

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

### **Subpart O – Contract Administration**

#### **528.140 Overview**

This subpart provides guidance on the administration of ACEP-WRE easements and contracts, including contracting and fund management activities. In particular, this subpart addresses topics related to the development of easement restoration agreements, payments, contract and easement modifications, annual contract reviews, cancellations, and terminations. All easement and 30-year contract obligations and payments for the acquisition of the easement or contract itself will comply with the most current Easement Acquisition Enhanced Internal Controls policy. Notwithstanding the payment type, NRCS will not provide tax advice, including any representations about the tax implications of any easement, contract, or financial transaction. Several topics addressed in this subpart are covered in greater detail in other agency policy. Wherever possible, these policies have been cross-referenced.

#### **528.141 Contracts to Implement the Wetland Reserve Plan of Operations (WRPO)**

##### **A. Overview of Contractual Arrangements to Implement the WRPO**

- (1) NRCS will provide funding for implementing the WRPO, to the extent that NRCS determines that it is appropriate and in the public interest, based on the availability of funds. NRCS will provide technical and financial assistance for implementing and establishing conservation practices, components, measures, and activities necessary for the restoration and enhancement of all enrollment types. NRCS also has authority to provide technical and financial assistance for management and maintenance on existing easements and repairs for all enrollment types.
- (2) To provide this technical and financial assistance, NRCS may use different procurement and payment methods, depending upon the individual enrollment type, service being obtained, phase of the project, and nature of the payment being made.
- (3) In general, NRCS may obtain WRPO implementation from a vendor, through partners or other agencies, or through the landowner using appropriate methods, including but not limited to the following:
  - (i) Federal contracts, such as blanket purchase agreements, indefinite quantity and indefinite delivery contracts, or cost-type contracts (see Federal Acquisition Regulation (FAR)).
  - (ii) Such agreements as cooperative agreements, contribution agreements, or interagency agreements (see Title 120, Federal Grants and Cooperative Agreements Handbook (FGCAH), Part 600; Title 120, Contribution Agreements Handbook (CAH), Part 610; or National Instruction (NI)-120-301, Processing Grants, Agreements, and Memorandums of Understanding).
  - (iii) Conservation program contracting with the landowner.
- (4) Policy and procedures unique to ACEP-WRE regarding conservation program contracting with the landowner are specified in this section and will prevail; additional information on landowner contracting procedures can be found in Title 440, Conservation Program Manual (CPM), Part 512. ACEP-WRE contracts are not developed or executed in Protracts.
- (5) The Conservation Program Contract (CPC) is the collective term for the set of documents that comprise the agreement with the landowner, which include—
  - (i) The Form NRCS-CPA-1202 “Conservation Program Contract,” or successor form, which sets forth contract length and parties, and identifies attachments.

- (ii) The Form NRCS-CPA-1202-Appendix, “Appendix to the Conservation Program Contract,” or successor appendix form, which identifies terms, special provisions, and violations.
- (iii) The Form NRCS-CPA-1155, “Conservation Plan Schedule of Operations” or successor form, along with required signature pages, and any applicable, Form NRCS-CPA-1156, “Revision of Plan/Schedule of Operations or Modification of a Contract,” or successor form, which set the practices, extents, and costs.
- (iv) Standard Form (SF)-1199, “Direct Deposit,” which is needed for obligation of funds.
- (v) The approved CPC documents package can be found in the exhibits in subpart U.

#### B. Contractual Arrangements for WRPO Implementation

- (1) WRPO implementation (including restoration, enhancement, management, maintenance and repair practices, components, measures, and activities) is conducted through an easement restoration agreement for all easement enrollments and for 30-year contract enrollments with Indian tribes.
- (2) Easement Restoration Agreement
  - (i) Under the terms of the easement and 30-year contract, NRCS acquires from the landowner the right to implement the restoration practices and activities identified in the WRPO through an agreement with the landowner or through someone other than the landowner, as determined by NRCS. NRCS may use CPCs, Federal contracts (FAR), contribution agreements, cooperative agreements, or other appropriate procurement methods to secure implementation of restoration practices and activities on easement and 30-year contract lands. NRCS refers to the documents used to secure restoration implementation on land enrolled through either the easement or 30-year contract enrollment type as the “easement restoration agreement.”
  - (ii) When working with a landowner through a CPC, the costs identified in the Form NRCS-CPA-1155, “Conservation Plan Schedule of Operations” will be based on actual contractor’s bids, if available, or on the engineers’ cost estimate developed, based on the final restoration design.
  - (iii) The CPC must be signed by all landowners or the appropriately authorized representative. Prior to approval by the State Conservationists, the CPC must be reviewed to ensure that it is properly completed, has all required landowner signatures secured, and includes the start and end dates of the contract. Restoration activities must have a restoration practice commenced in the first year of the easement recordation or execution of the 30-year contract, and should have all restoration practices completed within the first 3 years from easement recordation or 30-year contract execution.
  - (iv) When NRCS decides to implement the WRPO’s restoration activities through a contribution, cooperative, interagency, or other agreement, the agreement must include the specific work to be completed, amount and cost of work to be completed, and the period of performance, and be signed by the person or persons with authority to sign the agreement documents for the partner. The restoration costs will be based on estimated quantities included in the final WRPO and on the budget estimate submitted by the partner at the time of selecting the partner and developing the agreement. The agreement will be reviewed by appropriate NRCS contracting or agreements staff to ensure its proper completion.
  - (v) Once the appropriate documents are reviewed, determined complete and proper, and funds availability is verified, the State Conservationist will sign the appropriate obligating document. Funds are then obligated in FMMI or successor system, or in the Integrated Acquisition System (IAS) for Federal acquisitions.

