

Part 528 – Agricultural Conservation Easement Program

Subpart R – ACEP Easement Subordination, Modification, Exchange, and Termination

528.170 Overview of Easement Administration Action Authority

A. Easement Administration Action Terms

- (1) “Easement administration action” means subordination, modification, exchange, or termination of rights of the United States in an ACEP easement.
- (2) “Modification” means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, agrees to adjust the boundaries or terms of an easement that will result in equivalent or greater conservation value, acreage, and economic value to the United States, and the modification only involves lands within or physically adjacent to the original easement area.
- (3) “Exchange” means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, relinquishes all or a portion of its real property rights or interests in an easement that are replaced by real property rights or interests granted through an easement that has equivalent or greater conservation value, acreage, and economic value to the United States on land that is not adjacent to the original easement area.
- (4) “Subordination” means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, agrees to subordinate its real property rights or interests on all or a portion of an easement as part of an easement exchange or easement modification. The subordinated rights will be replaced by rights that are of equivalent or greater conservation value, acreage, and economic value to the United States.
- (5) “Termination” means a real estate transaction where NRCS, on behalf of the United States and in its sole discretion, agrees to terminate its rights or interests in an easement or portion thereof to facilitate a project that addresses a compelling public need for which there is no practicable alternative and such termination action will result in equivalent or greater conservation value and economic value to the United States, and NRCS is provided compensation for such termination.

B. Threshold Criteria

- (1) This subpart implements easement administration action provisions in accordance with 7 CFR Section 1468.6. When prudently implemented, the authority at 7 CFR Section 1468.6 provides NRCS the necessary flexibility to ensure that the long-term viability of agricultural land, grazing uses and related conservation values and wetland restoration and protection efforts through NRCS conservation easements will be achieved.
- (2) Once an ACEP easement is in place, including easements enrolled under predecessor programs, the United States retains vested rights and interests that authorize NRCS to make determinations necessary to administer easement interests on behalf of the United States. Any easement administration action decision affecting these vested rights and interests are made at the sole discretion of NRCS, and the consideration of an easement administration action does not vest any rights or privileges in the landowner, an ACEP-ALE eligible entity or easement holder, or third party, and are thus are not program benefits subject to appeal.
- (3) After an ACEP easement has been recorded, NRCS will not consider any request for an easement administration action except where NRCS has first determined that the criteria 7 CFR Section 1468.6 and outlined in this Title 440, Conservation Programs Manual (CPM), Part 528, Subpart R, are met. The requestor of the easement administration action (project

proponent) is responsible to provide all required documentation to NRCS, and NRCS must determine that the easement administration action—

- (i) Is in the Federal Government's interest.
 - (ii) Is concurred with in writing by the landowner, and, if ACEP-ALE, the eligible entity who holds title to the easement.
 - (iii) Addresses a compelling public need for the easement administration action or will further the practical administration of the program and for which there is no practicable alternative that will avoid impacting the easement area.
 - (iv) Will result in equal or greater conservation functions and values to the United States. This will require that if there are no practicable alternatives that do not impact the conservation functions and values of the easement area, that such impacts have been minimized to the greatest extent practicable, and any remaining adverse impacts will be mitigated by enrollment of other lands that provide equal or greater conservation functions and values, as determined by NRCS, at no cost to the Government.
 - (v) Will result in equal or greater economic value to the United States.
 - (vi) Will result in no net loss of acres in the program, except in the case of a termination.
 - (vii) Will not affect more than 10 percent of the original easement area, except under specific circumstances described in section D(2) below.
 - (viii) Meets all other requirements of 7 CFR Section 1468.6 and this subpart.
- (4) NRCS is not required to take any easement administration action with respect to any of its rights or interests in an easement and easement administration actions are discretionary, voluntary, real estate transactions between the United States, landowner, and other parties that are subject to the requirements of 7 CFR Section 1468.6 and 440-CPM, Part 528.
 - (5) Unless and until the parties enter into a binding easement administration action agreement, any party may withdraw from and terminate a proposal for an easement administration action at any time during the process.

