the regulation specifies that the easement deed terms must require that the plan be updated to reflect any change in the agricultural operations on the easement area.

#### *Buy-Protect-Sell Transactions*

The 2018 Farm Bill defines a new transaction type and authorizes the Secretary to enter into a legal arrangement for buy-protect-sell transactions. Buy-protect-sell transactions are arrangements between NRCS and an eligible entity where the entity owns or will own the land prior to the acquisition of the agricultural land easement on the property, and the eligible entity either:

(1) Sells fee title to the land to a farmer or rancher prior to or at easement closing; or

(2) Holds fee title at the time the agricultural land easement is conveyed on that land, and transfers ownership of the land subject to the easement to a farmer or rancher not later than 3 years after the date of acquisition of the agricultural land easement.

Buy-protect-sell transactions are limited to private and Tribal agricultural lands. State or local governments are not eligible for buy-protect-sell transactions on land they own.

Buy-protect-sell transactions differ from standard transactions that occur under ACEP–ALE. The standard ACEP–ALE transactions involve land that is currently owned by a farmer or rancher and subject to a pending offer by an eligible entity to purchase an agricultural land easement, but the eligible entity does not and would not ever own the property itself.

In contrast, all buy-protect-sell transactions require the eligible entity hold fee title to the land and to transfer such title subject to the agricultural land easement to a farmer or rancher at not more than agricultural value plus reasonable holding and transaction costs within the timeframes specified for the buy-protect-sell transaction type. Failure to meet these conditions, as determined by NRCS, requires the eligible entity to reimburse NRCS for the entirety of the Federal share provided. NRCS evaluated alternatives for determining compliance with buy-protect-sell conditions, including:

(1) Verification that the purchaser was a farmer or rancher through filing of an Internal Revenue Service (IRS) Schedule F (Form 1040), “Profit or Loss From Farming,” or alternatively an independent certification by the eligible entity;

(2) verification that the sale of the land occurred at not more than agricultural value based on an independent appraisal provided by the eligible entity, or alternatively other documentation and certification of agricultural value provided by the eligible entity;

(3) ensuring that the purchaser was charged only reasonable holding and transaction costs by identifying the items that could be considered and establishing an upper limit as a percentage of the agricultural value, or alternatively defining reasonable holding and transaction costs but not setting a fixed upper limit.

NRCS also evaluated alternatives to minimize risk of transaction failure and cost recovery, including:

(1) For land that the eligible entity does not own but is in the process of purchasing at the time the buy-protect-sell agreement is entered into, there is an additional risk to these transactions should the entity fail to complete the initial purchase of the land, therefore, NRCS considered limiting the time frame for this initial purchase to within 12 months of the execution of the buy-protect-sell agreement, or alternatively

requiring the initial purchase to be completed any time prior to closing on the agricultural land easement;

(2) to minimize the risk of cost recovery for the first type of buy-protect-sell transactions described above by issuing the ACEP–ALE cost-share payment only on a reimbursable basis after the agricultural land easement has closed, or alternatively issuing the ACEP–ALE cost-share as either an advance payment 30-days prior to easement closing or as a reimbursable payment.

To make the process as objective and streamlined as possible, NRCS has identified that evidence that the purchaser is a farmer or rancher should be based on the filing of an IRS Schedule F, that the agricultural value of the land must be determined by an appraisal, and that the holding and transaction costs that may be charged to the landowner are limited to 10 percent of the agricultural value of the easement. NRCS will take into consideration in its determination that beginning farmers and ranchers in their first year of farming and limited resource farmers and ranchers may not file an IRS Schedule F, and may require the eligible entity to provide alternative documentation in those situations.

To minimize the risk that ACEP–ALE funds will be obligated to an unviable transaction for the full length of a buy-protect-sell agreement at the expense of viable ACEP projects, the interim rule requires that the eligible entity's initial purchase of the land be completed within 12 months of the execution of the buy-protect-sell agreement as identified by NRCS in the terms of the ALE-agreement. To minimize the risk that the eligible entity will have to repay NRCS for the Federal share, the interim rule identifies that an ACEP–ALE cost-share payment will only be provided on a reimbursable basis for the first type of buy-protect-sell transactions.

Under the 2014 Farm Bill, NRCS had conducted ACEP–ALE transactions similar to the first type of buy-protect-sell transactions where the eligible entity owns fee title to a parcel of land and transfers that fee title to a farmer or rancher prior to or at the time of the creation of the agricultural land easement. However, there are potential legal impediments to the second type of buy-protect-sell transactions where the eligible entity holds fee title at the time the agricultural land easement is created but does not transfer ownership of the land subject to the easement for up to 3 years after the creation of the agricultural land easement. Typically there are provisions in easement law that restrict a person or legal entity from

granting themselves an easement on land they own. Further, under easement law, conservation easements are created either by reservation at the time of transfer of the land or through a grant of an easement to a third party.

As part of the regulation development, NRCS worked with the USDA Office of the General Counsel to identify how arrangements might be structured to implement the second type of buy-protect-sell transaction. NRCS considered five potential scenarios, including several options under which the eligible entity worked with a third-party to address the basic principle that an eligible entity that owns fee title to land typically cannot create an easement against itself (referred to in these examples as the “easement principle”). The five scenarios considered were:

1. A third-party (Straw Landowner) holds the fee title until fee title of the land subject to the easement is sold to a qualified farmer or rancher at agricultural value, and the eligible entity holds the agricultural land easement at time of easement closing. This scenario addresses the easement principle as well as the requirement that the transaction to the Straw Landowner does not violate the mandate that the initial sale of the land subject to the agricultural land easement is to a farmer or rancher.

2. Two eligible entities apply for ACEP, jointly holding the fee title to the parcel. Only one eligible entity becomes the holder of the agricultural land easement. Both eligible entities then sell the fee title of the land subject to the easement to a qualified farmer or rancher at agricultural value. This scenario was determined not likely to be legally viable due to the complexities under various State laws regarding unity of title and disparate treatment about how such title issues are addressed.

3. A third-party (Straw Easement Holder) holds the agricultural land easement from the time of easement closing, and the eligible entity holds the fee title until a qualified farmer or rancher is found to purchase, at agricultural value, the fee title of the land subject to the easement, at which time the agricultural land easement is transferred to the eligible entity. While this scenario addresses the easement principle, NRCS would only be able to make payment after the agricultural land easement is transferred to the eligible entity.

4. As recommended by a comment submitted to the USDA Listening Session held February 26, 2019, the parties to the ALE-agreement would develop strong anti-merger and cost-

recovery language to allow the eligible entity to grant the agricultural land easement to itself while still holding fee title to the property and then reaffirm the agricultural land easement at the time the fee title to the land subject to the easement is sold to a qualified farmer or rancher at agricultural value. This scenario does not address the easement principle as it still purports that the eligible entity can hold both an easement and fee title simultaneously, therefore NRCS determined that this scenario was likely not legally viable.

5. NRCS determines the viability of the transaction submitted by an eligible entity. An eligible entity submits to NRCS, as part of its application, the proposed structure of the individual buy-protect-sell arrangement for the sale of the fee title of the land subject to the agricultural land easement to a qualified farmer or rancher at agricultural value in a manner that would address the basic easement principle and applicable program requirements. For approved applications, the individual buy-protect-sell transaction agreement includes such terms and conditions as necessary to satisfy the legal and statutory requirements identified by NRCS.

NRCS has incorporated scenario 5 into the regulation as more fully discussed below in the section-by-section description of changes.

#### *Certification of Eligible Entities*

When ACEP–ALE was first authorized, NRCS established a process under which eligible entities that meet established criteria could be certified and entered into longer-term agreements for ACEP–ALE cost-share assistance. Certified eligible entities are able to avail themselves of administrative flexibilities under ACEP–ALE based upon their status as a certified eligible entity as compared to a non-certified eligible entity. For example, NRCS relies on the certified entity to independently complete the easement acquisition in accordance with the terms and conditions of the ACEP–ALE agreement and consistent with the requirements of this part. Additionally, NRCS conducts annual quality assurance reviews on a subset of the transactions after closing and payment rather than prior to closing.

To be certified, an eligible entity must demonstrate to NRCS that the eligible entity could maintain, at a minimum, for the duration of the agreement, a plan for administering easements that is consistent with the purposes of ACEP–ALE; the capacity and resources to monitor and enforce the agricultural land easements; and policies and procedures to ensure the long-term

integrity of the easements. NRCS established in regulation a set of objective, measurable criteria that were used to evaluate the eligible entity's ability to meet the statutory certification criteria, including that the eligible entity provide proof that they held and had stewardship responsibility for a minimum of 25 agricultural land conservation easements, unless that number was reduced by NRCS through a waiver, and proof that at least 5 of the these easements were ACEP-ALEs or predecessor program<sup>1</sup> easements.

The 2018 Farm Bill added two new methods by which an eligible entity may become certified. NRCS can grant certification status to an eligible entity that is either:

(1) An eligible entity that is accredited by the Land Trust Accreditation Commission or by an equivalent accrediting body as determined by NRCS; or

(2) A State department of agriculture or other State agency with authority for farm and ranchland protection, and the associated requirements for such entities.

Under these two new methods of certification, the eligible entity must demonstrate that it acquired not fewer than 10 agricultural land easements under ACEP-ALE, FRPP, or FPP and has successfully met the responsibilities of the eligible entity under the applicable agreements with NRCS relating to agricultural land easements.

NRCS revised the regulation to add these two new methods for an eligible entity to be considered for certification. Additionally, to ensure that an eligible entity that is certified under the original criteria meets the same ACEP-ALE experience requirements as is required under the two new methods, NRCS has increased from 5 to 10 the number of ACEP-ALE agricultural land easements or predecessor program easements that an eligible entity must have successfully closed to qualify for certification. The minimum requirement has not changed; the eligible entity must hold and have stewardship responsibility for at least 25 agricultural land conservation easements.

#### *Optional Permitted Uses*

Section 2603 of the 2018 Farm Bill amended section 1265B of the Food Security Act of 1985 (16 U.S.C. 3865b)

<sup>1</sup> The Farmland Protection Program (FPP), as authorized by the Federal Agricultural Improvement and Reform Act of 1996 (the 1996 Farm Bill) and the Farm and Ranch Lands Protection Program (FRPP) as authorized by the Farm Security and Rural Investment Act of 2002 (the 2002 Farm Bill) and the 2008 Farm Bill are the predecessor programs to ACEP-ALE.

to identify optional permitted uses that an eligible entity may include in the terms and conditions for an easement deed funded under ACEP-ALE. Among the optional uses, ACEP now includes criteria by which subsurface mineral development on land subject to the agricultural land easement may be authorized. These criteria mirror many of the criteria which NRCS identified in policy and used when evaluating an eligible entity's proposed terms and conditions concerning subsurface mineral development. The 2018 Farm Bill amendments make some of the criteria and requirements more specific, and in some instances more restrictive, than the criteria and language used in previous ACEP-ALE funded easements deeds. For example, the 2018 Farm Bill specifies that the subsurface mineral development plan must include a plan for the remediation of impacts to the agricultural use or conservation values and must be approved by NRCS prior to the initiation of the mineral development activity. This rule revises the regulation and NRCS has revised its associated policy.

#### **ACEP-WRE Key Changes**

##### *ACEP-WRE Compatible Use Authorizations*

Under ACEP-WRE, a landowner conveys a wetland reserve easement to the United States through a reserved interest deed. Among the rights conveyed, the United States acquires the rights to permit, in its sole discretion and under specified conditions, compatible uses of the easement area, including hunting and fishing, managed timber harvest, or periodic haying or grazing. The 2018 Farm Bill requires several considerations that have been part of the NRCS compatible use authorization process.

In particular, the 2018 Farm Bill added "water management" to the list of activities that may be considered a compatible economic use on a wetland reserve easement. The 2018 Farm Bill specified that NRCS will request and consider the advice of the applicable State technical committee about the types of compatible uses that may be authorized and the conditions under which they may be conducted on land subject to a wetland reserve easement. The 2018 Farm Bill provided that in evaluating and authorizing compatible economic uses that NRCS will consider the ability of the compatible use to facilitate the practical administration and management of the WRE and ensure that the authorized use furthers the functions and values for which the easement was established.

NRCS added water management to the list of specific examples of compatible uses identified in the ACEP regulation, incorporated into the responsibilities of the applicable State technical committees input as it relates to compatible use types and conditions, and incorporated the compatible use evaluation and authorization considerations identified in the 2018 Farm Bill.

##### *ACEP-WRE Reservation of Grazing Rights*

Under ACEP-WRE, a landowner may reserve grazing rights under a wetland reserve easement or 30-year contract if the reservation and use of the grazing rights is:

- Compatible with the land subject to the easement,
- Consistent with the historical natural uses of the land and long-term wetland protection and enhancement goals for which the easement or 30-year contract was established, and
- In compliance with the WRE plan developed for the easement.

The 2018 Farm Bill adds language to the ACEP-WRE reservation of grazing rights enrollment option. There is now a statutory requirement that the reservation and use of grazing rights comply with a grazing management plan that is consistent with the wetland reserve easement plan and that such grazing management plan has been reviewed, and modified as necessary, at least every 5 years.

NRCS recognizes that grazing can be an appropriate vegetation management and disturbance activity tool to restore and maintain the functions and values of certain wetland ecosystems. On any ACEP-WRE enrollment, NRCS may authorize grazing on the easement area through a temporary compatible use authorization to facilitate specific wetland restoration or management objectives on the easement area.

Under the ACEP-WRE reservation of grazing rights enrollment option, NRCS identifies, as part of the wetland reserve easement deed, the specific wetland ecosystem and the associated level of grazing that is appropriate to ensure the wetland functions and values are achieved. This level of grazing comprises the extent of the grazing rights reserved to the landowner. As a result, the easement compensation for ACEP-WRE reservation of grazing rights enrollments is less than a standard ACEP-WRE enrollment because the landowner is retaining a right that normally would be conveyed under a standard ACEP-WRE easement deed.

*ACEP–WRE Wetland Restoration*

In the rulemaking for ACEP–WRE under the 2014 Farm Bill, NRCS adopted in the ACEP regulation substantially the same definition of wetland restoration that had long existed in the WRP regulation; namely, the term wetland restoration under the ACEP regulation has been defined as follows:

*Wetland restoration* means the rehabilitation of degraded or lost habitat in a manner such that:

(1) The original vegetation community and hydrology are, to the extent practical, re-established; or

(2) A community different from what likely existed prior to degradation of the site is established. The hydrology and native self-sustaining vegetation being established will substantially replace original habitat functions and values and does not involve more than 30 percent of the easement area.

This definition of wetland restoration is unique to ACEP–WRE and is used as a broad and inclusive term intended to guide decision-making related to the treatment of the entire easement area, including wetland and any associated habitats, and for the duration of the enrollment, from initial land eligibility and ranking determinations, through preliminary and final restoration planning, design, and implementation, and on through the long-term management of the easement area. The 2018 Farm Bill adds new language under which NRCS, in coordination with State technical committees and following State-specific criteria and guidelines, may authorize the establishment or restoration of a hydrologically appropriate native community or alternative naturalized vegetative community as part of a wetland reserve easement plan on land subject to a wetland reserve easement under certain conditions. This rule revises the definition of wetland restoration for consistency with the new requirements in the 2018 Farm Bill. The definition of wetland restoration has been revised to include the requirement for wetland restoration to be conducted following published State-specific criteria and guidelines developed in consultation with the State technical committee. Additionally, NRCS has eliminated the existing regulatory limitation that an alternative community different from what existed historically on the site be no more than 30 percent of the easement area and has added the conditions under which such a community may be restored on the easement area consistent with the

provisions identified in the 2018 Farm Bill.

**ACEP Regulation Organization**

The ACEP regulation in 7 CFR part 1468 is organized into three subparts. Subpart A contains provisions applicable across ACEP, subpart B contains provisions specific to the implementation of ACEP–ALE, and subpart C contains provisions specific to the implementation of ACEP–WRE. The following section summarizes each section of the regulation and describe the changes made to conform to the 2018 Farm Bill. Other editorial adjustments to improve readability. Although some provisions remain unchanged, this rule revises the ACEP regulation in its entirety.

**Summary of Changes in Subpart A, General Provisions***§ 1468.1 Applicability*

This section sets forth the requirements, policies, and procedures for ACEP; identifies that ACEP is available in all 50 States, District of Columbia, and certain territories; describes how the remainder of the regulation is organized; and addresses stewardship responsibilities associated with existing easements. NRCS incorporated the revision to the program purposes to limit nonagricultural uses that negatively affect the agricultural uses and conservation values.

*§ 1468.2 Administration*

This section identifies that ACEP is administered under the general supervision and direction of the NRCS Chief. The Commodity Credit Corporation (CCC) made changes to its Board of Directors and the Chief is no longer a Vice President of the CCC. A new paragraph (d) was moved to this section, relocating a provision originally in § 1468.21 that is applicable across ACEP. Paragraph (d) specifies that applications may be submitted on a continuous basis or in response to specific ACEP solicitations.

The 2018 Farm Bill requires easement monitoring, therefore paragraph (h) has been added to specify generally monitoring responsibilities for ACEP–ALE and ACEP–WRE. Paragraph (f) has been revised to add monitoring of wetland reserve easements to the responsibilities that NRCS may delegate to an appropriately qualified conservation organization.

Additionally, the 2018 Farm Bill amended the Regional Conservation Partnership Program (RCPP) so that RCPP funds are administered through RCPP contracts and not contracts and

agreements of the covered programs, including ACEP. Therefore, the references to RCPP and related text have been removed from the ACEP regulation.

Other existing paragraphs in this section were reorganized slightly for readability purposes.

*§ 1468.3 Definitions*

The following definitions have been added in § 1468.3 to be consistent with the 2018 Farm Bill as follows:

The definition of “buy-protect-sell transaction” is included to establish this new transaction type under ACEP–ALE. An eligible entity and NRCS may enter into a legal arrangement to secure an agricultural land easement on land that will be transferred to a qualified farmer or rancher under specified conditions.

The definition of “Easement administration action” is included to ease readability of the regulation where all four terms, easement subordination, easement modification, easement exchange, and easement termination are referenced.

The definition of “Grazing management plan” is included to identify the document used to describe an NRCS-approved grazing management system on an ACEP–WRE.

The definition of “Monitoring report” is included to describe the obligation of the easement holder to document and convey the findings of the annual review of ACEP easements.

The definition of “Nonindustrial private forest land” is included to reflect terminology used to describe the vegetative cover and ownership requirements of such land. With the inclusion of the definition of “Nonindustrial private forest land,” the definition of “Forest land” was removed to avoid confusion or redundancy.

Changes to the definition of “Wetland restoration” are discussed above in the section on that topic.

Minor editorial changes were made to other definitions to improve their readability. This rule also removed the definitions for “Active agricultural production,” “Forest land of statewide importance,” and “Projects of special significance” since such terms were only necessary to identify whether a transaction qualified for a waiver as a project of special significance, and the 2018 Farm Bill removed the need for such a waiver.

