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Part VI

## Department of Agriculture

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Commodity Credit Corporation

7 CFR Part 1468

Agricultural Conservation Easement Program; Interim Rule

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

RIN 0578-AA61

[Docket No. NRCS-2014-0011]

**Agricultural Conservation Easement Program**

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Agricultural Act of 2014 (the 2014 Act) consolidates the purposes of the Farm and Ranch Lands Protection Program (FRPP), Grassland Reserve Program (GRP), and Wetlands Reserve Program (WRP) into one easement program called the Agricultural Conservation Easement Program (ACEP). ACEP restores, protects, and enhances wetland on eligible land; protects the agricultural use, viability, and related conservation values of eligible land by limiting non-agricultural uses of that land; and protects grazing uses and related conservation values by restoring and conserving eligible land. This interim rule with request for comments sets forth the policies and procedures related to implementation of ACEP as authorized by the 2014 Act. Since the Conservation Farm Option (CFO) is a repealed program that was never implemented, NRCS is replacing the CFO regulations at 7 CFR part 1468 with the regulations necessary to implement ACEP.

**DATES:** *Effective date:* The rule is effective February 27, 2015.

*Comment date:* Submit comments on or before April 28, 2015. Comments will be made available to the public or posted publicly in their entirety.

**ADDRESSES:** You may submit comments by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments for Docket No. NRCS-2014-0011.

- *U.S. mail or hand delivery:* Public Comments Processing, Attn: Docket No. NRCS-2014-0011, Regulatory and Agency Policy Team, Strategic Planning and Accountability, U.S. Department of Agriculture, Natural Resources Conservation Service, 5601 Sunnyside Avenue, Building 1-1112D, Beltsville, MD 20705.

NRCS will post all comments on <http://www.regulations.gov>. Personal information provided with comments will be posted. If your comment includes your address, phone number, email address, or other personal identifying information, please be aware that your entire comment, including this personal information, will be made publicly available. Do not include personal information with your comment submission if you do not wish for it to be made public. This interim rule may be accessed via Internet. Users can access the NRCS homepage at: <http://www.nrcs.usda.gov/>; select the Farm Bill link from the menu; select the Interim final link from beneath the Final and Interim rules Index title under the heading "2014 NRCS Farm Bill Conservation Program Rules." Select Agricultural Conservation Easement Program.

**FOR FURTHER INFORMATION CONTACT:** Kim Berns, 202-720-1882.

Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA TARGET Center at: 202-720-2600 (voice and TDD).

**SUPPLEMENTARY INFORMATION:****Regulatory Certifications***Executive Order 12866 and 13563*

Executive Order 12866, "Regulatory Planning and Review," and Executive Order 13563, "Improving Regulation and Regulatory Review," directs 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 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Upon implementation of this rule the Natural Resources Conservation Service intends to conduct a retrospective review of this rule with the purpose of improving program performance, and better understanding the longevity of conservation implementation.

The Office of Management and Budget (OMB) designated this interim rule, with request for comment, a significant regulatory action. The administrative record is available for public inspection at the Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue SW., Room 5831 South Building, Washington, DC.

In accordance with Executive Order 12866, NRCS conducted an economic analysis of the potential impacts associated with this program. A summary of the economic analysis can be found at the end of this preamble, and a copy of the analysis is available upon request from Kim Berns, Director, Easement Programs Division, U.S. Department of Agriculture, Natural Resources Conservation Service, Post Office Box 2890, Washington, DC 20013-2890; or at: <http://www.nrcs.usda.gov/programs/acep/> under *ACEP Rules and Notices with Supporting Documents*.

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to your comments on this interim rule, we invite your comments on how to make the provisions 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 (5 U.S.C. 601-612) (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute. NRCS did not prepare a regulatory flexibility analysis for this rule because NRCS is not required by 5 U.S.C. 553, or any other provision of law, to publish a notice of proposed rulemaking with respect to the subject matter of this rule. Even so, NRCS has determined that this action, while mostly affecting small entities, will not have a significant economic impact on a substantial number of these small entities. NRCS made this determination based on the fact that this regulation only impacts those who choose to participate in the program. Small entity applicants will not be affected to a greater extent than large entity applicants.

### Congressional Review Act

Section 1246(c) of the Food Security Act of 1985 (the 1985 Act), as amended by Section 2608 of the Agricultural Act of 2014, requires that the Secretary of Agriculture use the authority in section 808(2) of title 5, United States Code, which allows an agency to forego Congressional Review Act usual 60-day Congressional Review delay of the effective date of a major regulation if the agency finds that there is a good cause to do so. NRCS hereby determines that it has good cause to do so in order to meet the Congressional intent to have the conservation programs, authorized or amended under Title XII of the 1985 Act, in effect as soon as possible. NRCS also determined it has good cause to forgo delaying the effective date given the critical need to let agricultural producers know what programmatic changes are being made so that they can make financial plans accordingly prior to planting season. For these reasons, this rule is effective upon publication in the **Federal Register**.

### Environmental Analysis

A programmatic Environmental Assessment (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 1508.13). The EA and Finding of No Significant Impact (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.

A copy of the EA and Finding of No Significant Impact (FONSI) may be obtained from the following Web site: <http://www.nrcs.usda.gov/ea>. A hard copy may also be requested in one of the following ways: (1) Email: [andree.duvarney@wdc.usda.gov](mailto:andree.duvarney@wdc.usda.gov) with "Request for EA" in the subject line; or (2) written request: National Environmental Coordinator, Natural Resources Conservation Service, Ecological Sciences Division, Post Office Box 2890, Washington, DC 20013–2890. Comments should be specific and indicate that comments provided are on the EA and FONSI. Public comment on the environmental analysis only may be submitted by any

of the following means: (1) Email comments to [andree.duvarney@wdc.usda.gov](mailto:andree.duvarney@wdc.usda.gov), (2) go to <http://www.regulations.gov> and follow the instructions for submitting comments for Docket No. NRCS–2014–0011, or (3) mail written comments to: National Environmental Coordinator, Natural Resources Conservation Service, Ecological Sciences Division, Room 6159–S, P.O. Box 2890, Washington, DC 20013–2890.

### Civil Rights Impact Analysis

USDA has determined through a Civil Rights Impact Analysis that this interim rule discloses no disproportionately adverse impacts for minorities, women, or persons with disabilities. The data presented in the Civil Rights Impact Analysis indicate producers who are members of the protected groups have participated in NRCS conservation programs at parity with other producers. Extrapolating from historical participation data, it is reasonable to conclude that ACEP will be administered in a nondiscriminatory manner as the predecessor programs have been. Outreach and communication strategies are in place to ensure all producers will be provided the same information to allow them to make informed compliance decisions regarding the use of their lands that will affect their participation in U.S. Department of Agriculture (USDA) programs. NRCS conservation programs apply to all persons equally regardless of their race, color, national origin, gender, sex, or disability status. Therefore, this interim rule portends no adverse civil rights implications for women, minorities, and persons with disabilities. Copies of the Civil Rights Impact Analysis are available, and may be obtained from Kim Berns, Director, Easement Programs Division, U.S. Department of Agriculture, Natural Resources Conservation Service, Post Office Box 2890, Washington, DC 20013–2890, or electronically at: <http://www.nrcs.usda.gov/programs/ACEP>.

### Paperwork Reduction Act

Section 1246 of the Food Security Act of 1985 (the 1985 Act) as amended by the Agricultural Act of 2014 (the 2014 Act) requires that the implementation of this provision be carried out without regard to the Paperwork Reduction Act, chapter 35 of Title 44, U.S.C. Therefore, NRCS is not reporting recordkeeping or estimated paperwork burden associated with this interim rule.

### Government Paperwork Elimination Act

NRCS is committed to compliance with the Government Paperwork Elimination Act and the Freedom to E-File Act, which require government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

### Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994

Pursuant to section 304 of the Federal Crop Insurance Reform Act of 1994 (Pub. L. 103–354), USDA classified this rule as non-major. Therefore, a risk analysis was not conducted.

### Unfunded Mandates Reform Act of 1995

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, USDA assessed the effects of this interim rule on State, local, and Tribal governments, and the public. This rule does not compel the expenditure of \$100 million or more by any State, local, or Tribal governments or anyone in the private sector; therefore, a statement under section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

### Executive Order 13132

This interim rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. NRCS has determined that this interim rule conforms with the Federalism principles set forth in the Executive Order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities on the various levels of government. Therefore, NRCS concludes that this interim rule does not have Federalism implications.

### Executive Order 13175

This interim rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. Executive Order 13175 required 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 been substantial direct effects on (1) one or more Indian Tribes, (2) the

Relationship between the Federal Government and Indian Tribes, or (3) the distribution of power and responsibilities between the Federal Government and Indian Tribes. NRCS has assessed the impact of this interim rule on Indian Tribes and determined that this rule does not have Tribal implication that requires Tribal consultation under EO 13175. The rule neither imposes substantial direct compliance costs on Tribal governments nor preempts Tribal law. The agency has developed an outreach/collaboration plan that it will implement as it develops its Farm Bill policy. If a Tribe requests consultation, NRCS will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress.

### Registration and Reporting Requirements of the Federal Funding and Transparency Act of 2006

OMB published two regulations, codified at 2 CFR part 25 and 2 CFR part 170, to assist agencies and recipients of Federal financial assistance in complying with the Federal Funding Accountability and Transparency Act of 2006 (FFATA) (Pub. L. 109–282, as amended). Both regulations have implementation requirements effective as of October 1, 2010.

The regulations at 2 CFR part 25 require, with some exceptions, recipients of Federal financial assistance to apply for and receive a Dun and Bradstreet Universal Numbering Systems (DUNS) number and register in System Award Management (SAM). The regulations at 2 CFR part 170 establish new requirements for Federal financial assistance applicants, recipients, and subrecipients. The regulation provides standard wording that each agency must include in its awarding of financial assistance that requires recipients to report information about first-tier subawards and executive compensation under those awards.

NRCS has determined that 2 CFR part 25 and 2 CFR part 170 applies to ACEP financial assistance provided to entities. Therefore, NRCS has incorporated, by reference, these registration and reporting requirements into the ACEP regulations and will continue to include the requisite provisions as part of assistance agreements.

### 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: (1) Agricultural land easements; and (2) wetland reserve easements. Under the agricultural land easement component, NRCS provides matching funds to State, Tribal, and local governments, and nongovernmental organizations with farm and ranch land protection programs to purchase permanent agricultural land easements. Under the wetland reserve easement component, NRCS protects wetlands by purchasing directly from owners a reserved interest in eligible land 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.

The 2014 Act kept much of the substance of the statutory provisions that originally existed for the Wetlands Reserve Program (WRP) and Farm and Ranch Lands Protection Program (FRPP), with land eligibility elements from the Grassland Reserve Program (GRP) incorporated. In particular, ACEP as authorized by the 2014 Act:

- Consolidates FRPP, GRP, and WRP easement options into one program, and repeals these three programs; and
- Incorporates elements of FRPP and GRP into the agricultural land easement component of ACEP, and elements of WRP into the wetland reserve easement component of ACEP.

ACEP provisions are organized by those provisions that affect the entire program, provisions that affect only the Agricultural Land Easement component, and provisions that affect only the Wetlands Reserve Easement component. Provisions that affect the entire program include:

- Identification of the following lands as ineligible—
  - Federal lands except lands held in trust for Indian Tribes.
  - State-owned lands, including lands owned by agencies or subdivisions of the State or unit of local government.
  - Land subject to an existing easement or deed restriction that provides similar protection that would be achieved by enrollment.
  - Lands that have onsite or offsite conditions which would undermine meeting the purposes of the program.
- Authorization for easement subordination, modification, exchange, termination of easements under specific criteria.

- Identification that lands enrolled in FRPP, GRP, and WRP are considered enrolled in ACEP.

- Transition of contracts, agreements, and easements entered into prior to October 1, 2013, creating a pool of funds from each of the original programs to address existing enrollments, to remain available until expended.

Provisions that affect only the Agricultural Land Easement Component include:

- Limiting the Federal share of the easement cost for projects that are not *grasslands of special environmental significance* to not exceed 50 percent of the *fair market value* of the agricultural land easement, while requiring the non-Federal share to be at least equivalent to the Federal share, with an eligible entity contributing at least 50 percent of the Federal share with its own cash resources. Eligible entities may include Indian Tribes, State governments, local governments, or nongovernmental organizations which have farmland or grassland protection programs that purchase agricultural land easements.

- Protecting grasslands of special environmental significance by authorizing NRCS to pay up to 75 percent of the fair market value of the agricultural land easement for the enrollment of such grasslands.

- Providing flexibility for projects of special significance by authorizing NRCS to waive the eligible entity cash contribution requirement with no increase in Federal share where the landowner voluntarily increases the landowner contribution commensurate to the amount of the waiver and the property is in active agricultural production.

- Maintaining a certification process for eligible entities.

- Prohibiting the assigning of a higher priority to an application solely on the basis of lesser cost to the program.

- Requiring all easements to be subject to an *agricultural land easement plan*.

Provisions that affect only the Wetland Reserve Easement Component include:

- Maintaining most elements of WRP eligibility and administrative framework.

- Authorizing a waiver process to allow enrollment of Conservation Reserve Program (CRP) lands established to trees.

- Allowing ranking criteria to consider the extent to which a landowner or other person or entity leverages the Federal investment.

- Reducing length of ownership requirement prior to enrollment from 7 years to 24 months.

- Keeping WRP easement compensation framework for wetland reserve easements.

The enrollment options under ACEP differ slightly from the source programs because ACEP does not incorporate GRP rental agreements or the authority for the Secretary of Agriculture to directly purchase and hold grassland easements; requires a State or other entity to provide 50 percent of the WRE-easement cost for lands meeting the closed basin lake WRE eligibility criteria; and eliminates the stand-alone wetland Restoration Cost-Share Agreements without an associated easement.

