

Part 528 – Agricultural Conservation Easement Program (ACEP)

Subpart K – ACEP-WRE Application Process and Eligibility Requirements

528.100 Overview of the Wetland Reserve Easements (WRE) Component

A. WRE Purpose

- (1) The purpose of the Agricultural Conservation Easement Program-Wetland Reserve Easement (ACEP-WRE) is to restore, protect, and enhance wetlands on eligible private or Tribal lands while maximizing wildlife habitat benefits.
- (2) The enrollment options available to eligible landowners are listed in figure 528-K1.

Figure 528-K1

Enrollment Option	Duration	Eligible Applicant
30-Year Contract	30 years	Acreage owned by Indian Tribes only
30-Year Easement	30 years or the maximum duration allowed by State law if less than perpetual	Private landowners or Indian Tribes (including Native Corporations)
Permanent Easement	Perpetuity	Private landowners or Indian Tribes (including Native Corporations)

B. Program Objectives

The objectives of ACEP-WRE are to protect, restore, and enhance the functions and values of wetland ecosystems to attain—

- (i) Habitat for migratory birds and other wetland-dependent wildlife, including endangered or threatened species and species of concern.
- (ii) Protection and improvement of water quality.
- (iii) Attenuation of floodwater.
- (iv) Recharge of ground water.
- (v) Protection and enhancement of open space and aesthetic quality.
- (vi) Carbon sequestration.
- (vii) Protection of native flora and fauna contributing to the Nation's natural heritage.
- (viii) Contribution to educational and scientific scholarship.

C. Agreements

- (1) Partnerships may be established at the national, regional, or State level to—
 - (i) Implement components of the program.
 - (ii) Leverage program funds.
 - (iii) Provide for the longer-term conservation of the ACEP-WRE 30-year easements.
 - (iv) Coordinate acquisition or restoration implementation activities.
 - (v) Assist NRCS with the easement acquisition process.
 - (vi) Assist with development of easement restoration agreements.
 - (vii) Assist with restoration planning, design or implementation.
 - (viii) Assist with monitoring and management activities.

- (2) NRCS may enter into cooperative or contribution agreements with State or local agencies, conservation districts, and private conservation organizations to assist NRCS with program implementation, including the provision of technical assistance. NRCS may also enter into interagency agreements with other Federal agencies.
- (3) Agreements may include but are not limited to the following:
 - (i) Taking applications
 - (ii) Easement acquisition functions, such as procuring due diligence reports (environmental record searches, title commitments, etc.), appraisals, easement boundary surveys, or closing agent services
 - (iii) Restoration planning and design
 - (iv) Implementing restoration plans
 - (v) Maintenance, management, and monitoring activities
- (4) Agreements must be specific enough to accurately and specifically define deliverables, track program expenditures, and document accomplishments. Agreements must conform to applicable policy, depending on the type of agreement (see subpart O of this manual for further information).
- (5) NRCS may enter into agreements with a State, nongovernmental organization, or Indian Tribe to carry out the Wetland Reserve Enhancement Partnership (WREP) enrollment option as described in subpart Q of this manual.

D. Delegated Management, Monitoring, and Enforcement Authority

- (1) Under ACEP-WRE, NRCS may, at any time, delegate its easement management responsibilities to a conservation organization that has appropriate authority, expertise, and technical and financial resources, as determined by NRCS, to carry out such delegated responsibilities. NRCS may also, at any time, delegate its easement management, monitoring, or enforcement responsibilities under ACEP-WRE to other Federal or State agencies that it determines to have the appropriate authority, expertise, and technical and financial resources to carry out delegated responsibilities. State or Federal agencies may utilize their general statutory authorities in administering delegated management, monitoring, or enforcement responsibilities for the ACEP-WRE easements. These responsibilities shall not be delegated to any conservation organization or Federal or State agency who is the fee title owner of the land subject to the easement.
- (2) These delegations are accomplished through the use of a memorandum of understanding or other appropriate written agreement that details the responsibilities of all parties, includes a termination clause, and may be recorded with the easement.
- (3) The authority to subordinate, modify, exchange or terminate the easement is reserved to the Chief and will not be vested in a delegated agency or organization. See subpart R of this manual for the policy and procedure related to easement administration actions which include subordination, modification, exchange, and termination of the easement.

528.101 Application Process and Eligibility Overview

A. This subpart provides information about the application process, land eligibility, and landowner eligibility criteria. (See Subpart U, “Exhibits,” for the ACEP-WRE business process.)

B. NRCS accepts ACEP-WRE applications on a continuous basis. At the discretion of the State Conservationist and in coordination with any required national application cutoff dates, States may:

- (1) Establish and advertise one or more application cutoff dates during the fiscal year. Applications received after the cutoff date will be considered in the next application period;
or

- (2) Establish a process to rank applications continuously and fund all eligible applications that score above a threshold established by the State Conservationist.
- C. NRCS evaluates and approves applications through three primary steps:
- (1) Gathering landowner information, determining landowner eligibility, and conducting preliminary investigations.
 - (2) Conducting onsite land eligibility determination (which includes determining legal and physical access to the proposed easement site), conducting environmental ranking, and developing a preliminary restoration plan.
 - (3) Selecting for funding based on outcome of eligibility determinations, ranking priority fund availability, and any waiver requests; ability to provide clear title, access rights, any necessary water rights; and determinations that there are no onsite or offsite issues or conditions that would preclude enrollment or restoration.

528.102 Landowner Information

A. Application

- (1) Landowners who are interested in participating in ACEP-WRE must apply by submitting a completed application. (See Subpart U, “Exhibits,” for application package materials.)
- (2) Only owners of private land or acreage owned by Indian Tribes may enroll land in the ACEP-WRE. The landowners must be able to convey clear title to the land and provide consent or subordination agreements from each holder of a security interest in the land.
- (3) Landowners must be willing and able to grant NRCS or its designee unencumbered, unrestricted, transferable, and otherwise sufficient physical and legal access from an identified Federal, State, or local public right of way to the entire enrolled area for the term of the enrollment for restoration, management, maintenance, monitoring, and enforcement purposes.