C. Federal Action and NEPA Sequencing

- (1) This part clarifies the preferred easement administration action is always avoidance of impacts to the easement area, followed by minimization of impacts to the easement area or rights and interests held by the United States.
- (2) An easement administration action affecting an ACEP easement constitutes a Federal action that may adversely affect the environment, and, therefore, NRCS must evaluate any easement administration action under the National Environmental Policy Act (NEPA) found at 42 U.S.C. Section 4321 et seq. In addition to NEPA regulations promulgated by the Council of Environmental Quality, NRCS has supplemental NEPA regulation at 7 CFR Part 650 and its NEPA policy at Title 190, General Manual (GM), Part 410. Under NEPA, NRCS must evaluate the consequences of, and alternatives to, the requested easement administration action.
 - (i) Because any easement administration action of an ACEP-ALE easement constitutes a Federal action that has the potential to convert important farmland to nonfarm use, NRCS also has a responsibility to evaluate any ACEP-ALE easement administration action under the Farmland Protection Policy Act at 7 U.S.C. Section 4201 et seq. and 7 CFR Part 658.
 - (ii) Because any easement administration action of an ACEP-WRE easement constitutes a Federal action that may have an adverse impact on wetland resources, NRCS also has a responsibility to evaluate any ACEP-WRE easement administration action request under Executive Order 11990.
- (3) NRCS must adhere to a clearly established evaluation sequence when deciding whether to approve or deny a request for an easement administration action, including whether there are practicable alternatives to the easement administration action and the project proponent is

willing to adjust the requested action to avoid, minimize, or compensate for the impacts to the easement area. The preferred alternative is always to avoid the easement area. If the easement area cannot be avoided entirely, then the preferred alternative must be based on least impact to the original easement area.

- (i) Avoidance.—If there are practicable alternatives or other measures that will avoid impacts of the proposed activity on the ACEP easement, NRCS must deny the easement administration action request.
- (ii) Minimization.—If a practicable alternative is not available that avoids adverse impacts to the ACEP easement, then NRCS will identify and inform the project proponent about measures that may minimize adverse impacts to the ACEP easement, and may request the project proponent also provide minimization options. If the project proponent is willing and able to minimize impacts to the ACEP easement, then NRCS may continue to evaluate the merits of the easement administration request. If there are practicable alternatives or other measures that will minimize the adverse impacts of the proposed activity on the ACEP easement, and the project proponent does not select such alternatives or measures, then NRCS must deny the request easement administration action request.
- (iii) Compensation.—If NRCS determines that adverse impacts cannot be avoided or minimized, then NRCS may only continue to evaluate the merits of the easement administration request if the project proponent is willing and able to compensate for lost ACEP conservation and economic value by providing lands or measures that provide equivalent or greater conservation value and equivalent or greater economic value to the United States and result in no net loss of acres enrolled in the program. Compensation may include, but is not limited to, enrolling new acres in ACEP or increasing the protection and function of already enrolled acres. If adverse impacts cannot be avoided, minimized, or adequately compensated for, NRCS must deny the easement administration action request.