With these slight differences acknowledged, NRCS is incorporating the substance of many of the regulatory provisions of FRPP and WRP originally promulgated at 7 CFR part 1491 and 7 CFR part 1467, respectively in this regulation. However, ACEP is a consolidated program, and therefore, NRCS has organized these provisions into three subparts. Subpart A contains provisions that apply to both agricultural land easements and to wetland reserve easements and 30-year contracts; subpart B contains provisions specific to the implementation of agricultural land easements; and subpart C contains provisions specific to the implementation of wetland reserve easements and 30-year contracts. These subparts, and their constituent provisions, are described more fully below, including a discussion about how NRCS will exercise provisions that are new or different from the predecessor programs.

### 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.

#### § 1468.2 Administration

This section identifies that ACEP is administered under the general supervision and direction of the NRCS Chief, who is a Vice President of the Commodity Credit Corporation (CCC), and sets forth the roles and responsibilities of NRCS staff and other agencies that assist with ACEP implementation.

#### § 1468.3 Definitions

The purpose of the definitions section set forth at § 1468.3 is to ensure

consistent interpretation of the terms used throughout the regulation. These definitions are the same definitions that were used to implement FRPP or WRP with adjustments made, where needed, to further the purposes of ACEP as authorized by the 2014 Act.

The definitions of “30-year contract” and “Acreage Owned by Indian Tribes” are the same definitions that were used in WRP and are included to implement the 30-year contract enrollment option under subpart C.

The definition of “Access” is included to clarify what constitutes sufficient legal access to ensure that the purposes of the program can be achieved and federal investment in the easement can be enforced for the duration of the easement. This definition allows NRCS to provide additional flexibility under ALE than is available for the Federally-held easements under WRE. NRCS welcomes public comment on whether NRCS should adopt this greater flexibility for eligible entities on what constitutes sufficient access for ALE easements and what specific conditions should be considered sufficient access under ALE to ensure the federal investment is protected?

The definition of “Active agricultural production” is included to establish the parameters of the requirement that the land be in active agricultural production to qualify as a project of special significance under subpart B of this part.

The definition of “Agreement” is included to identify any document that specifies the rights of NRCS and a person or legal entity participating in ACEP. This term formerly was only defined in WRP.

The definition of “Agreement to purchase” is included to identify the document that NRCS uses to obligate funding for the acquisition of a wetland reserve easement and proceed with easement acquisition activities.

The definition of “Agricultural commodity” is included since it is part of the statutory and regulatory definition of “legal entity.”

The definition of “Agriculture uses” uses a more universal term of “farm or ranch land protection program” than was used under FRPP to ensure that programs that have the principal purpose of protecting grasslands or grazing uses are included. NRCS will refer to the State definition of agricultural use found in either its farm and ranch land protection program or tax assessment authority, but reserves the right to impose deed restrictions to comply with Federal law or to protect soil or related natural resources. For

example, some States have identified that sod farming or turf operations are an agricultural use despite such activities representing an unsustainable mining of valuable topsoil resources, and therefore, NRCS reserves its right to require that such activities be prohibited in the terms of an Agriculture Land Easement (ALE) funded with ACEP funds.

The definition of “Agricultural Land Easement” is included to identify the type of conservation easement that is funded pursuant to the policies and procedures under subpart B.

The definition of “Agricultural Land Easement Plan” is included to identify the document that NRCS will use to meet the requirements of section 1265B(b)(4)(C)(iv) of the 1985 Act, which requires land enrolled under subpart B to be subject to an agricultural land easement plan. All ACEP-Agricultural Land Easement (ALE) enrollments must have an agricultural land easement plan and may also incorporate by reference 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 agricultural land easement plan and any associated component plans are collectively referred to as the agricultural land easement plan. The agricultural land easement plan must promote the long-term viability of the land to meet the purposes for which the easement was acquired. The eligible entity is responsible for the development of an agricultural land easement plan, though NRCS may provide technical assistance in the development of the agricultural land easement plan or any of the component plans. The eligible entity is responsible to annually monitor compliance and provide NRCS an annual monitoring report that documents that the landowner and eligible entity are in compliance with the terms of easement deeds, including the agricultural land easement plan.

The definition of “Beginning farmer or rancher” is included to meet program outreach purposes and is consistent with how the term is identified in USDA programs.

The term “Certified entities” is added to meet the statutory requirement providing for an eligible entity certification process. Certification of “eligible entities” is discussed in the description of § 1468.27.

The term “Chief” existed in both FRPP and WRP, and is the official who

has been delegated administrative responsibility for ACEP by the Secretary of Agriculture.

The terms for “*Commenced conversion wetland*,” “*Converted wetland*,” “*Lands substantially altered by flooding*,” “*Riparian areas*,” “*Wetlands*,” and “*Wetland functions and values*” were defined terms under WRP and are incorporated in this rulemaking as applicable to the land eligibility requirements for enrollment of wetland reserve easements and 30-year contracts under subpart C.

The definition of “*Commodity Credit Corporation*” is included since ACEP is funded through CCC and since the Chief serves as a Vice-President of the CCC.

The definition of “*Compatible use*” is included to describe the mechanism through which NRCS may authorize the implementation of activities that NRCS determines are consistent with the long-term purposes of a wetland reserve easement.

The definition of “*Conservation plan*” is included since section 1265B(b)(4)(C)(iv)(III) requires that highly erodible cropland enrolled in an agricultural land easement must be subject to a conservation plan developed pursuant to the requirements under 7 CFR part 12.

The definition of “*Conservation practice*” is included since NRCS may provide technical assistance for the development of agricultural land easement plans for lands enrolled in ACEP-ALE and will provide technical and financial assistance for the planning and implementation of conservation practices on lands enrolled in ACEP-Wetland Reserve Easement (WRE).

The definition of “*Conservation Reserve Program*” is included since lands enrolled in CRP are eligible for enrollment in ACEP, with priority provided for enrollment in ACEP-ALE of grasslands leaving CRP and for enrollment in the ACEP-WRE of high value wetlands that are likely to return to production upon leaving CRP.

The term “*Cooperative agreement*” is included to define the document that specifies the obligations and rights of NRCS and the eligible entities related to the purchase of an agricultural land easement under subpart B.

The term “*Cost-share payment*” is added to refer to a payment for program implementation that NRCS provides to an eligible entity related to the purchase of an agricultural land easement under subpart B.

The term “*Dedicated fund*” is added and describes an account that can only be used for the purposes of management, monitoring, and enforcement of agricultural land

easements. This requirement applies to nongovernmental organizations who seek to become “certified entities” under subpart B and serves as evidence of their capacity to ensure the long-term protection of easements.

Definitions for “*Easement exchange*,” “*Easement modification*,” “*Easement subordination*,” and “*Easement termination*” have been added to address the various ways that NRCS may address the long-term management and administration of the easements rights it has in lands enrolled in ACEP.

The definition of “*Easement payment*” is included to identify the payment that is made by NRCS to a landowner under ACEP-WRE.

The definition of “*Easement restoration agreement*” is included to encompass any of the legal arrangements NRCS may enter into to effect the restoration of any area enrolled in ACEP-WRE under subpart C. Section 1265C(d) identifies that NRCS may “enter into one or more contracts with private entities or agreements with a State, nongovernmental organization, or Indian Tribe to carry out necessary restoration, enhancement or maintenance of a wetland reserve easement if the Secretary of Agriculture determines that the contract or agreement will advance the purposes of the program.”

The definition of “*Eligible activity*” is included to address actions that may be included in a Wetland Reserve Plan of Operation (WRPO) to further the wetland functions and values of lands enrolled under subpart C. The former WRP rule referred to this plan as the Wetlands Restoration Plan of Operations.

The definition of “*Eligible entity*” is included to identify the entities who are eligible to receive assistance under ACEP-ALE as described in subpart B.

The definition of “*Eligible land*” is included to identify lands that are eligible for assistance under ACEP as specified in subparts B and C.

The definition of “*Fair market value*” is included to refer to the basis upon which NRCS will base its cost-share payment to an eligible entity under ACEP-ALE and its easement payment under ACEP-WRE.

The definition of “*Farm and ranch land of statewide importance*” is included to provide greater specificity to the existing umbrella term “other productive soils.” This definition is the technical definition of this land type which is subsumed in the general term “other productive soils.”

The definition of “*Farm and ranch land of local importance*” is added for

the same reason discussed above under “*Farm and ranch land of statewide importance*.”

The definition of “*Farm or ranch succession plan*” is included to assist with identification of parcels that may receive priority consideration since the landowners had taken action to ensure the long-term viability of the agricultural use of the parcel.

The definition of “*Farm Service Agency (FSA)*” is included since NRCS coordinates with FSA on many program matters, including land and landowner eligibility criteria.

The definition of “*Field Office Technical Guide (FOTG)*” is included to provide consistency with the way the term is defined in other NRCS program regulations.

The definition of “*Fish and Wildlife Service (FWS)*” is included since NRCS coordinates with Department of the Interior’s Fish and Wildlife Service at the local level on several matters related to wetland reserve easements and contracts with Indian Tribes.

The definition of “*Forest land*” is included since it is identified as land category eligible for enrollment in ACEP-ALE.

The term “*Forest management plan*” is included to identify the documentation required to demonstrate forest land eligibility for agricultural land easements, when the “forest land” is being enrolled under the “contributes to the economic viability of the agricultural operation” land eligibility category. NRCS is using the “forest management plan” as documentation for eligibility, rather than requiring submission of receipts or tax returns which may be viewed as intrusive. The definition is consistent with the way the term is defined in other NRCS program regulations. Additionally, a forest management plan is a component of an agricultural land easement plan as described above.

The term “*Grassland of special environmental significance*” is included since section 1265B of the 1985 Act authorizes NRCS to provide additional cost-share assistance for the purchase of an agricultural land easement by an eligible entity on land that is grassland of special environmental significance. NRCS has defined grassland of special environmental significance in this interim rule as “grasslands that contain little or no noxious or invasive species; are subject to threat of conversion to nongrassland uses or are subject to fragmentation; and the land is rangeland, pastureland, or shrubland on which the vegetation is dominated by native grasses, grass-like plants, shrubs, or forbs, or is improved, naturalized

pastureland and rangeland. In addition, these must be lands that provide, or could provide, habitat for threatened, endangered species or at-risk species; protect sensitive or declining native prairie or grassland types; or provide protection of highly sensitive natural resources.”

The definition of “*Grasslands management plan*” is similar to the definition that existed in the GRP regulation, and such a plan is required by section 1265B(b)(4)(C)(iv)(II) of the 1985 Act for grasslands subject to an agricultural land easement.

The definition of “*Historical and archaeological resources*” includes resources related to parcels listed in the National Register of Historic Places, but can include lands listed in the State Historic Preservation Office or Tribal Historic Preservation Office inventory with written justification as to why the resource meets the National Register of Historic Places criteria. This definition recognizes preservation efforts of State, Tribal, and local preservation offices.

The definition of “*Historically underserved landowner*” is included to further the outreach purposes of ACEP.

The definition of “*Imminent harm*” is included to help identify situations where NRCS may exercise its right of enforcement on agricultural land easements.

The definition of “*Impervious surface*” is included since the terms of an agricultural land easement under subpart B must specify an impervious surface limitation appropriate for the agricultural operation.

The definition of “*Indian Tribe*” is consistent with how the term has been defined in the previous FRPP and WRP regulations. However, the term “pueblo” has been added consistent with other conservation programs. “Pueblo” is a type of collective ownership already encompassed by the statutory definition of Indian Tribe, but clarification was sought by commenters in prior rulemaking efforts.

The definition of the “*Land Evaluation and Site Assessment System*” is included since it is the land evaluation system used to rank land for farm and ranch land protection purposes.

The definition of “*Landowner*” is included since conservation easements, whether through an agricultural land easement or a wetland reserve easement, is a real property transaction which requires the participation by the fee title landowner. The definition of “*landowner*” is adopted from the WRP regulation and is included to clarify that a landowner may be a “person, legal entity, or Indian Tribe.” An Indian Tribe

does not meet the definition of person or legal entity as defined by section 1201 of the 1985 Act, and thus, needs to be included in order to ensure full participation in ACEP.

The definition of “*Legal entity*” is included since ACEP payment eligibility requirements apply to persons and legal entities.

The definition of “*Limited Resource Farmer or Rancher*” is included as an embedded term in the definition of “*Historically Underserved Landowner*.”

The definition of “*Maintenance*” is included to identify actions necessary to be conducted on lands enrolled in the program to meet program purposes.

The term “*Natural Resources Conservation Service*” existed in both the FRPP and WRP regulations.

However, the WRP definition more fully describes NRCS relationship to CCC, and therefore, has been adopted for use in ACEP. ACEP is funded through the CCC.

The definition of “*Nongovernmental organization*” is included in accordance with the 2014 Act that identifies the types of agencies and organizations that may qualify as an eligible entity under subpart B.

The definition of “*Other interests in land*” is included to clarify interests in land other than easements NRCS may provide cost-share assistance to an eligible entity to purchase under subpart B. However, NRCS requires that an eligible entity obtain prior approval from the Chief before rights or interests in land other than an agricultural land easement are funded under subpart B.

The definition of “*Other productive soils*” is included to identify that the term is restricted to farm and ranch land soils that are considered “unique farmland” and “farm and ranch land of statewide and local importance.” The terms “unique farmland,” “farm and ranch land of statewide importance,” and “farm and ranch land of local importance” are defined separately rather than within the definition of “other productive soils.” The change was made to provide specific definitions for these types of land.

The definition of “*Parcel*” is included to simplify the language used to identify an area of land that is either subject to an application or enrollment under ACEP.

The definition of “*Participant*” is included as it identifies who may be accepted for participation in ACEP.

The definition of “*Pending offer*” is included since a parcel must be subject to a written pending offer by an eligible entity in order to be eligible for cost-share assistance under subpart B.