B. Information Provided to Landowners

- (1) Upon the landowners’ completion of the application (NRCS-CPA-1200), NRCS provides the landowners with program information to help them decide whether to continue with the application process, including a list of the documentation that must be provided prior to NRCS taking any action on the application. All landowners must be informed about landowner and payment eligibility requirements under the highly erodible land and wetland conservation (HEL/WC) provisions of the Food Security Act of 1985 and the adjusted gross income (AGI) provisions. They must also be informed that land enrolled in ACEP-WRE is ineligible for any other USDA program payment for the life of the enrollment. Additionally, landowners operating under an employee identification number (EIN) must also be informed about the requirements to obtain a valid Dun and Bradstreet Data Universal Numbering System (DUNS) number and meet the Central Contractor Registration (CCR) requirements through registration or renewal in the System for Award Management (SAM) or successor registry. (See Subpart U, “Exhibits,” for a sample information to applicant letter.)
- (2) Information provided to easement applicants includes—
 - (i) A sample copy of a blank warranty easement deed and associated exhibits appropriate for the enrollment option selected. This deed is the document used by a landowner to grant and convey to the United States by and through NRCS an easement with appurtenant rights of access to the easement area. Revisions to the warranty easement deed are not permitted.

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- (ii) Notification of landowner requirement to provide clear title and unencumbered, unrestricted, and transferable legal right of access from an identified Federal, State, or local public right of way to the entire enrolled area for the term of the enrollment.
 - (iii) A sample copy of Form AD-1158, “Subordination Agreement and Limited Lien Waiver,” or successor form. This waiver is used to subordinate mortgages and obtain limited lien waivers to the United States, when applicable, with respect to any and all interests of the subordinating party in or related to the easement area. The form will be recorded with the warranty easement deed, if applicable.
 - (iv) A sample copy of the Form NRCS-LTP-31, “Agreement for the Purchase of a Conservation Easement” (APCE). The landowner and the State Conservationist must sign this document before NRCS incurs costs for surveys and closing procedures on the easement.
- (3) When the application is for a 30-year contract on acreage owned by Indian Tribes, this information includes—
- (i) A sample copy of a blank “Contract for 30-year Land Use” and associated exhibits based on ownership type. The contract details the terms and conditions of the enrollment, responsibilities of the landowner and NRCS, restrictions on land use, and potential violations. Revisions to the “Contract for 30-year Land Use” are not permitted.
 - (ii) A sample copy of the Form NRCS-LTP-40, “Agreement to Enter Contract for 30-Year Land Use” (AECLU). The landowner and the State Conservationist must sign the AECLU before NRCS proceeds with incurring survey and final contract execution costs.
 - (iii) Notification to the landowner of the requirement to provide clear title and access rights. Any farming leases must be terminated prior to execution of the 30-year contract.

C. Information Provided by Landowners

- (1) Before NRCS proceeds further, all landowners must be established in the Service Center Information Management System (SCIMS) and have the following documents completed, reviewed, and filed at the USDA service center (see Subpart U, “Exhibits,” for sample landowner application checklist):
- (i) Copy of the current property deed or other current evidence of ownership, including a breakdown of ownership shares if applicable
 - (ii) Form AD-1026, “HELC/WC Certification”
 - (iii) Form CCC-941, “AGI Certification and Consent to Disclosure of Tax Information,” and related forms
 - (iv) Form CCC-901 or CCC-902, “Member’s Information” (when the landowner is a legal entity)
 - (v) Proof that the entity is a legal and valid entity in the State where the land is located, usually by a certificate of good standing from the secretary of the State
 - (vi) Evidence of a valid DUNS number and current registration in SAM if landowner is an entity
 - (vii) Evidence of signature authority as described in section 528.103D
- (2) Eligibility must be determined for all landowners of record, as listed on the current property deed or equivalent current evidence of ownership documentation, including all individuals, entities, and entity members down to the individuals as required.
- (3) In accordance with Farm Service Agency (FSA) Handbook 1-CM, FSA will work with customers to gather any additional information needed to complete the SCIMS record. Using the information listed above, FSA will establish the specific business type for each landowner.

528.103 Landowner Eligibility Determination

A. General

Once the documents provided by the landowner have been received, NRCS must determine if the landowner is eligible to participate in the program by reviewing the following information. (See Subpart U, “Exhibits,” for the ACEP eligibility matrix):

- (i) Evidence of ownership to determine that the land has been owned by the applicant for at least 24 months, unless proof is provided of adequate assurances that the land was not acquired for the purposes of enrolling in ACEP-WRE, as described in section 528.103B
- (ii) Evidence of the landowner ability to provide unencumbered, unrestricted, and transferable legal right of access from an identified Federal, State, or local public right of way to the entire enrolled area for the term of the enrollment
- (iii) Documentation from FSA that all persons and entities on the deed are compliant with the HEL/WC provisions of the Food Security Act of 1985
- (iv) Documentation from FSA that all persons and entities on the deed are eligible for payment based on the adjusted gross income provisions of the Food Security Act of 1985 so that NRCS can determine whether a payment reduction applies (section 528.103C)
- (v) Evidence of signature authority to determine its sufficiency (section 528.103D)
- (vi) Proof that the entity is legal and valid in the State where the land is located, usually evidenced by a certificate of good standing from the secretary of the State
- (vii) Evidence of a valid DUNS number and current registration in SAM if landowner is an entity
- (viii) Proof of ownership of sufficient water rights, when needed for wetland restoration

B. 24-Month Ownership Review and Waiver Process

- (1) The applicant must have owned the land for at least 24 months prior to application to be eligible to enroll land in a permanent or 30-year ACEP-WRE easement. NRCS may, at its sole discretion, waive the 24-month ownership requirement if any of the following criteria apply:
 - (i) The land was acquired by will or succession as a result of the death of the previous landowner.
 - (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.
 - (iii) The landowner provides adequate assurances that the land was not acquired for the purpose of placing the land in the ACEP-WRE.
- (2) If an applicant has not owned the land for the requisite time period, NRCS must notify the applicant that the application is ineligible unless a written waiver request is submitted by the applicant that describes or provides documentation that one of the three above listed waiver criteria applies. The designated conservationist must forward the applicant’s waiver request and documentation to the State Conservationist. (See Subpart U, “Exhibits,” for sample 24-month ownership and waiver information letter.)
- (3) For waiver recommendations, the State Conservationist should consider the management and use of the property since it was purchased, documentation provided by the landowner, or other information provided by the landowner regarding the personal or financial circumstances. A 24-month ownership waiver request worksheet will be completed for all 24-month ownership waiver request determinations. (See Subpart U, “Exhibits,” for the 24-month ownership waiver request worksheet.)