#### C. Authorized Payment Levels by Enrollment Type

NRCS may share the costs of establishing or implementing conservation practices, components, measures, or activities specified in the WRPO. Unless a partner or landowner donation applies, the amount, terms, and conditions of the assistance will be subject to the following restrictions:

- (i) For perpetual easement enrollments, NRCS will pay not less than 75 percent, but not more than 100 percent of the costs.
- (ii) For 30-year easement or less-than-permanent easements due to maximum duration allowed by State law and 30-year contract enrollments, NRCS will pay not less than 50 percent, but not more than 75 percent of the costs, except as described below.
- (iii) For all easement enrollment types, NRCS may pay up to 100 percent of the costs for the replacement of an eligible conservation practice, if NRCS determines the practice is still needed and the failure of the original practice was beyond the control of the participant.

## 528.142 Contract Development for WRPO Implementation

### A. General

- (1) NRCS may use any appropriate procurement method to implement the easement restoration agreement. The primary factor in determining the amount and type of funds to use is when the actual “bona fide need” for the funds exists. Allowance holders and fund certifiers must determine if the bona-fide needs rule is satisfied prior to entering into each obligation. Funds cannot be obligated without a documented bona fide need.
- (2) The bona fide need for NRCS to conduct restoration exists at the time APCE or AECLU is signed. Therefore, NRCS may obligate funds for restoration at the time the acquisition funds are obligated. Prior to executing the APCE or AECLU and obligating acquisition funds, States will complete, at a minimum, a preliminary WRPO that includes costs estimates sufficient to serve as the basis for the initial obligation of funds for restoration. The initial obligation of restoration funds based on the preliminary WRPO cost estimates is for internal NRCS accounting purposes only, therefore, no payments will be made based on this obligation, no obligation documents will be signed by anyone other than NRCS, and no one is authorized to incur restoration costs, initiate restoration activities, or implement restoration practices.
- (3) The final WRPO developed by NRCS is the basis for the easement restoration agreement. Upon development of the final WRPO, any existing obligations for restoration will be adjusted accordingly in the financial system. The fully executed easement restoration agreements will constitute the final obligating documents through which restoration funds may be expended only after the easement is recorded or 30-year contract is executed. A final WRPO and fully executed easement restoration agreements must be in place before any restoration payments can be processed. Since a landowner, vendor, or partner may not be capable of implementing all the restoration practices required under the WRPO, there may be one or more active easement restoration agreements for a given specific enrollment.

**Example:** NRCS may work directly with the landowner for tree planting under a CPC and with a construction firm under a Federal contract for installing water control structures. Both the CPC and the Federal contract are considered easement restoration agreements. The basis for each will be the final WRPO or a properly completed and documented modification to the WRPO.

- (4) Restoration funds may be obligated to an easement restoration agreement based on a final WRPO prior to easement closing or 30-year contract execution. However, States must advise landowners that any practices commenced prior to the easement’s closing or 30-year

- contract's execution will not be eligible for payment without a waiver, as described in paragraph C of this section.
- (5) Participating partners may provide financial assistance or in-kind services for restoration implementation. In cases where landowner contribution is required, any financial contributions by a partner may be considered as all or a portion of the landowner's share of the costs. Total restoration assistance from all sources must not exceed 100 percent of the actual cost of installing the practice. ACEP-WRE does not prohibit the use of other non-USDA Federal funds as a match, though the other awarding Federal agency may.

#### B. WRPO Contract Practice Implementation Schedule

Restoration practices and activities authorized through any contracting method must commence within 12 months from the date the easement is recorded or the 30-year contract is signed by NRCS, and should have all restoration practices scheduled to be completed within the first 3 years of the contract. If the contract holder fails to commence during this time period, a waiver or extension may be granted if requested by the contract holder and approved by NRCS. If at any time the landowner, vendor, or partner fails to complete the agreed-to items, as scheduled, NRCS may terminate the contractual agreement in accordance with the applicable procedures. NRCS may select a different contracting method by which to secure implementation of the easement restoration agreement.

#### C. Practices Commenced Prior to WRPO Contract Approval

- (1) Practices started or completed before easement recording or 30-year contract execution and easement restoration agreement approval are not eligible for ACEP-WRE payments. Starting a practice or engaging the services of a technical service provider before the applicable agreement is approved by NRCS renders an applicant ineligible for payment for those practices unless the State Conservationist grants a waiver. The waiver must be granted after application for the program has been made but before starting the practice.
- (2) Requests for a waiver must be made by the landowner in writing. Waivers may be considered in special cases and for meritorious reasons for applications that meet all ACEP-WRE land and landowner eligibility requirements. Meritorious reasons may include the following:
  - (i) Alleviation of imminent and significant environmental problems
  - (ii) Prevention of damage to life or property
  - (iii) Seasonal weather constraints
- (3) If a waiver is granted, the State Conservationist will advise the landowner that—
  - (i) Funding will only be provided after the easement is closed or 30-year contract is executed and only if all other conditions are met.
  - (ii) The applicant is liable for all costs incurred if an easement restoration agreement is not signed by both parties.
  - (iii) Work must be applied according to NRCS-approved standards and designs.
  - (iv) Work must be completed in accordance with an approved final WRPO.
  - (v) The waiver will expire on a date determined by the State Conservationist, but no later than 12 months after the waiver is granted.
- (4) The landowner must sign the following acknowledgment statement (See Subpart U, "Exhibits," for sample early-implementation waiver letter), which will be filed in the official enrollment file:

"I/We acknowledge that the implementation of restoration practices on the land enrolled in ACEP-WRE is at my/our own risk and that my/our ability to receive ACEP-WRE funding for such practices is contingent upon NRCS and the landowner [closing on the easement or executing the 30-year contract] and entering into an easement restoration agreement. I/we

understand that payment may only be provided based on NRCS determination that the practices are established according to the final wetlands reserve plan of operations and NRCS standards and specifications. I/We further understand that we are responsible for obtaining all necessary Federal, State, and local authorizations and permits needed to implement such wetland restoration activities.”