The definition of “*Permanent easement*” is included to clarify that the duration for easements enrolled as “permanent easements” under ACEP is perpetual. Wetland reserve easements that are for a duration that is the maximum authorized by State law, but are not perpetual, will be subject to the same payment rates as 30-year wetland reserve easements.

The definition of “*Prime farmland*” is the technical definition that is used by NRCS under the Farmland Protection Policy Act and is included given the purposes for acquiring an agricultural land easement.

The definition of “*Private land*” is included since land is only eligible for enrollment if it is private or Tribal land. Tribal land is land identified as “acreage owned by an Indian tribe” as defined above.

The term “*Right of enforcement*” is an interest in the land enrolled in the ACEP-ALE which the United States may exercise under specific circumstances to enforce the terms of the agricultural land easement. The definition is included to identify that the right of enforcement may only be used under circumstances where the eligible entity or other holder of the easement has not enforced the terms of an agricultural land easement.

The definition of “*Socially disadvantaged farmer or rancher*” is included as an embedded term in the definition of “*Historically underserved landowner*.”

The definition of “*State Conservationist*” is inclusive of Directors of the “Caribbean and Pacific Island Areas.”

The definition of “*State Technical Committee*” existed in both FRPP and WRP, and the FRPP definition, since it cites to both statutory and regulatory authority for the State Technical Committees, is adopted for use in ACEP.

The term “*Unique farmland*” is added to improve clarity and provide a more technically accurate definition of this type of land that is encompassed by the clause “prime and unique farmland.”

The definition of “*Wetland Reserve Easement*” is included to identify the type of reserve interest conservation easement that NRCS will purchase directly from a landowner of eligible land pursuant to the policies and procedures under subpart C.

The definition of “*Wetland Reserve Plan of Operations*” is included to identify the easement plan that is applicable to lands enrolled under subpart C.

The definition of “*Wetland restoration*” existed in WRP and is included to identify the actions

necessary to further the purposes of ACEP-WRE.

#### § 1468.4 Appeals

This section identifies the different programmatic relationships that NRCS has with persons, legal entities, or eligible entities that receive payment under ACEP in return for participation in the program and the nature of the appeal rights that flow from these relationships. Additionally, NRCS clarifies the scope of program participation so that it is clear that prior to the transfer of property rights and the payment of compensation, NRCS decisions that affect the participant adversely are appealable under NRCS appeal procedures, including a direct appeal to the National Appeals Division (NAD) as provided in 7 CFR part 11. NRCS determinations that are after easement closing would not be subject to the appeal process in 7 CFR part 11. In the latter situation, a WRE landowner, or ALE eligible entity as applicable, with easement lands that are not in compliance with the easement terms would be provided advance notice of the NRCS determination and the landowner or eligible entity would be provided the opportunity to file an appeal with the appropriate State Conservationist.

NRCS enters into agreements with and makes payments to eligible entities under ACEP-ALE, and thus, the eligible entities are the program participants under subpart B. NRCS enters into agreements with and makes payment directly to landowners of eligible land under ACEP-WRE, and thus, the private landowners are the program participants under subpart C. Given the different program agreement relationships, the appeal rights differ.

#### § 1468.5 Scheme or Device

This section is similar to other conservation program provisions and is included to describe the authority which NRCS exercises to protect the Federal investment in conservation easements from fraudulent activities.

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

This section implements the new easement administration provisions authorized by section 1265D(c) of the 1985 Act as added by the 2014 Act. This section provides the necessary flexibility to ensure that the long-term viability of agricultural land and wetland protection efforts through conservation easements will be achieved in a manner that can accommodate subsequent compelling public needs, or will facilitate the

practical administration of the program when no reasonable alternatives are available. This section clarifies the preferred alternative is always avoidance of impacts to the easement area, followed by minimization of impacts to the easement area. Furthermore, NRCS will give preference to addressing impacts of an action to the easement onsite or immediately adjacent to original easement area over addressing such impacts offsite. This consideration of alternative and sequencing is consistent with NRCS responsibilities under the National Environmental Policy Act (NEPA).

Given its stewardship responsibilities, NRCS has limited the scope of the easement that may be affected by an easement action to 10 percent of the easement area. Under very limited circumstances, NRCS may consider easement actions that exceed this 10 percent limitation if NRCS determines that the original easement area has experienced offsite landscape changes such as catastrophic changes to hydrology, complete loss of all agricultural infrastructure and markets, or contamination from hazardous materials from adjacent properties, and NRCS determines that such changes make achieving easement purposes impracticable.

NRCS will make the determination of equal or greater economic value to the United States based upon an approved easement valuation methodology in place at the time of the easement action request. Currently, the easement valuation methodology for ALE easements is outlined under subpart B and outlined for WRE 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.

To further ensure that the easement action will result in equal or greater conservation value to the United States, NRCS places a limitation concerning the geographic area from which exchange acres can be obtained. The type of conservation and economic values of exchange properties are more likely to be similar if situated in close proximity to the original easement area, and thus NRCS identifies that replacement of easement acres as part of an easement exchange must occur in the same 8-digit watershed and within the same State.

#### § 1468.7 Transfer of Land

This section sets forth how NRCS will address enrollment of land where the

landowner transfers the rights in land to a third party prior to the purchase of the easement.

#### § 1468.8 Payments Not Subject to Claims

This section sets forth that NRCS will make payment to its program 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.

#### § 1468.9 Assignments

This section identifies that a program participant has the ability to assign their right to payment to another person or legal entity in accordance with 7 CFR part 1404.

#### § 1468.10 Environmental Markets

This section 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 and do not cause the landowner to violate the terms of the agricultural land easement or wetland reserve easement.

### Subpart B—Agricultural Land Easements

#### § 1468.20 Program Requirements

This section includes the program requirements for eligible entities who wish to receive cost-share assistance from NRCS for the purchase of an agricultural land easement.

Paragraph (a) identifies that NRCS will facilitate and provide funding for the purchase of easements or other interests in eligible land that is subject to a written pending offer from an eligible entity for the purpose of protecting the agricultural use and related conservation values of the land by limiting nonagricultural uses of the land. Paragraph (a) also identifies the basic parameters of the program, including that eligible entities must submit applications to NRCS State offices, that funding would be provided through a cooperative agreement that specifies NRCS minimum deed terms, and that all easements or other interests in land will be in perpetuity unless provided otherwise by State law.

Paragraph (b) provides that to be eligible to receive ACEP-ALE funding, an Indian Tribe, State, unit of local government, or nongovernmental organization must demonstrate a commitment to long-term conservation of agricultural lands; a capability to acquire, manage, and enforce easements;



sufficient number of staff dedicated to monitoring and easement stewardship; and the availability of funds.

Paragraph (c) provides that a landowner who is selling an eligible entity an agricultural land easement is responsible for meeting conservation compliance requirements at 7 CFR part 12, as required by section 1265D(e) of the 1985 Act and the Adjusted Gross Income Limitation provisions at 7 CFR part 1400. Under paragraphs (b) and (c), the regulation clarifies 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) sets forth the criteria by which land can be determined eligible. In particular, eligible land includes private or Tribal agricultural land on a farm or ranch subject to a pending written offer by the eligible entity and contains at least 50 percent prime or unique farmland or designated farm and ranch land of State or local importance, unless a lesser percentage is determined appropriate by NRCS based on local conditions; contains historical or archaeological resources; protects grazing uses and related conservation values by restoring and conserving land; or furthers a State or local government policy consistent with the purposes of the program.

Paragraph (d) 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 FRPP regulation and policy that sought to minimize overlap and conflict with other forest easement programs, paragraph (d) clarifies that land cannot include forest land greater than two-thirds of the easement area. NRCS will reduce its cost-share in proportion to the extent that an easement protects forest land that exceeds two-thirds of the easement area. For example, if a 100 acre easement contains 30 acres of cropland and 70 acres of forest land, NRCS would provide cost-share on the 30 acres of cropland and 66.6 acres of forest land, but would not provide any cost-share for the purchase of the remaining 3.4 acres of forest land. However, this paragraph also identifies that NRCS may waive the forest land restriction for sugar bush acreage that contributes significantly to the economic viability of the parcel being

offered for enrollment. A sugar bush refers to a forest stand which is utilized by agricultural landowners for the production of maple syrup. The tree canopy is dominated by sugar maple, black maple, or similar tree species, and other tree species, if present, form only a small fraction of the total tree cover. NRCS believes that landowners manage their sugar bush as an integral part of their overall agricultural operations.

Paragraph (e) specifies lands that are ineligible for enrollment. Lands that are owned by a governmental entity, unless in trust for an Indian Tribe, are ineligible. Additionally, certain 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. NRCS will also consider land ineligible if it is subject to (1) onsite or offsite conditions that would interfere with the agricultural viability of the property, including the risk of the presence of hazardous substances or incompatible land uses, or (2) subject to a deed restriction that provides similar protection to that provided by the program.

#### *§ 1468.21 Application Procedures*

This section identifies the application procedures that an entity must follow in order to have their application be considered for funding under ACEP-ALE.

Paragraph (a) requires an entity to submit an application to NRCS in the State where parcels are located.

Paragraph (b) identifies that applications may be submitted on a continuous basis or in response to specific program solicitations. However, NRCS may announce application cut-off periods to evaluate applications received by a date certain.

Paragraph (c) provides that NRCS will determine whether an applicant is eligible to participate in ACEP-ALE based on the criteria set forth in § 1468.20(b).

Paragraph (d) provides that at the end of each fiscal year, NRCS will cancel the lists of pending, unfunded eligible parcels unless the eligible entity requests that certain parcels be considered for funding in the following fiscal year.

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

This section sets forth how parcels will be ranked for funding. NRCS will determine the eligibility of the landowner and land prior to ranking.

The NRCS ranking system in each State incorporates national and State-specific criteria to rank, score and prioritize each eligible parcel within the State. All eligible parcels that compete for funding during a given application period are ranked using the same NRCS ranking criteria. The national criteria must comprise at least 50 percent of the total numerical ranking score with the state criteria comprising the remaining 50 percent.

The national ranking criteria include quantitative factors such as the percent of prime, unique, and important soil or grazing uses and related conservation values in the parcel to be protected; the percent of cropland, pastureland, grassland, and rangeland in the parcel to be protected; the ratio of the total acres of land in the parcel to be protected to average farm or ranch size in the county according to the most recent USDA Census of Agriculture; the percent population growth in the county as documented by the United States Census; the threat of conversion to incompatible land uses; the existence of a farm or ranch succession plan; proximity to other protected land; grassland that is currently enrolled in the conservation reserve program in a contract that is set to expire within 1 year that would benefit from protection under a long-term easement; and other similar criteria.

This section also identifies the factors that may be identified by NRCS at the State level. State criteria are determined by the State Conservationist, with advice from the State Technical Committee. This section of the regulation identifies that the State criteria may consider the location of a parcel in an area zoned for agricultural use, the eligible entity's performance in managing and enforcing easements, multifunctional benefits of agricultural land protection, geographic regions where enrollment of particular lands may help achieve program objectives, diversity of natural resources to be protected, score using the land evaluation and site assessment system or equivalent measure for grassland enrollments, or other criteria determined by NRCS that will allow for the selection of parcels that will achieve ACEP-ALE purposes. When developing the State ranking factors, the State Conservationist must use factors that will assess the parcels potential to meet the purpose and goals of ACEP-ALE.

The ranking system incorporating both national and state criteria enables NRCS to prioritize parcels that merit ACEP-ALE enrollment. The ranking process must be followed and parcels funded in order of priority unless

inadequate funds are available to fund the next highest ranked parcel. If adequate funds are not available, NRCS may select the next highest-ranked parcel for which funding is available.

The ranking system may assign negative points or place at the bottom of the ranking list any parcels submitted by an eligible entity which is delinquent on submitting annual monitoring reports on prior-year conservation easements or has open ACEP–ALE cooperative agreements more than 2 years old. State Conservationists may also establish ranking thresholds below which parcels will not be funded.

In summary, NRCS will rank all eligible parcels submitted by eligible entities prior to an announced application cut-off date. NRCS will rank all parcels in accordance with the national and State criteria identified in this section. As required by section 1265B(b)(3)(C) of the 1985 Act, NRCS will not assign a higher priority to any parcel solely based on the lesser cost to the program.

NRCS will list the selected eligible parcels in the cooperative agreement to be entered into between NRCS and the eligible entity.

#### *§ 1468.23 Cooperative Agreements*

This section addresses the principal program document under which NRCS and an eligible entity identify how they will coordinate the activities needed for the eligible entity to purchase a conservation easement with ACEP assistance, including their respective rights and responsibilities related to program enrollment under this subpart. In particular, NRCS, on behalf of the CCC, enters into a cooperative agreement with entities selected for funding. Once NRCS selects an application, the eligible entity works with NRCS to finalize and sign a standard program cooperative agreement, incorporating all necessary ACEP–ALE requirements including the requirement that each easement must have an agricultural land easement plan.

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

This section 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 up to 50 percent of the approved fair market value of the agricultural land easement. NRCS will approve the use of the Uniform Standards for Professional Appraisal Practice (USPAP), the Uniform Appraisal Standards for Federal Land Acquisition (UASFLA), or Areawide

Market Analysis procedures by the eligible entity for determining “fair market value of the agricultural land easement.” An eligible entity is responsible to obtain a fair market value determination of the easement using one of the approved methods in accordance with NRCS specifications and applicable industry standards. The eligible entities provide the easement valuation determination documentation to NRCS. The Uniform Standards of Professional Appraisal Practices may serve as an industry standard for areawide market analysis. NRCS welcomes comments on what other types of “industry methods” should be considered when determining “fair market value of the agricultural land easement” for Federal match requirements for agricultural land easements.

A landowner may make donations toward the acquisition of the agricultural land easement. However, the 2014 Act requires that the eligible entity provide a share that is at least equivalent to that provided by NRCS. While the eligible entity may include as part of its share a landowner’s qualified donation, the statute identifies that the eligible entity must contribute its own cash resources in an amount that is at least 50 percent of the amount contributed by NRCS. To ensure that the Federal share meets these parameters, NRCS requires that prior to execution of the easement deed and payment of compensation to the landowner, the eligible entity provide the necessary acceptable valuation documentation and NRCS approve the determination of fair market value.