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- (4) The State Conservationist may waive the 24-month ownership requirement if the documentation supports a finding that the land was acquired by will or succession or that the landowner exercised a right of redemption, as described in paragraphs (1)(i) and (1)(ii) above.
- (5) If the basis for the waiver request is adequate assurance that the land was not acquired for the purpose of placing the land in ACEP-WRE, the responsible approving official (either the Chief or the State Conservationist) will be determined based on the circumstances surrounding the change in ownership.
- (6) The State Conservationist may waive the 24-month ownership requirement based on adequate assurances the land was not acquired for the purposes of placing the land in ACEP-WRE when the change in ownership has occurred as a result of one of the following circumstances:
 - (i) The prior landowner owned the land for 24 months or more and continues to own one-half or greater interest after the ownership change, for example:
 - A spouse is added to the deed.
 - A prior owner transfers property from their individual ownership into a trust, life estate, or other entity of which they are a member or beneficiary.
 - A majority share of an entity is bought out by an existing member.
 - (ii) The prior landowner owned the land for 24 months or more and transferred ownership amongst members of his or her immediate family (father, mother, spouse, children, grandparents, or grandchildren).
 - (iii) The change in ownership is the result of a completed contract for sale (or contract for deed) entered into 24 months or more prior to the application date.
 - (iv) The current landowner had leased the land for agricultural purposes for 24 months or more prior to the application date and provides evidence of agricultural lease or operator status for the required 24-month period.
- (7) The State Conservationist will submit all other 24-month ownership waiver requests to the Chief through the Deputy Chief for Programs. **These applications must have ranked high enough for enrollment after all other eligibility requirements have been verified.** The State Conservationist will provide a copy of the landowner’s written waiver request and any additional documentation provided by the landowner, an evaluation of the documentation and surrounding circumstances, a copy of the evidence of ownership document, and the State Conservationist’s recommendation on whether to grant the waiver documented on the 24-month ownership waiver request worksheet. The State Conservationist must provide a clear explanation for the basis of their recommendation. (See Subpart U, “Exhibits,” for the 24-month ownership waiver request worksheet.)
- (8) The Chief determines if the information provided constitutes adequate assurances that the landowner did not purchase the land for purposes of enrolling in ACEP-WRE and whether a waiver request should be granted. The Chief provides the determination to the State Conservationist, and the State Conservationist notifies the landowner of the determination and the landowner’s rights to appeal. (See Subpart U, “Exhibits,” for a sample ineligibility determination letter.)
- (9) All 24-month ownership waiver requests, approved or denied, must be reported in the National Easement Staging Tool (NEST) by answering the “Land Owned for 24 Months” data element on the application record. Documentation for the basis for the request and the determination made by the State Conservationist or Chief must be uploaded to the “Documents” page of the NEST record. A document type of “24-Month Waiver Documentation” should be selected.
- (10) If the application is not funded in the same fiscal year the 24-month ownership waiver is granted, the waiver remains valid and may be applied in a subsequent fiscal year only if there is no further change in ownership after the waiver is granted.

C. Adjusted Gross Income (AGI) Review

- (1) Section 1001D of the Food Security Act of 1985, as amended, establishes payment eligibility for conservation programs based upon the average adjusted gross nonfarm income for persons and legal entities. FSA promulgated regulations to implement section 1001D payment limitations at 7 CFR Part 1400 AGI provisions. For AGI purposes, the term “person” means an individual, natural person and does not include a legal entity. Additionally, the term “legal entity” means an entity created under Federal or State law. All landowners will file the AGI certification, Form CCC-941, with FSA. FSA is responsible for completing determinations on all AGI certifications.

Note: Indian Tribes are not subject to AGI provisions.

- (2) In accordance with 7 CFR Part 1400, an application will be considered—
 - (i) Eligible and no commensurate reduction of payment will apply if the land is owned by—
 - A person who is eligible for payment under the AGI provisions.
 - Multiple persons, when all persons are eligible for payment under the AGI provisions.
 - An AGI-eligible legal entity in which all members are eligible for payment under the AGI provisions.
 - (ii) Ineligible and cancelled, if the land is owned by—
 - One person, and the person is determined to be ineligible for payment.
 - Multiple persons, a legal entity, or a combination thereof, and any of the persons or legal entities are ineligible for payment based on the AGI provisions.
 - (iii) Eligible, but ACEP-WRE easement payments to a legal entity will be reduced by an amount commensurate to the percent ownership of any AGI ineligible member of that legal entity.
- (3) The required reduction in payments should be discussed with the applicants before continuing to process the application to determine if the applicants wish to continue in the process. The landowner will provide percentage ownership documentation. NRCS will verify this information, determine whether landowners are eligible or the commensurate payment reduction is applicable due to ineligible member of otherwise eligible legal entity, and coordinate with the financial management staff to ensure that correct obligations and any necessary payment reductions occur. (See Subpart U, “Exhibits,” for ACEP Eligibility Matrix.)

D. Signature Authority Documentation Review

- (1) Many landowners, whether an individual person or a legal entity, conduct business, including program participation, through agents and representatives who have been authorized to execute documents on behalf of the landowner. NRCS may work with landowners through their authorized representatives if the landowner has provided sufficient signature authority documentation (see figure 528-K2 below) to demonstrate that the representatives are authorized to execute documents on behalf of the landowner and NRCS has determined that the representatives have the requisite signature authority for the type of document being executed.
- (2) To verify a sufficiently authorized signatory for a legal entity, NRCS will review a copy of the organizational documents, formational documents, or other legal documents clearly designating the individuals who possess signature authority for the legal entity. The type of documents will depend on the type of entity and may include items such as filed articles of incorporation and bylaws, corporate charters, court orders of appointment, trust agreements, last will and testaments, partnership agreement and filed articles of partnership, certificate of formation, or others. When specific or sufficient signatory authority is not provided in the

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entity documents, all members must sign the agreement and deed or contract documents, amend the entity documents, or execute a power of attorney that designates an individual to act as the attorney-in-fact or agent for the legal entity.