*§ 1468.4 Appeals*

Section 1468.4 specifies the nature of the appeal rights for persons, legal entities, or eligible entities that apply for, receive payment under, or receive determinations for ACEP. The 2018

Farm Bill did not make any changes that affects this section. Minor edits have been made to include notice to easement holders.

#### § 1468.5 *Scheme or Device*

Section 1468.5 is similar to other conservation program provisions and describes the authority that NRCS exercises to protect the Federal investment in conservation easements from fraudulent activities. No changes were made to this section.

#### § 1468.6 *Subordination, Exchange, Modification, and Termination*

Section 1468.6 specifies the easement administration actions that may be authorized by section 1265D(c) of the Food Security Act of 1985.

The 2018 Farm Bill made several changes that modified the framework under which requests for easement administration actions may be reviewed and approved. In particular, the 2018 Farm Bill, while maintaining consistent standards for review, provides flexibility for the review of requests for subordination, and added conditions to limit the approval of terminations.

The changes to this section included reorganizing the provisions to specify the criteria that apply to each of the particular types of easement administrative actions. Where particular criteria apply to several types of easement administrative action, the rule identifies the easement administrative actions types that must meet that criteria in order to be considered for approval. Proposed easement administration actions must meet all applicable criteria for the action to be considered for approval. The section is organized in a step-wise fashion so if the proposal fails to meet one of the criterion, it is not necessary for NRCS to consider the remaining criteria.

#### § 1468.7 *Transfer of Land*

Section 1468.7 specifies how NRCS will address enrollment of land where the landowner transfers the rights in land after an agreement has been executed, but prior to the purchase of the easement. No changes were made to this section.

#### § 1468.8 *Payments Not Subject to Claims*

Section 1468.8 specifies that NRCS will make payment to ACEP participants without regard to any claims that non-Federal creditors may have on the financial assets of the program participant as authorized by 7 CFR part 1403. The 2018 Farm Bill did not make any changes to ACEP that affect this section. A minor edit was

made to remove the word “government.”

#### § 1468.9 *Assignments*

Section 1468.9 specifies that a program participant can assign their right to payment to another person or legal entity. No changes were made to this section.

#### § 1468.10 *Environmental Markets*

Section 1468.10 provides that a landowner subject to an ACEP easement may also enter into an environmental credit agreement with third parties provided that the terms of the environment credit agreement do not interfere with the rights acquired by the United States or the eligible entity and do not cause the landowner to violate the terms of the agricultural land easement or wetland reserve easement. Revisions to § 1468.10 clarify that the purposes of the environmental services market must include the facilitation of additional conservation benefits consistent with the conservation purposes for which the easement was acquired.

### **Summary of Changes in Subpart B, Agricultural Land Easements**

#### § 1468.20 *Program Requirements*

Section 1468.20 includes the program requirements for eligible entities who wish to receive cost-share assistance from NRCS for the purchase of an agricultural land easement. The 2018 Farm Bill made several changes that affect this section.

Paragraph (a) provides that NRCS will facilitate and provide funding for the purchase of easements or other interests in eligible private or Tribal agricultural land for protecting the agricultural use and related conservation values of the land. Also, it maintains the existing requirement that such land be subject to a written pending offer from an eligible entity for standard ALE transactions and adds the option for such lands to be owned by the eligible entity as part of an approved buy-protect-sell transaction.

Paragraph (b) specifies the requirements for establishing the eligibility of an entity applying for ACEP-ALE cost-share assistance. This rule removes the requirement that an eligible entity provide evidence at the time of application that they have funds available to meet the minimum cash contribution requirement. Instead, for transactions where the eligible entity's cash contribution will be less than 10 percent of the easement's fair market value, NRCS requires the eligible entity

to provide the estimated costs and anticipated sources of funding for each parcel and evidence of funds available for stewardship of the easement.

Paragraph (c) requires that a landowner who is selling an agricultural land easement to an eligible entity meets the conservation compliance requirements in 7 CFR part 12 and the AGI limitation provisions at 7 CFR part 1400. Under a buy-protect-sell transaction, the eligible entity is the landowner. For transactions where the eligible entity sells the fee title to a qualified farmer or rancher prior to or at the time of the easement closing, then the farmer or rancher purchaser must meet these landowner payment eligibility requirements. If, however, the fee title to the land will not be transferred to a farmer or rancher until after the agricultural land easement is closed, then the eligible entity is responsible for meeting the landowner payment eligibility requirements prior to easement closing. The regulation continues to clarify that it is the eligible entity and landowner's responsibility to ensure that the necessary records have been established in the USDA customer records system.

Paragraph (d) specifies the criteria by which land can be determined eligible and specifies that the land must be cropland, rangeland, grassland, or land that contains forbs or shrubland for which grazing is the predominant use, located in an area historically dominated by grassland, forbs, or shrubs, and could provide habitat for animal or plant populations of significant ecological value, pastureland, or nonindustrial private forest land that meet specific criteria. Consistent with the prior easement regulation and policy that sought to minimize overlap and conflict with other USDA forest easement programs, paragraph (d) requires that land enrolled in ACEP-ALE cannot include forest land greater than two-thirds of the ACEP-ALE easement area but eliminates the requirement that land with a certain amount of forest land have a forest management plan. Lands with greater than two-thirds non industrial private forests may be protected under a larger conservation easement of which the ACEP-ALE easement area may be a subcomponent, provided the forest land within the ACEP-ALE easement area does not exceed two-thirds of the described ACEP-ALE easement area.

Paragraph (e) specifies which lands are ineligible for enrollment, including lands that are owned by a governmental entity, unless in trust for an Indian Tribe. Also, it identifies that land



owned by nongovernmental organizations whose purpose is to protect agricultural use and related conservation values are ineligible since such lands are already protected from conversion to agricultural use. To address buy-protect-sell transactions, paragraph (e)(3) has been revised to specify that eligible lands owned by the eligible entity on a transitional basis to secure an ALE on the land and to transfer fee title ownership to a farmer or rancher may be eligible for enrollment provided all other eligibility requirements are met.

The 2018 Farm Bill replaced the term “proposed” with “permitted” in the language about the types of rights-of-way, infrastructure development, or other adjacent land uses whose impacts may cause land to be considered ineligible. NRCS made a conforming change.

This rule adds paragraph (f) to specify additional eligibility requirements related to buy-protect-sell transactions. In addition to meeting the other eligibility requirements, to be eligible for enrollment under the complex and lengthy real estate transactions, the land must be subject to conditions that necessitate the transitional ownership by an eligible entity from fee title owner to only easement holder. The conditions may include an imminent threat of development as a result of which the existing landowner is unwilling to accept an offer for the purchase of an agricultural land easement from the eligible entity but is willing to sell the land to the eligible entity and the eligible entity intends to place an agricultural land easement on the property and ensure it is sold to a qualified farmer or rancher subject to the conditions of a buy-protect-sell transaction. When applying, the eligible entity must provide evidence of active purchase of the parcel, such as a valid purchase agreement, on land not owned by the eligible entity at the time of application.

#### *§ 1468.21 Application Procedures*

Section 1468.21 specifies the application procedures that an entity must follow to have their application be considered for funding under ACEP–ALE. NRCS determines whether an applicant is eligible to participate in ACEP–ALE based on the criteria in § 1468.20. Paragraph (a) was revised to identify that additional application information may be required for buy-protect-sell transactions. Also, it was revised to simplify the regulation and remove matters of policy and administration.

#### *§ 1468.22 Establishing Priorities, Ranking Considerations, and Application Selection*

Section 1468.22 specifies how parcels will be ranked for funding. The NRCS ranking system in each State incorporates national and State-specific criteria to rank, score, and prioritize each eligible parcel within the State. The 2018 Farm Bill allows NRCS to adjust the ALE ranking criteria to account for geographic differences if the adjustments meet ACEP purposes and continue to maximize the benefit of the Federal ACEP investment. The section provides flexibility to ensure that such adjustments to address geographic differences are available. In particular, the ranking system, incorporating both national and State criteria, enables NRCS to prioritize parcels that merit ACEP–ALE enrollment. The 2018 Farm Bill also changed certain requirements related to the eligible entity’s contribution of cash to the non-Federal share for the purchase of the easement and the requirements for an ACEP–ALE plan. This rule revises the extent of the eligible entity’s cash contribution is a National ranking criterion. Additionally, as revised, the regulation specifies that measures that will be used to maintain or increase agricultural viability, such as ACEP–ALE plans, may be a State ranking criterion. The benefits of these actions are now specified as attributes that may be considered as a matter of ranking in the prioritization of projects for selection for funding. Paragraph (g) was modified to simplify the regulation and remove matters of policy and administration.

#### *§ 1468.23 ALE Agreements*

Section 1468.23 addresses the principal ACEP documents under which NRCS and an eligible entity identify how they will coordinate the activities needed for the eligible entity to purchase an agricultural land easement with ACEP cost-share assistance, including the respective rights, requirements, and responsibilities related to ACEP implementation under subpart B of the regulation. NRCS, on behalf of the CCC, enters into ALE-agreements with eligible entities with parcels selected for funding. The section was revised for consistency with provisions of the 2018 Farm Bill for ALE-agreements.

#### *§ 1468.24 Compensation and Funding for Agricultural Land Easements*

Section 1468.24 addresses the extent to which NRCS will provide financial assistance to an eligible entity for the purchase of an agricultural land

easement by the eligible entity. NRCS may provide a Federal share up to 50 percent of the approved fair market value of the agricultural land easement, and the eligible entity must provide a non-Federal share that is at least equivalent to that provided by NRCS.

While ACEP formerly required that an eligible entity contribute its own cash resources in an amount that was at least 50 percent of the amount contributed by NRCS, the 2018 Farm Bill removed the specific 50 percent eligible entity cash contribution requirement, and instead identifies permissible sources of the non-Federal share provided by the eligible entity. These sources include the eligible entity’s own cash resources, a landowner charitable donation or qualified conservation contribution, certain easement acquisition costs incurred by the eligible entity, and other costs as determined by NRCS.

Paragraph (b) has been revised to remove the requirement for the eligible entity to contribute its own cash resources in an amount equal to 50 percent of the amount of the Federal share. Paragraph (b) also specifies the costs incurred by the eligible entity associated with securing a deed to the easement that may be included in the calculation of the non-Federal share and the source and limit of other costs that may be included in the calculation of the non-Federal share.

The 2018 Farm Bill removed the reference to the availability of waivers for grassland of special environmental significance since the specific eligible entity cash contribution requirement was removed. NRCS may now provide up to 75 percent of the fair market value of the agricultural land easement, and the eligible entity must provide the remainder as the non-Federal share through any of the specified sources. The ACEP regulation has been modified accordingly, to update the provisions related to grasslands of special environmental significance and to delete paragraph (b)(4) regarding projects of special significance.

NRCS may only provide ACEP–ALE cost-share funds in the form of financial assistance toward the cost of the agricultural land easement itself. The 2018 Farm Bill limited the technical assistance that may be provided by NRCS through ACEP–ALE funding related to planning on the agricultural land easement to the development of a conservation plan on highly erodible cropland. The section of the ACEP regulation has been revised accordingly.

### § 1468.25 *Agricultural Land Easement Deeds*

Section 1468.25 addresses the minimum deed requirements for an easement transaction to receive ACEP–ALE assistance. In particular, the section specifies that in order for NRCS to provide cost-share assistance to an eligible entity, NRCS will ensure that the eligible entity will include in its easement deeds the terms and conditions necessary to ensure ACEP purposes and requirements are met. The 2018 Farm Bill changes the required and new permitted terms and conditions of agricultural land easement deeds used to specify the regulatory deed requirements.

Paragraph (d)(1) has been revised to incorporate the added specificity to the right of enforcement conveyed to NRCS under the terms of an agricultural land easement.

The requirement that the agricultural land easement be subject to an ACEP–ALE plan was removed.

Paragraph (d)(7) was added to specify the terms and conditions required by statute that must be addressed if the eligible entity chooses to allow subsurface mineral development on the land subject to the agricultural land easement. In particular, the 2018 Farm Bill specified criteria to ensure prohibitions on subsurface mineral development did not eliminate otherwise high value conservation lands from program eligibility. As identified in the Managers Report, the terms and conditions do not negate or supersede any other applicable laws, including State laws, which may otherwise apply to any mineral development activities but ensure the activity should be consistent with the conservation and agricultural purposes of the land and all provisions of the program.

The requirement for a conservation plan on highly erodible cropland was revised and moved to new paragraph (d)(9).

Paragraph (d)(10) was added to specify that appropriate terms and conditions must be included in the easement deed to address items agreed to by the eligible entity as a matter of ranking and basis for selection for funding, such as an eligible entity agreement to develop and maintain an ACEP–ALE plan or provide a cash contribution toward the purchase of the easement.

Paragraph (d)(11) was added to provide that an eligible entity may include terms and conditions in the ALE deed that are intended to keep the land subject to the easement under farmer or rancher ownership.

### § 1468.26 *Agricultural Land Easement Plans*

As discussed above, agricultural land easements enrolled under the 2018 Farm Bill are not required to be subject to an ACEP–ALE plan. The stand-alone section regarding ACEP–ALE plans has been deleted. Applicable provisions related to the development of required conservation plans or the development of ACEP–ALE plans as agreed-to by the eligible entity are captured in other sections of the regulation.

#### § 1468.26 *Eligible Entity Certification*

Under ACEP, NRCS is required to establish a process under which eligible entities that meet established criteria may be certified and entered into long-term agreements for ACEP–ALE cost-share assistance. This interim rule redesignates § 1468.27 as § 1468.26, and is revised as discussed in this section. As redesignated, § 1468.26, *Eligible Entity Certification*, provides that, at an eligible entity's request, the Chief will determine whether an eligible entity meets certification requirements and if so, certify the entity. The 2018 Farm Bill expanded the way an eligible entity could demonstrate that they meet certification criteria. In particular, the 2018 Farm Bill provided that NRCS may certify an eligible entity that is either accredited by the Land Trust Accreditation Commission (or equivalent accrediting body) or is a State department of agriculture or other State agency with statutory authority for farm and ranch land protection, and that either of these types of entities has acquired at least 10 agricultural land easements under ACEP–ALE, or predecessor NRCS easement programs, and has successfully met, as determined by NRCS, its responsibilities under ALE-agreements. NRCS has incorporated the additional certification criteria and revised the criteria to require a minimum of 10 agricultural land easements under ACEP–ALE, or predecessor NRCS easement programs (FPP and FRPP), to be held by any eligible entity requesting certification, not just those that meet the new criteria introduced in the 2018 Farm Bill. Other paragraphs in the section were revised to simplify the existing regulation and remove matters of policy and administration.

#### § 1468.27 *Buy-Protect-Sell Transactions*

As discussed above, the 2018 Farm Bill added a new transaction type under ACEP–ALE for buy-protect-sell transactions. Section 1468.27 has been added to describe the form that buy-

protect-sell transactions may take and to specify the requirements based on the specific buy-protect-sell transaction type. Buy-protect-sell transactions introduce an option under which NRCS may provide ACEP–ALE cost-share assistance for the purchase of an agricultural land easement on private or Tribal agricultural land owned on a transitional basis by an eligible entity when the ownership of that land will be timely transferred to a qualified farmer or rancher. Section 1468.27 specifies that there are two types of buy-protect-sell transactions, pre-closing and post-closing transfers, which are differentiated based on the timing of the sale of the fee title interest in the land to a qualified farmer or rancher relative to the timing of securing the agricultural land easement. The regulation specifies the requirements and ALE-agreement terms that are applicable to both buy-protect-sell transaction types, and those that are applicable to the individual transaction types. For post-closing buy-protect-sell transactions, additional information will be required at the time of application and NRCS must determine whether the structure of the transaction as proposed by the eligible entity conforms with legal requirements prior to entering into an ALE-agreement for such transactions on a parcel determined to meet the requirements of part 1468.

#### § 1468.28 *Violations and Remedies*

Section 1468.28 specifies the eligible entity's responsibilities to enforce the agricultural land easement's terms and conditions. Additionally, § 1468.28 specifies the circumstances under which NRCS may exercise its right of enforcement under ACEP–ALE, including its right of inspection.

The 2018 Farm Bill identified more specific conditions upon when NRCS could exercise the right of inspection on ACEP–ALE easements, requiring that the right of inspection could only be exercised if the holder of the easement fails to provide monitoring reports in a timely manner or NRCS has a reasonable and articulable belief that the terms and conditions of the easement have been violated. Prior to the inspection, NRCS will notify the eligible entity and the landowner of the inspection and provide a reasonable opportunity for the eligible entity and the landowner to participate in the inspection. These requirements have been incorporated into this section of the ACEP regulations and in the terms and conditions of the ALE-agreements. NRCS will continue to work with the eligible entity, including any easement holders subsequent to the eligible entity,

to assist it in its responsibility to enforce the easement terms.

### Summary of Changes in Subpart C, Wetland Reserve Easements

#### § 1468.30 Program Requirements

Section 1468.30 specifies the basic requirements for participation in ACEP through a wetland reserve easement, including landowner and land eligibility requirements. The 2018 Farm Bill increased the acres of total cropland in a county that may be subject to an ACEP–WRE easement to 15 percent. Paragraph (b)(1) has been revised accordingly. The 2018 Farm Bill removed the requirement for NRCS to seek input from the Secretary of the Interior at the local level in the determination of eligible land. Paragraph (e)(3) has been revised accordingly. The 2018 Farm Bill also made a slight adjustment to NRCS’s consideration of the effects of onsite or offsite conditions that may interfere with the ability of the wetland functions and values to be successfully and cost-effectively restored by changing the status of certain rights-of-way, infrastructure development, or other adjacent land uses whose impacts must be considered from “proposed” to “permitted”. Paragraph (g)(6) has been revised accordingly.

#### § 1468.31 Application Procedures

Section 1468.31 specifies the application procedures for a landowner who wants to participate in ACEP–WRE. The 2018 Farm Bill did not make any changes to program implementation that affects this portion of the ACEP regulation.

#### § 1468.32 Establishing Priorities, Ranking Consideration and Project Selection

Section 1468.32 specifies the criteria NRCS will use to prioritize, rank, and select properties for enrollment in ACEP–WRE. Among the prioritization and ranking criteria, NRCS may consider the conservation benefits of obtaining an easement, the cost-effectiveness of each easement, whether Federal funds are being leveraged, and the extent to which ACEP–WRE purposes would be achieved on the land.

The 2018 Farm Bill included water quality as an additional priority along with the priority placed on acquiring easements based on the value of the easement for protecting and enhancing habitat for migratory birds and other wildlife. While the ACEP regulation included benefits to water quality as a component of various existing ranking

criteria, the capacity of the wetland to improve water quality has been added in the regulation.

#### § 1468.33 Enrollment Process

Section 1468.33 specifies the process that NRCS uses for handling applications once they have been selected for enrollment. Minor edits to improve accuracy and readability have been made in the section.

#### § 1468.34 Compensation and Funding for Wetland Reserve Easements and 30-Year Contracts

Section 1468.34 specifies how NRCS will determine the level of compensation that a landowner will receive in return for conveying a wetland reserve easement. ACEP–WRE easement compensation is based upon the lowest of the fair market value of the land, a geographic area rate cap, or landowner offer. No substantive changes have been made to this section and only minor edits have been made to improve its accuracy and readability.