This section also outlines circumstances where NRCS may waive certain cost-share limitations for grassland of special environmental significance or other projects of special significance. For grasslands of special environmental significance, NRCS may provide up to 75 percent of the fair market value of the agricultural land easement and the eligible entity is required to provide the remainder as the entity share, of which the eligible entity is still required to provide its own cash resources as at least half of the entity share unless an additional entity cash contribution waiver is requested and granted.

For projects of special significance, NRCS may waive the eligible entity cash contribution requirement in accordance with the criteria and circumstances outlined in this section. However, for these projects of special significance, the landowner donation must increase commensurate to the amount of the waiver, the landowner donation must be

voluntary, and the property must be in active agricultural production. This section identifies the criteria by which a project may be determined to be one of special significance, including that the land is subject to threat of conversion or fragmentation and is in proximity to other protected areas supporting agricultural, grassland, or other compatible uses.

Additional factors considered are whether the project is listed on the National Register of Historic Places, if the location is within a micropolitan statistical area and 50 percent of the adjacent land is agricultural land, if the location is within a metropolitan statistical area, if the project will increase participation in agriculture by underserved communities, veterans, or beginning or disabled farmers and ranchers, and whether the farm or ranch is used as an education or demonstration farm focused on agricultural production and natural resource conservation, and other similar factors. NRCS welcomes input on the criteria that have been developed and any additional criteria that may be used to determine projects of special significance.

NRCS will provide ACEP–ALE cost-share funds toward the cost of the agricultural land easement itself. Since section 1265B of the 1985 Act does not authorize any cost-share beyond contribution towards the purchase of an ACEP–ALE easement based on the approved fair market value of the agricultural land easement, NRCS does not provide funds for related administrative costs such as appraisals, surveys, title insurance, legal fees, costs of easement monitoring, and other related administrative and transaction costs incurred by the eligible entity.

#### *§ 1468.25 Agricultural Land Easement Deeds*

Section 1265B(b)(4)(C) of the 1985 Act anticipates that an eligible entity is able to use its own deed terms provided that NRCS is able to determine that such terms “are consistent with the purposes of the program [and] permit effective enforcement of the conservation purposes of such easements.” Therefore, in order for NRCS to provide cost-share assistance to an eligible entity, NRCS must ensure that the eligible entity will include in its agricultural land easement deeds the terms and conditions necessary to ensure ACEP statutory purposes and requirements are met.

NRCS may determine that an agricultural land easement deed meets program purposes by either the eligible entity drafting all of the deed terms and conditions for an individual easement

and submitting the entire deed to NRCS for review, or through NRCS developing a standard set of minimum deed terms that the eligible entity agrees to incorporate as a whole into the deed along with the entity's own deed terms. In either scenario the eligible entity may use their own terms and conditions, the difference is the review process by which NRCS ensures the purposes and requirements of the program are met.

Under FRPP, NRCS reviewed each individual deed review due to the variability of easement deed terms. The result of this highly individualized approach provided maximum flexibility for the eligible entity but also resulted in extended acquisition timelines, inconsistent deed terms, variability in deed enforceability, and risk of inequitable treatment of eligible entity applicants.

Under ACEP, NRCS will provide a standard set of minimum deed terms that could be wholly incorporated along with the eligible entity's own deed terms into the agricultural land easement deed. NRCS and the eligible entity would agree to the standard minimum deed terms through the cooperative agreement, and the eligible entity would include these standard minimum deed terms into the agricultural land easement deed directly or as deed addendum attached and incorporated by reference into the deed.

If the eligible entity agrees to and incorporates these minimum standard deed terms, NRCS may choose not to review individual deeds prior to closing. NRCS goals with this approach are to streamline program delivery, increase the transparency of program requirements, ensure the equitable treatment of all participants, and reduce inconsistency in the long-term management and enforcement of the easements. This approach still allows the eligible entity to introduce its own deed terms, including those that are more restrictive. Through the publication of this interim rule, NRCS is seeking and welcomes specific public comment on the content of these standard minimum deed terms. The current minimum deed terms can be found at [enter URL for such terms].

Due to high program demand, limited funds, and anticipated cost-savings from streamlining program delivery, in fiscal year 2015, NRCS will prioritize those applications with entities who agree to use the standard minimum deed terms found at <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/>.

Among the minimum requirements that must be in each ALE funded easement, whether or not an eligibility

entity elects to use the minimum standard set of deed terms, is a right of enforcement for the Secretary of Agriculture required by Section 1265B(b)(4)(C)(iii) of the 1985 Act. The United States right of enforcement may only be used if the terms of the Agricultural Land Easement are not enforced by the holder of the easement. The right of enforcement includes the right of inspection so that NRCS can ensure that the eligible entity is meeting its enforcement, monitoring and stewardship responsibilities. As described above, the eligible entity must annually monitor compliance and provide NRCS an annual monitoring report that documents that the eligible entity and landowner have complied with the Agricultural Land Easement and Agricultural Land Easement Plan. Therefore, pursuant to its right of enforcement, if the annual monitoring report is insufficient or is not provided annually, or if NRCS has evidence of an unaddressed violation, as determined by NRCS, NRCS may exercise this right of inspection and enter the easement area with advance notice to the eligible entity and the landowner or landowner's representative. In the event of an emergency, NRCS may enter the easement area to prevent, terminate, or mitigate a potential or unaddressed violation of the easement's restrictions and will provide notice to both the eligible entity and the landowner at the earliest practicable time.

Consistent with former FRPP requirements and standard conservation easement practice, each ALE funded easement must also include an indemnification clause requiring the landowner to indemnify and hold harmless the United States from liability arising from or related to the property enrolled in ACEP-ALE. Each eligible entity is also responsible for the development of baseline documentation that is attached to the easement deed, or if allowed by State law cross reference in the deed. Baseline documentation is submitted to NRCS with the other easement deed documents.

Consistent with policy that had been developed under FRPP, NRCS has established that impervious surfaces will not exceed 2 percent of the ACEP-ALE easement area, excluding NRCS-approved conservation practices. However, NRCS may waive the 2 percent impervious surface limitation on a parcel-by-parcel basis, provided that no more than 10 percent of the easement area is covered by impervious surface.

The inclusion of these minimum provisions in ALE-funded easements is a requirement for participation in the

ACEP-ALE and cannot be waived. All agricultural land easement deeds acquired with ACEP-ALE funds must be recorded in the appropriate land records for the county or parish.

#### *§ 1468.26 Agricultural Land Easement Plans*

This section sets forth the requirement of section 1265B(b)(4)(C)(iv) of the 1985 Act that all agricultural land easements must be subject to an agricultural land easement plan approved by NRCS and the landowner. This section identifies the minimum requirements for an agricultural land easement plan and describes the relationship between the agricultural land easement plan and the individual component plans that are required for certain land-use types and incorporated by reference into the overarching agricultural land easement plan. The eligible entity is responsible to ensure an agricultural land easement plan that has been approved by NRCS and signed by the landowner is in place prior to the execution of the easement deed and the payment of compensation to the landowner.

As identified in Section 1265B(d), NRCS may provide technical assistance, if requested, to assist in the development of an agricultural land easement plan. Therefore, the cooperative agreement can address the availability of NRCS technical assistance to develop these plans. No separate approval of the plan by NRCS is needed if NRCS, a certified technical service provider, or other NRCS certified conservation planner develops the agricultural land easement plan. The development of a robust and comprehensive agricultural land easement plan, such as a plan at the NRCS Resource Management System planning level, is encouraged and as such, may include both required and recommended practices. NRCS recommends that NRCS' planning procedures, conservation practices, and standards and specifications be used to develop the agricultural land easement plans. Certain component plans, such as the forest land management plan may use other industry-approved planning methods and standards such as forest stewardship plans.

The eligible entity is responsible for enforcement of the easement, including ensuring the landowner is implementing or adhering to the required elements of the agricultural land easement plan. The NRCS right of enforcement includes a right of inspection that authorizes NRCS to ensure the landowner and easement holder are in compliance with the

agricultural land easement plan as required by section 1265B(b)(4)(C)(iv).

#### *§ 1468.27 Eligible Entity Certification*

Section 1265B of the Food Security Act of 1985, as amended, requires NRCS to establish a process under which eligible entities that meet established criteria may be certified and enter into long-term agreements for ACEP–ALE cost-share assistance. In summary, Section 1468.27 implements this statutory provisions and provides that, at an entity's request, the Chief will determine whether an eligible entity meets certifications requirements and if so, certify the entity.

The ACEP–ALE statutory provisions specify that an eligible entity, to be certified, must demonstrate to NRCS that the eligible entity will maintain, at a minimum, for the duration of the agreement:

(i) A plan for administering easements that is consistent with the purposes of ACEP–ALE;

(ii) The capacity and resources to monitor and enforce the agricultural land easements; and

(iii) Policies and procedures to ensure—

a. the long-term integrity of the easements,

b. timely completion of acquisition of such easements, and

c. timely and complete evaluation and reporting to NRCS on the use of ACEP–ALE cost-share assistance provided. Additionally, NRCS must, based upon when an entity is certified, conduct a review of a certified eligible entity at least every three years to ensure it continues to meet the certification criteria. If NRCS finds that the certified entity no longer meets the criteria, NRCS may allow the entity a specified period of time to take corrective actions, and may revoke certification if the entity does not meet the requirements.

These same certification provisions existed under the ACEP–ALE predecessor program, the Farm and Ranch Lands Protection Program (FRPP). However NRCS is introducing a few key changes in the ACEP–ALE regulation and policy to streamline and improve the certification process that was initially developed under FRPP and expand the availability of certification to eligible entities.

NRCS has developed a set of objective, measurable criteria that can be used to evaluate the eligible entity's ability to meet the statutory certification criteria. The certification criteria outlined in this interim rule are similar to the criteria under FRPP with a key change to the criteria that proved most problematic under FRPP. The statutory

requirement that the entity have a plan to administer easements that is consistent with the purposes of ACEP–ALE will be demonstrated by the eligible entity agreeing in their request for certification to use the template ACEP–ALE Agreement for Certified Entities if they are certified.

This change is in effort to address the issues that arose related to entities being unable or unwilling to adjust their policy and procedures to meet the programmatic FRPP requirements under the FRPP certification process. This change will also expedite the review of entity certification requests and ensure the equitable treatment of all certified entities by establishing a simple, transparent, objective criteria for determining whether the entity is addressing the statutory requirement.

Another change is that an eligible entity may submit a request for certification with associated documentation to the NRCS State Conservationist at any time rather than during specific sign-up periods. The State Conservationist will review the materials and make a recommendation to the National Office for final determination. NRCS will notify an entity in writing whether they have been certified and the rationale for the agency's decision.

This section also identifies the type of administrative flexibility available to a certified entity based upon their certification. For example, NRCS will rely on the certified entity to independently complete the easement acquisition in accordance with the terms and conditions of the cooperative agreement and consistent with the requirements of this part. NRCS will conduct annual quality assurance reviews on a subset of the transactions after closing and payment rather than prior to closing. Since NRCS review of these transactions is minimized prior to closing, a certified entity is better able to schedule easement closings and meet timelines associated with other funding sources. These benefits associated with certification will allow a certified entity greater autonomy in its acquisition of ALE-funded easements and potentially expedite the time it takes for a certified entity to complete its easement acquisitions.

#### *§ 1468.28 Violations and Remedies*

This section sets forth the eligible entity's responsibilities to enforce the easement terms and conditions. Additionally, this section sets forth the circumstances under which NRCS may exercise its right of enforcement.

NRCS will work with the eligible entity to assist it in its responsibility to

enforce the easement terms. If, however, the eligible entity is unable or unwilling to enforce the easement terms and NRCS determines the eligible entity has not met its enforcement responsibilities, NRCS may exercise the United States' rights identified under an agricultural land easement or other interest in land to protect the agricultural values. If such action becomes necessary, NRCS will provide written notice by certified mail, return receipt requested, to the eligible entity at the eligible entity's last known address. Unless emergency circumstances require more immediate NRCS action to prevent imminent harm, the notice will provide the eligible entity an opportunity to cure its failure to enforce the terms of the deed within a reasonable timeframe. If NRCS is required to exercise its right of enforcement, NRCS may recover any and all administrative and legal costs from the eligible entity, the current holder of the easement if applicable, and the landowner or other party responsible for the easement violation.

#### **Subpart C—Wetland Reserve Easements**

##### *§ 1468.30 Program Requirements*

This section sets forth the basic requirements for participation in ACEP through a wetland reserve easement, including landowner and land eligibility requirements.

Paragraph (a) identifies that under the ACEP–WRE, NRCS may purchase wetland reserve easements from eligible landowners who voluntarily agree to the restoration, protection, and enhancement of wetlands on eligible private and Tribal lands. Additionally, the 30-year contract enrollment option is available to enroll acreage owned by Indian Tribes and these 30-year contracts are implemented similarly to 30-year easements. In order to participate through any of the WRE enrollment options, the landowner must agree to the implementation of a WRPO, the effect of which is to restore, protect, enhance, maintain, and manage the hydrologic conditions of inundation or saturation of the soil, native vegetation, and natural topography of eligible lands.

Paragraph (b) sets forth the county cropland enrollment limitations that are established by section 1244 of the 1985 Act as amended by the 2014 Act. In particular, no more than 25 percent of the total cropland in any county may be enrolled in CRP and ACEP–WRE, and no more than 10 percent of the total cropland in the county, as determined by FSA, may be subject to an easement under ACEP–WRE. The cropland limits do not apply to shelterbelts,

windbreaks, and certain designated wet and saturated soils.