- (3) To verify a sufficiently authorized signatory for an individual person, NRCS will review a copy of the power of attorney, court orders of appointment, legal guardianship or conservatorship, or other legal documents clearly indicating the authority of the designated individual to sign on behalf of a landowner who is an individual person.
- (4) In addition to instruments listed above, the following forms are adequate to authorize a representative to execute the specified documents on behalf of a landowner participating in ACEP-WRE:

Figure 528-K2

Form Number and Name	Sufficient Authority to Sign	Insufficient Authority to Sign
CCC-901, “Member’s Information”	<ul style="list-style-type: none"> • Application, • Conservation Program Contract • Payment Applications 	<ul style="list-style-type: none"> • Agreement for Purchase of Conservation Easement • Warranty Easement Deed
FSA-211, “Power of Attorney”	<ul style="list-style-type: none"> • Application, • Conservation Program Contract • Payment Applications 	<ul style="list-style-type: none"> • Agreement for Purchase of Conservation Easement • Warranty Easement Deed
NRCS-CPA-09, “Power of Attorney,” or successor form	Adequate for all ACEP-WRE documents	

Note: Of the NRCS and FSA forms listed in figure 528-K2, only the notarized Form NRCS-CPA-09 creates sufficient authority to sign the warranty easement deed and related closing documents.

- (4) All signature authority documents must be reviewed by NRCS to determine adequacy and applicability. NRCS must also send the signature authority documents to the local Office of the General Counsel (OGC) attorney for review during the title opinion process.

E. Preliminary Investigations for Easements and 30-Year Contracts

- (1) Once the landowner is determined eligible for enrollment under an easement or 30-year contract and the information required by this section (528.103) has been provided and determined to be adequate by NRCS, preliminary investigation services may be obtained by the agency. The preliminary investigations include, at a minimum, the preliminary title search and a limited phase I.
- (2) The preliminary title search and underlying documents are used to determine if title issues exist that would preclude or delay closing the easement. The preliminary title search must include copies of all the underlying documents. In some cases, a title commitment binder may be ordered at this time, along with the preliminary title search. Generally, NRCS secures preliminary title search services from a vendor with whom NRCS intends to acquire easement closing services. See subpart M for additional information on title review and closing agent requirements.
- (3) NRCS conducts the limited phase-I to identify whether the land has potential hazardous substance issues that may preclude or delay successful enrollment and restoration of the land in ACEP-WRE. This limited phase-I must include at a minimum: 1) an environmental

records search, 2) current landowner interviews, and 3) an onsite visit to view present conditions. NRCS will not enroll property where hazardous substance concerns are identified and that NRCS determines pose an unacceptable risk or a risk sufficient to make restoration not feasible.

- (4) The preliminary title search and limited phase-I should be conducted as early in the process as possible to verify eligibility and minimize the risk of fund deobligation. The preliminary title search and all three parts of the limited phase-I must be obtained and reviewed prior to obligating easement funds unless there are extenuating circumstances such as allocations provided with less than 45 business days remaining in the fiscal year. All investigations must be completed prior to easement closure or 30-year contract execution.
- (5) The preliminary title and environmental record searches and reports, when conducted and provided by qualified, non-NRCS personnel, will use financial assistance funds. Preliminary investigation services will be procured using an appropriate procurement method, and funds will be obligated to the procurement document for obtaining title and record search services.

528.104 Ineligible Landowners

A. Highly Erodible Land and Wetland Conservation Compliance

- (1) Landowners must be in compliance with the HEL/WC provisions of the Food Security Act of 1985 to participate in ACEP-WRE and receive payment.
- (2) Through operation of “affiliated persons” under 7 CFR Section 12.8, all landowners on the deed are required to be in compliance with both the HEL and WC provisions for the application to be considered eligible for enrollment. If any landowner listed on the deed is ineligible, the application is ineligible.
- (3) If the landowner is a legal entity, the entity must be HEL- and WC-compliant, and required members of the legal entity must be in compliance. (see Subpart U, “Exhibits,” for ACEP eligibility matrix) If any member of a legal entity that requires member eligibility is not in compliance with the HEL and WC provisions, the application is ineligible. If the landowner regains compliance with those provisions, a new application may be filed.
- (4) See subpart O for further details regarding applicability of HEL/WC payment eligibility provisions to particular program payments.

B. Adjusted Gross Income

Persons or legal entities are ineligible to participate in ACEP-WRE if they do not meet the adjusted gross income limitations, have not filed, or have been determined ineligible by FSA. Those for whom a payment reduction is not applicable are also ineligible. See subpart O for further details regarding applicability of AGI payment eligibility provisions to particular program payments.

C. Federal, State, and Local Governments

Landowners that are units of Federal, State, or local governments are not eligible to enroll lands in ACEP-WRE.

528.105 Land Eligibility

A. General

- (1) Determining eligibility for enrollment requires an assessment of both technical and administrative land eligibility requirements. To be determined eligible, NRCS must determine that—
 - (i) The land is either privately owned or acreage owned by Indian Tribes.

- (ii) In consultation with FWS, that the enrollment of such land maximizes wildlife benefits and wetland functions and values.
 - (iii) The likelihood of successful restoration of such land and the resultant wetland functions and values merit inclusion in the program, taking into consideration the cost of the restoration, protection, enhancement, maintenance, and management.
 - (iii) Such land meets the eligible land or other eligible land types identified in this section.
 - (iv) The land is capable of having wetland hydrology and hydrophytic vegetation restored (including determining whether adequate water rights are available, if applicable, to carry out desired wetland restoration and management efforts for the duration of the enrollment period).
 - (v) The offering is of sufficient size and has properly configured boundaries that allow for the efficient management of the enrollment area.
 - (vi) The landowner is willing and able to grant NRCS or its designee unencumbered, unrestricted, transferable and otherwise sufficient physical and legal access from an identified Federal, State, or local public right of way to the entire enrolled area for the term of the enrollment for restoration, management, maintenance, monitoring, and enforcement purposes.
 - (vii) Otherwise promotes and enhances ACEP-WRE objectives.
 - (viii) There are no offsite or onsite legal or physical issues that would preclude or diminish successful conveyance, restoration, management, or enforcement of the enrolled area (see section 528.106 for additional information).
- (2) NRCS, in consultation with FWS, determines land eligibility for ACEP-WRE enrollment through an onsite evaluation process, identified in paragraph B of this section. The ACEP-WRE statutory and regulatory land eligibility provisions identify eligible lands, other eligible lands, and ineligible lands. This section describes the criteria for determining whether land meets either eligible land or other eligible land criteria. Section 528.106 identifies ineligible land criteria.
- (3) For the purposes of enrollment in ACEP-WRE, a “certified” or “official” wetland determination, as defined by the National Food Security Act Manual (NFSAM), is not required to determine eligibility.
- (4) The easement case file must contain documentation that identifies which portions of the offered area meets which technical land eligibility criteria. If lands meeting the “other eligible lands” criteria are included in the easement area, the case file must document the basis for the inclusion of those lands along with any applicable waivers.