#### § 1468.35 Wetland Reserve Enhancement Partnerships (WREP)

Section 1468.35 specifies how NRCS will implement a wetland reserve enhancement option with partners under ACEP–WRE. No changes were made in the section.

#### § 1468.36 WRPO Payments

Section 1468.36 specifies that NRCS will provide funds towards the wetland reserve plan of operations (WRPO) on land enrolled through a wetland reserve easement or 30-year contract. Minor edits to improve accuracy and readability have been made in the section.

#### § 1468.37 Easement and 30-Year Contract Participation Requirements

Section 1468.37 specifies requirements for ACEP–WRE participation. The 2018 Farm Bill addresses restoration and management within the easement and contract requirements. The section has been revised to conform with the 2018 Farm Bill provisions. The section also specifies that a landowner may be able to reserve grazing rights under a wetland reserve easement or 30-year contract if the reservation and use of the grazing rights is consistent with the historical natural uses of the land and long-term wetland protection and enhancement goals for which the easement or 30-year contract was established. The grazing rights are reserved to the landowner and are subject to a recorded exhibit to the deed that outlines the purposes and

limitations of the grazing. Additionally, the grazing must comply with a WRPO. As a matter of existing ACEP policy, the WRPO may include a grazing management plan, which is updated as necessary. The 2018 Farm Bill added a specific reference to the grazing management plan and identified that the plan may be reviewed and modified as necessary, at least every 5 years. This section has been revised to incorporate this change.

#### § 1468.38 Development and Revision of the WRPO and Associated Compatible Use Authorizations

The section specifies that WRPO is developed and updated by NRCS, in consultation with the State technical committee, with consideration of available site-specific technical input from the U.S. Fish and Wildlife Service (FWS) at the local level and others as appropriate. NRCS specifies in WRPO the manner in which land enrolled through a wetland reserve easement or 30-year contract will be restored, protected, enhanced, maintained, managed, and monitored to accomplish ACEP–WRE goals.

Paragraph (c) has been added to the section to more specifically identify the activities identified in the 2018 Farm Bill that should be addressed in the WRPO.

The 2018 Farm Bill included new provisions related to the evaluation and authorization of compatible uses on the easement area. The new provisions have been added to the section. Specifically, paragraph (d) provides that in evaluating and considering compatible uses NRCS will consider whether the use will facilitate the practical administration and management of the easement or contract area and ensure that the use furthers the functions and values for which the land was enrolled.

The section also specifies that the authorization of a compatible use is a determination made by NRCS, in its sole discretion, and that all compatible use authorizations are time-limited and may be modified or rescinded at any time. Compatible use authorizations issued by NRCS do not vest any right of any kind to the landowner.

#### § 1468.39 Violations and Remedies

Section 1468.39 specifies how NRCS will address violations of a wetland reserve easement or 30-year contract.

### Effective Date, Notice and Comment, and Paperwork Reduction Act

In general, the Administrative Procedure Act (APA) (5 U.S.C. 553) requires that a notice of proposed rulemaking be published in the **Federal**

**Register** and interested persons be given an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation, except when the rule involves a matter relating to public property, loans, grants, benefits, or contracts. This rule involves matters relating to benefits and therefore is exempt from the APA requirements. Further, the regulations to implement the programs of chapter 58 of title 16 of the U.S. Code, as specified in 16 U.S.C. 3846, and the administration of those programs, are:

- To be made as an interim rule effective on publication, with an opportunity for notice and comment,
- Exempt from the Paperwork Reduction Act (44 U.S.C. ch. 35), and
- To use the authority under 5 U.S.C. 808 related to Congressional review and any potential delay in the effective date.

For major rules, the Congressional Review Act requires a delay in the effect date of 60-days after publication to allow for Congressional Review. This rule is major under the Congressional Review Act, as defined by 5 U.S.C. 804(2). The authority in 5 U.S.C. 808 provides that when an agency finds for good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, that the rule may take effect at such time as the agency determines. Due to the nature of the rule, the mandatory requirements of the 2018 Farm Bill, and the need to implement the ACEP regulations expeditiously to provide assistance to producers, NRCS and CCC find that notice and public procedure are contrary to the public interest. Therefore, even though this rule is a major rule for purposes of the Congressional Review Act of 1996, NRCS and CCC are not required to delay the effective date for 60 days from the date of publication to allow for Congressional review. Therefore, this rule is effective on the date of publication in the **Federal Register**.

NRCS invites interested persons to participate in this rulemaking by submitting written comments or views about the changes made by this interim rule. The most helpful comments reference a specific portion of the regulation, explain the reason for any recommended changes, and include supporting data and references to relevant section of either the 2018 Farm Bill or the 1985 Farm Bill. NRCS specifically seeks public comment on recommendations to streamline access to the program and input on new or existing ranking criteria that would assist NRCS in selecting projects that

best further ACEP purposes. All comments received on or before the closing date for comments will be considered. NRCS will review and respond to the public comments in the ACEP final rule.

#### **Executive Orders 12866, 13563, 13771, and 13777**

Executive Order 12866, “Regulatory Planning and Review,” and Executive Order 13563, “Improving Regulation and Regulatory Review,” direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” established a federal policy to alleviate unnecessary regulatory burdens on the American people.

The Office of Management and Budget (OMB) designated this interim rule, with request for comment, a significant under Executive Order 12866, and therefore, OMB has reviewed this rule. The costs and benefits of this rule are summarized at the end of this preamble. The full cost benefit analysis is available on [www.regulations.gov](http://www.regulations.gov).

Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” requires that, in order to manage the private costs required to comply with federal regulations that for every new significant or economically significant regulation issued, the new costs must be offset by the elimination of at least two prior regulations. The OMB guidance in M–17–21, dated April 5, 2017, specifies that “transfer rules” are not covered by Executive Order 13771. If any of the increases in flexibilities for program participants results in cost-savings, they will be considered deregulatory and will be accounted for under Executive Order 13771 when the rule is finalized.

#### **Clarity of the Regulation**

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to your substantive comments on this rule, we invite your comments on how to make the rule easier to understand. For example:

- Are the requirements in the rule clearly stated? Are the scope and intent of the rule clear?
- Does the rule contain technical language or jargon that is not clear?
- Is the material logically organized?
- Would changing the grouping or order of sections or adding headings make the rule easier to understand?
- Could we improve clarity by adding tables, lists, or diagrams?
- Would more, but shorter, sections be better? Are there specific sections that are too long or confusing?
- What else could we do to make the rule easier to understand?

#### **Regulatory Flexibility Act**

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory analysis of any rule whenever an agency is required by the Administrative Procedure Act or any other law to publish a proposed rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule is not subject to the Regulatory Flexibility Act because CCC is not required by the Administrative Procedure Act or any law to publish a proposed rule for this rulemaking. Despite the Regulatory Flexibility Act not applying to this rule, the action only affects those entities who voluntarily participate in ACEP and in doing so receive its benefits. Compliance with the provisions of ACEP regulations is only required for those entities who choose to participate in this voluntary program.

#### **Environmental Review**

The environmental impacts of this rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and the NRCS regulations for compliance with NEPA (7 CFR part 650). A draft programmatic EA has been prepared in association with this rulemaking. The analysis has determined there will not be a significant impact to the human environment and as a result, an Environmental Impact Statement (EIS) is not required to be prepared (40 CFR part 1508.13). The draft EA and FONSI are available for review and comment for 30 days from the date of publication of this interim rule in the **Federal Register**. NRCS will consider this input and determine whether there is any new information provided that is relevant to environmental concerns and bearing on the proposed action or its impacts that warrant supplementing or revising the

current available draft of the ACEP EA and FONSI.

#### **Executive Order 12372**

Executive Order 12372, “Intergovernmental Review of Federal Programs,” requires consultation with State and local officials that would be directly affected by proposed federal financial assistance. The objectives of the Executive order are to foster an intergovernmental partnership and a strengthened Federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and direct Federal development. For reasons specified in the final rule related notice regarding 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), the programs and activities in this rule are excluded from the scope of Executive Order 12372.

#### **Executive Order 12988**

This rule has been reviewed under Executive Order 12988, “Civil Justice Reform.” This rule will not preempt State or local laws, regulations, or policies unless they represent an irreconcilable conflict with this rule. This rule will not have retroactive effect. Before any judicial actions may be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR part 11 are to be exhausted.

#### **Executive Order 13132**

This rule has been reviewed under Executive Order 13132, “Federalism.” The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, except as required by law. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

#### **Executive Order 13175**

This rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship

between the Federal Government and Indian Tribes or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

The USDA’s Office of Tribal Relations (OTR) has assessed the impact of this rule on Indian Tribes and determined that this rule has significant Tribal implication that require ongoing adherence to Executive Order 13175. Tribal consultation for this rule was included in the 2018 Farm Bill Tribal consultation held on May 1, 2019, at the National Museum of the American Indian, in Washington, DC. The portion of the Tribal consultation relative to this rule was conducted by Bill Northey, USDA Under Secretary for the Farm Production and Conservation mission area, as part of the Title II session. There were no specific comments from Tribes on the rule during the Tribal consultation. If a Tribe requests additional consultation, NRCS will work with OTR to ensure meaningful consultation is provided where changes, additions, and modifications identified in this rule are not expressly mandated by law.

Separate from Tribal consultation, communication, and outreach efforts are in place to assure that all producers, including Tribes (or their members), are provided information about the regulation changes. Specifically, NRCS obtains input through Tribal Conservation Advisory Councils. A Tribal Conservation Advisory Council may be an existing Tribal committee or department and may also constitute an association of member Tribes organized to provide direct consultation to NRCS at the State, regional, and national levels to provide input on NRCS rules, policies, programs, and impacts on Tribes. Tribal Conservation Advisory Councils provide a venue for agency leaders to gather input on Tribal interests. Additionally, NRCS will be holding several sessions with Indian Tribes and Tribal entities across the country in fiscal year 2019 to describe the 2018 Farm Bill changes to NRCS conservation programs, obtain input about how to improve Tribal and Tribal member access to NRCS conservation assistance, and make any appropriate adjustments to the regulations that will foster such improved access.

#### **The Unfunded Mandates Reform Act of 1995**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), requires Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal Governments or the private sector. Agencies generally must prepare a written statement, including a cost

benefits analysis, for proposed and final rules with Federal mandates that may result in expenditures of \$100 million or more in any 1 year for State, local or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no federal mandates, as defined under Title II of UMRA, for State, local, and Tribal Governments or the private sector. Therefore, this rule is not subject to the requirements of UMRA.

#### **Federal Assistance Programs**

The title and number of the Federal Domestic Assistance Programs in the Catalog of Federal Domestic Assistance to which this rule applies is 10.931—Agricultural Conservation Easement Program.

#### **E-Government Act Compliance**

NRCS and CCC are committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

#### **Cost Benefit Analysis Summary**

For ACEP, NRCS provides technical and financial assistance to help customers (farmers, ranchers, landowners, and other land users) address natural resource concerns. As discussed above, ACEP has two distinct components:

- The ALE component protects the agricultural use, future viability, and conservation values of eligible land by limiting non-agricultural uses of that land or protects grazing uses and related conservation values by restoring or conserving eligible land; and
- The WRE component restores, protects, and enhances wetlands.

The 2018 Farm Bill included mandatory changes to ACEP that NRCS must implement and changes over which NRCS has some discretion. Additionally, NRCS continues to have discretion over other program aspects that were unchanged by the 2018 Farm Bill, such as the allocation of funds. Together, these various changes and discretionary provisions may affect ACEP costs and the resulting impacts on natural resource concerns, but those changes are expected to be small. Because ACEP is voluntary, it does not impose any burden upon agricultural landowners who choose not to participate.

One of the most significant ACEP changes in the 2018 Farm Bill is to the existing contribution requirements for the non-Federal share under ACEP-ALE. This change adds flexibility for eligible entities to meet the non-Federal share requirement by no longer specifying a minimum cash contribution amount to be provided by the eligible entity and allowing the total of the non-Federal share to be comprised of a charitable donation or qualified conservation contribution from the private landowner. It also includes provisions for costs related to securing the easement to be included in the calculation of the non-Federal share.

There are 6 states and 1 territory (Alabama, Arkansas, Hawaii, Louisiana, Missouri, North Dakota, and Puerto Rico) that currently have no enrollment in ACEP-ALE. This may have been due to a lack of available financial resources for an eligible entity to meet the minimum cash contribution requirement or may be due to a lack of entities that meet the eligibility requirements to participate in ACEP-ALE. The changes to the non-Federal share requirements may result in increased ACEP-ALE enrollments in areas where enrollment has been limited due to a lack of financial resources available for entities that meet the ACEP-ALE eligibility requirements. To address these changes, this rule has eliminated a specified minimum cash contribution amount and incorporated provisions for considering costs related to securing the easement. These changes are applicable to all eligible entities in all States and as a result, it is anticipated that the amount of the Federal contribution toward ACEP-ALE easements will increase by 8 to 10 percent.

Another change under the 2018 Farm Bill provides the Secretary with authority to enter into legal arrangements with eligible entities to conduct buy-protect-sell transactions under ACEP-ALE. In specific instances, NRCS may provide ACEP-ALE cost-share assistance to an eligible entity for the purchase of an agricultural land easement on private or Tribal agricultural land owned on a transitional basis by an eligible entity when the ownership of that land will be timely transferred to a qualified farmer or rancher. Buy-protect-sell transactions are intended to help farmers and ranchers acquire agricultural land they could not otherwise afford and to protect agricultural land that may have otherwise been developed or removed from agricultural production.

NRCS continues to have the discretion to rank and prioritize projects

and to select individual applications based on their ability to achieve ACEP purposes and to assess and determine the appropriate allocation of funds for the acquisition of agricultural land and wetland easements. The 2018 Farm Bill does not identify enrollment level requirements between ACEP-WRE and ACEP-ALE. The relative emphasis NRCS places on these two program components depends on State and national priorities, environmental impacts, and local demand. It is anticipated that enrollment in ACEP will be consistent with historic enrollment trends.

#### List of Subjects in 7 CFR Part 1468

Agricultural, Flood Plains, Grazing lands, Natural resources, Soil conservation, and Wildlife.

■ For the reasons explained above, CCC revises 7 CFR part 1468 to read as follows:

### PART 1468—AGRICULTURAL CONSERVATION EASEMENT PROGRAM

#### Subpart A—General Provisions

Sec.

- 1468.1 Applicability.
- 1468.2 Administration.
- 1468.3 Definitions.
- 1468.4 Appeals.
- 1468.5 Scheme or device.
- 1468.6 Subordination, exchange, modification, and termination.
- 1468.7 Transfer of land.
- 1468.8 Payments not subject to claims.
- 1468.9 Assignments.
- 1468.10 Environmental markets.

#### Subpart B—Agricultural Land Easements

- 1468.20 Program requirements.
- 1468.21 Application procedures.
- 1468.22 Establishing priorities, ranking considerations, and project selection.
- 1468.23 ALE-agreements.
- 1468.24 Compensation and funding for agricultural land easements.
- 1468.25 Agricultural land easement deeds.
- 1468.26 Eligible entity certification.
- 1468.27 Buy-Protect-Sell transactions.
- 1468.28 Violations and remedies.

#### Subpart C—Wetland Reserve Easements

- 1468.30 Program requirements.
- 1468.31 Application procedures.
- 1468.32 Establishing priorities, ranking consideration, and project selection.
- 1468.33 Enrollment process.
- 1468.34 Compensation for easements and 30-year contracts.
- 1468.35 Wetland Reserve Enhancement Partnerships.
- 1468.36 WRPO payments.
- 1468.37 Easement and 30-year contract participation requirements.
- 1468.38 Development and revision of the WRPO and associated compatible use authorizations.
- 1468.39 Violations and remedies.

Authority: 15 U.S.C. 714b and 714c; 16 U.S.C. 3865–3865d.

#### Subpart A—General Provisions

##### § 1468.1 Applicability.

(a) The regulations in this part set forth requirements, policies, and procedures for implementation of the Agricultural Conservation Easement Program (ACEP) administered by the Natural Resources Conservation Service (NRCS). ACEP purposes include:

(1) Combining the purposes and coordinating the functions of the Wetlands Reserve Program established under section 1237, the Grassland Reserve Program established under section 1238N, and the Farmland Protection Program established under section 1238I, as such sections were in effect on the day before the date of enactment of the Agricultural Act of 2014;

(2) Restoring, protecting, and enhancing wetlands on eligible land;

(3) Protecting the agricultural use and future viability, and related conservation values, of eligible land by limiting nonagricultural uses of that land that negatively affect the agricultural uses and conservation values; and

(4) Protecting grazing uses and related conservation values by restoring or conserving eligible land.

(b) The NRCS Chief may implement ACEP in any of the 50 States, the District of Columbia, Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(c) Subpart B of this part sets forth additional requirements, policies, and procedures for implementation of the Agricultural Land Easements (ALE) component of ACEP.

(d) Subpart C of this part sets forth additional requirements, policies, and procedures for the Wetland Reserve Easement (WRE) component of ACEP.

(e) Easement lands previously enrolled under the predecessor programs Farm and Ranch Lands Protection Program (7 CFR part 1491), the Grassland Reserve Program (7 CFR part 1415), and the Wetlands Reserve Program (7 CFR part 1467) are considered enrolled in ACEP. Existing easements and agreements remain valid and enforceable, and subject to the legal framework in place at the time of enrollment, except that the long-term stewardship and management of these easements, and any ACEP funding made available for implementation, will be in accordance with this part.

**§ 1468.2 Administration.**

(a) The regulations in this part will be administered under the general supervision and direction of the NRCS Chief.

(b) NRCS may seek advice from the State technical committee on considerations relating to implementation and technical aspects of the program, such as identification of lands of statewide importance or special significance, review of State-level geographic area rate caps, development of ranking criteria, wetland restoration objectives, management considerations, including compatible use criteria, or related technical matters.

(c) NRCS may obtain input from Federal or State agencies, conservation districts, or other organizations in program administration. No determination by these agencies or organizations will compel NRCS to take any action which NRCS determines does not serve the purposes of the program established by this part.

(d) Applications may be submitted on a continuous basis or in response to specific program solicitations. NRCS may announce one or more application cut-off dates for funding consideration within a given fiscal year.

(e) The Chief may allocate funds for purposes related to: Encouraging enrollment by beginning farmers or ranchers, socially disadvantaged farmers or ranchers, limited resource farmers or ranchers, Indian Tribes, and veteran farmers or ranchers as authorized by 16 U.S.C. 3844; implementing landscape and related initiatives, special pilot programs for easement management and monitoring; agreements with other agencies and organizations to assist with program implementation; coordination of easement enrollment across State boundaries; coordination of the development of easement plans for ACEP-WRE or conservation plans for ACEP-ALE; or for other goals of the ACEP found in this part.

(f) NRCS may delegate at any time its ACEP-WRE monitoring or management responsibilities to conservation organizations that have appropriate authority, expertise and technical and financial resources, as determined by NRCS, to carry out such delegated responsibilities.