Paragraph (c) identifies that an applicant must be the landowner of eligible land for which enrollment is sought, and must have owned that land for at least 24 months prior to the time the land is determined eligible for enrollment unless certain exemptions apply, including that it is determined by the Chief, upon application by the landowner, that such land was acquired under circumstances that give adequate assurances that the land was not acquired for the purposes of placing it in the program. NRCS has also included the requirement that the landowner must provide all necessary documents that are required by the Farm Service Agency to establish customer records in the USDA customer records system. Recipients of USDA benefits, including NRCS customers, work with the Farm Service Agency to establish the requisite eligibility records in the USDA customer service data base. NRCS checks these records to ensure that the landowner meets conservation compliance and adjusted gross income limitation requirements.

Paragraph (d) sets forth how NRCS will handle enrollment situations where, prior to easement purchase, the landowner transfers the land offered for enrollment.

Paragraph (e) sets forth the land eligibility criteria that were specified by sections 1265(3) of the 1985 Act as added by the 2014 Act. Among the categories of eligible land are: Farmed wetland or converted wetland, together with adjacent lands that are functionally dependent on the wetlands; cropland or grassland that was used for agricultural production prior to flooding from the natural overflow of a closed basin lake or pothole, together with the adjacent land, where practicable, that is functionally dependent on the cropland or grassland; farmed wetland and adjoining lands enrolled in CRP, with the highest wetland functions and values, and is likely to return to production after it leaves CRP; or 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 easement.

Determination of land eligibility is made at the time of application evaluation.

NRCS may also enroll adjacent or contiguous 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 otherwise meet riparian eligibility requirements, and restored wetlands.

Land enrolled in the program must have sufficient legal access, be configured in a size and with boundaries that allow for the efficient management of the area for program purposes, and otherwise promote and enhance program objectives, as determined by NRCS.

Paragraph (f) addresses the enrollment of CRP lands.

Paragraph (g) identifies land that is not eligible for enrollment, including converted wetlands if the conversion was commenced after December 23, 1985; land established to trees under CRP except in cases where NRCS determines it would further the purposes of the program; lands owned by a Federal or non-Federal governmental agency; land that does not have sufficient legal access, clear title, or meet Department of Justice Title Standards; 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; and lands where purposes of program or implementation of restoration practices would be undermined due to onsite or offsite conditions. Such conditions may include risk of contamination from hazardous substances either onsite or offsite, proposed or existing rights of way, either onsite or offsite, for infrastructure development, or adjacent land uses that would either impede complete restoration or prevent wetland functions and values from being fully restored.

With respect to the ineligibility of land established to trees under CRP, the 2014 Act authorized a waiver where NRCS determines the enrollment of such land will further the purposes of the program. Such circumstances may exist where established cover conforms to ACEP-WRE requirements if the CRP trees are on incidental land adjacent to eligible wetland; enrollment would improve the practical administration of the easement boundary; the land contains habitat for at-risk species or migratory birds; conversion to higher intensity of production is likely; or other criteria as determined appropriate by the Chief.

#### *§ 1468.31 Application Procedures*

This section sets forth the application procedures for a landowner that wants to participate in the ACEP-WRE. Specifically, a landowner may obtain and submit to NRCS an application to

participate in the program at any time to the local USDA Service Center. By filing an application, the landowner consents to an NRCS representative entering upon the land for purposes needed to evaluate the application. The landowner is entitled to accompany an NRCS representative on any site visits.

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

This section sets forth the factors NRCS will use to select properties for enrollment in an ACEP-WRE. Among the priority factors, 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.

Given the statutory priority placed on acquiring easements based on the value of the easement for protecting and enhancing habitat for migratory birds and other wildlife and maximizing the benefit of the Federal investment, NRCS will also give priority consideration to obtaining permanent easements over shorter term easements. NRCS may work with both the FWS and the State Technical Committee on priority factors to ensure that ACEP and related Federal consultation requirements are met.

As provided by section 1265D(b) of the 1985 Act, NRCS may provide priority enrollment to land that is currently enrolled in CRP in a contract that is set to expire within one year from date of application to ACEP-WRE and is a wetland or related area with high wetland functions and values; is likely to return to production after the land leaves CRP; and has not been established to trees under CRP unless that limitation has been waived by NRCS.

This section sets forth how applications will be ranked for funding. The NRCS ranking system in each State incorporates criteria to rank, score and prioritize each eligible parcel within the State. NRCS determines priority for ACEP-WRE enrollment through an onsite field reviews conducted by NRCS and an appropriate interdisciplinary team of partner specialists, which may include FWS. The landowner is invited to participate in these field reviews.

The ranking criteria include quantitative factors that assess the sites physical capacity to be restored and the extent and diversity of anticipated benefits of such restoration. Hydrology restoration potential comprises at least 50 percent of the potential points awarded for environmental benefit considerations. NRCS obtains specific

information about a site's physical capacity to be restored using metrics such as the soil and landscape form characteristics including soil type, permeability, flooding frequency, depth to water table, slope, extent the original hydrology has been manipulated or removed, the extent to which the original hydrology can be restored, and other wetland restoration factors. To receive hydrology restoration ranking points, hydrology restoration or enhancement practices must provide hydrologic conditions suitable for the needs of the native wetland-dependent wildlife species that occurred in the area and appropriate for the wetland functions and values that existed prior to manipulation.

#### *§ 1468.33 Enrollment Process*

This section sets forth the process that NRCS will use for handling applications once they have been selected for enrollment. NRCS notifies a landowner of their tentative acceptance into the program. This notice does not bind NRCS or the landowner, but allows the parties to continue the enrollment process.

Once NRCS has completed its preliminary enrollment activities, the landowner will be presented with an agreement to purchase. The agreement to purchase describes the easement area, the easement compensation amount, the easement terms and conditions, and other terms and conditions for participation that NRCS may require. Easement compensation is based upon the criteria identified in § 1468.34, including the determination of fair market value of the land. This same methodology was used under the predecessor program, the Wetlands Reserve Program. USPAP establishes the criteria for appraisals and areawide market analysis which are each supplemented by NRCS Specifications and Statement of Work requirements for each methodology. NRCS has also developed policy parameters for area wide market analyses and geographic area rate caps to ensure that compensation amounts are appropriately constrained. Individual appraisals cannot be used on land that has been valued through an areawide market analysis.

Fair market value is determined, therefore, through either the use of a USPAP appraisal or an areawide market analysis or survey. For any particular easement offer, NRCS will only use one method for determining fair market value, and a landowner does not have input into which method NRCS will use. Once fair market value is determined, the value is compared to

the geographic area rate cap and the landowner offer made prior to enrollment, if any. The least of these values is the value used to determine the easement compensation amount.

The landowner accepts enrollment in the ACEP–WRE by signing the agreement to purchase. A similar process is followed for enrolling land held by Indian Tribes through a 30-year contract.

The agreement to purchase establishes the scope of the agreement between the parties, including the landowners' agreement to grant to the United States a wetland reserve easement and to the implementation of a WRPO.

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

This section sets forth how NRCS will determine the level of compensation that a landowner will receive in return for granting a wetland reserve easement. Easement compensation methodologies are determined by statute at section 1265C(b)(6) of the 1985 Act. In particular, the landowner will receive the least of: (1) The fair market value of the land; (2) a geographic rate cap; or (3) the landowner offer. This section also describes how each of these values are determined. This valuation determination uses the same methods of valuation determination that had previously been used in the WRP.

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

This section sets forth how NRCS will implement a wetland reserve enhancement option with partners under ACEP–WRE. In particular, the purpose of WREP is to target and leverage resources to address high priority wetlands protection, restoration, and enhancement objectives through agreements with States (including political subdivision or agency of a State, nongovernmental organizations, and Indian tribes. The Chief will establish priorities for funding, required level of partner contribution of resources, ranking criteria, and other criteria. NRCS will make public notifications of the availability of funding and instruct interested partners about the manner in which they should submit their proposal. Partners with a selected proposal will enter into WREP agreements with NRCS to carry out the project. Under WREP, individual easements are purchased directly from the landowner and held by the United States.

#### *§ 1468.36 WRPO Payments*

This section identifies that NRCS will provide funds towards implementing the WRPO on land enrolled through a wetland reserve easement or 30-year contract. NRCS will offer to pay at least 75 percent but not more than 100 percent of the cost of implementing the WRPO on land subject to a permanent easement. NRCS will offer to pay at least 50 percent but not more than 75 percent of such costs on enrolled land subject to a 30-year easement or maximum duration allowed by state law or 30-year contract.

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

This section identifies that to enroll land in ACEP–WRE through the permanent or 30-year easement option, a landowner must grant an easement to the United States. Consistent with ACEP–WRE requirements and as previously required under WRP, the landowner grants the wetland reserve easement to the United States through a reserved interest deed, including the right of access to the easement area, the right to permit compatible uses of the easement area, and the right to restore, protect, enhance, maintain, and manage activities on the easement area. Similar provisions are contained in a 30-year contract that is entered into with an Indian Tribe.

This section also identifies 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. Compensation for easements or 30-year contracts where the grazing rights are reserved will be reduced by an amount equal to the value of the reserved grazing rights, as determined by the Chief.

#### *§ 1468.38 The WRPO Development*

This section identifies that the development of the WRPO is through the local NRCS representative, in consultation with the State Technical Committee, with consideration of available site-specific technical input from the FWS and others as appropriate. NRCS specifies in the WRPO the manner in which land enrolled through a wetland reserve easement or 30-year contract will be restored, protected, enhanced, maintained, and managed to accomplish ACEP–WRE goals. NRCS will review, revise, and supplement the WRPO, as needed, throughout the

duration of the easement or 30-year contract term to ensure that program goals are fully and effectively achieved.

**§ 1468.39 Violations and Remedies**

This section identifies how NRCS will address violations of a wetland reserve easement or 30-year contract. In the event of a violation of a wetland reserve easement or 30-year contract involving the landowner, NRCS will give the landowner reasonable written notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice. However, NRCS reserves the right to enter upon the easement 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 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 negligence or failure to comply with easement or contractual obligations.

**Executive Summary of the Regulatory Impact Analysis**

Section XII of the Food Security Act of 1985, as amended by the Agricultural Act of 2014 (2014 Act), requires the Natural Resources Conservation Service (NRCS) to establish the Agricultural Conservation Easement Program (ACEP) in a new Subtitle H. This Subtitle repeals the previously authorized programs, Wetlands Reserve Program (WRP), Farm and Ranchlands Protection Program (FRPP) and Grassland Reserve

Program (GRP), but maintains the purposes of these programs in ACEP. Pursuant to Executive Order 12866, Regulatory Planning and Review, NRCS has conducted a Regulatory Impact Analysis and Initial Regulatory Flexibility Analysis (RIA) of ACEP using historical data and information, including information from WRP, FRPP, and GRP. This RIA describes both the potential impact of the regulation on benefits and costs and the regulatory flexibility in the rule implementation. Implementation of this rule is required to complete the Congressional Action.

In considering alternatives for implementing ACEP, the agency followed the legislative intent to establish an open participatory process, optimize environmental/conservation benefits, and address natural resource concerns. Because ACEP is a voluntary program, the program will not impose any obligation or burden upon agricultural landowners who choose not to participate.

The 2014 Act requires establishment of ACEP to retain the provisions in the current easement programs by establishing two types of easements: Wetlands reserve easements (WRE) that protect and restore wetlands as previously available under WRP, and agricultural land easements (ALE) that limit nonagricultural uses on productive farm or grassland as previously available under FRPP and the easement component of GRP. The WRE component will provide technical and financial assistance to landowners to restore and protect wetlands and associated habitats through conservation

easements. ACEP–WRE will address wetlands, wildlife habitat, soil, water, and related natural resource concerns on private lands. The ALE component will protect the natural resources and agricultural value of agricultural cropland, pasture and other working land, promote agricultural viability for future generations, preserve open space, provide scenic amenities, and protect grazing uses and related conservation values by restoring and conserving eligible land and limiting nonagricultural uses.

The 2014 Act also identified ACEP as a covered program for implementation of the Regional Conservation Partnership Program (RCPP), authorized by Subtitle I of Title XII of the Food Security Act of 1985, as amended (16 U.S.C. 3871 *et seq.*) RCPP is funded, in part, by a reservation of 7 percent of funds that have been allocated to implement covered programs, including 7 percent of funds allocated for ACEP implementation.

*Impacts of ACEP*

Most of this rule's impacts consist of transfer payments from the Federal Government to farmers, landowners, and producers. Although these transfers create incentives that very likely cause changes in the way society uses its resources, we lack data with which to quantify the resulting social costs or benefits. Under the 2014 Act, ALE and WRE enrollments are limited by funding. As set forth in the 2014 Act, total proposed ACEP funding and associated transfer payments by fiscal year is presented in Table ES–1.

TABLE ES–1—PROPOSED CONSERVATION TRANSFER PAYMENTS FACILITATED BY ACEP FUNDING, INCLUDING THE POTENTIAL RCPP ALLOCATION, FY 2014–2018

FY	Nominal-dollar farm-bill authorization	Real-dollar <sup>1</sup> authorization 2.1% GDP deflator	Real-dollar <sup>1</sup> authorization discounted at 3%	Real-dollar <sup>1</sup> authorization discounted at 7%
	million \$	million \$	million \$	million \$
FY 2014 .....	\$400.0	\$400.0	\$400.0	\$400.0
FY 2015 .....	425.0	416.3	404.1	389.0
FY 2016 .....	450.0	431.7	406.9	377.0
FY 2017 .....	500.0	469.8	429.9	383.5
FY 2018 .....	250.0	230.1	204.4	175.5
Total <sup>2</sup> .....	2,025.0	1,947.8	1,845.4	1,725.1

<sup>1</sup> 2013 dollars.

<sup>2</sup> Net present value of discounted funding levels.