B. Onsite Determination

Land eligibility is determined during onsite field reviews by NRCS and an appropriate interdisciplinary team of partner specialists, including FWS. The landowner should be invited to participate in these field reviews. It is recommended that the field reviews be completed only after all requirements outlined in section 528.103 have been completed to the satisfaction of NRCS. During the onsite field reviews of the offered acres, NRCS will—

- (i) Determine if the land meets one or more of the eligible land type requirements to be eligible for enrollment, as listed in the ACEP-WRE statute, rule, and section 528.105C.
- (ii) Complete ranking of the land in accordance with subpart L.
- (iii) Complete preliminary planning activities so that a cost estimate can be derived for eligibility and ranking purposes and to ensure that restoration activities are feasible.
- (iv) Complete the Hazardous Materials Field Inspection Checklist and Hazardous Materials Landowner Interview (see Subpart U, “Exhibits,” for a hazardous materials field inspection checklist and hazardous materials landowner interview) to determine if there are offsite or onsite conditions that would preclude restoration of the enrolled area or use

of the area for the purposes of the program. In most cases, if hazardous substance issues are found, the site is not eligible for enrollment.

- (v) Determine if any onsite or offsite issues not identified in step iv would make the land ineligible for enrollment.
- (vi) Complete the National Environmental Policy Act (NEPA) evaluation process and complete required documentation to ensure compliance with NEPA provisions. At minimum, the Form NRCS-CPA-52, “Environmental Evaluation,” should be completed along with appropriate supporting documentation.
- (vii) Interview the landowner and complete the landowner disclosure worksheet which contains information about use or occupancy of the land, structures, leases, or other information about the property. (See Subpart U, “Exhibits,” for landowner disclosure worksheet.) NRCS should request the landowner provide copies of any written, unrecorded leases or agreements at this time.
- (viii) Verify by a field visit that the proposed boundary and ingress and egress route are acceptable to NRCS. At minimum, land access must be all-wheel-drive accessible.

C. Eligible Land Types – Farmed or Converted Wetlands

- (1) Farmed wetland or converted wetland together with the adjacent land that is functionally dependent on the wetlands are eligible for enrollment, except that converted wetland are not eligible if the conversion was not commenced prior to December 23, 1985, except as provided for in section 528.105I(3).
- (2) For the purposes of ACEP-WRE eligibility only, lands may be considered farmed wetland or converted wetland if such land is identified by NRCS to be any of the following:
 - (i) Farmed or Converted Wetlands.—Wetlands farmed under natural conditions, farmed wetlands, prior converted cropland, commenced conversion wetlands, or farmed wetland pasture. NRCS makes this determination based on NFSAM criteria.
 - (ii) Former or Degraded Wetlands.—Former or degraded wetlands that occur on lands that have been or are being used for the production of food and fiber, including rangeland, pastureland, hayland, and forest production lands, where the hydrology has been significantly degraded or modified and will be substantially restored through the implementation of the Wetland Reserve Plan of Operations (WRPO).

For example, if the hydrology has been significantly degraded or modified due to long-term grazing or silvicultural management practices, such as diversions, dams, ditches or other water management infrastructure, and the hydrology and vegetative structure can be restored by the implementation of the WRPO, then the site is eligible.

- (iii) Lands Substantially Altered by Flooding.—Lands substantially altered by flooding so as to develop and retain wetland functions and values. To qualify, the alteration must be determined to be of such magnitude and permanency that it is unlikely that the alteration will cease to exist during the easement or contract period. Furthermore, the extent of the surface or subsurface flooding or saturation must be great enough to create hydrologic conditions that have or will develop hydric soil and hydrophytic vegetation characteristics over time. Additional efforts may be utilized to further improve wetland functions and values through implementation of the WRPO.

Examples include—

- Land that has been scoured by floods or broken levees.
- Lands that have soil saturation and water table elevation changes as a result of offsite surface or subsurface hydrologic changes (e.g., dams and irrigation systems).

D. Eligible Land Types – Croplands or Grasslands

- (1) Certain croplands or grasslands that were used for agricultural production that are subject to flooding from the natural overflow of a closed basin lake, or pothole are eligible for enrollment in ACEP-WRE if the land has a high likelihood of successful restoration and meets all the criteria detailed below:
 - (i) The size of the parcel offered for enrollment is a minimum of 20 contiguous acres.
 - (ii) The soils are hydric.
 - (iii) The depth of the water is 6.5 feet or less.
- (2) Water depths vary throughout the year and from year to year due to the dynamic aspects related to flooding in these systems. Therefore, NRCS will verify the water depth within 15 business days of application or will accept producer self-certification on depth if NRCS's verification is not completed within 15 business days.
- (3) Land flooded from the overflow of a closed basin lake is only eligible if the State or other entity is willing to provide 50 percent share of the cost of the easement. This limitation does not apply to lands flooded from the overflow of a pothole. States must contact NHQ for specific guidance regarding closed basin lake enrollments.

E. Eligible Land Types – Riparian Areas

- (1) Riparian areas along streams or other waterways are eligible, provided that the offered riparian area directly links wetlands less than 1 mile apart and that those wetlands are currently protected or will be protected under the same ACEP-WRE easement transaction. Protected wetlands include areas currently enrolled under an existing easement or other resource protection device or circumstance that achieves the same objectives as an easement, such as a State or Federal wildlife management area.
- (2) If the riparian area will link already-protected wetland areas, then no additional wetland acres are required to enroll the riparian acres.
- (3) If the riparian area will link two or more wetland areas that are not yet protected, but would be protected under the same ACEP-WRE easement action, then both the riparian area and wetland areas are eligible for enrollment and must be enrolled under the same or a concurrent easement transaction. The wetland areas to be enrolled must not meet any of the land ineligibility criteria under section 528.106.
- (4) Eligible riparian areas should average no more than 300 feet in width, measured from the top of bank on one side, or 600 feet in width, if both sides of the river, stream, channel, or water body are offered for enrollment.
- (5) Larger widths or linkages of wetland areas greater than 1 mile apart should be considered if the riparian zone and its associated wildlife or ecological values so warrant; waivers for additional width or for eligible wetland areas more than one mile apart may be granted by the State Conservationist.
- (6) The riparian areas, including the linking wetlands if enrolled under the same easement transaction, will be considered to be a part of the eligible acres to which additional adjacent lands may be added.