(g) NRCS may delegate at any time its ACEP-WRE monitoring, management, or enforcement responsibilities to other Federal or State agencies that have the appropriate authority, expertise, and technical and financial resources, as determined by NRCS, to carry out such delegated responsibilities.

(h) For ACEP-ALEs, the easement holder is responsible to ensure the

easement is monitored on an annual basis and to provide annually to NRCS a monitoring report. For ACEP-WREs, NRCS or its delegate, is responsible to monitor the easement on an annual basis and comply with applicable reporting requirements.

(i) No delegation in the administration of this part to lower organizational levels will preclude the Chief from making any determinations under this part, re delegating to other organizational levels, or from reversing or modifying any determination made under this part.

(j) The Chief may modify or waive nonstatutory, discretionary provisions of this part if the Chief determines the waiver of such discretionary provision is necessary to further the purposes of ACEP as part of an ACEP-ALE buy-protect-sell transaction or under the ACEP-WRE wetland reserve enhancement partnership option. The waiver must further ACEP purposes and be consistent with the specific ACEP-WRE or ACEP-ALE conservation purposes and objectives. No waiver will result in reducing the quality of wetland functions and values restored under ACEP-WRE, or the protection of agricultural viability under ACEP-ALE.

(k) To assist in ACEP implementation the Chief may also waive the applicability of the adjusted gross income limitation as authorized by section 1001D(b)(3) of the Food Security Act of 1985 for participating landowners if the Chief determines that environmentally sensitive land of special significance would be protected as a result of such waiver.

**§ 1468.3 Definitions.**

The definitions in this section apply to this part, and all documents issued in accordance with this part, unless specified otherwise:

*30-year Contract* means an ACEP-WRE contract that is for a duration of 30 years and is limited to acreage owned by Indian Tribes.

*Access* means legal and physical ingress and egress to the entire easement area over adjacent or contiguous lands for the exercise of any of the rights or interests under the easement for the duration of its term for the purposes of the program. Access for easement enrollments must be described in the easement deed.

*Acreage owned by Indian Tribes* means lands held in private ownership by an Indian Tribe or individual Tribal member and lands held in trust by a native corporation, Tribe, or the Bureau of Indian Affairs. This land may be also be referred to as "Tribal land."

*Agreement* means the document that specifies the rights, requirements, and

responsibilities of NRCS and any persons, legal entities, or eligible entities participating in the program or any document that authorizes the transfer of assistance between NRCS and a third party for provision of authorized goods and services associated with program implementation. Agreements may include but are not limited to an agreement to purchase, an ALE-agreement, a buy-protect-sell arrangement, a wetland reserve easement restoration agreement, a cooperative agreement, a grant agreement, a partnership agreement, or an interagency agreement.

*Agreement to purchase* means the legal document that is the equivalent of a real estate purchase and sale contract. The landowner signs the agreement to purchase, which is the authorization for NRCS to proceed with the ACEP-WRE acquisition process.

*Agricultural commodity* means any agricultural commodity planted and produced in a State by annual tilling of the soil, including tilling by one-trip planters or sugarcane planted and produced in a State.

*Agricultural land easement* means an easement or other interest in eligible land that is conveyed for the purposes of protecting natural resources and the agricultural nature of the land, and of promoting agricultural viability for future generations, and permits the landowner the right to continue agricultural production and related uses.

*Agricultural land easement plan* means a document developed by the eligible entity that describes the activities which promote the long-term viability of the land to meet the purposes for which the easement was acquired. An agricultural land easement plan includes a description of the farm or ranch management system and the natural resource concerns on the land, describes the conservation measures and practices that may be implemented to address applicable resource concerns for which the easement was enrolled, and incorporates by reference any component plans such as a grasslands management plan, forest management plan, or conservation plan as defined in this part.

*Agricultural uses* means those activities defined by a State's farm or ranch land protection program or where no program exists, by the State agricultural use tax assessment program. However, if NRCS determines that a State definition of agricultural use is so broad that an included use would constitute a violation of Federal law, limit future agricultural viability, degrade soils or the agricultural nature

of the land or the related natural resources, NRCS reserves the right to impose greater deed restrictions on the property to be subject to an agricultural land easement. These deed restrictions would narrow the State definition of agricultural use in order to meet Federal law, or to protect soils, the agricultural nature of the land, or related natural resources.

*ALE-agreement* means the document that outlines the rights, requirements, roles, and responsibilities of NRCS and eligible entities participating in the program under subpart B, including cost-share payment provisions.

*At-risk species* means any plant or animal species listed as threatened or endangered; proposed or candidate for listing under the Endangered Species Act; a species listed as threatened or endangered under State law or Tribal law on Tribal land; State or Tribal land species of conservation concern; or other plant or animal species or community, as determined by the State conservationist, with advice from the State technical committee or Tribal Conservation Advisory Council, that has undergone, or is likely to undergo, population decline and may become imperiled without direct intervention.

*Beginning farmer or rancher* means a person, Indian Tribe, Tribal corporation, or legal entity who:

(1) Has not operated a farm or ranch, or non-industrialized private forest land (NIPF), or who has operated a farm or ranch or NIPF for not more than 10 consecutive years. This requirement applies to all members of an entity who will materially and substantially participate in the operation of the farm or ranch or NIPF.

(2) In the case of an individual, individually, or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch consistent with the practices in the county or State where the farm is located.

(3) In the case of a legal entity or joint operation, all members must materially and substantially participate in the operation of the farm or ranch. Material and substantial participation requires that each of the members provide some amount of the management or labor and management necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.

*Buy-Protect-Sell transaction* means a legal arrangement between an eligible entity and NRCS relating to land owned or being purchased by an eligible entity

on a transitional basis during which an agricultural land easement will be secured on eligible private or Tribal land, and ownership of the land transferred to a qualified farmer or rancher following conditions specified in this part.

*Certified entity* means an eligible entity that NRCS has determined to meet the certification requirements in § 1468.26 for the purposes of ACEP–ALE.

*Chief* means the Chief of the Natural Resources Conservation Service or the person delegated the authority to act for the Chief.

*Commenced conversion wetland* means a wetland or converted wetland for which the Farm Service Agency (FSA) has determined that the wetland manipulation was contracted for, started, or for which financial obligation was incurred before December 23, 1985.

*Commodity Credit Corporation (CCC)* is a wholly-owned government corporation within the Department of Agriculture.

*Compatible use* means a use or activity conducted on a wetland reserve easement that NRCS determines, in its sole discretion, is consistent with the long-term protection and enhancement of the wetland and other natural values of the easement area when performed according to amount, method, location, timing, frequency, intensity, and duration limitations prescribed by NRCS.

*Conservation plan* is for ACEP–ALE the document that—

(1) Applies to highly erodible cropland;

(2) Describes the conservation-system applicable to the highly erodible cropland and describes the decisions of the person with respect to location, land use, tillage systems, and conservation treatment measures and schedules and where appropriate, may include conversion of highly erodible cropland to less intensive uses; and

(3) Is developed in accordance with 7 CFR part 12.

*Conservation practice* means a specified treatment, such as a vegetative, structural, or land management practice, that is planned and applied according to NRCS standards and specifications.

*Conservation Reserve Program (CRP)* means the program administered by the CCC as required by 16 U.S.C. 3831–3836.

*Converted wetland* means a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow,

circulation, or reach of water) for the purpose of, or to have the effect of, making possible the production of an agricultural commodity if such production would not have been possible but for such action, and before such action such land was wetland, farmed wetland, or farmed-wetland pasture and was neither highly erodible land nor highly erodible cropland.

*Cost-share payment* means the payment made by NRCS to an eligible entity for the purchase of an ACEP–ALE easement as set forth in subpart B of this part.

*Dedicated fund* means an account held by a certified nongovernmental organization which is sufficiently capitalized for the purpose of covering expenses associated with the management, monitoring, and enforcement of agricultural land easements and where such account cannot be used for other purposes.

*Easement administration action* means an easement subordination, easement modification, easement exchange, or easement termination.

*Easement area* means the portion of a parcel that is encumbered by an ACEP easement.

*Easement exchange* means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, relinquishes all or a portion of its rights or interests in an easement which are replaced by similar rights or interests in an easement that have equivalent or greater conservation value, acreage, and economic value to the United States on land that is not adjacent to the original easement area. NRCS is not required to exchange any of its rights or interests in an easement, and easement exchanges are discretionary, voluntary, real estate transactions between the United States, landowner, and other parties with an interest in the easement.

*Easement modification* means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, agrees to adjust the boundaries or terms of an easement that will result in equivalent or greater conservation value, acreage, and economic value to the United States, and the modification only involves lands within or physically adjacent to the original easement area. NRCS is not required to modify any of its rights or interests in an easement, and easement modifications are discretionary, voluntary, real estate transactions between the United States, landowner, and other parties with an interest in the easement that are subject to the requirements of this part.



*Easement payment* means the consideration paid to a participant or their assignee for an easement conveyed to the United States under the ACEP-WRE, or the consideration paid to an Indian Tribe or Tribal members for entering into 30-year contracts under ACEP-WRE.

*Easement restoration agreement* means the agreement or contract NRCS enters into with the landowner or a third party to implement the WRPO on a wetland reserve easement or 30-year contract.

*Easement subordination* means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, agrees to subordinate all or a portion of its rights or interests in an easement. NRCS is not required to subordinate any of its rights or interests in an easement, and easement subordinations are discretionary, voluntary, real estate transactions between the United States, landowner, and other parties with an interest in the easement that are subject to the requirements of this part. As determined by NRCS, the subordination must be in the public interest or further the practical administration of the program, minimally affect the easement acreage, and increase or have limited negative effects on the conservation values of the easement area.

*Easement termination* means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, agrees to terminate all or a portion of its rights or interests in an easement. The termination must address a compelling public need for which there is no practicable alternative even with avoidance and minimization of adverse impacts and must facilitate the practical administration of the program. The United States must be provided full compensation for such termination and any costs and damages related to the termination. NRCS is not required to terminate any of its rights or interests in an easement, and easement terminations are discretionary, voluntary, real estate transactions between the United States, landowner, and other parties that are subject to the requirements of this part. Unless and until the parties enter into a binding termination agreement, any party may withdraw its approval of a termination proposal at any time during the termination process.

*Eligible activity* means an action other than a conservation practice that has the effect of alleviating problems or improving the condition of the resources, such as ensuring proper management or maintenance of the wetland functions and values restored, protected, or enhanced through an

ACEP-WRE easement or 30-year contract as identified in the WRPO.

*Eligible entity* means an Indian Tribe, State government, local government, or a nongovernmental organization that has a farmland or grassland protection program that purchases agricultural land easements for the purposes of protecting:

(1) The agricultural use and future viability, and related conservation values, of eligible land by limiting nonagricultural uses of that land that negatively affect the agricultural uses and conservation values; or

(2) Grazing uses and related conservation values by restoring or conserving eligible land.

*Eligible land* means private or acreage owned by Indian Tribes that NRCS has determined to meet the requirements of § 1468.20 or § 1468.30 of this part.

*Fair market value* means the value of an agricultural land easement as determined using the Uniform Standards of Professional Appraisal Practice, an areawide market analysis or survey, or another industry-approved method approved by the Chief, as established in subpart B or, for a wetland reserve easement, the value of the land as determined using the Uniform Standards of Professional Appraisal Practices or areawide market analysis or survey, as established in subpart C.

*Farm and ranch land of local importance* means farm or ranch land used to produce food, feed, fiber, forage, biofuels, and oilseed crops that are locally important but not identified as having national or statewide importance. Criteria for defining and delineating this land are to be determined by the appropriate local agency or agencies. Farmlands of local importance may include tracts of land that have been designated for agriculture by local ordinance.

*Farm and ranch land of statewide importance* means, in addition to prime and unique farmland, land that is of statewide importance for the production of food, feed, fiber, forage, biofuels, and oilseed crops. Criteria for defining and delineating this land are to be determined by the appropriate State agency or agencies. Generally, additional farmlands of statewide importance include those that are nearly prime farmland and that economically produce high yields of crops when treated and managed according to acceptable farming methods. Some may produce as high a yield as prime farmlands if conditions are favorable. In some States, additional farmlands of statewide importance may include tracts of land that have been designated for

agriculture by State law in accordance with 7 CFR part 657.

*Farm or ranch succession plan* means a general plan to address the continuation of some type of agricultural business on the enrolled land. The farm or ranch succession plan may include specific intra-family succession agreements or business asset transfer strategies to create opportunities for new or beginning farmers or ranchers, veteran farmers or ranchers, or other historically underserved landowners.

*Farm Service Agency (FSA)* is an agency of the United States Department of Agriculture.

*Field Office Technical Guide (FOTG)* means the official local NRCS source of resource information and interpretations of guidelines, criteria, and requirements for planning and applying conservation practices and conservation management systems. The FOTG contains detailed information on the conservation of soil, water, air, plant, animal, and energy resources applicable to the local area for which it is prepared.

*Fish and Wildlife Service (FWS)* is an agency of the United States Department of the Interior.

*Forest management plan* means a site-specific plan that describes management practices that conserve, protect, or enhance the viability of the forest land. Forest management plans may include a forest stewardship plan, as specified in section 5 of the Cooperative Forestry Assistance Act of 1978 (16 U.S.C. 2103a) or other plan approved by the State forester.

*Future viability* means the legal, physical, and financial conditions under which the land itself will remain capable and available for continued sustained productive agricultural or grassland uses while protecting related conservation values such as management of the agricultural land easement area consistent with an agricultural land easement plan.

*Grassland* means land on which the vegetation is dominated by grasses, grass-like plants, shrubs, or forbs, including shrubland, land that contains forbs, pastureland, and rangeland, and improved pastureland and rangeland.

*Grassland of special environmental significance* means grasslands that contain little or no noxious or invasive species, as designated or defined by State or Federal law; are subject to the threat of conversion to non-grassland uses or fragmentation; and the land:

(1)(i) Is rangeland, pastureland, shrubland, or wet meadows on which the vegetation is dominated by native grasses, grass-like plants, shrubs, or forbs, or

(ii) Is improved, naturalized pastureland, rangeland, or wet meadows;

(2)(i) Provides, or could provide, habitat for threatened or endangered species or at-risk species,

(ii) Protects sensitive or declining native prairie or grassland types or grasslands buffering wetlands, or

(iii) Provides protection of highly sensitive natural resources as identified by NRCS, in consultation with the State technical committee.

*Grasslands management plan* means a site-specific plan that describes the grassland resources, the management system and practices that conserve, protect, or enhance the viability of the grassland, and as applicable, the habitat, species, or sensitive natural resources.

*Grazing management plan* means for ACEP–WRE, a site-specific plan developed as a component of the WRPO that provides for grazing of the grass and grass-like cover while accomplishing the wetland functions and values of the easement area as identified by NRCS.

*Historical and archaeological resources* mean resources that are:

(1) Listed in the National Register of Historic Places (established under the National Historic Preservation Act (NHPA), 54 U.S.C. 300101, *et seq.*);

(2) Formally determined eligible for listing in the National Register of Historic Places (by the State Historic Preservation Office (SHPO) or Tribal Historic Preservation Office (THPO) and the Keeper of the National Register in accordance with section 106 of the NHPA);

(3) Formally listed in the State or Tribal Register of Historic Places of the SHPO (designated under section 101(b)(1)(B) of the NHPA) or the THPO (designated under section 101(d)(1)(C) of the NHPA); or

(4) Included in the SHPO or THPO inventory with written justification as to why it meets National Register of Historic Places criteria.

*Historically underserved landowner* means a beginning, limited resource, socially disadvantaged farmer or rancher, or veteran farmer or rancher.

*Imminent harm* means easement violations or threatened violations that, as determined by NRCS, would likely cause immediate and significant degradation to the conservation values for which the easement was acquired.

*Impervious surface* means surfaces that are covered by asphalt, concrete, roofs, or any other surface that does not allow water to percolate into the soil.

*Indian Tribe* means any Indian Tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village or regional or

village corporation as defined in or established as required by the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), that is eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Land evaluation and site assessment system* means the land evaluation system approved by NRCS and used, when applicable, to rank land for farm and ranch land protection purposes based on soil potential for agriculture, as well as social and economic factors such as location, access to markets, and adjacent land use. For additional information see the Farmland Protection Policy Act regulation at 7 CFR part 658.

*Landowner* means a person, legal entity, or Indian Tribe having legal ownership of eligible land and those who may be buying eligible land under a purchase agreement. The term landowner may include all forms of collective ownership including joint tenants and tenants-in-common, and includes heirs, successors, assigns, and anyone claiming under them. State and local governments are not eligible as landowners. For ACEP–ALE, nongovernmental organizations and Indian tribes that qualify as eligible entities are not eligible as landowners unless otherwise determined by the Chief following an approved buy-protect-sell transaction.

*Lands substantially altered by flooding* means agricultural lands where flooding has created wetland hydrologic conditions which, with a high degree of certainty, will develop and retain wetland soil, hydrology, and vegetation characteristics over time.

*Limited resource farmer or rancher* means either:

(1)(i) A person with direct or indirect gross farm sales not more than the current indexed value in each of the previous two fiscal years (adjusted for inflation using Prices Paid by Farmer Index as compiled by National Agricultural Statistical Service), and

(ii) Has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous two years (to be determined annually using Commerce Department Data); or

(2) A legal entity or joint operation if all individual members independently qualify under paragraph (1) of this definition.

*Maintenance* means work performed to keep the wetland reserve easement lands functioning for program purposes for the duration of the enrollment period. Maintenance includes actions and work to manage, prevent

deterioration, repair damage, or replace conservation practices or eligible activities on a wetland reserve easement, as approved or conducted by NRCS.

*Monitoring report* means a report, the contents of which are formulated and prepared by the easement holder, or their delegate, that accurately documents on an annual basis whether the land subject to easement is in compliance with the terms and conditions of the easement.

*Natural Resources Conservation Service (NRCS)* means an agency of the U.S. Department of Agriculture (USDA), including when NRCS carries out program implementation using the funds, facilities, or authorities of the CCC.

*Nongovernmental organization* means any organization that for purposes of qualifying as an eligible entity under subpart B:

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

(2) Is an organization described in section 501(c)(3) of that Code that is exempt from taxation under 501(a) of that Code; and

(3) Is described in—

(i) Section 509(a)(1) and (2) of that Code, or

(ii) Section 509(a)(3) of that Code and is controlled by an organization described in section 509(a)(2) of that Code.

*Nonindustrial private forest land (NIPF)* means rural land, as determined by the NRCS, that has existing tree cover or is suitable for growing trees; and is owned by any nonindustrial private individual, group, association, corporation, Indian Tribe, or other private legal entity that has definitive decision-making authority over the land.

*Other interests in land* include any right in real property other than easements that are recognized by State law that the Chief determines can be purchased by an eligible entity to further the agricultural use of the land and other ACEP–ALE purposes.

*Other productive soils* means farm and ranch land soils, in addition to prime farmland soils, that include unique farmland or farm and ranch land of statewide and local importance.

*Parcel* means the defined area of land and may be a portion or all of the area of land that is owned by the landowner.