D. Additional Criteria

- (1) Easement modifications, including subordinations, that only involve the easement area itself or land physically adjacent to the easement area, are preferred to easement exchanges that involve lands that are not physically adjacent to the original easement area. Easement exchanges are limited to circumstances where there are no available lands adjacent to the original easement area that will result in equal or greater conservation and economic values to the United States.
- (2) The scope of the easement area that may be affected by an easement administration action is limited to 10 percent of the easement area. NRCS may only exceed 10 percent of the easement area if NRCS determines it is impracticable to achieve the purposes for which the easement was acquired on the original easement area. NRCS may make such determination if there are offsite landscape changes such as catastrophic changes to hydrology, complete loss of agricultural infrastructure, or contamination from hazardous materials from adjacent properties.
- (3) To meet the “compelling public need” criterion, the resulting easement configuration must not only address a compelling public need, but demonstrate that there is a compelling public need for the easement administration action itself. For example, a proponent seeks to modify an easement boundary to construct a commercial office building and parking lot. The building and parking lot would be constructed on a portion of the existing easement area that includes endangered species habitat. The proponent proposes to replace the acres removed from the easement area with twice as many acres that also offer endangered species habitat. In this example, there may be a compelling public need for the resulting easement configuration by expanding the protection of endangered species habitat, but there is not a

compelling public need for the easement administration action itself that would relinquish existing protection for endangered species on the existing easement area for the purposes of a private business enterprise. NRCS will not relinquish Federal protection on a particular land area unless the activity that will replace the Federal ACEP protection of that land area is also for purposes of a compelling public need.

- (4) NRCS will make the determination of equal or greater economic value to the United States based upon an approved easement valuation methodology in place at the time of the easement administration action request unless the terms of the easement require a different methodology, in which case NRCS will comply with the terms of the easement.
- (5) To further ensure that the easement administration action will result in equal or greater conservation functions and values to the United States, the replacement of easement acres as part of an easement exchange must occur in the same eight-digit watershed and within the same State.
- (6) Because easement administration actions could impact the total acres enrolled in the program, all easement administration actions, with the exception of terminations, must result in no net loss of acreage enrolled in the program.
- (7) ACEP easements represent a significant public investment in agricultural land and wetland protection and, therefore, easement administration actions are a limited exception to normal business processes and should rarely be recommended or approved under ACEP.

528.171 Easement Administration Action Procedural Requirements

A. Procedural Requirements

- (1) Easement administration actions generally evolve from situations that could not be anticipated when the easement was established, such as a new highway or bridge construction project.
- (2) Easement administration actions may be initiated by NRCS or proposed by a landowner, an ACEP-ALE easement holder, or a third party project proponent able to demonstrate that it has the concurrence of the landowner and for ACEP-ALE easements, the ACEP-ALE easement holder, to submit a request for the easement administration action. The ability of a landowner or third party to request an easement administrative action does not create any new rights or benefits in a landowner, easement holder, or in an authorized third party, and there is no right of approval created in the landowner, easement holder, or authorized third party. This guidance simply acknowledges the sources of information by which NRCS may consider easement administration actions and that the landowner's concurrence, and for ACEP-ALE easements, the ACEP-ALE easement holder's concurrence, is a necessary precondition for NRCS to consider approval of any easement administration action.
- (3) The party requesting the easement administration action (project proponent) is responsible for providing a project proposal with all necessary supporting documentation to NRCS.
- (4) All criteria and requirements outlined this part must be met before an easement administration action request may be recommended or approved. Evaluation of an easement administration action request should be conducted in a stepwise manner as outlined below, such that if the request does not meet one of the criteria, there is no need to continue the evaluation of the remaining criteria as the request cannot be approved. Before an easement administration action request may be recommended for approval, the State Conservationist must—
 - (i) Have written concurrence from the landowners, and easement title holders, if ALE, that they concur with the proposed easement administration action.

- (ii) Determine whether the easement administration action addresses a compelling public need for which there is no practicable alternative to the proposed easement administration action.
- (iii) Determine whether the easement administration action will further the practical administration of ACEP in their State.
- (iv) Determine if the easement administration action will result in equal or greater conservation functions and value.
- (v) Evaluate any easement administration action request under the National Environmental Policy Act (NEPA), NRCS NEPA compliance policy at 190-GM, Part 410, and this part, including the consequences of, and alternatives to, the requested easement administration action. NRCS must conduct an environmental evaluation (EE) (Form NRCS-CPA-52) to determine the level of NEPA analysis required according to NRCS policy and regulations. The project proponent must provide sufficient information for NRCS to conduct the necessary NEPA analysis and may request the project proponent to provide additional information.