*Conservation Impacts of the Program*

Land enrolled in ACEP–WRE easements will produce onsite and offsite environmental impacts. Those include: Restoration and protection of high value wetlands; control of sheet

and rill erosion as lands are restored from cropland to wetlands and associated habitats; restoration, enhancement, and protection of habitat for fish and wildlife, including threatened and endangered species and migratory birds; improving water

quality by filtering sediments and chemicals; reducing flooding and flood-related damage; recharging groundwater; protecting biological diversity; controlling invasive species with planting of native vegetation; as well as providing opportunities for

educational, scientific, and recreational activities. Soil health and air quality are improved by reduced wind erosion, reduced soil disturbance, increased organic matter accumulation, and an increase in carbon sequestration. Many of those conservation impacts are difficult to quantify at a national scale, but have been described by studies at an individual project, watershed, or flyway scale.

For land enrolled in ACEP–ALE, the suite of conservation effects on protected grasslands are different than those on protected farmland. ACEP–ALE easements on grasslands limit agricultural activities to predominately grazing and haying, whereas easements on farmland allow crop cultivation and pasture-based agriculture. As such, farmland protection effects are derived from onsite and ecological services, as well as preserving highly productive agricultural areas from development or fragmentation. Impacts on grasslands are derived from onsite and ecological impacts as well as preventing conversion to nongrassland uses. The net conservation effects through time from farmland protection include direct access benefits (pick-your-own, agri-tourism, and nature based activities like hunting) indirect access benefits (open spaces and scenic views) and nonuse benefits (wildlife habitat and existence values). Grassland protection conservation effects include the direct, indirect, and nonuse benefits, but also include on-farm production gains and carbon sequestration.

#### *Expected Costs of the Program*

The main program costs are the purchase of easements and associated restoration expenses under the ACEP–WRE component. Agricultural production ceases on lands enrolled in ACEP–WRE. At the same time, disaster payments, crop loss payments, and other commodity payments are eliminated.

Through ACEP–ALE, landowners voluntarily restrict the land to agricultural uses by the sale of conservation easements to eligible entities. Local cooperating entities are key drivers in farmland<sup>1</sup> conservation because they benefit from the indirect services (offsite and nonuse benefits) provided by agricultural land, and in the case of ACEP–ALE and its predecessors, also share in the costs of purchasing conservation easements. The local nature of the supply of and

demand for conservation easements, and the site-specific nature of the potential benefits complicate the description of conservation effects conducted in this analysis.

The public and private costs of ACEP–ALE are: (1) The actual cost of purchasing the easement; (2) a reduced tax base which includes the opportunity cost of lower local economic activity, which for this analysis we assume is offset by a reduction in needed public infrastructure and associated taxes to support that infrastructure; and (3) the forgone economic activity fostered by new development. These costs are not social costs and we do not estimate them in this analysis.

#### *Allocation Process and Comparison to Legacy Programs*

NRCS allocates ACEP funding based upon State-generated assessments of priority natural resource needs and associated work necessary to address identified resource concerns. These State-developed assessments, following national guidance to assure accuracy and consistency, are submitted to agency leadership for review. At the national level NRCS analyzes in a systematic manner these state-reported resource needs and requests along with factors including NRCS landscape initiatives or other nationally established conservation priorities; regional factors such as development pressure, migratory bird flyways, multi-state watersheds with water quality resource concerns; existing State capacity, workload, and performance; and other factors. This approach provides flexibility to address nationally and locally important natural resource concerns. Once funds are allocated to the States, individual project selection occurs at the State level based on the prioritization of the eligible applications using the NRCS ranking criteria.

Over the course of the 2008 Farm Bill, the three easement programs (WRP, GRP, and FRPP) received an average of \$691 million annually, which was comprised of \$513 million WRP, \$138 million in FRPP, and \$39 million in GRP. All three easement programs were combined under ACEP and the purposes of FRPP and GRP were combined under the ACEP–ALE component. The average annual funding available under the new ACEP program will be approximately \$368 million annually, about 53 percent of the amount previously available under the repealed programs.

#### *Conclusions*

Executive Summary Table ES–2 provides an overview of the potential benefits from both sub-program areas of

ACEP. For the private landowner, the end products of the ACEP–WRE include assurances of the restoration of the property and associated recreational use, the potential to engage in compatible uses on the property, and the elimination of negative impacts to agricultural operations on the property. Outcomes from the private landowner view of the ACEP–ALE include the long-term protection of the agricultural nature of the land and potential increases in productivity (from implementing the ALE plan) and sustainability of the local agricultural market (from local production). In addition, the private landowner, along with the general public, will reap the benefits of recreational waterfowl harvest, upland species harvest, and agri-tourism. Also in many cases easement that protect farmsteads under ACEP–ALE will provide the general public with an opportunity to engage with and obtain food products from a local farm producer.

Both ACEP–WRE and ACEP–ALE may provide benefits that are achieved for society as a whole, within the limitations of a voluntary program. These include: Improved water quality and water quantity; carbon sequestration; restoration of habitat for endangered or threatened wildlife species; flood prevention and protection; and improvements to scenic quality and rural characteristics. We note that agricultural lands and wetlands sequester carbon at higher rates than lands converted to development.

Participation in ACEP is voluntary and landowners participate in the program for many reasons, such as estate planning, income diversity, expanded recreational opportunity, improving agricultural efficiency, and their personal natural resource ethic. Landowners may also participate in part to meet requirements they face in managing their operation. For example, a landowner may decide to enroll acres in ACEP in order to protect highly productive grasslands from conversion to crop production and thus limit soil and chemical runoff into a nearby stream. Such actions may help demonstrate compliance with other State or Federal requirements, such as State plans to meet Federal TMDL requirements. ACEP may help landowners meet any compliance responsibilities that they may have under the Endangered Species Act. Also, ACEP–WRE implementation provides new habitat through the restoration of degraded wetlands that benefits wildlife. Even in the absence of a FWS critical habitat listing, as is

<sup>1</sup> Farmland refers to agricultural land used in crop production and livestock production, *i.e.*, cropland and pasture. For the purposes of this document, farmland does not include grasslands.



generally the case, land enrolled in ACEP could benefit at-risk species.

NRCS has a long-term responsibility to ensure ACEP program objectives are achieved and statutory requirements are met on these lands. Monitoring policy for these lands is in place to guide NRCS in meeting these responsibilities and to maintain working relationships with landowners. In addition, the Statement of Federal Financial Accounting Standards 29 (SFFAS 29) considers easements held by the United States as Stewardship Lands which must be accounted for as part of the agency's annual financial accountability reporting. The SFFAS 29 requires that the "Condition" of all Stewardship Lands be reported regularly. Therefore, NRCS incorporates this additional financial accounting responsibility to report on the condition of Stewardship Lands into its monitoring requirements by assessing compliance with the terms

of the easement and whether the easement is meeting program objectives. NRCS added functionality to its easement database to aid its State Offices in tracking monitoring events and observations.

NRCS requires an annual monitoring review of all ACEP easements to ensure compliance with easement terms and that program purposes are being met. For ACEP-ALE easements, NRCS requires the eligible entity to submit annual monitoring reports to NRCS for all ALE easements it holds, while NRCS conducts the annual monitoring of all ACEP-WRE easements.

Data, however, currently do not exist that would allow for parsing, or attributing, different potential benefits to the suite of motivations that might result in a producer participating in this program. What can be said, is that those actions benefit the public as a whole and the ACEP easement payment

compensates the landowner for the rights they are encumbering as a result of participating in ACEP. In addition, those transfer payments from the Federal Government to farmers, landowners, and producers may also create incentives that cause changes in the way society uses its resources. As mentioned, we lack data with which to estimate and attribute the overall social costs or benefits.

NRCS is committed to the continual improvement of its collection and analysis of administrative and programmatic data to ensure that program benefits are being achieved through adoptions and implementation of targeted resource-based policies and procedures. Given the existing limitation and lack of data, NRCS will investigate ways to quantify the incremental benefits obtained from this program.

TABLE ES-2—POTENTIAL BENEFITS FROM THE AGRICULTURAL CONSERVATION EASEMENTS PROGRAM DESCRIBED IN THE 2014 FARM BILL BY RECIPIENT

Ecosystem function	Ecosystem service	Wetlands reserve easements	Agricultural lands easements
<b>Benefits likely to accrue to private landowner</b>			
Tree growth medium .....	Commercial timber harvest .....	√	.....
Fish habitat .....	Commercial fish harvest .....	√	.....
Grassland preservation .....	Forage production .....	√	√
<b>Benefits that potentially accrue to both private landowner and public</b>			
Wildlife habitat .....	Recreational waterfowl harvest .....	√	.....
Wildlife habitat .....	Recreational upland species harvest .....	√	√
Land for Food Production .....	Local Food Production .....	.....	√
Recreation Opportunities .....	Agri-tourism .....	√	√
<b>Potential Social Benefits</b>			
Flood retention .....	Reduced flood flows/peaks .....	√	√
Water filtration .....	Water Quality .....	√	√
Endangered and Threatened wildlife habitat .....	Biodiversity .....	√	√
Open Space .....	Scenic quality and rural characteristics .....	√	√
Carbon Sequestration .....	Carbon Storage .....	√	√
Groundwater Recharge .....	Water Quantity .....	√	√

**Summary of Request for Comments**

NRCS seeks general comments related to how to make the provisions easier to understand. In addition, NRCS seeks public comment related to the ACEP regulation adopted by this interim rule, including seeking comment on the following topics:

- Access—Under ALE, NRCS has modified the requirements for what constitutes sufficient access to the easement to be less stringent than what is required by the Department of Justice title standards for WRE easements. Should NRCS adopt this greater flexibility for eligible entities on what

constitutes sufficient access for ALE easements and what specific conditions should be considered sufficient access under ALE to ensure the federal investment is protected?

- New terms—NRCS defined several new terms to implement new statutory authorities. What improvements to the definitions and implementation of the associated provisions should NRCS incorporate? The new terms include *active agricultural production*, *agricultural land easement plan*, the easement administration definitions (*easement modification*, *easement exchange*, *easement subordination*, and

*easement termination*), and *grassland of special environmental significance*.

- Project Selection Criteria and Weightings—What additional criteria should NRCS adopt in its allocation of funds and selection of ACEP projects, what weighting should NRCS provide to existing or new criteria, should this weighting of particular ranking factors occur at the National or State level, and what other changes would assist NRCS in selecting projects that best further ACEP purposes.

- ALE Valuation methods—What other types of "industry methods" should NRCS allow for determining

agricultural land easement “fair market value” for Federal match requirements?

- Projects of Special Significance—Did NRCS select appropriate criteria for determining projects of special significance and what other criteria should NRCS consider?

- Standard Minimum Easement Deed Terms—NRCS has developed a standard set of minimum deed terms that implement the minimum requirements that must be addressed by provisions in every ALE deed. What improvements can NRCS make to these standard deed terms?

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

Agricultural operations, conservation practices, conservation payments, conservation easements, farmland protection, grasslands, natural resources, soil conservation, wetlands, wildlife.

For the reasons stated in the preamble, the Natural Resources Conservation Service revises part 1468 of Title 7 of the CFR 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 application selection.
- 1468.23 Cooperative agreements.
- 1468.24 Compensation and funding for agricultural land easements.
- 1468.25 Agricultural land easement deeds.
- 1468.26 Agricultural land easement plan.
- 1468.27 Eligible entity certification.
- 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 and funding for wetland reserve 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 The WRPO development.

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).

(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 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 the identification of lands of statewide importance, development of a priority ranking process, and related technical matters.

(c) NRCS may delegate at any time its wetlands reserve easement management responsibilities to other Federal or State agencies or conservation organizations that have appropriate authority, expertise and technical and financial resources, as determined by NRCS, to carry out such delegated responsibilities.

(d) NRCS may delegate at any time its wetlands reserve easement monitoring

and 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.

(e) NRCS may consult 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.

(f) 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; special pilot programs for easement management and monitoring; cooperative 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; or for other goals of the ACEP found in this part.

(g) 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.

(h) 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 under the Regional Conservation Partnership Program (RCPP) authorized by Subtitle I of Title XII of the Food Security Act of 1985. The waiver must further ACEP purposes while also addressing whether the purpose and conservation objectives of the RCPP project(s) are consistent with the specific Wetland Reserve Easement (WRE) or Agricultural Land Easement (ALE) conservation purpose and objectives. No waiver will result in reducing the quality of wetland wildlife habitat that is restored under WRE, or the protection for agricultural viability under ALE.

(i) To assist in RCPP implementation the Chief may also waive the applicability of the limitation in section 1001D(b)(2) of the Food Security Act of 1985 for participating landowners if the Chief determines that the waiver is necessary to fulfill RCPP objectives.

**§ 1468.3 Definitions.**

The following definitions will 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.

*Active agricultural production* means that on lands that meet the definition of being in agricultural use, agricultural or forest-related products or livestock are being produced or have been produced within one year of the date of application by an eligible entity for funding under subpart B of this part. Land may also be considered in active agricultural production if it is current or former CRP land that is planted, considered planted, or in conserving use as determined by NRCS.

*Agreement* means the document that specifies the obligations and rights of NRCS and any person, legal entity, or eligible entity who is 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, a wetland reserve easement restoration agreement, a cooperative 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 wetland reserve easement acquisition process and to incur costs for surveys, title clearance, due diligence activities, and closing procedures on the easement.

*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 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, degrade soils, 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.

*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 subject to an agricultural land easement plan.

*Agricultural land easement plan* means the document developed by NRCS or provided by the eligible entity and approved by NRCS, in consultation with the eligible entity and landowner, that describes the activities which promote the long-term viability of the land to meet the purposes for which the easement was acquired. The agricultural land easement plan includes a description of the farm or ranch management system, conservation practices that address the resource concerns for which the easement was enrolled, and any required component plans such as a grasslands management plan, forest management plan, or conservation plan as defined in this part. Where appropriate, the agricultural land easement plan will include conversion of highly erodible cropland to less intensive uses.

*Beginning farmer or rancher* means an individual or legal entity who:

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

(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.

*Certified entity* means an eligible entity that NRCS has determined to meet the certification requirements in 1468.27 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, timing, frequency, intensity, and duration limitations prescribed by NRCS.