*Participant* means a person, legal entity, Indian Tribe, native corporation,

or eligible entity who has been accepted into the program and who is receiving payment or who is responsible for implementing the terms and conditions of an agreement to purchase, an agreement to enter a 30-year contract, or an ALE-agreement.

*Pending offer* means a written bid, contract, or option between a landowner and an eligible entity for the acquisition of an agricultural conservation easement in perpetuity, or for the maximum duration allowed by State law, before the legal title to these rights has been conveyed for the purposes of protecting:

- (1) The agricultural use and future viability, and related conservation values, of eligible land by limiting nonagricultural uses of that land; or
- (2) Grazing uses and related conservation values by restoring or conserving eligible land.

*Permanent easement* means an easement that lasts in perpetuity.

*Person* means a natural person.

*Prime farmland* means land that has the best combination of physical and chemical characteristics for producing food, feed, fiber, forage, oilseed, and other agricultural crops with minimum inputs of fuel, fertilizer, pesticides, and labor without intolerable soil erosion, as determined by NRCS.

*Private land* means land that is not owned by a governmental entity and includes acreage owned by Indian Tribes, as defined in this part.

*Right of enforcement* means the right of the United States to enforce the easement entered into under this part in those instances in which the grantee of the easement does not fully protect the interests provided to the grantee under the easement.

*Riparian areas* means areas of land that occur along streams, channels, rivers, and other water bodies. These areas are normally distinctly different from the surrounding lands because of unique soil and vegetation characteristics, may be identified by distinctive vegetative communities that are reflective of soil conditions normally wetter than adjacent soils, and generally provide a corridor for the movement of wildlife.

*Socially disadvantaged farmer or rancher* means a producer who is a member of a group whose members have been subjected to racial or ethnic prejudices without regard to its members' individual qualities. For a legal entity, at least 50-percent ownership in the legal entity must be held by socially disadvantaged individuals.

*State conservationist* means the NRCS employee authorized to direct and supervise NRCS activities in a State and

includes the directors of the Caribbean Area (Puerto Rico and the Virgin Islands), or the Pacific Islands Area (Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands).

*State technical committee* means a committee established under 16 U.S.C. 3861 and 7 CFR part 610, subpart C.

*Unique farmland* means land other than prime farmland that is used for the production of specific high-value food and fiber crops as determined by NRCS. It has the special combination of soil quality, location, growing season, and moisture supply needed to economically produce sustained high quality or high yields of specific crops when treated and managed according to acceptable farming methods. Examples of such crops include citrus, tree nuts, olives, cranberries, fruits, and vegetables. Additional information on the definition of prime, unique, or other productive soil can be found in 7 CFR part 657 and 7 CFR part 658.

*Veteran farmer or rancher* means a producer who meets the definition in section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990, as amended (7 U.S.C. 2279(a)).

*Wetland* means land that:

- (1) Has a predominance of hydric soils;
- (2) Is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
- (3) Supports a prevalence of such vegetation under normal circumstances.

*Wetland functions and values* means the hydrological and biological characteristics of wetlands and the socioeconomic value placed upon these characteristics, including—

- (1) Habitat for migratory birds and other wildlife, in particular at-risk species.
- (2) Protection and improvement of water quality.
- (3) Attenuation of water flows due to flood.
- (4) The recharge of ground water.
- (5) Protection and enhancement of open space and aesthetic quality.
- (6) Protection of flora and fauna which contributes to the Nation's natural heritage.
- (7) Carbon sequestration.
- (8) Contribution to educational and scientific scholarship.

*Wetland reserve easement* means a reserved interest easement which is an interest in land defined and delineated in a deed whereby the landowner conveys all rights, title, and interests in a property to the United States, but the

landowner retains those rights, title, and interests in the property which are specifically reserved to the landowner in the easement deed.

*Wetland reserve plan of operations (WRPO)* means the document that is developed or approved by NRCS that identifies how the wetland functions and values and associated habitats on the easement will be restored, improved, protected, managed, maintained, and monitored to achieve the purposes of the wetland reserve easement enrollment.

*Wetland restoration* means the rehabilitation of degraded or lost wetland and associated habitats pursuant to published State-specific criteria and guidelines developed in coordination with the State technical committee in a manner such that:

- (1) The original, native vegetative community and hydrology are, to the extent practical, reestablished; or
- (2) A hydrologic regime and native vegetative community different from what likely existed prior to degradation of the site is established that will:
  - (i) Substantially replace the original habitat functions and values while providing significant support or benefit for migratory waterfowl or other wetland-dependent wildlife; or
  - (ii) Address local resource concerns or needs for the restoration of wetland functions and values for wetland-dependent wildlife as identified in an approved State wildlife action plan or NRCS national initiative.

#### § 1468.4 Appeals.

(a) *ACEP-ALE eligibility of entities.* An entity which has submitted an ACEP-ALE application to be considered an eligible entity may obtain a review of any administrative determination concerning their eligibility for participation utilizing the administrative appeal regulations provided in 7 CFR parts 11 and 614.

(b) *ACEP-WRE applicants and participants.* An applicant or participant in the ACEP-WRE may obtain a review of any administrative determination concerning eligibility for participation or receipt of payment utilizing the administrative appeal regulations provided in 7 CFR parts 11 and 614.

(c) *Easement administration and management determinations under ACEP after easement closing.* NRCS determinations that are made pursuant to its rights or interests in an ACEP-funded easement after closing may only be appealed to the State conservationist as specified in the notice provided to the landowner or easement holder when NRCS exercises its rights under the easement. Such determinations are not

subject to appeal under 7 CFR parts 11 or 614.

**§ 1468.5 Scheme or device.**

(a) In addition to other penalties, sanctions, or remedies that may apply, if it is determined by NRCS that anyone has employed a scheme or device to defeat the purposes of this part, any part of any program payment otherwise due or paid during the applicable period may be withheld or be required to be refunded with interest, thereon, as determined appropriate by NRCS.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving anyone of a program benefit, or for the purpose of obtaining a payment to which they would otherwise not be entitled.

**§ 1468.6 Subordination, exchange, modification, and termination.**

(a) After an easement has been recorded, no subordination, modification, exchange, or termination will be made in any interest in land, or portion of such interest, except as approved by the NRCS. NRCS may approve such easement administration actions if NRCS determines, in accordance with the sequencing considerations under the National Environmental Policy Act, that—

(1)(i) The subordination, modification, or exchange action results in no net loss of easement acres, and is in the public interest or will further the practical administration and management of the easement area or the program, as determined by the NRCS, or

(ii) The termination action will address a compelling public need for which there is no practicable alternative even with avoidance and minimization, and will further the practical administration and management of the easement area or the program, as determined by the NRCS.

(2) For modification or exchange actions—

(i) There is no reasonable alternative that would avoid the easement area, or if the easement area cannot be avoided entirely, then the preferred alternative must minimize impacts to the original easement area and its conservation functions and values to the greatest extent practicable and any remaining adverse impacts must be mitigated, as determined by NRCS, at no cost to the government,

(ii) The action is consistent with the original intent of the easement and is consistent with the purposes of the program, and

(iii) The action results in equal or greater conservation functions and value and equal or greater economic value to

the United States. A determination of equal or greater economic value to the United States will be made in accordance with an approved easement valuation methodology for agricultural land easements under subpart B or for wetland reserve easements under subpart C. In addition to the value of the easement itself, NRCS may consider other financial investments it has made in the acquisition, restoration, and management of the original easement to ensure that the easement administration action results in equal or greater economic value to the United States.

(3) For subordination actions, the action—

(i) Increases conservation functions and values or has a limited negative effect on conservation functions and values;

(ii) Is at no cost to the Government; and

(iii) Notwithstanding paragraph (a)(4) of this section, will only minimally affect the acreage subject to the interest in land.

(4) For termination actions, the action—

(i) Is in the interest of the Federal Government; and

(ii) The United States will be fully compensated for the fair market value of the interest in land including any costs and damages related to the termination.

(5) The easement administration action will not affect more than 10 percent of the original easement area unless NRCS determines that it is impracticable to achieve program purposes on the original easements area, in which case NRCS may authorize a greater percentage of the original easement area to be affected.

(6) The landowner and, if applicable, the agricultural land easement holder agrees to such easement administration action prior to NRCS considering that such easement administration action may be approved.

(b) Easement subordinations or modifications are preferred to easement exchanges that may involve lands that are not physically adjacent to the original easement area. Easement exchanges are limited to circumstances where there are no available lands adjacent to the original easement area that will result in equal or greater conservation and economic values to the United States.

(c) Replacement of easement acres as part of an easement exchange must occur within the same State and within the same eight-digit watershed as determined by the hydrologic unit codes developed by the U.S. Geological Survey.

(d) Where NRCS determines that recordation of an amended or new easement deed is necessary to affect an easement administration action under this section, NRCS may use the most recent version of the ACEP deed document or deed terms approved by NRCS. The amended or new easement deed must be duly prepared and recorded in conformity with standard real estate practices, including requirements for title approval, subordination of liens, and recordation of documents.

(e) Modification or exchange of all or a portion of an interest in land enrolled in ACEP-ALE may not increase any payment to an easement holder.

(f)(1) A termination action must meet criteria identified in this part and are limited to those circumstances where NRCS determines it is in the Federal Government's interest to terminate all or a portion of the interest in the land enrolled in the program, that the purposes of the program can no longer be achieved on the original easement area, or the terms of the easement are no longer enforceable and there are no acceptable replacement acres available.

(2) NRCS will enter into a compensatory agreement with the proponent of the termination that identifies the costs for which the United States must be reimbursed, including but not limited to the value of the easement itself based upon current valuation methodologies, repayment of legal boundary survey costs, legal title work costs, associated easement purchase and restoration costs, legal filing fees, costs relating to the termination, and any damages determined appropriate by NRCS.

(3) At least 90 days prior to taking any termination action, written notice of such termination action will be provided to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate.

(g) Insofar as is consistent with the easement and applicable law, NRCS may approve modifications to an easement plan that do not affect provisions of the easement. Easement plans include any conservation plan, WRPO, wetland reserve easement restoration agreements, grazing management plan, habitat management plans, or other plans required as a condition of enrollment. Any easement plan modification must meet this part and must result in equal or greater conservation benefits on the enrolled land.

**§ 1468.7 Transfer of land.**

(a) *Offers voided.* Any transfer of the property prior to recording the easement in the applicable land records or executing the 30-year contract may void the availability of ACEP funding for that transaction, unless the new landowner is determined eligible, the transfer is approved by NRCS, and the new landowner is willing to comply with ACEP requirements.

(b) *Payments to participants.* For wetland reserve easements with annual installment payments, any remaining easement payments will be made to the original participants unless NRCS receives an assignment of proceeds.

(c) *Claims to payments.* With respect to any and all payments owed to participants, NRCS will bear no responsibility for any full payments or partial distributions of funds between the original participant and the participant's successor. In the event of a dispute or claim on the distribution of payments, NRCS may withhold payments without the accrual of interest pending an agreement or adjudication on the rights to the funds.

**§ 1468.8 Payments not subject to claims.**

Any cost-share, contract, agreement, or easement payment or portion, thereof, due any person, legal entity, Indian Tribe, eligible entity, or other party under this part will be allowed without regard to any claim or lien in favor of any creditor, except agencies of the United States.

**§ 1468.9 Assignments.**

Any person, legal entity, Indian Tribe, eligible entity, or other party entitled to any cash payment under this program may assign the right to receive such cash payments, in whole or in part.

**§ 1468.10 Environmental markets.**

(a) *Ecosystem services credits for conservation improvements under a wetland reserve easement.* 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.

(b) *Ecosystem services credits related to an agricultural land easement.* 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 interests granted under the easement to the grantee or to the United States right of enforcement.

(c) *Voluntary action.* 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.

**Subpart B—Agricultural Land Easements****§ 1468.20 Program requirements.**

(a) *General.* (1) Under ACEP–ALE, NRCS will facilitate and provide cost-share assistance for the purchase by eligible entities of agricultural land easements or other interests in eligible private or Tribal land that is—

(i) Subject to a written pending offer; or

(ii) Owned or in the process of being purchased by the eligible entity as part of an approved buy-protect-sell transaction.

(2) To participate in ACEP–ALE, eligible entities as identified in (b) below must submit applications to NRCS State offices to partner with NRCS to acquire conservation easements on eligible land. Eligible entities must enter into an ALE-agreement with NRCS and address the ACEP–ALE deed requirements specified therein, the effect of which is to protect natural resources and the agricultural nature of the land and permit the landowner the right to continue agricultural production and related uses.

(3) Under the ALE-agreement, unless otherwise specified in this part, the Federal share of the cost of an agricultural land easement or other interest in eligible land will not exceed 50 percent of the fair market value of the agricultural land easement and the eligible entity will provide a share that is at least equivalent to the Federal share.

(4) The duration of each agricultural land easement or other interest in land will be in perpetuity or the maximum duration allowed by State law.

(b) *Entity eligibility.* (1) To be eligible to receive ACEP–ALE funding, an Indian Tribe, State, unit of local government, or a nongovernmental organization must meet the definition of eligible entity as listed in § 1468.3. In addition, eligible entities interested in receiving ACEP–ALE funds must provide NRCS sufficient evidence of—

(i) A commitment to long-term conservation of agricultural lands,

(ii) A capability to acquire, manage, and enforce easements,

(iii) Sufficient number of staff dedicated to monitoring and easement stewardship,

(iv) The estimated easement and related costs and the anticipated sources of funding sufficient to meet the non-Federal share requirements for each parcel as described in § 1468.24, and

(v) For individual parcels on which the eligible entity's own cash resources will comprise less than 10 percent of the fair market value of the agricultural land easement for payment of easement compensation to the landowner, the eligible entity must provide NRCS specific evidence of funding available to manage, monitor, and enforce the easement.

(2) All eligible entities identified on an application or ALE-agreement must—

(i) Ensure that their records and the records of all landowners of parcels identified on an application have been established in the USDA customer records system and that USDA has all the documentation needed to establish these records, and

(ii) Eligible entities must also comply with applicable registration and reporting requirements of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282, as amended) and 2 CFR parts 25 and 170, and maintain such registration for the duration of the ALE-agreement.

(c) *Landowner eligibility.* Under ACEP–ALE, all parcel landowners, including an eligible entity owner of private or Tribal land in an approved buy-protect-sell transaction, must—

(1) Be in compliance with the highly erodible land and wetland conservation provisions in 7 CFR part 12,

(2) Persons or legal entities must be in compliance with the Adjusted Gross Income Limitation provisions of 7 CFR part 1400;

(3) Agree to provide access to the property and such information to NRCS as the agency deems necessary or desirable to assist in its determination of eligibility for program implementation purposes; and

(4) Have their records established in the USDA customer records system.

(d) *Land eligibility.* (1) Land will only be considered eligible for enrollment in ACEP–ALE based on NRCS determination that such private or Tribal agricultural land, including land on a farm or ranch that—

(i) Is subject to a written pending offer by an eligible entity or part of an approved buy-protect-sell transaction;

(ii)(A) Contains at least 50 percent prime or unique farmland, or designated farm and ranch land of State or local importance unless otherwise determined by NRCS,

(B) Contains historical or archaeological resources,

(C) The enrollment of which would protect grazing uses and related conservation values by restoring or conserving land, or

(D) Furthers a State or local policy consistent with the purposes of the ACEP–ALE;

(iii) Is—

(A) Cropland;

(B) Rangeland;

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

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

(E) Pastureland; or

(F) Nonindustrial private forest land that contributes to the economic viability of a parcel offered for enrollment or serves as a buffer to protect such land from development; and

(iv) Possesses suitable onsite and offsite conditions which will allow the easement to be effective in achieving the purposes of the program.

(2) If land offered for enrollment is determined eligible under paragraph (d)(1) of this section, then NRCS may also enroll land that is incidental to the eligible land if the incidental land is determined by NRCS to be necessary for the efficient administration of an agricultural land easement.

(3) Eligible land, including eligible incidental land, may not include nonindustrial private forest land of greater than two-thirds of the easement area unless waived by NRCS with respect to lands identified by NRCS as sugar bush that contributes to the economic viability of the parcel.

(e) *Ineligible land.* The land specified in paragraphs (e)(1) through (7) of this section is not eligible for enrollment in ACEP–ALE:

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

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

(3) Land owned by a nongovernmental organization whose purpose is to protect agricultural use and related conservation values including those listed in the statute under eligible land unless the eligible land is owned on a transitional basis as

part of an approved buy-protect-sell transaction;

(4) Land subject to an easement or deed restriction which, as determined by NRCS, provides similar restoration and protection as would be provided by enrollment in the program;

(5) Land where the purposes of the program would be undermined due to onsite or offsite conditions, such as risk of hazardous materials, permitted or existing rights-of-way, infrastructure development, or adjacent land uses;

(6) Land which NRCS determines to have unacceptable exceptions to clear title or insufficient legal access; or

(7) Land on which gas, oil, earth, or mineral rights exploration has been leased or is owned by someone other than the landowner is ineligible under ACEP–ALE unless it is determined by NRCS that the third-party rights will not harm or interfere with the conservation values or agricultural uses of the easement, that any methods of exploration and extraction will have only a limited and localized impact on the easement, and the limitations are specified in the ALE deed.

(f) *Buy-Protect-Sell transaction land eligibility.* (1) NRCS may enter into a buy-protect sell transaction with an eligible entity on a parcel that—

(i) Otherwise meets the eligibility criteria described in this section,

(ii) Is subject to conditions, as determined by NRCS, that necessitate the ownership of the parcel by the eligible entity on a transitional basis prior to the creation of an agricultural land easement, such as imminent threat of development, including, but not limited to, planned or approved conversion of grasslands to more intensive agricultural uses, and

(iii) Is owned by or is in the process of being purchased by the eligible entity.

(2) At the time of application, the eligible entity must provide NRCS evidence of ownership or active purchase of the parcel, such as a valid purchase agreement.

(3) The eligible entity must meet all program requirements and any specific provisions related to buy-protect-sell transactions as specified in this part.

#### § 1468.21 Application procedures.

(a) To apply for enrollment an eligible entity must submit an entity application for an ALE-agreement and any associated individual parcel applications to NRCS. For buy-protect-sell transactions, additional information may be required at the time of application as identified by NRCS.

(b) NRCS may conduct initial eligibility determinations for the fiscal

year an application is submitted. As determined by NRCS, the entity eligibility requirements must be met for the fiscal year in which the ALE-agreement is executed, and the land and landowner must be eligible for the fiscal year the parcel is approved for funding through an ALE-agreement. NRCS eligibility determinations are based on the application materials provided by the eligible entity, onsite assessments, and the criteria in § 1468.20.

#### § 1468.22 Establishing priorities, ranking considerations, and project selection.

(a) NRCS will use national and State criteria to rank and select eligible parcels for funding. The national ranking criteria will comprise at least half of the ranking score. The State criteria will be developed by NRCS on a State-by-State basis, with input from the State technical committee. The weighting of ranking criteria, including adjustments to account for geographic differences, will be developed to maximize the benefit of the Federal investment under the program. Parcels are ranked and selected for funding at the State level.