F. Eligible Land Types – Lands in the Conservation Reserve Program (CRP)

- (1) Eligible Conservation Reserve Program (CRP) lands include farmed wetlands and adjoining lands that meet all of the following criteria:
 - (i) Are subject to an existing CRP contract
 - (ii) Have the highest wetland functions and values
 - (iii) Are likely to return to production after the land leaves the CRP
- (2) Such lands may be enrolled in the ACEP-WRE only if the land and landowner meet the eligibility requirements of this subpart and if the enrollment is requested by the landowner

and agreed to by NRCS. Upon closing of the easement, the CRP contract for the property will be terminated or otherwise modified, subject to such terms and conditions as are mutually agreed upon by FSA and the landowner.

- (3) Lands established to trees under CRP are ineligible for enrollment unless they meet the requirements identified in section 528.106B(2) below.

G. Other Eligible Lands – Wetlands Restored or Protected Under a Private, State, or Federal Program

- (1) Eligible land types previously restored under a local, State, or Federal restoration program, including the FWS Partners for Fish and Wildlife Program, or privately developed wetland areas meeting or capable of meeting NRCS restoration standards and specifications are eligible. A wetland that has already been restored but is not fully protected will be considered a positive attribute in ranking.
- (2) Lands that have entered into the restoration cost share agreement enrollment option of the former Wetlands Reserve Program or another similar restoration program, such as the FWS Partners for Fish and Wildlife Program, may, during the agreement period or after, be enrolled in the 30-year contract, 30-year or permanent easement options of ACEP-WRE.

Note: Lands that have been entered into the ACEP-WRE 30-year easement or contract option may, during the easement or contract period, be enrolled in the permanent easement option. Compensation for the permanent easement will not exceed 25 percent of the applicable geographic area rate cap (GARC) being offered at the time the land is offered for permanent enrollment (see Subpart O, Section 528.148, “Converting a 30-year easement to a permanent easement”).

- (3) Land subject to an easement or deed restriction that (as determined by NRCS) provides similar restoration and protection of wetland functions and values as would be provided by enrollment in ACEP-WRE, may still be considered eligible. Such lands may be eligible if NRCS determines that the existing easement or deed restriction terms will not restrict or interfere with NRCS in its exercise of the rights to be acquired under the ACEP-WRE easement (or the easement or deed restriction can be removed or subordinated to the ACEP-WRE easement) and that any of the following apply:
 - (i) ACEP-WRE enrollment would provide significant additional resource protection, such as additional cropping restrictions.
 - (ii) The additional restoration and protection would provide critical habitat for targeted threatened or endangered species.
 - (iii) The existing easement or deed restrictions do not provide for full restoration of the wetland functions and values.
- (4) Examples
 - (i) An area subject to an FWS “no drain, burn, level, or fill” easement, which prohibits further drainage but does not restrict cropping. Because the FWS easement does not provide “comparable” conservation benefits, the ACEP-WRE easement would be value added.
 - (ii) A site could be considered eligible for a 30-year easement if the current deed restrictions would last for 10 years or less from the date of application.
 - (iii) A site could be considered eligible for a permanent easement if the current deed restriction was for a term less than 30 years.

Note: Lands with a deed restriction similar to ACEP-WRE that is 99 years in duration are not eligible for ACEP-WRE enrollment.

- (5) Individual appraisals may be required to determine the easement compensation values for lands subject to an existing easement or deed restriction that is determined to be eligible by

NRCS if the applicable areawide market analysis (AWMA) fair market values and associated GARCs do not take into consideration the presence of such deed restrictions.

H. Other Eligible Lands – Hydric Soil Minor Components (Inclusions) and Problematic Hydric Soils (Non-Typical Situations)

- (1) Often, there are minor components (small inclusions) of hydric soils in map units of nonhydric soils. These hydric soils are relevant in determining eligibility for ACEP-WRE if hydrology and hydrophytic vegetation can be restored.
- (2) Some soils that meet the hydric soil definition may not exhibit typical hydric soil morphology. These problematic hydric soils exist for a number of reasons, and their proper identification requires additional information, such as landscape position and presence or absence of restrictive soil layers, or information about hydrology.
- (3) In some cases, problematic hydric soils may appear to be nonhydric due to the color of the parent material from which the soils developed. In others, the lack of hydric soil indicators is due to conditions that inhibit the development of redoximorphic features despite prolonged soil saturation and anaerobic conditions. In addition, recently developed wetlands may lack hydric soil indicators because insufficient time has passed for their development, such as an agriculturally induced wet area created through compaction in a pasture. Sometimes, site disturbance, such as plowing, may obscure the evidence of hydric characteristics. For these situations, if site assessment verifies that restoration of hydrology and hydrophytic vegetation is feasible, the areas may be considered eligible for enrollment in ACEP-WRE.
- (4) When hydric soil minor components (inclusions) or problematic hydric soils occur, the land proposed for enrollment could be considered eligible land if it otherwise meets one of the eligible land types listed in this section. The decision to utilize this land eligibility criterion must be made by the State Conservationist and be based on the restorability and ecological merits of the site.
- (5) The decision to enroll such areas in ACEP-WRE only applies to ACEP-WRE and its authorities, and has no bearing on the manner in which these soils are handled under the wetland identification process for wetland compliance (NFSAM) purposes. (See 180-NFSAM.) The State Conservationist must specifically consider the wildlife benefits and overall need to facilitate effective program implementation.

I. Other Eligible Lands – Adjacent Lands

- (1) If the proposed easement area includes eligible lands as described in paragraphs C through H of this section, the easement may also include adjacent lands that meet all of the following criteria:
 - (i) The adjacent lands will contribute significantly to the wetland functions and values or adjacent lands that are incidental but necessary for the practical administration of the enrolled area.
 - (ii) The acres of adjacent lands to be enrolled must not exceed the acres of otherwise eligible land to be enrolled.
 - (iii) These adjacent lands are considered to be primarily upland buffer and associated areas but may also include created wetlands, restored nonagricultural wetlands, riparian areas that do not meet the requirements of paragraph E of this section, artificial wetlands, and noncropped natural wetlands.
- (2) The State Conservationist may consider waiving the one-to-one matching limitation in certain unique situations. These determinations and waivers must be documented in the easement case file and may include the following situations—
 - (i) Enrollment of unique or critical wetland complexes. Examples of unique wetland complexes include, but are not limited to, pocosins, prairie potholes, playas, vernal pools,