- (5) Restoration payments for practices certified by NRCS or a technical service provider are not issued until after the easement is recorded or the 30-year contract is executed and easement restoration agreement is signed by the landowner and the State Conservationist. Notwithstanding the waiver, NRCS will not make payment for practices or components if any of the following apply:
  - (i) The intended acreage is determined ineligible for program participation.
  - (ii) NRCS does not record the easement or execute the 30-year contract.
  - (iii) NRCS and the landowner fail to enter into an easement restoration agreement.
  - (iv) The practices or components are not applied according to NRCS standards and specifications or final WRPO provisions.

**D. Procurement of Compliance Activities Related to the National Environmental Policy Act, the National Historic Preservation Act, and the Endangered Species Act**

- (1) Identification and evaluation of historic, cultural, and other environmental resources within an ACEP-WRE project area is an essential component of NRCS conservation planning and environmental compliance responsibilities. State Conservationists use technical assistance funds for these activities within a project’s area of potential effect. Technical assistance activities include resource identification and the evaluation of significance. Technical assistance funds are also to be used for any follow up activities that include cultural resources investigations and biological assessments that may be needed before applying the conservation practice.
- (2) In circumstances where the conservation planning process reveals that a particular project will require unusual, extensive, or complex investigations or assessments to meet NRCS environmental compliance responsibilities, the State Conservationist may use ACEP-WRE financial assistance funds to obtain these services when this work is being performed by non-NRCS personnel. These compliance activities would normally occur during step 8 (implementation) of the conservation planning process. For example, ACEP-WRE financial assistance funds may be used for—
  - (i) Extended cultural resource evaluation studies, resource treatment, and data recovery, including site excavation and recording.
  - (ii) Meeting terms and conditions identified in a memorandum of agreement or programmatic memorandum of agreement with the State historic preservation officer, Tribal historic preservation officer, or the Advisory Council on Historic Preservation, in accordance with 36 CFR Part 800.
  - (iii) Conducting studies related to the potential for bird strikes due to easement locations near airport facilities.
  - (iv) Meeting terms and conditions identified in a biological opinion.
  - (v) Meeting mitigation measures identified in an environmental evaluation.
- (3) All cultural, historic, and other environmental resource compliance services that will use financial assistance funds will be procured by NRCS. The use of landowner CPCs for implementing these services is not authorized. It is not appropriate to use financial assistance funds for services and activities typically provided by NRCS personnel.
- (4) In all cases in which financial assistance funds are to be used for cultural, historic, or other environmental resource compliance, the State Conservationist must explicitly approve, in

writing, the expenditure and ensure that the costs are reasonable, appropriate, and consistent with NRCS policy. The State Conservationist may not delegate this decision.

## 528.143 Payments

### A. Easement and 30-Year Contract – Acquisition Payments

#### (1) General

- (i) State Conservationists, with support from State and national easement and financial staff, are responsible for ensuring the easement acquisition internal controls are implemented pursuant to applicable laws and policy.
- (ii) After completion of internal control reviews, funds for the easement or 30-year contract payment will be obligated directly to the landowner through the appropriate Agreement for the Purchase of Conservation Easement (APCE, Form NRCS-LTP-31) or Agreement to Enter Contract for 30-Year Land Use (AECLU, Form NRCS-LTP-40). Easement payments will be issued through a closing agent unless an alternative method has been agreed to by the State, EPD, and OGC per section 528.125G(6); 30-year contract payments will be issued directly to the landowner. Payments will be made using electronic fund transfers (EFTs). See subpart M for additional information.
- (iii) NRCS will make payment for an easement or 30-year contract in the amount agreed to and specified in APCE or AECLU or as modified based on the final determination of acreage. Adjustment to acreage or compensation amount stated on the APCE or AECLU based on final determination of acreage will be documented in the easement case file and reflected in the final “Warranty Easement Deed” or “30-year Contract” (see section 528.122G). Documentation identifying the final acreage and compensation amount will be submitted to the financial management staff for adjustment of funds. (See Subpart U, “Exhibits,” for sample easement and contract compensation adjustment document.)
- (iv) The APCE authorizes NRCS to provide payment to the landowner through an escrow account managed by the closing agent. The landowner approves payment to the escrow account through the execution of the APCE; therefore, a separate “Assignment of Payment” form (Form NRCS-CPA-1236 or successor form) does not need to be executed by the landowner.
- (v) Easement payment may only be issued after NRCS has received a title opinion from OGC setting forth the requirements to secure sufficient title to the land and NRCS has determined that the requirements set forth in the OGC title opinion can be satisfied. A copy of the OGC title opinion must be provided to the financial officer for easement payment processing. A separate “Application for Payment” form (Form NRCS-CPA-1245 or successor form) is not required in order to process the easement payment.
- (vii) A completed copy of the ACEP-WRE “Easement Acquisition Internal Controls Review Certification Checklist” is required to process the easement payment. The financial officer will identify the closing agent as an assignee or alternate payee in FMMI.
- (viii) The closing agent will handle the funds in the escrow account and issue the appropriate Internal Revenue Service (IRS) Form 1099 in accordance with NRCS closing instructions and OGC title opinion for ultimate disbursement of the proceeds to the landowner and provide NRCS documentation of disbursement of those funds, such as a HUD-1 Form or closing disbursement statement. See subpart M for more detailed information about the closing process.
- (ix) NRCS will not acquire any easement or 30-year contract unless the landowner accepts the amount of the easement or 30-year contract payment that NRCS offers. 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. The acquisition payment for 30-

year easements, less than permanent easements due to maximum duration allowed by State law, and 30-year contracts will not exceed 75 percent of the value determined for a permanent easement.