(b) The national ranking criteria are—

(1) Percent of prime, unique, and other important farmland soils in the parcel to be protected;

(2) Percent of cropland, rangeland, grassland, historic grassland, pastureland, or nonindustrial private forest land in the parcel to be protected;

(3) Ratio of the total acres of land in the parcel to be protected to average farm size in the county according to the most recent USDA Census of Agriculture;

(4) Decrease in the percentage of acreage of farm and ranch land in the county in which the parcel is located between the last two USDA Censuses of Agriculture;

(5) Percent population growth in the county as documented by the United States Census;

(6) Population density (population per square mile) as documented by the most recent United States Census;

(7) Existence of a farm or ranch succession plan or similar plan established to address agricultural viability for future generations;

(8) Proximity of the parcel to other protected land, such as military installations; land owned in fee title by the United States or an Indian Tribe, State or local government, or by a nongovernmental organization whose purpose is to protect agricultural use and related conservation values; or land that is already subject to an easement or deed restriction that limits the conversion of the land to

nonagricultural use or protects grazing uses and related conservation values;

(9) Proximity of the parcel to other agricultural operations and agricultural infrastructure;

(10) Maximizing the protection of contiguous or proximal acres devoted to agricultural use;

(11) Whether the land is currently enrolled in CRP in a contract that is set to expire within 1 year and is grassland that would benefit from protection under a long-term easement;

(12) Decrease in the percentage of acreage of permanent grassland, pasture, and rangeland, other than cropland and woodland pasture, in the county in which the parcel is located between the last two USDA Censuses of Agriculture;

(13) Percent of the fair market value of the agricultural land easement that is the eligible entity's own cash resources for payment of easement compensation to the landowner and comes from sources other than the landowner; and

(14) Other criteria as determined by NRCS.

(c) State or local criteria as determined by NRCS, with advice of the State technical committee, may only include—

(1) The location of a parcel in an area zoned for agricultural use;

(2) The eligible entity's performance in managing and enforcing easements. Performance must be measured by the efficiency by which easement transactions are completed or percentage of parcels that have been monitored and the percentage of monitoring results that have been reported;

(3) Multifunctional benefits of farm and ranch land protection including—

(i) Social, economic, historic, and archaeological benefits;

(ii) Enhancing carbon sequestration;

(iii) Improving climate change resiliency;

(iv) At-risk species protection;

(v) Reducing nutrient runoff and improving water quality;

(vi) Other related conservation benefits.

(4) Geographic regions where the enrollment of particular lands may help achieve national, State, and regional agricultural or conservation goals and objectives, or enhance existing government or private conservation projects;

(5) Diversity of natural resources to be protected or improved;

(6) Score in the land evaluation and site assessment system as identified in 7 CFR part 658 or equivalent measure for grassland enrollments, to serve as a measure of agricultural viability (access to markets and infrastructure);

(7) Measures that will be used to maintain or increase agricultural viability, such as succession plans, agricultural land easement plans, or entity deed terms that specifically address long-term agricultural viability; and

(8) Other criteria determined by NRCS that will account for geographic differences provided such criteria allow for the selection of parcels that will achieve ACEP–ALE purposes and continue to maximize the benefit of the Federal investment under the program.

(d) If NRCS determines that the purchase of two or more agricultural land easements are comparable in achieving program goals, NRCS will not assign a higher priority to any one of these agricultural land easements solely on the basis of lesser cost to the program.

(e) NRCS will rank all eligible parcels that have been submitted prior to an application cut-off date in accordance with the national and State ranking criteria before selecting parcels for funding.

(f) Eligible parcels selected for funding by NRCS will be identified in an agreement executed by NRCS and an eligible entity, either as part of the ALE-agreement or through a supplemental arrangement as agreed to by the parties.

(g) Pursuant to the terms of the ALE-agreement, eligible parcels may be selected for funding in a fiscal year subsequent to the fiscal year in which the parties entered into an ALE-agreement.

#### § 1468.23 ALE-agreements.

(a) NRCS will enter into an ALE-agreement with a selected eligible entity that stipulates the terms and conditions under which the eligible entity is permitted to use ACEP–ALE funding and will incorporate all ACEP–ALE requirements. NRCS will make available to eligible entities the ALE-agreement terms and conditions, including any applicable templates, based on enrollment type. The ALE-agreement will address—

(1) The interests in land to be acquired, including the United States' right of enforcement, the deed requirements specified in this part, as well as the other terms and conditions of the easement deed;

(2) The management and enforcement of the rights on lands acquired with ACEP–ALE funds;

(3) The responsibilities of NRCS;

(4) The responsibilities of the eligible entity on easements acquired with ACEP–ALE funds;

(5) The requirement for any conservation plan for highly erodible

cropland or agricultural land easement plans to be developed as required or agreed-to prior to execution of the easement deed and payment of easement compensation to the landowner;

(6) As applicable, the allowance of eligible parcel substitution upon mutual agreement of the parties;

(7) The certification by the landowner at the time of easement execution and payment of easement compensation of the extent of any charitable contribution or other donation the landowner has provided to the eligible entity;

(8) The submission of documentation of procured costs for each parcel, including appraisal, boundary survey, phase-I environmental site assessment, title commitment or report, title insurance, and closing cost if such procured costs are to be considered as part of the eligible entity's non-Federal share; and

(9) Other requirements deemed necessary by NRCS to meet the purposes of this part or protect the interests of the United States.

(10) For buy-protect-sell transactions, the ALE-agreement will also include the requirements identified in § 1468.27.

(b) The term of standard ALE-agreements, except as described in § 1468.27 for ALE-agreements for approved buy-protect-sell transactions, will be:

(1) Up to 5 fiscal years following the fiscal year the agreement is signed for certified entities; and

(2) Up to 3 fiscal years and not to exceed 5 fiscal years following the fiscal year the agreement is signed for other eligible entities.

(c) Eligible parcels selected for funding by NRCS will be identified on an attachment to the ALE-agreement. The attachment will include landowners' names, acreage of the easement area, the estimated fair market value, the estimated Federal contribution, and other relevant information.

(d) The ALE-agreement will require the eligible entity to comply with applicable registration and reporting requirements of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282, as amended) and 2 CFR parts 25 and 170.

(e) With NRCS approval, the eligible entity may substitute acres within a pending easement offer. Substituted acres must not reduce the easements capability in meeting program purposes.

(f) With NRCS approval, an eligible entity may substitute pending easement offers within a standard ALE-agreement. The substituted landowner and easement offer must meet eligibility

criteria as described in § 1468.20. NRCS may require re-ranking of substituted acres within an easement offer and substituted easement offers within an ALE-agreement. Substitutions are not authorized under ALE-agreements for buy-protect-sell transactions.

**§ 1468.24 Compensation and funding for agricultural land easements.**

(a) *Determining the fair market value of the agricultural land easement.* (1) The Federal share will not exceed 50 percent of the fair market value of the agricultural land easement, as determined using—

(i) An appraisal using the Uniform Standards of Professional Appraisal Practices or the Uniform Appraisal Standards for Federal Land Acquisitions,

(ii) An areawide market analysis or survey, or

(iii) Another industry-approved method approved by NRCS.

(2) Prior to receiving funds for an agricultural land easement, the eligible entity must provide NRCS with an acceptable determination of the fair market value of the agricultural land easements that conforms to applicable industry standards and NRCS specifications and meets the requirements of this part.

(3) If the value of the easement is determined using an appraisal, the appraisal must be completed and signed by a State-certified general appraiser and must contain a disclosure statement by the appraiser. The appraisal must conform to the Uniform Standards of Professional Appraisal Practices or the Uniform Appraisal Standards for Federal Land Acquisitions as selected by the eligible entity.

(4) If the fair market value of the easement is determined using an areawide market analysis or survey, the areawide market analysis or survey must be completed and signed by a person determined by NRCS to have professional expertise and knowledge of agricultural land values in the area subject to the areawide market analysis or survey. The use of areawide market analysis or survey must be approved by NRCS prior to entering into an ALE-agreement.

(5) Requests to use another industry-approved method must be submitted to NRCS and approved by NRCS prior to entering into the ALE-agreement. NRCS will identify the applicable industry standards and any associated NRCS specifications based on the methodology approved.

(6) NRCS will review for quality assurance purposes, appraisals, areawide market analysis or surveys,

valuation reports, or other information resulting from another industry-approved method approved for use by NRCS.

(7) Eligible entities must provide a copy of the applicable report or other information used to establish the fair market value of the agricultural land easement to NRCS at least 90 days prior to the planned easement closing date.

(8) Prior to the eligible entity's purchase of the easement, including payment of easement compensation to the landowner, NRCS must approve the determination of the fair market value of the agricultural land easement upon which the Federal share will be based.

(b) *Determining the Federal share of the agricultural land easement.* (1) Subject to the statutory limits, NRCS may provide up to 50 percent of the fair market value of the agricultural land easement. An eligible entity will provide a non-Federal share that is at least equivalent to the Federal share.

(2) The non-Federal share provided by an eligible entity may be comprised of—

(i) The eligible entity's own cash resources for payment of easement compensation to the landowner;

(ii) A charitable donation or qualified conservation contribution (as defined by section 170(h) of the Internal Revenue Code of 1986) from the landowner;

(iii) The procured costs paid by the eligible entity to a third-party for an appraisal, boundary survey, phase-I environmental site assessment, title commitment or report, title insurance, or closing cost; and

(iv) Up to 2 percent of the fair market value of the agricultural land easement for easement stewardship and monitoring costs where the costs as identified in paragraphs (b)(2)(i) through (iii) of this section are not sufficient to meet the non-Federal share;

(3) NRCS may authorize a waiver to increase the Federal share of the cost of an agricultural land easement to an amount not to exceed 75 percent of the fair market value of the agricultural land easement if—

(i) NRCS determines the lands to be enrolled are grasslands of special environmental significance as defined in this part,

(ii) An eligible entity provides a non-Federal share that is at least equivalent to the Federal share or comprises the remainder of the fair market value of the agricultural land easement, whichever is less, and

(iii) The eligible entity agrees to incorporate and enforce the additional necessary deed restrictions to manage and enforce the easement to ensure the grassland of special environmental significance attributes are protected.

(c) *Uses of NRCS ACEP-ALE funds.*

(1) ACEP-ALE funds may not be provided or used for eligible entity expenditures for expenses, such as: Appraisals, areawide market analysis, legal surveys, access, title clearance or title insurance, legal fees, phase I environmental site assessments, closing services, development of agricultural land easement plans or component plans by the eligible entity, costs of easement monitoring, and other related administrative and transaction costs incurred by the eligible entity.

(2) NRCS will conduct its own technical and administrative review of appraisals, areawide market analysis, or other easement valuation reports and hazardous materials reviews.

(3) NRCS may provide technical assistance for the development of a conservation plan on those portions of a parcel that contain highly erodible cropland, or if requested, to assist in compliance with the terms and conditions of easements.

**§ 1468.25 Agricultural land easement deeds.**

(a) Under ACEP-ALE, a landowner grants an easement to an eligible entity with which NRCS has entered into an ALE-agreement. The easement deed will require that the easement area be maintained in accordance with ACEP-ALE goals and objectives for the term of the easement.

(b) The term of an agricultural land easement must be in perpetuity, except where State law prohibits a permanent easement. In such cases where State law limits the term of a conservation easement, the easement term will be for the maximum duration allowed under State law.

(c) The eligible entity may use its own terms and conditions in the agricultural land easement deed, but the agricultural land easement deed must address the deed requirements as specified by this part and by NRCS in the ALE-agreement.

(d) All deeds, as further specified in the ALE-agreement, must address the following regulatory deed requirements:

(1) Include a right of enforcement clause for NRCS. NRCS will specify the terms for the right of enforcement clause, including that such interest in the agricultural land easement:

(i) May be used only if the terms and conditions of the easement are not enforced by the eligible entity;

(ii) Extends to a right of inspection only if the holder of the easement fails to provide monitoring reports in a timely manner or NRCS has a reasonable and articulable belief that the



terms and conditions of the easement have been violated;

(iii) Remains in effect for the duration of the easement and any changes that affect NRCS's interest in the agricultural land easement must be reviewed and approved by NRCS under § 1468.6 of this part.

(2) Specify that impervious surfaces will not exceed 2 percent of the ACEP-ALE easement area, excluding NRCS-approved conservation practices unless NRCS grants a waiver as follows:

(i) The eligible entity may request a waiver of the 2-percent impervious surface limitation at the time an individual parcel is approved for funding.

(ii) NRCS may waive the 2-percent impervious surface limitation on an individual easement basis, provided that no more than 10 percent of the easement area is covered by impervious surfaces.

(iii) Before waiving the 2 percent limitation, NRCS will consider, at a minimum, population density; the ratio of open, prime, and other important farmland versus impervious surfaces on the easement area; the impact to water quality concerns in the area; the type of agricultural operation; parcel size; and the purposes for which the easement is being acquired.

(iv) Eligible entities may submit an impervious surface limitation waiver process to NRCS for review and consideration. The eligible entities must apply any approved impervious surface limitation waiver processes on an individual easement basis, and

(v) NRCS will not approve blanket waivers or entity blanket waiver processes of the impervious surface limitation. All ACEP-ALE easements must include language limiting the extent of impervious surfaces within the easement area.

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

(4) Include an amendment clause requiring that any changes to the easement deed after its recordation must be consistent with the purposes of the agricultural land easement and this part. Any substantive amendment, including any subordination of the terms of the easement or modifications, exchanges, or terminations of the easement area, must be approved by NRCS and the easement holder in accordance with § 1468.6 prior to recordation or else the action is null and void.

(5) Prohibit commercial and industrial activities except those activities that

NRCS has determined are consistent with the agricultural use of the land.

(6) Limit the subdivision of the property subject to the agricultural land easement, except where State or local regulations explicitly require subdivision to construct residences for employees working on the property or where otherwise authorized by NRCS.

(7) Prohibit subsurface mineral development unless the terms of the deed, as determined by NRCS, specify that any subsurface mineral development allowed by the eligible entity on the easement area must—

(i) Be conducted in accordance with applicable State law;

(ii) Have a limited and localized impact;

(iii) Not harm the agricultural use and conservation values of the land subject to the easement;

(iv) Not materially alter or affect the existing topography;

(v) Comply with a subsurface mineral development plan that includes a plan for the remediation of impacts to the agricultural use or conservation values of the land subject to the easement and is approved by NRCS prior to the initiation of mineral development activity;

(vi) Not be accomplished by any surface mining method;

(vii) Be within the impervious surface limits of the easement under paragraph (d)(2) of this section;

(viii) Use practices and technologies that minimize the duration and intensity of impacts to the agricultural use and conservation values of the land subject to the easement; and

(ix) Ensure that each area impacted by the subsurface mineral development are reclaimed and restored by the holder of the mineral rights at cessation of operation.

(8) Include specific protections related to the purposes for which the agricultural land easement is being acquired, including provisions to protect historical or archaeological resources or grasslands of special environmental significance.

(9) For parcels with highly erodible cropland, include terms that ensure compliance with the conservation plan that will be developed and managed in accordance with the Food Security Act of 1985, as amended, and its associated regulations.

(10) Include any additional provisions needed to address the attributes for which a parcel was ranked and selected for funding by NRCS, such as the purchase of the agricultural land easement, the development and maintenance of an agricultural land easement plan, or use of the minimum

deed terms as described in paragraph (f) of this section.

(11) Include terms, if required by the eligible entity, that identify an intent to keep the land subject to the agricultural land easement under ownership of a farmer or rancher.

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

(e) NRCS reserves the right to require additional specific language or require removal of language in the agricultural land easement deed to ensure the enforceability of the easement deed, protect the interests of the United States, or to otherwise ensure ALE purposes will be met.

(f) For eligible entities that have not been certified, the deed document must be reviewed and approved by NRCS in advance of use as provided herein:

(1) NRCS will make available for an eligible entity's use a standard set of minimum deed terms that satisfactorily address the deed requirements in paragraph (d) of this section and may be wholly incorporated along with the eligible entity's own deed terms into the agricultural land easement deed, or as an addendum that is attached and incorporated by reference into the deed. The standard minimum deed terms addendum will specify the terms that will prevail in the event of a conflict.

(2) If an eligible entity agrees to use the standard set of minimum deed terms as published by NRCS, NRCS and the eligible entity will identify in the ALE-agreement the use of the standard minimum deed terms as a requirement and National Office review of individual deeds may not be required. NRCS may place priority on applications where an eligible entity agrees to use the standard set of minimum deed terms as published.

(3) The eligible entity must submit all individual agricultural land easement deeds to NRCS at least 90 days before the planned easement closing date and be approved by NRCS in advance of use.

(4) Eligible entities with multiple eligible parcels may submit an agricultural land easement deed template for review and approval. The deed templates must be reviewed and approved by NRCS in advance of use.

(5) NRCS may conduct an additional review of the agricultural land easement deeds for individual parcels prior to the execution of the easement deed by the landowner and the eligible entity to ensure that they contain the same language as approved by the National Office and that the appropriate site-specific information has been included.

(g) The eligible entity will acquire, hold, manage, monitor, and enforce the

easement. The eligible entity may have the option to enter into an agreement with appropriately qualified governmental or private organizations that have no property rights or interests in the easement area to carry out easement monitoring, management, and enforcement responsibilities.

(h) All agricultural land easement deeds acquired with ACEP–ALE funds must be recorded. The eligible entity will provide proof of recordation to NRCS within the timeframe specified in the ALE-agreement.

**§ 1468.26 Eligible entity certification.**

(a) To be considered for certification, an entity must submit a written request for certification to NRCS, which specifically addresses the items in paragraphs (a)(1) through (7) of this section:

(1) An explanation of how the entity meets the requirements identified in § 1468.20(b) of this section;

(2) An agreement to use for ACEP–ALE funded acquisitions easement valuation methodologies identified in section § 1468.24 of this part;

(3) A showing of a demonstrated record of completing acquisition of easements in a timely fashion;

(4) A showing that it has the capacity to monitor and enforce the provisions of easement deeds and history of such monitoring and enforcement;

(5) A plan for administering easements enrolled under this part, as determined by NRCS;

(6) Proof that the eligible entity—

(i) Has been accredited by the Land Trust Accreditation Commission and has acquired not fewer than 10 agricultural land easements under ACEP–ALE, the Farm and Ranch Lands Protection Program, or the Farmland Protection Program;

(ii) Is a State department of agriculture or other State agency with statutory authority for farm and rangeland protection and has acquired not fewer than 10 agricultural land easements under ACEP–ALE or its predecessor programs; or

(iii) Holds, manages, and monitors a minimum of 25 agricultural land conservation easements, of which a minimum of 10 of these easements are agricultural land easements under ACEP–ALE or its predecessor programs, and if the eligible entity is a nongovernmental organization, provides evidence that the eligible entity possesses a dedicated fund for the purposes of managing, monitoring, and enforcing each easement held by the eligible entity; and

(7) Successfully met the responsibilities of the eligible entity

under the applicable agreements with NRCS, as determined by NRCS, relating to agricultural land easements that the eligible entity has acquired under the program or any predecessor program;

(b) NRCS will notify an eligible entity in writing whether they have been certified and the rationale for the agency's decision. When NRCS determines an eligible entity qualifies as certified—

(1) NRCS may enter into an ALE-agreement with the certified entity that is for a period of up to 5 fiscal years following the fiscal year the agreement is executed. NRCS will review and select parcel applications submitted for funding by certified entities as specified in § 1468.22. Funding for selected parcels is identified on an attachment to the ALE-agreement.