- fens, bogs, and ridge and swale floodplain complexes. (The State Conservationist must seek input from FWS before granting a waiver on this basis.)
- (ii) Enrollment targeting wetland dependent species that require additional upland areas for nesting or protection from predators. (The State Conservationist must seek input from FWS before granting a waiver on this basis.)
 - (iii) Enrollment where the wetland acres could become degraded from agricultural activities on lands not in the enrolled area and additional upland buffers are needed for adequate protection.
 - (iv) Strict application of the ratio would create unmanageable boundaries, negatively impacting the practical administration of the enrolled area by NRCS.
 - (v) Strict application of the ratio would leave areas of land remaining outside the enrolled area, creating uneconomic or unmanageable remnant parcels for the landowner.
- (3) Converted wetlands (180-NFSAM designations “CW” and “CW+year”) are not eligible for enrollment in ACEP-WRE. However, where such areas are an incidental portion of an otherwise eligible easement offer, the converted wetlands may be considered eligible adjacent land if **all** of the following criteria are met:
- (i) Not enrolling the area would create unmanageable boundaries, negatively impacting the practical administration of the enrolled area by NRCS.
 - (ii) Not enrolling the area would leave areas of land remaining outside of the enrolled area that would create uneconomic or unmanageable remnant parcels for the landowner.
 - (iii) The landowner is willing to enroll the acreage for no compensation.
 - (iv) The landowner is willing to restore the converted wetlands as prescribed by NRCS, entirely at the landowner’s expense.

Note: Land may not be enrolled by the landowner who was responsible for the conversion; that landowner is ineligible to enroll in ACEP-WRE, in accordance with section 528.104A.

528.106 Ineligible Land

A. General

The following land is not eligible for enrollment in the ACEP-WRE:

- (i) Converted wetlands (180-NFSAM designations “CW” and “CW+year”) if the conversion was commenced after December 23, 1985, except as noted in section 528.105I(3).
- (ii) Lands established to trees under a CRP contract, except as provided in section B of this section.
- (iii) Lands that would exceed the county cropland enrollment limitations tracked by FSA.
- (iv) Lands owned by an agency of the United States, other than acreage owned by Indian Tribes.
- (v) Lands owned by a State, including an agency or a subdivision of a State or a unit of local government.
- (vi) Land subject to an easement or deed restriction that, as determined by NRCS, provides similar restoration and protection of wetland functions and values as would be provided by enrollment in ACEP-WRE.
- (vii) Lands where the purposes of the program or implementation of restoration practices would be undermined due to onsite or offsite conditions.
- (viii) Restoration or maintenance cost to the Government that is determined to be excessive for the area or type of wetland.
- (ix) Land that NRCS determines to have unacceptable exceptions to clear title or legal access that is encumbered, nontransferable, restricted, or otherwise insufficient.

B. Detailed Descriptions of Ineligible Land

- (1) **Converted Wetlands.**—This refers to land that has been labeled as “CW” or “CW+year” as part of a certified wetland determination conducted for NFSAM wetland compliance purposes.
- (2) **Lands Established to Trees Under CRP.**—In general, lands established to trees under a CRP contract are not eligible, whether the contract is active or not. However there are specific circumstances under which the State Conservationist may determine these lands to be eligible if—
 - (i) Tree establishment has not been completed, a planted stand failed to become established, or a stand that was determined to be established subsequently failed. NRCS will determine if plantings failed or were established and failed.
 - (ii) The State Conservationist determines the enrollment of such lands would further the purposes of the program based on the following criteria:
 - The application meets all other ACEP-WRE eligibility criteria.
 - The established cover conforms to ACEP-WRE restoration requirements.
 - If the CRP contract is active, upon closing of the ACEP-WRE easement, the CRP contract for the property will be terminated or otherwise modified, subject to such terms and conditions as are mutually agreed upon by FSA and the landowner.
 - Any additional criteria developed by the State Conservationist.

Note: The basis for the NRCS decisions must be documented in the case file and a record kept of how many acres of lands established to trees under CRP are determined eligible and include such information in NEST.

- (3) **County Cropland Limitation.**—No more than 25 percent of the total cropland in any county, as determined by FSA, may be enrolled in CRP and ACEP-WRE easements (ACEP-WRE easements include existing easements previously enrolled in the Wetlands Reserve Program (WRP) and Emergency Wetland Reserve Program (EWRP)). In addition, no more than 10 percent of the total cropland in the county may be subject to easements acquired under ACEP-WRE. These limitations do not apply to areas devoted to windbreaks and 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 soil saturation or inundation.
 - (i) State easements acquired through the Conservation Reserve Enhancement Program (CREP) do not count against the easement limitation.
 - (ii) FSA maintains an electronic record of the acreage enrolled in ACEP-WRE and CRP at the county level. This record should be accurate to the extent that approved CRP contracts have been recorded in the system and NRCS has provided current data regarding ACEP-WRE enrolled easement acreage. For easement enrollments, NRCS is required to provide FSA the total acreage enrolled and a map that identifies both the enrolled area and any exempt “subclass w” soils within the enrolled area.
 - (iii) FSA will determine the acreage it considers cropland on the nonexempt soils and update the CRP software with total cropland data accordingly. ACEP-WRE easements on noncropland acreage, as determined by FSA, or on cropland situated on exempted “subclass w” soils, as determined by NRCS, do not affect the cropland or easement limitation.
 - (iv) When calculating the total enrolled CRP acreage, the FSA software excludes CRP acreage that is scheduled to expire by the end of the current fiscal year. Before accepting new offers on cropland acreage in ACEP-WRE, the State Conservationist will verify the current enrollment limits with FSA.
 - (v) NRCS and FSA must concur before a waiver of the 25 percent limit of this subsection can be approved. Such a waiver will only be approved if the waiver will not adversely