- (2) Withholding Landowners Restoration Costs from the Acquisition Payment
  - (i) For all non-permanent easements and 30-year contract enrollments, sufficient funds must be withheld from the easement or contract payment to cover the landowner's share of the restoration costs based on the final WRPO. The easement will not be closed or the 30-year contract will not be executed until a final WRPO has been completed and the easement restoration agreement cost estimates have been determined.
  - (ii) Based on the final restoration cost estimates, NRCS will hold the landowner's share of the restoration cost in an appropriate account. Funds withheld from the easement payment for the landowner's share of restoration costs will be documented on the closing or settlement statement.
  - (iii) Financial management staff will follow current policy on processing and monitoring easement payment withholdings for landowners' restoration costs. States will coordinate with financial management to administer the payment and tracking of these funds. Any excess funds remaining at the completion of the restoration will be issued to the landowner.

**Note:** If NRCS determines during implementation that the restoration costs will be higher than originally estimated, NRCS must obtain the proportional additional funds from the landowner prior to proceeding with the practices or activities that will incur the additional costs.
  - (iv) The IRS Form 1099 received by the landowner must reflect the full amount of the consideration identified on the warranty easement deed or 30-year contract. The value stated on Form 1099 will not be reduced by the amount held in reserve for restoration.
- (3) Easement or 30-Year Contract Payment Schedule
  - (i) For easements or 30-year contracts valued at \$500,000 or less, NRCS will provide a single payment or up to 10 annual payments, as requested by the landowner and as specified in the APCE or AECLU.
  - (ii) For easements or 30-year contracts valued at more than \$500,000, NRCS will make a single payment unless installment payments are requested by the landowner. If installment payments are requested by the landowner, a minimum of 5 to a maximum of 10 installment payments may be made. The applicable payment schedule will be specified in the APCE or AECLU.
  - (iii) When the landowner elects installment payments, after the first installment payment, subsequent annual installment payments will be paid as soon as possible after October 1 of the calendar year following the first installment payment.
  - (iv) All landowners of a single easement must agree on a consistent payment method. Payments cannot be split between lump sum single payments and annual installments. Only one method will be utilized to make payment to the landowners.

B. Easement and 30-Year Contract – Other Related Costs

- (1) NRCS may pay up to 100 percent of costs related to acquiring and perfecting an easement or 30-year contract, such as preliminary title searches, environmental record searches, areawide market analysis, USPAP appraisals, closing costs, legal boundary surveys and descriptions, and final title insurance. NRCS may procure these services by contracting directly with the vendor, entering into an agreement with a partner or other agency or, for certain items, through an agreement with the landowner. All related-cost products completed by qualified non-NRCS personnel will use financial assistance funds.

- (2) Payments for these related costs should be issued only after the product has been delivered to and reviewed by appropriate NRCS personnel and a determination has been made that the product meets the applicable specifications, scope of work, task order, agreement terms, or other NRCS instructions. For example, payments for—
  - (i) Preliminary title search information should only be provided after the title document has been reviewed to determine, at minimum, that the correct and entire offered area has been searched and that all underlying documents identified in the search have been received.
  - (ii) Areawide market analysis should only be issued after the product has been reviewed by an authorized official who has confirmed that it meets applicable NRCS policy and scope of work.
  - (iii) Individual appraisals should only be issued after acceptance by a technical reviewer or National Headquarters (NHQ) staff appraiser.
  - (iv) Easement boundary surveys should only be issued after the meeting in the field with the surveyor and landowner to confirm that the surveyed area is correct, the verification has been documented to the file, and all paper and electronic copies of the boundary survey have been received and reviewed to determine compliance with specifications and scope of work for easement boundary surveys.
  - (v) Closing services should only be provided after the final title insurance policy has been reviewed to determine compliance with NRCS closing instructions and OGC title opinion.
- (3) A copy of an invoice or receipt and any required acceptance or review documentation must be included with the appropriate payment request form. The individual payment request forms will depend on the type of procurement method used. Refer to relevant agency policy governing either Federal contracts (FAR) or agreements (120-FGCAH, Part 600; 120-CAH, Part 610; or NI-120-301), depending upon the procurement method. If items were obtained through an agreement with the landowner, such as the easement boundary survey, a Form NRCS-CPA-1245, “Application for Payment” or successor form and a copy of the receipts or invoices must be submitted by the landowner.

#### C. WRPO Implementation Payments

- (1) Restoration payments for conservation practices, components, or activities—
  - (i) Are made only after NRCS certifies that the conservation practices, functional components, or activities are completed satisfactorily, either in accordance with standards and specifications for conservation practices or components, or in accordance with the WRPO for activities.
  - (ii) Are based on the actual cost at the time the practice is installed.
  - (iii) Must be accompanied by supporting receipts or invoices.
- (2) Partial practice payments are not allowed; therefore, incremental payments may not be made if the practice does not function until fully installed. However, a single practice with either multiple functional components, or extents that can be completed and certified as functional as installed, may be scheduled and paid for as separate line items in a contract.
  - (i) Example 1, Partial Payment.—If the wetland restoration design calls for a dike to be installed around the perimeter of a 50-acre wetland unit, payment may not be issued at the 50-percent completion point when the dike has only been completed on two sides of the field, as it will not function as designed.
  - (ii) Example 2, Component.—If the wetland restoration design calls for a dike to be installed on a 50-acre parcel that will create two 25-acre wetland units, payment could be issued when the dike around one of the 25-acre wetland units has been completed, as it would be a functional unit as designed and installed.
- (3) Conservation Program Contract (CPC)

Payments made for conservation practices or activities implemented through CPCs with the landowner will be based on the information provided on the “Application for Payment” form (Form NRCS-CPA-1245 or successor form). The form will be prepared by NRCS and signed by the landowner or authorized representative. The landowner will be established as the vendor in FMMI and payments will be made to the vendor, unless payment has been assigned through a properly executed “Assignment of Payment” form (Form NRCS-CPA-1236 or successor form) to another person or entity.