*Conservation plan* is 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, will 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 pursuant to 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.

*Cooperative agreement* means the document that specifies the obligations and rights of NRCS and eligible entities participating in the program under subpart B or the document that authorizes the transfer of assistance between NRCS and a non-Federal entity associated with implementation of the program under subpart C.

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

*Dedicated fund* means an account held by a 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 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 real property rights or interests in an easement which are replaced by real property rights or interests granted through an easement that has 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 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 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.

*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 enrollment.

*Easement subordination* means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, agrees to subordinate its real property rights on all or a portion of an easement as part of an easement exchange or easement modification. The subordinated rights will be replaced by rights that are of equivalent or greater conservation value, acreage, and economic value to the United States. NRCS is not required to subordinate any of its rights 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.

*Easement termination* means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, agrees to terminate its rights in an easement or portion thereof to facilitate a project that addresses a compelling public need for which there is no practicable alternative and such termination action will result in equivalent or greater conservation value and economic value to the United States, and the United States is provided compensation for such termination. NRCS is not required to terminate any of its rights 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 is included in the Wetland Reserve Plan of Operations (WRPO), as applicable, and

that has the effect of alleviating problems or improving the condition of the resources, including ensuring proper management or maintenance of the wetland functions and values restored, protected, or enhanced through an easement or 30-year contract.

*Eligible entity* means an Indian Tribe, State government, local government, or a nongovernmental organization which has a farmland or grassland protection program that purchases agricultural land easements for the purpose of protecting agriculture use and related conservation values, including grazing uses and related conservation values, by limiting conversion to nonagricultural uses of the land.

*Eligible land* means private or Tribal land 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, bio-fuels, 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, bio-fuels, and oil seed 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 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 land* means a land cover or use category that is at least 10 percent stocked by single-stemmed woody species of any size that will be at least 13 feet tall at maturity. Also included is land bearing evidence of natural regeneration of tree cover (cutover forest or abandoned farmland) that is not currently developed for nonforest use. Ten percent stocked, when viewed from a vertical direction, equates to an aerial canopy cover of leaves and branches of 25 percent or greater.

*Forest land of statewide importance* means forest land that NRCS, in consultation with the State Technical Committee, identifies as having ecological or economic significance within the State and may include forested areas or regions of the State that have been identified through statewide assessments and strategies conducted pursuant to State or Federal law.

*Forest management plan* means a site-specific plan developed or approved by NRCS, in consultation with the eligible entity and the landowner, that describes management practices to conserve, protect, and 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), another practice plan approved by the State Forester, or another plan determined appropriate by NRCS. The plan complies with applicable Federal, State, Tribal, and

local laws, regulations, and permit requirements.

*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 nongrassland uses or fragmentation; and the land is:

(1)(i) Rangeland, pastureland, or shrubland on which the vegetation is dominated by native grasses, grass-like plants, shrubs, or forbs, or  
(ii) Improved, naturalized pastureland and rangeland; and

(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  
(iii) Provides protection of highly sensitive natural resources.

*Grasslands management plan* means the site-specific plan developed or approved by NRCS that describes the management system and practices to conserve, protect, and enhance the viability of the grassland. The grasslands management plan will include a description of the grassland management system consistent with NRCS practices contained in the FOTG, including the prescribed grazing standard for easements that will be managed using grazing; the management of the grassland for grassland-dependent birds, animals, or other resource concerns for which the easement was enrolled; the permissible and prohibited activities; and any associated restoration plan or conservation plan. The grasslands management plan is a component of either an agricultural land easement plan or wetland reserve plan of operations.

*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), 16 U.S.C. 470, *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, or socially disadvantaged 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 pursuant to 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, including, for the purposes of this part, pueblos.

*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 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 governments, local governments, and nongovernmental organizations that qualify as eligible entities are not eligible as landowners, unless otherwise determined by the Chief.

*Lands substantially altered by flooding* means areas 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 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 activities on a wetland reserve easement, as approved by NRCS.

*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 and 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—

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

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

*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 and 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 or 30-year contract, or the cooperative agreement for agricultural land easements.

*Pending offer* means a written bid, contract, or option extended to a landowner by an eligible entity to acquire an agricultural conservation easement before the legal title to these rights has been conveyed for the purposes of protecting the agricultural use and future viability, including the protection of grazing uses and related conservation values, by limiting nonagricultural uses of the land or by restoring and 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.

*Projects of special significance* means projects identified by the Chief using the criteria identified in § 1468.24 of this part.

*Right of enforcement* means the right of the United States to inspect the easement area and 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 an entity, at least 50 percent ownership in the business 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 pursuant to 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(e) of the Food, Agriculture, Conservation, and Trade Act of 1990, as amended (7 U.S.C. 2279(e)).

*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 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, and protected to achieve the purposes of the wetland reserve easement enrollment.

*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; and
- (8) Contribution to educational and scientific scholarship.

*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.

#### **§ 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 determinations under ACEP after easement closing. NRCS determinations that are made pursuant to its rights in an ACEP-funded easement after closing may be appealed to the State Conservationist as specified in the notice provided to the landowner when NRCS exercises its rights under the easement. Such determinations are not subject to appeal under 7 CFR part 11.

#### **§ 1468.5 Scheme or device.**

(a) 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, exchange, modification, or termination will be made in any interest in land, or portion of such interest, except as approved by the NRCS.

(b) NRCS may approve subordinations, exchanges, modifications, or terminations if NRCS determines that:

- (1) It is in the Federal Government's interest to subordinate, exchange, modify, or terminate the interest in the land enrolled in the program;
- (2) The subordination, exchange, modification, or termination action will address a compelling public need or will facilitate the practical administration and management of the easement area or the program, as determined by the NRCS;
- (3) There is no practicable alternative that would address the compelling public need and avoid the easement area;

(4)(i) The change will not adversely affect the conservation functions and values for which the easement was acquired or

(ii) If there are no practicable alternative that exists other than impact to the conservation value of the easement area, such adverse impacts have been minimized to the greatest extent practicable, and any remaining adverse impacts mitigated by enrollment of other lands that provide equal or greater conservation functions and values, as determined by NRCS, at no cost to the government;

(5) The easement subordination, modification, exchange, or termination under this section will not affect more than 10 percent of the original easement area. NRCS may authorize a greater percentage of the original easement area to be affected if NRCS determines that it is impracticable to achieve program purposes on the original easement area; and

(6) The subordination, exchange, modification, or termination action will result in comparable conservation functions and value and equivalent or greater economic value to the United States as determined pursuant to paragraph (d) of this section.

(c) NRCS must determine that the landowner and, if applicable, the eligible entity agree to such easement subordination, modification, exchange, or termination prior to considering that

such easement administration action should be approved.

(d) A determination of equal or greater economic value to the United States under paragraph (b) of this section will be made in accordance with an approved easement valuation methodology for ALE easements under subpart B or for WRE 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.

(e) Subordinations, exchanges, modifications, or terminations must result in equal or greater conservation and economic values to the United States. Subordinations, exchanges, or modifications of ACEP easements must result in no net loss of easement acres.

(f) When reviewing a proposed action under this section, the preferred alternative is to avoid the easement area. If the easement area cannot be avoided entirely, then the preferred alternative should minimize impacts to the original easement area and its conservation functions and values.

(g) Easement modifications, including subordinations, are preferred to easement exchanges which 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.

(h) 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.

(i) Where NRCS determines that recordation of a new deed is necessary to effect an easement administration action under this section, NRCS will use the most recent version of the ACEP deed document or deed terms approved by NRCS.

(j) If a modification, subordination or exchange involves an amended or new easement deed, the amended or new easement deed will be duly prepared and recorded in conformity with standard real estate practices, including requirements for title approval, subordination of liens, and recordation of documents.

(k) 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.

(l) A termination must meet criteria identified in this part and are limited to those circumstances where NRCS determines 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. 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, and legal filing fees.

(m) *Easement plan.* 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 agricultural land easement plans and component plans, wetland reserve plans of operations, or wetland reserve easement restoration agreements. Any easement plan modification must meet ACEP regulations and program objectives 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 easement 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 Government.

#### **§ 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 but such action must not adversely affect the interests granted under the easement to the United States or be inconsistent with or defeat the conservation purpose for which the easement is acquired.

(b) *Ecosystem Services Credits Related to an Agricultural Land Easement:* Landowners may obtain environmental credits under other programs but such action must not adversely affect the interests granted under the easement to the grantee or to the United States right of enforcement or be inconsistent with or defeat the conservation purpose for which the easement is acquired.

### **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 subject to a written pending offer from an eligible entity for the purpose of protecting the agricultural use, including grazing, and related conservation values of the land by limiting nonagricultural uses of the land.

(2) To participate in ACEP–ALE, eligible entities as identified in paragraph (b) of this section must submit applications to NRCS State offices to partner with NRCS to acquire conservation easements on eligible land. Eligible entities with applications selected for funding must enter into a cooperative agreement with NRCS and use the NRCS required minimum deed terms 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 subject to an agricultural land easement plan as approved by NRCS.

(3) Under the agreement, 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, and at least 50 percent of the eligible entity share is from the eligible entity's own cash resources unless otherwise specified in this part.

(4) The duration of each agricultural land easement or other interest in land will be in perpetuity or the maximum duration permitted 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, and
- (iv) The availability of funds at the time of application sufficient to meet the eligible entity's contribution requirements for each parcel proposed for funding.

(2) All entities identified on the application or agreement must:

(i) Ensure that their records and the records of all landowners with parcels selected for funding have been established in the USDA customer records system and are responsible for ensuring that USDA has all the documentation needed to establish these records, and

(ii) 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 cooperative agreement.

(c) *Landowner eligibility.* Under ACEP–ALE, the parcel landowners must:

(1) 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 of 7 CFR part 1400;

(2) 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

(3) 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 land:

(i) Is private or Tribal land on a farm or ranch subject to a written pending offer by an eligible entity,

(ii) 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, contains historical or archaeological resources, the enrollment of which would protect grazing uses and related conservation values by restoring and conserving land, or furthers a State or local policy consistent with the purposes of the ACEP-ALE,

(iii) Is cropland; rangeland; grassland or land that contains forbs or shrubland for which grazing is the predominant use; 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; pastureland; or 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 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. Land with contiguous forest that exceeds the greater of 40 acres or 20 percent of the easement area will have a forest management plan before the easement is purchased and compensation paid to the landowner unless NRCS has approved an

alternative means by which the forest land's contribution to the economic viability of the land has been demonstrated.

(e) *Ineligible land.* The following land 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;

(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 substances, proposed 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.

#### **§ 1468.21 Application procedures.**

(a) To apply for enrollment under a new agreement or if applicable, under an existing agreement in a subsequent fiscal year, an eligible entity must submit an entity application for an ACEP-ALE agreement and any associated individual parcel applications to NRCS in the State where parcels are located.

(b) 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.

(c) NRCS will determine the entity, land, and landowner eligibility based on the application materials provided by the eligible entity, onsite assessments, and the criteria set forth in § 1468.20.

(d) At the end of each fiscal year, the lists of pending, unfunded eligible parcels will be cancelled unless the eligible entity requests that specific parcels be considered for funding in the next fiscal year and provides updated application information to NRCS.

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

(a) After NRCS determines the eligibility of the landowner and the land, it can score and rank the parcels for funding. NRCS will use national and State criteria to score and rank eligible parcels. 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 advice from the State Technical Committee. Eligible parcels are ranked at the State level.

(b) The national ranking criteria are:

(1) Percent of prime, unique, and other important farmland 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 farm 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;

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

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

(11) Whether the land is currently enrolled in CRP in a contract that is set

to expire within one year and is grassland that would benefit from protection under a long-term easement; and

(12) Other additional 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 social, economic, historical and archaeological, environmental benefits, species protection, or climate change resiliency;

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

(5) Diversity of natural resources to be protected;

(6) Score in the land evaluation and site assessment system or equivalent measure for grassland enrollments. This score serves as a measure of agricultural viability (access to markets and infrastructure); and

(7) Other criteria determined by NRCS that will allow for the selection of parcels that will achieve ACEP-ALE purposes.

(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 inclusion in a cooperative agreement.

(f) NRCS will list the selected eligible parcels in the cooperative agreements with the eligible entities that submitted the parcels, and the cooperative agreements will be signed by NRCS and eligible entities.

(g) If the terms of the cooperative agreement allow for amendments in a subsequent fiscal year, the subsequent fiscal year's selected eligible parcels

will be identified on an amendment to the cooperative agreement for that fiscal year. Funds for each subsequent fiscal year's parcels will be obligated with new NRCS and eligible entity signatures on each fiscal year's amendment. Parcels funded on each fiscal year's amendment will have a separate deadline for easement purchase, requesting reimbursement, and funding expiration.

#### **§ 1468.23 Cooperative agreements.**

(a) NRCS will enter into a cooperative agreement with selected eligible entities 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 a cooperative agreement template available to the eligible entities. The cooperative agreement will address:

(1) The interests in land to be acquired, including the United States' right of enforcement, the minimum deed requirements, as well as the form and 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 lands acquired with ACEP-ALE funds;

(5) The requirement for each easement to have an agricultural land easement plan that is approved by NRCS and signed by the landowner and the eligible entity prior to execution of the easement deed and payment of easement compensation to the landowner;

(6) 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 the landowner has provided to eligible entity; and

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

(b) The term of cooperative agreements will be up to 5 fiscal years following the fiscal year the agreement is signed for certified entities and up to 3 fiscal years following the fiscal year the agreement is signed for other eligible entities.

(c) The cooperative agreement will include an attachment listing the eligible parcels accepted by the NRCS. This list will include landowners' names and addresses, acreage, the

estimated fair market value, the estimated Federal contribution, and other relevant information.

(d) The cooperative 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 decrease the monetary value of the offered easement or reduce the easements capability in meeting program purposes. With NRCS approval, an eligible entity may substitute pending easement offers within their cooperative 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 a cooperative agreement.