- affect the local economy and if operators in the county are having difficulties complying with the conservation plans implemented under 16 U.S.C. Section 3812.
- (vi) The State Conservationist is responsible for determining whether a county cropland waiver will be requested. NRCS determinations must be submitted to the FSA State Committee for concurrence. FSA requires that the FSA national office review and approve requests in excess of 30 percent of the county cropland total.
 - (vii) Waiver requests submitted to FSA for concurrence must contain the following:
 - Letters of recommendation from at least one county commissioner and representatives of the conservation district.
 - Form AD-894, “Request for Cropland Waiver” (available from the local FSA office), with all items completed based on information received on Form AD-893, “Recommendation of Percent of Cropland to be Enrolled in CRP/ACEP-WRE.”
 - (viii) Upon NRCS’s request, FSA will distribute Form AD-893 to at least a 10 percent random sampling of the agricultural producers and groups listed on Form AD-894, items 26 and 27. FSA will forward responses received on Form AD-893 to NRCS.
 - (ix) The State Conservationist may determine the level of interest in the county for waiving the cropland limitation for ACEP-WRE and the effect of a waiver on producers and businesses in the county based on the information received on Form AD-894. If a waiver would have significant adverse effects, the State Conservationist may, with FSA concurrence, deny the request or lower the percent of cropland acreage limitation than recommended by the field office.
 - (x) There is no authority to waive the 10-percent limitation of ACEP-WRE easements on cropland.
 - (xi) States with counties that were previously at or near the 10-percent limit should review the soils information for those counties. NRCS should determine the ACEP-WRE easement acreage, including WRP and EWRP easements, enrolled on croplands that are on exempted “subclass w” soils and provide that information to FSA. At the State level, NRCS and FSA should determine the adjusted cropland enrollment percentages after excluding ACEP-WRE easement acres on cropland with exempted “subclass w” soils. NRCS should inform FSA at the local level that NRCS may be enrolling new ACEP-WRE easements in those counties.
- (4) Land Subject to a Similar Easement or Deed Restriction.—Land that is subject to an easement or deed restriction that, as determined by NRCS, provides similar restoration and protection of wetland functions and values will be considered ineligible if NRCS determines one of the following:
- (i) That ACEP-WRE enrollment will not provide significant additional resource protection to the wetland functions and values that would warrant expenditure of Federal funds.
 - (ii) That the existing easement or deed restriction will interfere or restrict NRCS in its exercise of the rights to be acquired under the ACEP-WRE easement and existing easement or deed restriction cannot be removed or subordinated.
- (5) Adverse Onsite or Offsite Conditions.—Offsite or onsite conditions that could undermine the purposes of the program or the successful implementation of restoration, as determined by NRCS, render the site ineligible. These adverse conditions may include, but are not limited to—
- (i) The presence or potential presence of hazardous substance issues.
 - If hazardous substance issues arise during the limited phase-I (record search, landowner interview, or NRCS field visit), NRCS may determine whether further investigation should be conducted or whether sufficient information exists to determine the site ineligible. Further investigation conducted by or paid for by NRCS is limited to a full phase-I environmental site assessment that meets the requirements of 40 CFR Part 312.

- OGC and EPD consultation is required if the State Conservationist wishes to proceed with the acquisition of an easement with documented hazardous substance issues identified during any part of the limited phase-I record search, onsite field visit, landowner interview or full phase-I assessment. NRCS, in consultation with OGC, will ascertain whether a combination of landowner response actions and liability protections provided to the United States can be established to allow the acquisition to continue.
 - If NRCS determines that a phase-II environmental site assessment is needed, the land is ineligible. NRCS will not reconsider the site unless and until the landowner provides sufficient documentation that all necessary assessments have been completed and that the site has been fully remediated such that restoration or inundation of the site does not pose risk of hazardous waste contamination.
 - NRCS will not enroll land that is or contains constructed wetlands used to treat wastewater or contaminated runoff.
- (ii) Proposed or existing rights of way, either onsite or offsite, such as—
- Public or private drainage ways that will adversely affect the long-term success of the restoration to an unacceptable degree.
 - Existing or proposed infrastructure routes that introduce disturbances or risks that undermine the purposes of the easement.
- (iii) Adjacent land uses that could impede complete restoration or prevent wetland functions and values from being fully restored, such as—
- Adjacent or nearby airports.
 - High-density residential areas.
 - Dumps, mining or extraction facilities.
 - Storm sewer, wastewater, feedlots, septic system, or other outlets.
- (6) Impacts to Adjacent Lands.—The land is ineligible if the enrollment of the neighboring land is essential to the successful restoration of the wetlands and those adjacent landowners are unwilling or are ineligible to participate.
- (7) Other Conditions.—There may be other existing conditions that the State Conservationist may determine warrant excluding enrollment of the proposed acres. These conditions include but are not limited to the following:
- (i) Lands where water rights cannot be ensured for the easement duration and such rights are necessary to meet program restoration objectives.
- (ii) Cultural resources or wetland-dependent endangered species are present, and restoration practices would have adverse long-term impacts on those resources.
- (iii) Onsite or offsite erosion problems that cannot be reliably or cost-effectively addressed and may impact successful restoration of the site.
- (iv) Land boundary configurations that are not mutually acceptable to both NRCS and the landowner, such as if the landowner has purposely manipulated the offered acreage to create in-holdings, outparcels, landlocked adjacent landholdings, road right-of-ways through the easement, or other boundary configurations that NRCS determines may negatively impact the restoration, protection, management, or enforcement easement area. Conversely, if the landowner is unwilling to exclude areas identified by NRCS as unacceptable based on a determination that including those areas will create an unacceptable risk, liability, maintenance, or other issue.
- (8) Excessive Restoration or Long-Term Costs.—Lands where the cost of restoration for the easement area will exceed the fair market value of the land are ineligible. This criterion may be waived by the State Conservationist in situations in which it is documented that the restoration may be accomplished without accumulating a long-term operation and maintenance cost burden to the program

- (9) Unacceptable Title or Access Issues.—Land that NRCS determines to have unacceptable exceptions to clear title or legal access that is encumbered, nontransferable, restricted, or otherwise insufficient are not eligible for enrollment. Ineligibility due to title encumbrances is not appealable. NRCS may request and opinion from OGC determining that the title is not satisfactory and stating the reasons why. Such issues may include but are not limited to—
- (i) Existing easements, rights-of-way, leases, or other encumbrances limiting NRCS ability to restore, manage, monitor, or enforce the easement or contract area, such as a flowage easement that prohibits the reestablishment of trees or a public drainage easement that prevents hydrology restoration to a substantial degree.
 - (ii) Lands that have severed mineral rights or gas and oil leases that have a high likelihood of having an adverse impact on the easement area and cannot be subordinated to the ACEP-WRE easement (see mineral matrix in part 527).
- (10) The State Conservationist may determine, on a case-by-case basis and in consultation with FWS, OGC, and NHQ, to enroll the lands with evaluated risk conditions if it is determined the benefits warrant such enrollment.

528.107 Notification of Ineligibility

Applicants found to be ineligible for participation in ACEP-WRE will be notified in writing of their status and advised of any applicable appeal rights. Appeal rights can be found in Title 440, Conservation Programs Manual, Part 510, “Appeals and Mediation.” Ineligibility may be the result of the lands not being eligible or the landowner not being eligible. (See Subpart U, “Exhibits,” for a sample ineligibility determination letter.)