(4) Contribution, Cooperative, and Interagency Agreements

Payments for conservation practices or activities completed through—

- A contribution agreement will be made as stipulated in 120-CAH, Part 610, Subpart C, Section 610.42, “Payment Approval.”
- A cooperative agreement will be made by submitting a completed SF-270 with specific documentation, as stipulated in 120-FGCAH, Subpart D.
- An interagency agreement will be made in accordance with guidance in the standard operating procedures issued with NI-120-301.

(5) Federal Contracts

Federal contracts must be entered through IAS. FAR and IAS policy and procedures will be followed regarding what forms and documents are required to initiate and issue a payment.

D. Application of Adjusted Gross Income (AGI) and Highly Erodible Land Conservation/Wetland Conservation (HEL/WC) Payment Eligibility Criteria and Payment Limitations to Landowners and Others

(1) Payments to Landowners

NRCS first determines a landowner’s eligibility for payment under the AGI provisions and the HEL/WC provisions at the time of application to ensure that NRCS is working with an eligible landowner. The landowner’s AGI determination is rechecked at the time of enrollment and remains in effect for the duration of the enrollment. The landowner’s HEL/WC determination must be rechecked at the time of each payment, as provided below.

- Easement and 30-Year Contract Payments
  - When an easement payment or 30-year contract payment is to be made to any landowner, the landowner’s eligibility under the HEL/WC provisions is rechecked to ensure that all landowners on the deed are eligible for the payment. NRCS will not make the easement or 30-year contract payment if the landowner or landowners are not compliant with the HEL/WC provisions when payment is requested.
  - A landowner may request to withdraw from program enrollment at the time of easement payment or 30-year contract payment if NRCS determines that the landowner is ineligible for payment under the HEL/WC provisions. If a landowner withdraws from ACEP-WRE enrollment based upon the NRCS determination of ineligibility for payment under the HEL/WC provisions, the landowner will be determined to be in violation of APCE or AECLU.
- Easement Restoration Agreement through CPC
  - NRCS does not need to revisit the landowner’s AGI eligibility determination if NRCS enters into an easement restoration agreement with the participant through a CPC, since the AGI determination is in effect for the duration of the program enrollment. However, NRCS must revisit the landowner’s HEL/WC eligibility at the time an easement restoration agreement is entered through a CPC. If a landowner is determined ineligible under the HEL/WC provisions after easement

closing, NRCS may obtain any necessary WRPO implementation through a Federal contract or agreement arrangement with a partnering organization. (See paragraph (2) below).

- When an easement restoration agreement payment is made to a landowner through a CPC, the landowner's eligibility under the HEL/WC provisions is rechecked to ensure that all landowners are eligible for the payment. If the landowner or landowners are not compliant with the HEL/WC provisions when payments are requested, NRCS will not pay the participants, and payments for practices completed by the participant during the period of ineligibility are forfeited, unless a good-faith exemption has been granted in accordance with 7 CFR Part 12. Modification of the contract or agreement to reschedule practices to avoid forfeiture of payment because of HEL/WC compliance issues is not allowed.

(2) Payments to Others

- (i) Under ACEP-WRE, a landowner must meet the AGI and HEL/WC provisions of the Food Security Act of 1985, as amended, to be eligible for payment, as described above.
- (ii) Subsequent to easement recordation or 30-year contract execution and payment, the eligibility of the landowner or ownership of the land may change. However, it does not further the purposes of the program to acquire permanent or long-term protection on an area that is not able to be restored due to post-closing changes in the circumstances of the landowner or the fee title ownership. Therefore, NRCS and the landowner agree that, at the time of enrollment, under the terms of the warranty easement deed or 30-year contract, NRCS may restore, protect, enhance, maintain, and manage activities on the easement or contract area by providing financial assistance directly to the landowner, or as determined necessary by NRCS, through another person or entity.
- (iii) NRCS may make payments to restore and maintain the easement or 30-year contract area to someone other than the original landowner, even if that other person or entity does not meet payment eligibility criteria. In particular, NRCS may make payments to others without regard to any other provision of law and in a manner NRCS determines is fair and reasonable. In this way, NRCS is able to ensure that all properties enrolled through an easement or 30-year contract are able to be restored as contemplated by the ACEP-WRE statute, despite events subsequent to easement recordation or 30-year contract execution.
- (iv) Therefore, if NRCS enters into a CPC with a subsequent landowner, a Federal contract with a vendor, a cooperative agreement with a partner, or a contribution agreement with a partner, NRCS may make payment under the terms of those types of easement restoration agreements without regard to the whether the payment recipient would meet the payment eligibility provisions of the Food Security Act of 1985.

**Example:** A State's department of natural resources (DNR) purchases fee title from the original ACEP-WRE participant. NRCS may enter into an easement restoration agreement with the DNR to implement the restoration practices and make payment to that agency, even though DNR is a State agency and would not have been eligible for enrollment.

(3) 30-Year Easement and 30-Year Contract Restoration Payment Limitations

- (i) Restoration payments remain subject to the statutory limitations regarding the level of assistance that may be made, whether such assistance is made directly to the person or through another person or entity. Therefore, for non-permanent easements and 30-year contracts, NRCS may not provide more than 75 percent of the cost of conservation practices or components implemented for the purpose of establishing the restoration, as specified in the WRPO, without regard to ownership or payee.

- (ii) NRCS may pay up to 100 percent of the repair costs associated with non-permanent easements. NRCS has discretion to pay up to 100 percent of repair costs on these easements only after the implementation and establishment period has ended and if NRCS determines the practice is still needed and the failure of the practice was beyond the control of the landowner.