#### **§ 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 a cooperative agreement.

(5) Requests to use another industry-approved method must be submitted to NRCS and approved by NRCS prior to entering into the cooperative 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. 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 date of easement execution and payment of easement compensation to the landowner.

(7) 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 determined.

(8) The landowner may make a charitable donation for a qualified conservation contribution (as defined by Section 170(h) of the Internal Revenue Code of 1986) to the eligible entity as provided in paragraph (b) of this section.

(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 share in the cost of purchasing an agricultural land easement in an amount that is at least equivalent to the Federal share.

(2) An eligible entity may include as part of its share a charitable donation or qualified conservation contribution (as defined by section 170(h) of the Internal Revenue Code of 1986) from the landowner if the eligible entity contributes its own cash resources in an amount that is at least 50 percent of the amount of the Federal share.

(3) NRCS may authorize a waiver to increase the Federal share of the cost 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 will share in the cost of purchasing an agricultural land easement in an amount that is no less than 33.33 percent of the Federal share. The eligible entity share may include a qualified landowner contribution if the eligible entity contributes its own cash resources in an amount that is at least 16.67 percent of the Federal share, and

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

(4) NRCS may waive a portion of the applicable eligible entity cash contribution requirement for enrollments that NRCS determines are of projects of special significance, including ALE enrollments that have received a waiver as grasslands of special environmental significance waiver. The waiver of the entity cash contribution does not result in an increase in the applicable Federal share and may only be authorized if NRCS determines the parcel is a project of special significance and NRCS determines that—

(i) The transaction is subject to an increase in the private landowner donation that is equal to the amount of the waiver,

(ii) The increase in the landowner donation is voluntary,

(iii) The property is in active agricultural production,

(iv) The agricultural land easement plan will address the protection of the attributes resulting in the parcel being a project of special significance, and

(v) The eligible entity contributes its own cash resources in an amount that is:

(A) For projects of special significance that are not grasslands of special environmental significance, at least 25 percent of the amount of the Federal share, or at least 10 percent of the Federal share in States that offer a State tax credit for a qualified conservation contribution on agricultural land; and

(B) For enrollment on lands that has received a grasslands of special environmental significance waiver, at least 8.33 percent of the amount of the Federal share, or at least 3.33 percent of the Federal share in States that offer a State tax credit for a qualified conservation contribution on agricultural land.

(vi) The parcel must meet definition of project of special significance and meet one or more of the following national criteria. The parcel is:

(A) Listed on the National Register of Historic Places or is a traditional cultural property;

(B) Located within a micropolitan statistical area and 50 percent of the adjacent land is agricultural land;

(C) Located within a metropolitan statistical area;

(D) An education or demonstration farm or ranch focused on agricultural production and natural resource conservation;

(E) A farm or ranch operated for the purpose of increasing participation in agriculture and natural resource conservation by underserved communities, veterans, beginning farmers or ranchers, or disabled farmers or ranchers;

(F) Officially designated as having been in the same family ownership for over 100 years; or

(G) Meets the definition of grasslands of special environmental significance.

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

(1) ACEP-ALE funds may not be used for eligible entity expenditures for appraisals, areawide market analysis, legal surveys, access, title clearance or title insurance, legal fees, 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 its hazardous materials reviews.

(3) NRCS may provide technical assistance to develop an agricultural land easement plan or component plans or may provide ACEP-ALE funds to technical service providers (TSP) under 7 CFR part 652 to develop the agricultural land easement plan or component easement plans.

#### **§ 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 ACEP-ALE cooperative 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) Written pending offers by an eligible entity must be for acquiring an easement 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 contain the minimum deed requirements as specified by NRCS in the cooperative agreement, either in the deed or through an addendum that is incorporated therein.

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

(2) Eligible entities with multiple eligible parcels in a cooperative agreement 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.

(3) 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 National Headquarters and that the appropriate site-specific information has been included.

(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) Among the minimum deed requirements specified in the cooperative agreement, the deed must:

(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 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) Ensure compliance with an agricultural land easement plan that is provided by the eligible entity in consultation with the landowner, approved by NRCS, and implemented according to NRCS requirements. NRCS may provide technical assistance for the development or implementation of the

agricultural land easement plan. If the parcel contains highly erodible land, the conservation plan component of the agricultural land easement plan will be developed and managed in accordance with the Food Security Act of 1985 and its associated regulations. The access must be sufficient to provide the United States ingress and egress to the easement area to ensure compliance pursuant to its right of enforcement.

(3) 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 that a 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 was 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 amount of impervious surfaces within the easement area.

(4) 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. This provision cannot be waived.

(5) 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 prior to recordation or else the action is null and void.

(6) Prohibit commercial and industrial activities except those activities that NRCS has determined are consistent with the agricultural use of the land.

(7) Prohibit 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.

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

(9) Other minimum deed terms specified by NRCS to ensure that ACEP-ALE purposes are met.

(g) NRCS will make available for an eligible entity's use a standard set of minimum deed terms that could 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. If an eligible entity agrees to use the standard set of minimum deed terms, NRCS and the eligible entity will identify in the cooperative agreement those minimum standard deed terms as a requirement and the review of individual deeds may not be required. The minimum standard deed terms will specify that if such terms conflict with other terms of the deed, the NRCS terms superseded and prevail. NRCS may place priority on applications where an eligible entity agrees to use the standard set of minimum deed terms.

(h) 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 a governmental or private organizations that have no property rights or interests in the easement area to carry out easement monitoring, management and enforcement responsibilities.

(i) 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 cooperative agreement.

#### **§ 1468.26 Agricultural land easement plan.**

(a) The terms of the agricultural land easement deed will permit the landowner the right to continue agricultural production and related uses subject to an agricultural land easement plan, approved by NRCS and the landowner. An agricultural land

easement plan is required on all ACEP–ALE easements and at a minimum must:

(1) Describe the activities which promote the long-term viability of the land to meet the purposes for which the easement was acquired;

(2) Identify required and recommended conservation practices that address the purposes and resource concerns for which the parcel was selected;

(3) Identify additional or specific criteria associated with permissible and prohibited activities consistent with the terms of the deed; and

(4) If the agricultural land easement contains certain land use types, a component plan must be incorporated by reference into the agricultural land easement plan for each land use type present on the easement as follows:

(i) Grasslands must have a grasslands management plan as defined in this part which includes a description of the grazing management system consistent with NRCS prescribed grazing standards,

(ii) Forest land as described in § 1468.20(d)(3) must have a forest management plan, and

(iii) Highly erodible land must have a conservation plan wherein NRCS may require the conversion to less intensive uses. The terms of the conservation plan must be developed and managed in compliance with the Food Security Act of 1985 and its associated regulations.

(5) The eligible entity is responsible to obtain and provide the agricultural land easement plan to NRCS. The agricultural land easement plan may be developed by NRCS, a qualified TSP, or an NRCS-certified conservation planner with current certifications.

(6) Prior to the execution of the easement by the eligible entity and the landowner and payment of easement compensation to the landowner, the agricultural land easement plan must be approved by NRCS and be signed by the landowner and the eligible entity. The eligible entity is primarily responsible to ensure compliance with any required provisions of the agricultural land easement plan.

(b) [Reserved].

#### **§ 1468.27 Eligible entity certification.**

(a) To be considered for certification, an entity must submit a written request for certification to NRCS, which specifically addresses the following items:

(1) An explanation of how the entity meets the requirements identified in § 1468.20(d) 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) Proof that the entity holds, manages, and monitors a minimum of 25 agricultural land conservation easements, unless the entity requests and receives a waiver of this requirement from NRCS;

(4) Proof that the entity holds, manages, and monitors a minimum of five ACEP–ALE, FRPP, or Farmland Protection Program conservation easements;

(5) A showing of a demonstrated ability to complete acquisition of easements in a timely fashion;

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

(7) For nongovernmental organizations, information that the entity possesses a dedicated fund for the purposes of easement management, monitoring, and enforcement where such fund is sufficiently capitalized. The fund must be dedicated to the purposes of managing, monitoring, and enforcing each easement held by the eligible entity; and

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

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

(1) NRCS may enter into a cooperative agreement with the certified entity through which NRCS may obligate funding for up to 5 fiscal years. New parcels or prior-year unfunded parcels submitted for funding by certified entities must compete for funding each year. Selected parcels and funding will be added to the existing cooperative agreement using an amendment to the cooperative agreement. Amendments added in the last year of the agreement cannot be extended;

(2) NRCS will accept applications from certified entities continuously throughout the fiscal year;

(3) The terms of the cooperative agreement will include the minimum deed terms and conditions to ensure that ACEP–ALE purposes will be met by the certified entity 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, agricultural land easement plans, titles, or appraisals before the purchase of the easement;

(ii) Certified entities will prepare the agricultural land easement deeds, agricultural land easement plans, titles, and appraisals in accordance with

NRCS requirements as identified in the cooperative agreement;

(4) NRCS may provide technical assistance to develop the agricultural land easement plan.

(5) NRCS will conduct quality assurance reviews of a percentage of the agricultural land easement transactions submitted by the certified entity for payment and annual monitoring reports submitted by the certified entity. The review will include whether the deed, title review, agricultural land easement plan, easement valuation determinations, and subsequent monitoring were conducted in accordance with the requirements set forth by NRCS in its certification of the eligible entity or in the cooperative agreement entered into with the certified entity; and

(6) If an agricultural land easement deed, agricultural land easement plan, title, appraisal, or other easement valuation determination, or monitoring report fails the NRCS quality assurance review, NRCS will provide the certified entity an opportunity to correct the errors. If the certified entity fails to correct the errors to NRCS' 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) *Review and decertification of the certified entity.* (1) NRCS will conduct a review of the certified entity a minimum of once every 3 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 of the entity's certification status or eligibility for future ACEP–ALE funding. This notice will specify the actions that have not been completed to retain certification status, the actions entity must take to request certification status, the status of funds in the cooperative 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 not exceed 3 years in duration, with duration of decertification based upon the seriousness of the facts; and

(4) The entity may be recertified upon application to NRCS, after the decertification period has expired, and when the entity has met the requirements as outlined under § 1468.20(d).

#### **§ 1468.28 Violations and remedies.**

(a) In the event of a violation of the agricultural land easement terms, the eligible entity 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 eligible entity 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 eligible entity, reserves the right to enter upon the easement area if the annual monitoring report provided by the eligible entity documenting compliance with the agricultural land easement and the agricultural land easement plan is insufficient or is not provided annually, the United States has evidence of an unaddressed violation, or to remedy deficiencies or easement violations as it relates to the agricultural land easement plan. In the event of an emergency, the entry 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 eligible entity 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.

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

relates to the enforcement of the ACEP-ALE easement.

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

(f) If NRCS exercises its rights identified under an agricultural land easement NRCS will provide written notice to the eligible entity at the eligible entity's last known address. The notice will set forth the nature of the noncompliance by the eligible entity and a 60-day period to cure. If the eligible entity fails to cure within the 60-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 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 with 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, and manage 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 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 activities through an agreement with the landowner, a contract with a vendor, an interagency agreement, or a cooperative agreement with a cooperating entity. Specific restoration, protection, enhancement, maintenance, and management actions 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 permitted 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 Farm Service Agency, may be enrolled in CRP and ACEP-WRE, and no more than 10 percent of the total cropland in the county may be subject to an easement under ACEP-WRE.

(2) The limitations in paragraph (1) of this subsection 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 Farm Service Agency 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;

(3) 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

(4) 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) *Transfer of parcel before purchase of easement.* 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' 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, and management.

(3) Land will only be considered eligible for enrollment in the ACEP-WRE if NRCS determines, in consultation with the FWS, 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 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; or

(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 50 percent share of the cost of the an 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 subsection, 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 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 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 following land 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 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 substances either onsite or offsite,

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

(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 easement 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 for 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) 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 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 wildlife, in consultation with FWS, 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 one 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 in order 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. NRCS may coordinate with other Federal, State, and nonprofit organizations to encourage the restoration of wetlands on adjacent ineligible lands, especially in priority geographic areas.

**§ 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' 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 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 enrollment document 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, and

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

(2) The agreement to purchase between NRCS and the landowner under the easement option 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 and protection of the wetland functions and values,

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

(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, and

(v) Withholding the landowner's share of the restoration cost from the easement payment for 30-year or non-permanent easement or 30-year contract enrollments.

(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 entity, any activities to restore, protect, manage, maintain, enhance, 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 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 hazardous substance contamination, 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 payment rates.* (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 following:

(i) The fair market value of the land using the Uniform Standards for Professional Appraisal Practices or based on an areawide 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 or may not equal 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 agreement to enter 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 a conservation easement (APCE) or agreement to enter contract for 30-year land use, 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 payments 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 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. Among other selection 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. The amount and terms and conditions of the financial assistance will be subject to the following restrictions on the costs of establishing or installing conservation practices or 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 replacement of an eligible conservation practice, if NRCS determines that the practice is still needed and that the failure of the original conservation practice 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 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, and management 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, and management 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 such activities as hunting and fishing, managed timber harvest, 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, and manage 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, and management 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, and management 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, and management 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, 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, and manage 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, and management 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 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.

(2) Compensation for easements or 30-year contracts where the grazing rights are reserved under this subsection 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 The WRPO development.**

(a) The WRPO will be developed as determined by NRCS in consultation with the State Technical Committee and consideration of available site-specific technical input from FWS and others as appropriate.

(b) The WRPO will specify the manner in which the enrolled land will be restored, protected, enhanced, maintained, and managed to accomplish the goals of the program. The WRPO 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 alternations and the offsite watershed conditions that adversely impact the hydrology and associated wildlife and wetland functions and values.

**§ 1468.39 Violations and remedies.**

(a) *Easement violations.* (1) In the event of a violation of the easement or 30-year contract 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 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.

Signed this 13th day of February, 2015, in Washington, DC.

**Jason A. Weller,**

*Vice-President, Commodity Credit Corporation and Chief, Natural Resources Conservation Service.*

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