(2) The terms of the ALE-agreement will include the regulatory deed requirements specified in § 1468.25 of this part that must be addressed in the deed to ensure that ACEP–ALE purposes will be met without requiring NRCS to pre-approve each easement transaction prior to closing.

(i) Certified entities may purchase easements without NRCS approving the agricultural land easement deeds, baseline reports, titles, or appraisals before the purchase of the easement;

(ii) Certified entities will prepare the agricultural land easement deeds, baseline reports, titles, and appraisals in accordance with NRCS requirements as identified in the ALE-agreement;

(3) NRCS will conduct quality assurance reviews of a percentage of the closed agricultural land easement transactions and annual monitoring reports submitted by the certified entity; and

(4) NRCS will provide the certified entity an opportunity to correct errors or remedy deficiencies identified in the NRCS quality assurance review. If the certified entity fails to remedy the identified items to NRCS's satisfaction, NRCS will consider whether to allow the certified entity to continue to purchase ALE-funded easements without prior NRCS approval, to decertify the entity in accordance with paragraph (c) of this section, or, require the certified entity to take administrative steps necessary to remedy the deficiencies.

(c)(1) NRCS will conduct a quality assurance review of the certified entity a minimum of once every 3 fiscal years to ensure that the certified entities are meeting the certification criteria established in this section.

(2) If NRCS determines that the certified entity no longer meets these criteria, the Chief will—

(i) Provide the certified entity a specified period of time, at a minimum 180 days, in which to take such actions as may be necessary to correct the identified deficiencies, and

(ii) If NRCS determines the certified entity does not meet the criteria established in this part after the 180 days, NRCS will send written notice of decertification. This notice will specify the actions that have not been completed to retain certification status, the actions the entity must take to regain certification status, the status of funds in the ALE-agreement; and the eligibility of the entity to apply for future ACEP–ALE funds. The entity may contest the notice of decertification in writing to NRCS within 20 calendar days of receipt of the notice of decertification. The entity's letter must provide specific reasons why the decision to decertify is in error.

(3) The period of decertification may be up to 3 years, based upon the circumstances associated with the action.

(4) The entity may submit a new request for certification to NRCS only after the decertification period has expired.

**§ 1468.27 Buy-Protect-Sell transactions.**

(a) NRCS may enter into an ALE-agreement with an eligible entity for a buy-protect-sell transaction to provide cost-share assistance for the purchase of an agricultural land easement on eligible private or Tribal agricultural land that an eligible entity owns or is in the process of purchasing for the purposes of securing the long-term protection of natural resources and the agricultural nature of the land and ensuring timely transfer to a qualified farmer or rancher.

(b) At the time the individual parcel application is submitted, the eligible entity must identify the specific buy-protect-sell transaction type as either—

(1) Pre-closing transfer, wherein the eligible entity will transfer fee title ownership to a farmer or rancher at or prior to closing on the agricultural land easement and the eligible entity will hold the agricultural land easement prior to receiving the Federal share, or

(2) Post-closing transfer, wherein the eligible entity will transfer fee title ownership to a farmer or rancher not later than 3 years after closing on the agricultural land easement, unless an extension of such time has been authorized by NRCS based on documentation of extenuating circumstances provided by the eligible entity.

(c) The ALE-agreement must contain the information described in § 1468.23

and must specify the details of the legal arrangement for the individual buy-protect-sell transaction, including that for all buy-protect-sell transactions the eligible entity must—

(1) Own the land or within 12 months of execution of the ALE-agreement for the buy-protect-sell transaction by both NRCS and the eligible entity, and the eligible entity has completed or has demonstrated to the satisfaction of NRCS that completion of the purchase of the land is imminent.

(2) Make an initial sale of the land to a farmer or rancher that is or will be subject to the agricultural land easement pursuant to the terms of the ALE-agreement.

(3) Sell the land to the farmer or rancher for a purchase price that does not exceed the lesser of—

(i) The original purchase price of the land paid by the eligible entity; or

(ii) The agricultural value as determined by an appraisal.

(4) Ensure that amounts included in the sale of the land to the farmer or rancher for reasonable holding and transaction costs incurred by the eligible entity in total do not exceed more than 10 percent of the agricultural value.

(5) Submit documentation satisfactory to NRCS that confirms the sale of the land that is or will be subject to the agricultural land easement meets the buy-protect-sell transaction requirements. Pursuant to the terms and conditions of the ALE-agreement for the buy-protect-sell transaction, the eligible entity must provide—

(i) Evidence that the purchaser of the land is a qualified farmer or rancher,

(ii) Documentation of the purchase price for the land paid by the eligible entity,

(iii) The appraisal used to determine the agricultural value of the land,

(iv) An itemized list of the allowable holding or transaction costs included in the sales price,

(v) A copy of the settlement statements identifying the sale price and all holding and transactions costs charged to the farmer or rancher purchaser, and

(vi) Other documents as specified by NRCS in the ALE-agreement.

(6) Reimburse NRCS for the entirety of the Federal share provided if, as determined by NRCS, the eligible entity failed to transfer ownership per the terms and conditions of the ALE-agreement for the buy-protect-sell transaction.

(d) In addition to the requirements identified in paragraph (c) of this section, for buy-protect-sell transactions that involve a pre-closing transfer as

required by paragraph (b)(1) of this section:

(1) The maximum duration of the ALE-agreement may be the same as described in § 1468.23(b).

(2) The Federal share for the agricultural land easement will be provided on a reimbursable basis only, after the agricultural land easement has closed and the required documents have been provided to and reviewed by NRCS.

(e) For buy-protect-sell transactions that involve a post-closing transfer as required by paragraph (b)(2) of this section:

(1) At the time of application, in addition to the information identified § 1468.21, the eligible entity must provide NRCS specific information on the proposed structure of the buy-protect-sell transaction, including the parties to be involved in the transaction, the roles and responsibilities of each party related to the acquisition, holding, monitoring, and enforcement of the easement and the fee title ownership of the land, relevant State law that authorizes such transactions, proposed timeline, and other information identified by NRCS.

(2) NRCS will determine the legal conformance of the proposed arrangement for the buy-protect-sell transaction.

(3) Based on the NRCS determination of legal conformance of the proposed buy-protect-sell transaction, for eligible applications selected for funding based on ranking and availability of funds, NRCS will identify the specific terms of the ALE-agreement for the buy-protect-sell transaction.

(4) The buy-protect-sell transaction must meet the timing requirements in paragraphs (e)(4)(i) through (iv) of this section—

(i) The term of the ALE-agreement for a buy-protect-sell transaction will be for a period no longer than 5 fiscal years following the fiscal year of execution of the ALE-agreement by NRCS and the eligible entity.

(ii) The agricultural land easement must be closed within 2 fiscal years following the fiscal year of ALE-agreement execution, and the sale of the land subject to the agricultural land easement to a qualified farmer or rancher must occur within 3 years of closing on the agricultural land easement.

(iii) Prior to the expiration of the 3-year timeframe, the eligible entity may submit to NRCS a request for an extension that includes documentation of extenuating circumstances and the anticipated timeline, not to exceed 12

months, in which the sale of the land subject to the easement will occur.

(iv) NRCS may, in its discretion, authorize such additional time for the sale of the land subject to the agricultural land easement to a qualified farmer or rancher through a modification to the ALE-agreement.

#### § 1468.28 Violations and remedies.

(a) In the event of a violation of the agricultural land easement terms, the agricultural land easement holder will notify the landowner and the violator, if different than the landowner, and NRCS. The landowner may be given reasonable notice and, where appropriate, an opportunity to voluntarily correct the violation in accordance with the terms of the agricultural land easement.

(b) In the event that the agricultural land easement holder, or its successors or assigns, fails to enforce any of the terms of the agricultural land easement as determined by NRCS, NRCS may exercise the United States' rights to enforce the terms of the agricultural land easement through any and all authorities available under Federal or State law.

(c) Notwithstanding paragraph (a) of this section, NRCS, upon notification to the landowner and the agricultural land easement holder, reserves the right to enter upon the easement area if the annual monitoring report provided by the agricultural land easement holder documenting compliance with the agricultural land easement is insufficient or is not provided annually, the United States has a reasonable and articulable belief that the terms and conditions of the easement have been violated, or to remedy deficiencies or easement violations as it relates to the conservation plan in accordance with 7 CFR part 12.

(d) In the event of an emergency, the entry onto the easement area may be made at the discretion of NRCS when the actions are deemed necessary to prevent, terminate, or mitigate a potential or unaddressed violation with notification to the landowner and the agricultural land easement holder provided at the earliest practicable time. The landowner will be liable for any costs incurred by NRCS as a result of the landowner's failure to comply with the easement requirements as it relates to agricultural land easement violations.

(e) The United States will be entitled to recover any and all costs from the eligible entity, or its successors or assigns, including attorney's fees or expenses, associated with any enforcement or remedial action as it

relates to the enforcement of the agricultural land easement.

(f) In instances where an easement is terminated, the proponent of the termination action must pay to CCC an amount determined by NRCS.

(g) If NRCS exercises its rights identified under an agricultural land easement NRCS will provide written notice to the agricultural land easement holder at their last-known address. The notice will set forth the nature of the noncompliance by the agricultural land easement holder, or its successors or assigns, and provide a 180-day period to cure. If the agricultural land easement holder fails to cure within the 180-day period, NRCS will take the action specified under the notice. NRCS reserves the right to decline to provide a period to cure if NRCS determines that imminent harm may result to the conservation values or other interest in land that it seeks to protect.

### Subpart C—Wetland Reserve Easements

#### § 1468.30 Program requirements.

(a) *General.* (1) Under the ACEP–WRE, NRCS may purchase wetland reserve easements from eligible landowners who voluntarily cooperate to restore, protect, and enhance wetlands on eligible private or Tribal lands. A 30-year contract enrollment option is also available for acreage owned by Indian Tribes.

(2) To participate in ACEP–WRE, a landowner must agree to the implementation of a WRPO, the effect of which is to restore, protect, enhance, maintain, manage, and monitor the hydrologic conditions of inundation or saturation of the soil, native vegetation, and natural topography of eligible lands.

(3) NRCS may provide financial assistance through an easement restoration agreement for the conservation practices and eligible activities that promote the restoration, protection, enhancement, maintenance, and management of wetland functions and values and associated habitats.

(4) For ACEP–WRE enrollments, NRCS may implement such conservation practices and eligible activities through an agreement with the landowner, a contract with a vendor, an interagency agreement, or a cooperative agreement. The specific restoration, protection, enhancement, maintenance, and management actions authorized by NRCS, may be undertaken by the landowner, NRCS, or its designee.

(5) The duration of a wetland reserve easement may be either perpetual, 30-years, or the maximum duration allowed by State law. The duration of a

30-year contract on acreage owned by Indian Tribes is 30 years.

(b) *Acreage limitations.* (1) No more than 25 percent of the total cropland in any county, as determined by the FSA, may be enrolled in CRP and ACEP–WRE, and no more than 15 percent of the total cropland in the county may be subject to an easement under ACEP–WRE.

(2) The limitations in paragraph (b)(1) of this section do not apply to areas devoted to windbreaks or shelterbelts after November 28, 1990, or to cropland designated by NRCS with “subclass w” in the land capability classes IV through VIII because of severe use limitations due to factors related to excess water such as poor soil drainage, wetness, high water table, soil saturation, or inundation.

(3) NRCS and the FSA will concur before a waiver of the 25-percent limit of paragraph (b)(1) of this section can be approved for an easement proposed for enrollment in ACEP–WRE. Such a waiver will only be approved if the waiver will not adversely affect the local economy, and operators in the county are having difficulties complying with the conservation plans implemented under 16 U.S.C. 3812.

(c) *Landowner eligibility.* To be eligible to enroll in the ACEP–WRE, all landowners must be in compliance with the highly erodible land and wetland conservation provisions in 7 CFR part 12. Persons or legal entities must be in compliance with the Adjusted Gross Income Limitation provisions at 7 CFR part 1400 and:

(1) Be the landowner of eligible land for which enrollment is sought;

(2) Provide any documentation required by NRCS as necessary to determine eligibility; and

(3) For easement applications, have been the landowner of such land for the 24-month period prior to the time of application unless it is determined by NRCS that:

(i) The land was acquired by will or succession as a result of the death of the previous landowner or pursuant to the terms of an existing trust,

(ii) The ownership change occurred due to foreclosure on the land and the owner of the land immediately before the foreclosure exercises a right of redemption from the mortgage holder in accordance with State law, or

(iii) The land was acquired under circumstances that give adequate assurances, as determined by NRCS, that such land was not acquired for the purposes of placing it in the program. Adequate assurances will include documentation that the change of

ownership resulted from circumstances such as:

(A) The prior landowner owned the land for 2 years or more and transferred ownership amongst members of the immediate family (father, mother, spouse, children, grandparents, or grandchildren),

(B) A completion of a contract for deed entered into 24 months or more prior to the application date,

(C) The new landowner had leased the land for agricultural purposes for 24 months or more prior to the application date, or

(D) The easement area is a portion of a larger property where the majority portion was acquired for agriculture purposes.

(4) Agree to provide such information to NRCS as the agency deems necessary to assist in its determination of eligibility for program benefits and for other program implementation purposes.

(d) *New landowner.* When a parcel of land that has been accepted for enrollment into the ACEP–WRE is sold or transferred prior to NRCS purchase of the easement, NRCS will cancel the application or agreement to purchase and remove the acres from enrollment unless the new landowner meets the requirements of paragraph (c) of this section and accepts the terms and conditions of enrollment. The new landowner must submit required documentation for NRCS review and execute any required agreements or contracts. The decision to approve and execute an enrollment transferred prior to closing is at NRCS’s discretion.

(e) *Land eligibility.* (1) Only private land or acreage owned by an Indian Tribe may be considered for enrollment into ACEP–WRE.

(2) NRCS will determine whether land is eligible for enrollment and whether, once found eligible, the lands may be included in the program based on the likelihood of successful restoration of such land and resultant wetland functions and values merit inclusion of such land in the program when considering the cost of acquiring the easement and the cost of the restoration, protection, enhancement, maintenance, management, and monitoring.

(3) Land will only be considered eligible for enrollment in the ACEP–WRE if NRCS determines that the enrollment of such land maximizes wildlife benefits and wetland function and values.

(4) To be determined eligible, NRCS must also determine that such land is—

(i) Farmed wetland or converted wetland, together with adjacent lands that are functionally dependent on the

wetlands, if such land is identified by NRCS as:

(A) Wetlands farmed under natural conditions, farmed wetlands, prior converted cropland, commenced conversion wetlands, farmed wetland pastures, and agricultural lands substantially altered by flooding so as to develop and retain wetland functions and values; or

(B) Former or degraded wetlands that occur on lands that have been used or are currently being used for the production of food and fiber, including rangeland and forest production lands, where the hydrology has been significantly degraded or modified and will be substantially restored; or

(C) Farmed wetland and adjoining land enrolled in CRP that has the highest wetland functions and values and is likely to return to production after the land leaves CRP; or

(D) A riparian area along a stream or other waterway that links, or after restoring the riparian area, will link wetlands protected by the ACEP–WRE easement, another easement, or other device or circumstance that achieves the same objectives as an ACEP–WRE easement.

(ii) Cropland or grassland that was used for agricultural production prior to flooding from the natural overflow of—

(A) A closed basin lake, together with adjacent land that is functionally dependent upon it, if the State or other entity is willing to provide a 50-percent share of the cost of the easement; or

(B) A pothole and adjacent land that is functionally dependent on it; and

(C) The size of the parcel offered for enrollment is a minimum of 20 contiguous acres. Such land meets the requirement of likelihood of successful restoration only if the soils are hydric and the depth of water is 6.5 feet or less.

(5) If land offered for enrollment is determined eligible under this section, then NRCS may also enroll land adjacent or contiguous to such eligible land together with the eligible land, if such land maximizes wildlife benefits and contributes significantly to wetland functions and values. Such adjacent or contiguous land may include buffer areas, created wetlands, noncropped natural wetlands, riparian areas that do not meet the requirements of paragraph (e)(4)(i)(D) of this section, and restored wetlands, but not more than NRCS, in consultation with the State technical committee, determines is necessary to maximize wildlife benefits and contribute significantly to wetland functions and values. NRCS will not enroll as eligible adjacent or contiguous land any constructed wetlands that treat wastewater or contaminated runoff.

(6) To be enrolled in the program, eligible land must have sufficient access and be configured in a size and with boundaries that allow for the efficient management and monitoring of the area for program purposes and otherwise promote and enhance program objectives as determined by NRCS.

(f) *Enrollment of CRP lands.* Land subject to an existing CRP contract may be enrolled in ACEP–WRE only if the land and landowner meet the requirements of this part and the enrollment is requested by the landowner and agreed to by NRCS. To enroll in ACEP–WRE, the CRP contract for the property must be terminated or otherwise modified subject to such terms and conditions as are mutually agreed upon by FSA and the landowner.

(g) *Ineligible land.* The land specified in paragraphs (g)(1) through (7) of this section is not eligible for enrollment in the ACEP–WRE:

(1) Converted wetlands if the conversion was commenced after December 23, 1985;

(2) Land established to trees under the CRP, except in cases where the land meets all other WRE eligibility criteria, the established cover conforms to WRE restoration requirements and NRCS specifications, an active CRP contract will be terminated or otherwise modified upon purchase of the WRE easement, and any additional criteria NRCS uses to determine if enrollment of such lands would further the purposes of the program;

(3) Lands owned by the United States other than held in trust for Indian Tribes;

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

(5) Land subject to an easement or deed restriction which, as determined by NRCS, provides similar restoration and protection of wetland functions and values as would be provided by enrollment in ACEP–WRE;

(6) Lands where the purposes of the program or implementation of restoration practices would be undermined due to onsite or offsite conditions, including, but not limited to—

(i) Risk of hazardous materials or petroleum products either onsite or offsite;

(ii) Permitted or existing rights of way, either onsite or offsite, for infrastructure development;

(iii) Adjacent land uses, such as airports, that would either impede complete restoration or prevent wetland functions and values from being fully restored; or

(7) Land which NRCS determines to have unacceptable exceptions to clear title or legal access that is encumbered, nontransferable, restricted, or otherwise insufficient.

#### § 1468.31 Application procedures.

(a) *Application for participation.* To apply for enrollment, a landowner must submit an application to NRCS.

(b) *Preliminary agency action.* By filing an application, the landowner consents to an NRCS representative entering upon the land for purposes of assessing the wetland functions and values and for other activities, such as the ranking and development of the preliminary WRPO, that are necessary or desirable for NRCS to evaluate applications. The landowner is entitled to accompany an NRCS representative on any site visits.