## **528.144 Modifications to the Easement Restoration Agreement**

### **A. Modifications to the WRPO**

A revision of the WRPO may be required before a modification to the easement restoration agreement can be completed. If particular practices or activities are not already identified in the WRPO, a revision to the WRPO may be needed to prepare new easement restoration agreements for new work, such as enhancements, maintenance, and repairs. See section 528.134E for guidance.

### **B. Modifications to Easement Restoration Agreements – Processing Contract Change Requests**

#### **(1) General – Determination of Scope**

- (i) For purposes of this section, the term “contract” means any conservation program contract, cooperative, contribution or interagency agreement, or Federal contract used to implement an easement restoration agreement.
- (ii) When the original terms of a contract obligation need to be altered, a contract change request must be made. The request must be analyzed by the State program manager or contracting officer to determine if the change or changes requested are within the scope of the original contract or are of sufficient magnitude to be considered outside the scope of the original contract. The basis for the change must be clearly stated in the contract change request.
- (iii) The determination of scope is the key to selecting the proper contracting procedures to be used to accommodate the request and the proper funds to be provided for the request. Contract change requests that are generally considered within scope are those that—
  - Are used to carry out the original intent of the contract.
  - Will treat the originally identified resource concerns.
  - Are of a reasonable magnitude.
- (iv) Contract change requests that are generally considered outside the scope of the original contract are those that—
  - Change or add resource concerns and the practices and activities to treat them.
  - Are repairs, replacement, or maintenance of existing, established practices.
  - Were never contemplated in the original contract.
  - Are of a magnitude that is beyond the scope of what was contemplated in the original contract.

#### **(2) Contracting Procedure Based on Scope Determination**

- (i) If a change request is determined to be within the scope of the existing contract, then a modification may be completed to make the changes. If the change request is determined to be outside the scope of the original contract, then a new contract must be used to accomplish the work or task.
- (ii) Executing modifications to existing contracts for approved in-scope changes will depend upon the specific contract vehicle, as indicated below. Modifications to existing contracts have the same signatory requirements as the original contract.

- Federal contract modifications will be entered into IAS in accordance with appropriate FARs. Funds are obligated once the authorized NRCS official signs the necessary paperwork.
  - CPC modifications will be completed on a “Revision of Plan/Schedule of Operations or Modification of a Contract” form (Form NRCS-CPA-1156) or successor form. Funds for the contract change, if needed, are obligated once the landowner and authorized NRCS official signs the form.
  - Contribution agreement modifications will be made on the appropriate forms and according to procedures in 120-CAH.
  - Cooperative agreement modifications will be in accordance with 120-FGCAH.
- (iii) Contract change requests determined to be outside the scope of the original contract require a new contract to be generated. The contract type and any competition requirements will depend upon the contract vehicle used.
- Federal Contracts.—If the proposed change is determined to be “out of scope,” either a new contract for the changed portion must be competed or the entire contract with the addition of the changes must be re-competed in accordance with FAR by an authorized contracting officer. If deemed appropriate by the contracting officer, there may be instances in which an out-of-scope modification may be authorized, based upon the concept of different site conditions or other criteria
  - CPC With the Landowner.—A new CPC, consisting of all component documents, the contract (Form NRCS-CPA-1202, “Conservation Program Contract,” or successor form), NRCS-CPA-1202 appendix, and schedule of operations (Form NRCS-CPA-1155 or successor form), must be generated, a new CPC contract number provided, and signatures obtained from the landowner. Funds may be obligated once the landowner and NRCS authorized officials’ signatures are obtained.
  - Contribution Agreements—A new agreement must be generated according to procedures in 120-CAH.
  - Cooperative Agreements.—A new agreement must be generated and possibly competed according to procedures in 120-FGCAH.
- (3) Funding Change Requests
- (i) Once a determination has been made regarding scope by the authorized official, then a determination can be made as to which funds may be used for the request. ACEP-WRE funds are no-year funds.
  - (ii) States will track the purpose (e.g., maintenance, repairs, enhancement, etc.) and amount funds obligated each year for costs outside the scope of existing contracts. The States will notify NHQ of this information, as requested, to assist NHQ tracking of how much of funding is being used for new enrollments and support of existing enrollments.
  - (iii) State program staff and administrative staff will coordinate and follow current FNM policies for funding and deobligation procedures. For all ACEP-WRE obligations, any excess funds are to be deobligated from contracts once the work for which they were obligated is completed. When all scheduled restoration practices have been completed, any remaining funds will be deobligated from the contract.
- (4) Types of Contract Changes and the Authorizing Official
- (i) State Conservationists must establish procedures and identify staff to perform initial scope determinations and second-level reviews of in-scope determinations. Although the State Conservationist is responsible for the second-level review and concurrence, he or she may delegate this authority. The authority may not be delegated lower than the member of the State management team responsible for ACEP-WRE, which in most States is the Assistant State Conservationist. Additionally, to comply with the principles of separation of duties, this authority must not be given to the same person who enters the obligation in

FMMI. Figure 528-O1 below provides examples of change requests and whether they are generally considered within-scope or outside-of-scope requests.

- (ii) It is critical to remember that the types of **situations identified below as outside-of-scope requests may not be considered within-scope requests**. However, it is possible that a change request shown below as generally being a within-scope request would be considered an outside-of-scope request when applying the “reasonable” test.
- (iii) For example, a cost overrun due to inflation is generally considered within the scope request. However, it is possible that the magnitude of the change could cause the request to fail the reasonable test, so the request would be considered an outside-of-scope request.
- (iv) All requests for additional funds for practices once the existing contract has been completed are new procurements and require the use of new contract instruments. This includes requests for “enhancement” practices or when the initial restoration did not adequately restore the site as anticipated, provided this determination is made after the original contract is completed.
- (v) Figure 528-O1 below is primarily focused on restoration-type activity however the same principles apply to any contract for any service in ACEP-WRE, including closing services, acquisition, surveys, appraisals, etc. It also applies to contracts and agreements with third parties to conduct activities for NRCS.

**Example:** NRCS has a signed APCE, but prior to easement closing the landowner decides to offer twice the amount of acres for enrollment. This increase was never considered by the landowner at the time of application and would double the size of the easement. This would be considered an outside-the-scope change.

- (vi) In the chart below—
  - All determinations in the “within scope” or “outside-of-scope” columns are based on passing the reasonable test.
  - All determinations in the funds columns assume that funds are not cancelled and are available for use.
  - “Practice” should be read as “practice, component, or activity.”

**Figure 528-O1**

Type of Request	Additional Examples or Description	Within Scope	Outside of Scope
Inflation	Cost of the practice increases due to inflation in cost of materials or labor.	Yes	
Increase in quantity	Quantity of a practice increases over the original estimated amount, which includes increased acreage of easement purchase due to final boundary survey.	Yes	
Reapplication	Practice is completed but not certified as fully functional and has failed due to no fault of the landowner. This will generally only apply to vegetative practices that require a period of time before determining that the practice was successful.	Yes	
Repair	A practice is completed and certified as complete. Practice is damaged or destroyed later through no fault of the landowner. For example, a dike is installed, certified, and paid for, and 2 weeks later it is washed out by flood waters.		Yes
Maintenance	Practice has been installed and certified as complete. Over		Yes

Type of Request	Additional Examples or Description	Within Scope	Outside of Scope
	time, rodent damage has occurred and needs to be corrected to protect the integrity of the structure. This does <b>not</b> include damage done through landowner violation, such as tree planting destroyed by unauthorized grazing.		
Management	Practices not originally scheduled but later determined necessary to manage the vegetation and hydrology of the site, such as prescribed burning.		Yes
Substitution	Practice planned in the existing contract will be replaced with a practice that serves the same purpose but does it more efficiently, more economically, etc. It could also be that the original, planned practice was found on final design to be infeasible and that the current practice will serve the same purpose and is feasible.	Yes	
New Practice	This includes practices for enhancement of the original restoration or because original restoration did not meet expectations. It includes practices inadvertently omitted from the existing contract that are not necessary for proper functioning of practices in the existing contract.		Yes
Facilitating Practice	Practice was omitted from existing contract but is necessary for the proper functioning of one or more practices in the existing contract.	Yes	

### 528.145 Contract Status Review

A. Easement restoration agreements that have open obligations will be reviewed annually until all scheduled practices have been implemented. Contract reviews will be conducted onsite to assess current conditions and progress in implementing the easement restoration agreement. Contract reviews should be done late enough in the calendar year to allow for the observation of performance of scheduled practices and should include the landowners to the extent possible.

B. During restoration implementation, the ACEP-WRE area may be visited one or more times during a year; however, the annual contract review is the occasion for careful evaluation and recording of the participant's needs and the status of the contract and operations. Findings are to be recorded on "Contract Review" form (Form NRCS-CPA-13). This contract review is independent of the required annual monitoring of easements and 30-year contracts; although the activities could be performed concurrently. (See 440-CPM, Part 527, Subpart P.)

C. At a minimum, the following are to be checked or reviewed, as appropriate:

- (1) Maintenance of practices previously applied
- (2) Application of practices scheduled in the current year
- (3) Items in noncompliance
- (4) Need for changes in time schedule or practices
- (5) Adequacy of applied conservation practices in relation to the programs objectives and the WRPO and associated plans
- (6) Determination of whether land under contract is still under the participant's control
- (7) Items needing attention next year

- (8) Agreement items not carried out as scheduled will be noted on the NRCS-CPA-13 along with the reason, if delayed
- (9) Non-cost-shared items will be noted
- (10) Contract disbursements and remaining estimated obligations

D. The contract review form must be signed by the designated conservationist who conducted the review. When the review is made with the participant, he or she should sign or initial to indicate concurrence. A copy of the contract review form is to be sent to the state office and retained in the official casefile. A copy should be provided to the landowner.

E. See 440 CPM 527, Subpart P for information on annual monitoring requirements.

## **528.146 Cancellation and Termination of Conservation Program Contracts**

### **A. General**

A CPC may be cancelled by both parties or terminated for cause by NRCS. In either event, the obligations contained in the CPC are ended through action that annuls the responsibilities of both parties to the contract. There is a slight, but significant difference in the terminology used when CPC obligations are ended.

- (i) Cancellation.—A cancellation is an equitable remedy that allows both parties to the contract to mutually revoke the contractual relationship (a cancellation may also be referred to as a “termination for convenience”). A recovery of costs may or may not be appropriate, as determined by the State Conservationist, depending upon the circumstances included in the program participant’s written request for cancellation. The participant is not afforded appeal rights, since cancellations are mutually agreed upon by the participant and NRCS.
- (ii) Termination.—A contract is subject to termination as a result of a material breach of the terms and conditions included in the CPC (may also be referred to as terminations for cause). As such, a contract termination meets the definition for an adverse decision in accordance with 7 CFR Section 11.1, “National Appeals Division Rules of Procedure.” The cause for termination and the procedure used by NRCS to ensure that the landowner has been provided an opportunity to remedy the violation as required by the specific program regulation must be fully documented. Terminations for cause will usually result in an assessment of damages for recovery of costs associated with the administration of the breached contract.