(c) *Voluntary reduction in costs.* In order to enhance the probability of enrollment in ACEP–WRE, the landowner or someone other than the landowner may offer to contribute financially to the cost of the acquisition or restoration of the wetland reserve easement to leverage Federal funds. This offer must be made in writing to NRCS.

#### § 1468.32 Establishing priorities, ranking consideration, and project selection.

(a) When evaluating easements or 30-year contract applications from landowners, NRCS, with advice from the State technical committee, may consider:

(1) The conservation benefits of obtaining an easement or other interest in the land, including but not limited to—

(i) Habitat that will be restored for the benefit of migratory birds and wetland-dependent wildlife, including diversity of wildlife that will be benefitted or life-cycle needs that will be addressed;

(ii) Extent and use of habitat that will be restored for threatened, endangered, or other at-risk species or number of different at-risk species benefitted;

(iii) Protection or restoration of native vegetative communities;

(iv) Habitat diversity and complexity to be restored;

(v) Proximity and connectivity to other protected habitats;

(vi) Extent of beneficial adjacent land uses;

(vii) Proximity to impaired water bodies;

(viii) Extent of wetland losses within a geographic area, including wetlands generally or specific wetland types;

(ix) Capacity of the wetland to improve water quality;

(x) Hydrology restoration potential, which must comprise at least 50 percent of the points for conservation benefits.

(2) The cost effectiveness of each easement;

(3) Whether the landowner or another person or entity is offering to contribute financially to the cost of the easement or other interest in the land to leverage Federal funds;

(4) The extent to which the purposes of this part would be achieved on the land;

(5) The productivity of the land;

(6) The on-farm and off-farm environmental threats if the land is used for the production of agricultural commodities;

(7) Such other factors as NRCS determines are necessary to carry out the purposes of the program.

(b) To the extent practicable, taking into consideration costs and future agricultural and food needs, NRCS will give priority to—

(1) Obtaining permanent easements over shorter term easements; and

(2) Acquiring easements based on the value of the easement for protecting and enhancing habitat for migratory birds and other wetland-dependent wildlife or improving water quality, in coordination with FWS at the local level, as may be appropriate.

(c) NRCS, in consultation with the State technical committee, may place higher priority on—

(1) Certain land types or geographic regions of the State where restoration of wetlands may better achieve State and regional goals and objectives; and

(2) Land that is currently enrolled in CRP in a contract that is set to expire within 1 year from the date of application and is farmed wetland and adjoining land that has the highest wetland functions and values and is likely to return to production after the land leaves CRP.

(d) Notwithstanding any limitation of this part regarding priority ranking, NRCS may enroll eligible lands at any time to encompass total wetland areas subject to multiple ownership or otherwise to achieve program objectives. NRCS may, at any time, exclude enrollment of otherwise eligible lands if the participation of the adjacent landowners is essential to the successful restoration of the wetlands and those adjacent landowners are unwilling or ineligible to participate.

#### **§ 1468.33 Enrollment process.**

(a) *Tentative selection.* Based on the priority ranking, NRCS will notify an affected landowner of tentative acceptance into the program.

(b) *Effect of notice of tentative selection.* The notice of tentative

acceptance into the program 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 notice informs the landowner of NRCS's intent to continue the enrollment process on their land.

(c) *Acceptance and effect of offer of enrollment—(1) Wetland reserve easement.* For applications requesting enrollment through a wetland reserve easement, NRCS will present an agreement to purchase to the landowner which will describe the easement area, the easement compensation amount, the easement terms and conditions, and other terms and conditions for participation that may be required by NRCS as appropriate. The easement compensation amount will be based upon the lowest of the fair market value of the land, the geographic area rate cap, or the landowner offer, as provided in § 1468.34 of this part. The landowner accepts enrollment in the ACEP–WRE by signing the agreement to purchase. NRCS will continue with easement acquisition activities after the property has been enrolled.

(2) *30-year contract.* For applications requesting enrollment of acreage owned by an Indian Tribe through the 30-year contract option, NRCS will present an agreement to enter 30-year contract to the Tribal landowner which will describe the contract area, the contract compensation amount, the contract terms and conditions, and other terms and conditions for participation that may be required by NRCS as appropriate. The Tribal landowner accepts enrollment in the ACEP–WRE by signing the agreement to enter 30-year contract. NRCS will proceed with implementation of the WRPO after the 30-year contract has been executed.

(d) *Restoration responsibility and the scope of enrollment.* (1) The agreement to purchase or agreement to enter 30-year contract is the enrollment document that establishes the terms of enrollment consistent with the terms and conditions of this part and identifies the—

(i) Scope of the agreement between NRCS and the landowner,

(ii) Basis for NRCS to obligate funds,

(iii) Nature and method through which NRCS will provide ACEP–WRE technical and financial assistance to the landowner, and

(iv) Withholding of the landowner's share of the restoration cost from the easement payment for applicable 30-year or nonpermanent easement or 30-year contract enrollments.

(2) The agreement to purchase between NRCS and the landowner

under the easement option also constitutes the agreement for—

(i) Granting an easement on the enrolled land and sufficient access to the enrolled land as set forth under § 1468.37,

(ii) Implementing a WRPO which provides for the restoration, protection, and management of the wetland functions and values,

(iii) Recording the easement in accordance with applicable State law, and

(iv) Ensuring the title to the easement is superior to the rights of all others, except for exceptions to the title that are deemed acceptable by NRCS and in accordance with Department of Justice Title Standards.

(3) The terms of the easement identified in paragraph (d)(2)(i) of this section includes the landowner's agreement to the implementation of a WRPO identified in paragraph (d)(2)(ii) of this section. In particular, the easement deed identifies that NRCS has the right to enter the easement area to undertake on its own or through an agreement with the landowner or other third party, any activities to restore, protect, enhance, manage, maintain, and monitor the wetland and other natural values of the easement area.

(4) At the time NRCS enters into an agreement to purchase, NRCS agrees, subject to paragraph (e) of this section, to acquire and provide for restoration of the land enrolled into the program.

(e) *Withdrawal of offer of enrollment.* Prior to execution of the easement deed or 30-year contract by the United States and the landowner, NRCS may withdraw the land from enrollment at any time due to lack of availability of funds, inability to clear title, insufficient access, sale of the land, risk of contamination from hazardous materials or petroleum products, or other reasons.

(f) *Landowner failure to accept enrollment offer in timely manner.* The offer of enrollment to the landowner will be void if not executed by the landowner within the time specified.

#### **§ 1468.34 Compensation for easements and 30-year contracts.**

(a) *Determination of easement compensation values.* (1) Compensation for an easement or 30-year contract under this part will be made in cash in such amount as is agreed to and specified in the agreement to purchase or agreement to enter 30-year contract and finalized in the warranty easement deed or 30-year contract.

(2) Payments for 30-year easements, nonpermanent easements as limited by State law, or 30-year contracts will be not more than 75 percent of that which

would have been paid for a permanent easement as determined by the methods listed in paragraph (a)(3) of this section.

(3) NRCS will pay as compensation the lowest of the values from paragraphs (a)(3)(i) through (iii) of this section:

(i) The fair market value of the land using the Uniform Standards for Professional Appraisal Practices or based on an area-wide market analysis or survey,

(ii) The geographic area rate cap determined under paragraph (a)(4) of this section, or

(iii) A written offer made by the landowner.

(4) Each fiscal year NRCS, in consultation with the State technical committee, will establish one or more geographic area rate caps within a State. NRCS will determine the geographic area rate cap using the best information which is readily available in that State. Such information may include soil types, types of crops capable of being grown, production history, location, real estate market values, and tax rates and assessments.

(b) *Acceptance of offered easement compensation.* (1) NRCS will not acquire any easement unless the landowner accepts the amount of the easement payment offered by NRCS. The easement payment may be less than the fair market value of the interests and rights to be conveyed by the landowner under the easement.

(2)(i) For easements or 30-year contracts valued at \$500,000 or less, NRCS will provide compensation in up to 10 annual payments, as requested by the participant, as specified in the agreement to purchase or 30-year contract between NRCS and the participant.

(ii) For easements or 30-year contracts valued at more than \$500,000, NRCS may provide compensation in at least 5, but not more than 10 annual payments. NRCS may provide compensation in a single payment for such easements or 30-year contracts when, as determined by the NRCS Chief, it would further the purposes of the program. The applicable payment schedule will be specified in the agreement to purchase or 30-year contract, entered into between NRCS and the landowner.

(c) *Reimbursement of a landowner's expenses.* For completed easement conveyances, NRCS will reimburse the landowner for fair and reasonable expenses, if any, incurred for legal boundary surveys and other related costs, as authorized and determined by NRCS.

(d) *Per-acre-basis-calculations.* If easement or 30-year contract compensation values are calculated on a

per-acre basis, NRCS will identify an estimated amount in its agreement to purchase and the final easement or 30-year contract payment will be made based on final determination of value and acreage and specified in the warranty easement deed or 30-year contract.

#### **§ 1468.35 Wetland Reserve Enhancement Partnerships.**

(a) The purpose of the Wetland Reserve Enhancement Partnership (WREP) option is to target and leverage resources to address high priority wetland protection, restoration, and enhancement objectives through agreements with States (including a political subdivision or agency of a State), nongovernmental organizations, or Indian Tribes.

(b) NRCS will establish priorities for funding, required level of partner contribution of resources, ranking criteria, and other criteria. NRCS will prioritize proposals that address wetland restoration needs of national or regional importance, including special project or area-wide proposals.

(c) NRCS will make the information regarding WREP available to the public and potential partners.

(d) NRCS will evaluate proposals and make final funding selections based upon the priorities identified in the public notice of funding availability.

(e) NRCS will enter into WREP agreements with partners who have projects selected for funding.

#### **§ 1468.36 WRPO payments.**

(a) NRCS may provide financial assistance for implementing the WRPO on the enrolled land subject to an easement or 30-year contract. The amount and terms and conditions of the financial assistance will be subject to the restrictions in paragraphs (a)(1) and (2) of this section on the costs of establishing or installing conservation practices or eligible activities specified in the WRPO:

(1) On enrolled land subject to a permanent easement, NRCS will offer to pay at least 75 percent but not more than 100 percent of such costs; and

(2) On enrolled land subject to a 30-year or nonpermanent easement or 30-year contract, NRCS will offer to pay at least 50 percent but not more than 75 percent of such costs. The landowner's share of the WRPO implementation costs may be withheld from the easement or 30-year contract payment.

(b) Payments may be made only upon a determination by NRCS that an eligible conservation practice or component of the conservation practice has been implemented in compliance

with appropriate NRCS standards and specifications; or an eligible activity has been implemented in compliance with the appropriate requirements detailed in the WRPO.

(c) Payments may be made for repair or replacement of an eligible conservation practice or activity, if NRCS determines that the conservation practice or eligible activity is still needed and that the disrepair or failure of the original conservation practice or eligible activity was due to reasons beyond the control of the participant.

(d) A participant may seek additional assistance from other public or private organizations as long as the conservation practices or eligible activities funded are approved by NRCS and implemented in compliance with this part.

#### **§ 1468.37 Easement and 30-year contract participation requirements.**

(a) *Easement requirements.* (1) To enroll eligible land in ACEP-WRE through the permanent or 30-year easement option, a landowner will grant an easement to the United States. The easement will require that the easement area be maintained in accordance with ACEP-WRE goals and objectives for the duration of the term of the easement, including the restoration, protection, enhancement, maintenance, management, and monitoring of wetland and other land functions and values.

(2) For the duration of its term, the easement will require, at a minimum, that the landowner and the landowner's heirs, successors, and assigns will cooperate in the restoration, protection, enhancement, maintenance, management, and monitoring of the land in accordance with the warranty easement deed and with the terms of the WRPO. In addition, the easement will grant to the United States:

(i) A sufficient right of legal access to the easement area,

(ii) The right to authorize compatible uses of the easement area, including but not limited to such activities as hunting and fishing, managed timber harvest, water management, or periodic haying or grazing, if such use is consistent with the long-term protection and enhancement of the wetland resources for which the easement was established,

(iii) All rights, title, and interest in the easement area except those rights specifically reserved in the deed, and

(iv) The right to restore, protect, enhance, maintain, manage, and monitor activities on the easement area.

(3) The landowner will convey title to the easement in a manner that is acceptable to NRCS. The landowner will warrant that the easement granted to the

United States is superior to the rights of all others, except for title exceptions deemed acceptable by NRCS.

(4) The participant will—

(i) Comply with the terms of the easement,

(ii) Comply with all terms and conditions of any related contract or agreement,

(iii) Agree to the permanent retirement of any existing cropland base and allotment history for the easement area, as determined by FSA,

(iv) Agree to the long-term restoration, protection, enhancement, maintenance, management, and monitoring of the easement in accordance with the terms of the easement and related agreements, and

(v) Agree that each person or legal entity that is subject to the easement will be jointly and severally responsible for compliance with the easement and the provisions of this part and for any refunds or payment adjustment which may be required for violation of any terms or conditions of the easement or the provisions of this part.

(b) *30-year contract requirements.* (1) To enroll eligible land in ACEP–WRE through the 30-year contract option, a landowner will enter into a contract with NRCS. The contract will require that the enrolled area be maintained in accordance with ACEP–WRE goals and objectives for the duration of the contract, including the restoration, protection, enhancement, maintenance, management, and monitoring of wetland and other land functions and values.

(2) For the duration of the 30-year contract, the contract will require, at a minimum, that the landowner and the landowner's heirs, successors, and assigns will, consistent with the terms of this part, cooperate in the restoration, protection, enhancement, maintenance, management, and monitoring of the land in accordance with the contract and with the terms of the WRPO. In addition, the 30-year contract will grant to NRCS:

(i) A sufficient right of legal access to the entire contract area for the duration of the contract,

(ii) The right to authorize compatible uses of the contract area, including such activities as a traditional Tribal use of the land, hunting and fishing, managed timber harvest, water management, or periodic haying or grazing if such use is consistent with the long-term protection and enhancement of the wetland resources for which the contract was established, and

(iii) The right to restore, protect, enhance, maintain, manage, and monitor activities on the enrolled area.

(3) The landowner will—

(i) Comply with the terms of the contract,

(ii) Comply with all terms and conditions of any associated agreement,

(iii) Agree to the long-term restoration, protection, enhancement, maintenance, management, and monitoring of the enrolled area in accordance with the terms of the contract and related agreements, and

(iv) Agree that each person or legal entity that is subject to the contract will be jointly and severally responsible for compliance with the contract and the provisions of this part and for any refunds or payment adjustment which may be required for violation of any terms or conditions of the contract or the provisions of this part.

(c) *Reservation of grazing rights.* (1) NRCS may include in the terms and conditions of an easement a provision under which the landowner reserves grazing rights if NRCS determines that the reservation and use of the grazing rights:

(i) Is compatible with the land subject to the wetland reserve easement or 30-year contract,

(ii) Is consistent with the historical natural uses of the land and long-term wetland restoration, protection, and enhancement goals for which the wetland reserve easement or 30-year contract was established,

(iii) Is subject to a recorded exhibit to the deed outlining grazing purposes and limitations, and

(iv) Complies with a WRPO developed by NRCS, which may include a grazing management plan component that is consistent with the WRPO and is reviewed and modified as necessary, at least every 5 years.

(2) Compensation for easements or 30-year contracts where the grazing rights are reserved under this section will be based on the method described in § 1468.34, except such compensation will be reduced by an amount equal to the value of the reserved grazing rights, as determined by NRCS.

**§ 1468.38 Development and revision of the WRPO and associated compatible use authorizations.**

(a) The WRPO will be developed and updated as determined by NRCS in consultation with the State technical committee and consideration of available site-specific technical input from FWS at the local level and others as appropriate.

(b) The WRPO will specify the manner in which the enrolled land will be restored, protected, enhanced, maintained, managed, and monitored to accomplish the goals of the program. The WRPO, and any revisions thereto,

will be developed to ensure that cost-effective restoration and maximization of wildlife benefits and wetland functions and values will result. Specifically, the WRPO will consider and address, to the extent practicable, the onsite alterations and the offsite watershed conditions that adversely impact the hydrology and associated wildlife, water quality, and wetland functions and values.

(c) The WRPO will identify the conservation practices and eligible activities needed to restore the functions and values on the enrolled land. NRCS may review, revise, and supplement the WRPO as needed throughout the duration of the enrollment to ensure that program goals are fully and effectively achieved. Revisions to the WRPO may result in the addition of conservation practices or eligible activities needed to enhance, maintain, manage, repair, replace or otherwise to protect the functions and values of the easement or 30-year contract area.

(d) As required by the terms of the easement deed as described in § 1468.37(a)(2)(ii) or 30-year contract as described in § 1468.37(b)(2)(ii), NRCS may, in its sole discretion, authorize the landowner to conduct compatible uses as defined in this part on the easement or contract area. Compatible use 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—

(1) Consider whether the authorized use will facilitate the practical administration and management of the land subject to the easement or contract; and

(2) Ensure that the authorized use furthers the functions and values for which the easement or 30-year contract was enrolled.

**§ 1468.39 Violations and remedies.**

(a) *Easement violations.* (1) In the event of a violation of the easement involving the landowner, the landowner will be given reasonable notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice, or such additional time as NRCS determines is necessary to correct the violation at the landowner's expense.

(2) Notwithstanding paragraph (a)(1) of this section, NRCS reserves the right to enter upon the easement or 30-year area at any time to remedy deficiencies or easement violations. Such entry may be made at the discretion of NRCS when such actions are deemed necessary to protect important wetland functions and values or other rights of the United



States under the easement. The landowner will be liable for any costs incurred by the United States as a result of the landowner's failure to comply with easement obligations.

(3) If there is failure to comply with easement obligations, the easement will remain in effect, and NRCS may, in addition to any other remedy available to the United States, retain any payment otherwise required to be paid under this part and require the refund of any payment previously made under this part.

(b) *30-year contract or wetland reserve easement restoration agreements violations.* (1) If NRCS determines that a landowner is in violation of the terms of a 30-year contract or wetland reserve easement restoration agreement, or documents incorporated by reference

into the 30-year contract or wetland reserve easement restoration agreement, the landowner will be given reasonable notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice, or such additional time as NRCS determines is necessary to correct the violation. If the violation continues, NRCS may terminate the 30-year contract or wetland reserve easement restoration agreement.

(2) Notwithstanding the provisions of paragraph (b)(1) of this section, a 30-year contract or wetland reserve easement restoration agreement termination is effective immediately upon a determination by the NRCS that the landowner has—

- (i) Submitted false information,
- (ii) Filed a false claim, or

(iii) Engaged in any act for which a finding of ineligibility for payments is permitted under this part.

(3) If NRCS terminates a 30-year contract or wetland reserve easement restoration agreement, the landowner will forfeit all rights for future payments under the 30-year contract or wetland reserve easement restoration agreement, and must refund all or part, as determined by NRCS, of the payments received, plus interest.

**Matthew Lohr,**

*Chief, Natural Resources Conservation Service.*

**Robert Stephenson,**

*Executive Vice President, Commodity Credit Corporation.*

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