### **B. Cancellation of CPC**

- (1) Cancellation of CPCs for easement restoration agreements must follow guidance given in 440-CPM, Part 512. Contract landowners may request that a contract be cancelled. Landowners must request cancellation in writing, provide reasons for the cancellation, and, if applicable, provide information on availability of any transferees.
- (2) If a contract is cancelled, the landowner forfeits all rights to any payments under the contract and may be required to refund payments as described in the CPC appendix. When a contract is cancelled, the State Conservationist will—
  - (i) Document the effective date of cancellation on the contract documents,
  - (ii) Fully document the reasons for the contract cancellation,
  - (iii) Inform the landowner, in writing, of the approval of the cancellation request, including the forfeiture of all future payments under the contract and repayment requirements to complete the process. (See Subpart U, “Exhibits,” for a sample cancellation letter.)

### **C. Termination of CPC**

- (1) Termination of CPCs for easement restoration agreements will follow guidance given in 440-CPM, Part 512. Documentation of termination should include Form NRCS-CPA-13, “Contract Reviews,” and Form NRCS-CPA-153 “Agreement Covering Non-Compliance with Provision of Contract” if a breach of contract is involved; the latter should be signed by the participant. (See Subpart U “Exhibits,” for a sample termination letter.)
- (2) If NRCS terminates a CPC, the landowner will forfeit all rights to future payments under the easement restoration agreement, and may be required to refund all or part of the payments received, plus interest. In addition, NRCS is entitled to recover any and all administrative and legal costs, including attorney’s fees or expenses, associated with any enforcement or legal action related to the termination.
- (3) A CPC termination is effective immediately upon a determination by the State Conservationist that the participant has—
  - (i) Submitted false information
  - (ii) Filed a false claim
  - (iii) Engaged in any act for which a finding of ineligibility for payments is permitted under this part
  - (iv) Taken actions (or inactions) that NRCS deems to be sufficiently purposeful or negligent to warrant a termination without delay

### **528.147 30-Year Contract Modification, Cancellation, and Termination Policy**

#### **A. Cancellation (Termination) of the 30-Year Contract**

In accordance with the terms of the 30-year contract, if NRCS determines that a landowner is in violation of the terms of the 30-year contract, or the terms of any documents incorporated by reference into the contract, the landowner must be given reasonable notice and an opportunity to voluntarily correct the violation within 30 calendar days of the date of notice or such additional time as the State Conservationist determines is necessary to correct the violation. If there is a continued failure of the landowner to comply with any provision of the contract, NRCS or other delegated authority will have any legal or equitable remedy provided by law and right to—

- (i) Enter upon the property to perform necessary work for the prevention of or remediation of damage to wetland or other natural values.
- (ii) Assess all expenses incurred by NRCS (including any legal fees or attorney fees) against the landowner, to be owed immediately to the United States.
- (iii) Terminate the contract and require repayment by the landowner of costs incurred by NRCS in furtherance of the contract.

#### **B. Modification of the 30-Year Contract or WRPO**

For lands held by the Bureau of Indian Affairs (BIA), modification of the 30-year contract or WRPO will require an amendment to the 30-year contract and will require the approval of the landowner, NRCS, and the designated BIA official. For boundary modifications to 30-year contracts considerations will be similar to criteria for easement administrative actions affecting the easement boundary or terms (see Subpart R, “ACEP Easement Subordination, Modification, Exchange, and Termination”). Coordinate with EPD on information and steps required to modify and amend the 30-year contract.

### **528.148 Converting an Existing 30-Year Easement to a Permanent Easement**

A. At the time of recording the 30-year easement, the easement payment provided to the landowner was not to exceed 75 percent of the easement value for a perpetual easement. At the time of the

conversion from a 30-year to a permanent easement, the landowner will be compensated for the remainder of the easement value by providing 25 percent of the current year's geographic area rate cap (GARC) applicable to the easement area being converted to a permanent easement.

Example: Land enrolled in a 30-year easement in FY 2012 was paid 75 percent of the \$1,600 per acre easement value, or \$1,200 per acre. In FY 2016, the landowner requests conversion to a permanent easement. That same land in FY 2016 has an established GARC of \$2,000 per acre. The payment to the landowner to convert from a 30-year to a permanent easement will be 25 percent of the current fiscal year GARC value of \$2,000 per acre, which is \$500 per acre.

B. To request an increase in easement duration from 30-year to permanent, the landowner will sign a new application, Form NRCS-CPA-1200, and indicate on it the desire to increase the easement duration to a permanent easement. A new application record will not be entered into NEST, but instead the request must be noted in the existing 30-year easement record. The request does not have to be ranked with applications for new enrollment for that year.

C. If the landowner proposes to convert less than the entire existing 30-year easement area to a permanent easement, NRCS must first determine whether the reduced area still meets the required land eligibility criteria. If NRCS determines the portion of the existing 30-year easement area to be converted to a permanent easement meets all of the eligibility criteria, NRCS must also obtain a new easement boundary survey to describe the perpetual easement area and ensure there is sufficient access to the permanent easement area. No new acres may be included in the easement area.

D. The standard ACEP-WRE easement acquisition activities and requirements in subparts K and M must be followed including, but not limited to, onsite visits, updated title search and review, an updated title opinion from OGC, necessary title clearances, and use of a closing agent to ensure the deed is closed and recorded in accordance with the OGC title opinion and NRCS closing instructions.

E. The perpetual easement will be recorded using the most current version of the Form NRCS-LTP-30, "Warranty Easement Deed in Perpetuity."

F. If all land and landowner eligibility and acquisition and program requirements are met, the State Conservationist may approve the conversion if it is determined the additional protection to be of significant environmental value. The request may only be approved by the State Conservationist, and this authority may not be delegated.

G. The obligation will be made using funds from the fiscal year when the State Conservationist signs the agreement to extend the easement duration. (See Subpart U, "Exhibits," for the agreement to extend easement duration).