Note: If NRCS finds under the NEPA analysis that the easement administration action has not been sufficiently analyzed and an environmental analysis (EA) or environmental impact statement (EIS) is required, then the project proponent must provide all of the necessary environmental compliance documentation allow NRCS to evaluate the proposed action under NEPA, NRCS NEPA compliance policy at 190-GM, Part 410, and this part. Failure by NRCS to complete the EE (NRCS-CPA-52) correctly will not eliminate the need for EA by the project proponent and may delay NRCS's response to the project proponent.

- (vi) Evaluate any ACEP-ALE, including FRPP considered enrolled in ACEP-ALE, easement administration action under the Farmland Protection Policy Act found at 7 U.S.C. Section 4201 et seq. as described in paragraph (6) below, and evaluate any ACEP-WRE easement administration action under Executive Order 11990.
 - (vii) Determine if the easement administration action results in equal or greater economic value to the United States.
 - (viii) Determine whether the easement administration action is appropriate, considering the purposes of the program and the facts surrounding the request for easement administration action.
- (5) Additionally, easement administration actions affecting an ACEP-ALE easement have the potential to convert important farmland to nonfarm use; therefore, under the FPPA, the State Conservationist is required to use the land evaluation and site assessment (LESA) system to establish a farmland conversion impact rating score on the portion of ACEP-ALE parcel that could foreseeably be converted to nonfarm use as a direct or indirect result of the easement administration action. The State Conservationist must also score the alternatives to the easement administration actions demonstrated by the project proponent and any other practicable alternatives proposed by NRCS.
- (i) The State Conservationist will use these scores as an indicator of whether an easement administration action will have adverse impacts on the farmland greater than those of any demonstrated or practicable alternative or exceed the recommended allowable level.
 - (ii) NRCS will not relinquish Federal protection on a protected parcel if the easement administration action will have an adverse impact on the farmland greater than those of a practicable alternative or exceed the recommended allowable level.
 - (iii) The project proponent must demonstrate—
 - What alternatives to the easement administration action were considered and whether the alternative actions would lessen the adverse impact to farmland based on their farmland conversion impact rating score.

- The easement administration action, to the extent practicable, is compatible with State, local government, and private programs and policies to protect farmland.
- (6) The State Conservationist will determine whether the requested easement administration action is appropriate.
- (i) If the State Conservationist decides the easement administration action is not appropriate, the State Conservationist will notify the project proponent that the request is denied and no appeal is available.
- (ii) If the State Conservationist determines the easement administration action is appropriate, then the project proponent's request, along with all supporting documentation from the State Conservationist, will be submitted to the director of EPD. The supporting documentation for the request must include, at minimum—
- A letter of determination and findings from the State Conservationist, including a summary of the proposal, impacts to the easement, and a statement from the State Conservationist concurring with proposed easement administration action and recommending its approval.
 - Evaluation under NEPA, providing a copy of the NEPA analysis and applicable FPPA or Executive Order 11990 documentation.
 - A map and description of the proposed easement administration action.
 - Evidence that easement administration action meets all of the requirements outlined in this part.
 - Written support from the local conservation district and for ACEP-WRE, the USFWS, in support of the easement administration action.
 - Evidence that the easement administration action is appropriate, considering the requirements and purposes of the program and the facts surrounding the request for easement administration action.
 - Concurrence of the landowner, and for ACEP-ALE easements only, the concurrence of the ACEP-ALE easement holder.
 - Any additional materials necessary to provide sufficient information for EPD to determine that the request is consistent with ACEP.
- (7) The EPD director will review the submitted materials and make the determination to approve or deny the easement administration request. The EPD director has delegated authority to approve or deny subordination, modification or exchanges and to deny termination requests. If termination is requested, the EPD director will review the submitted materials and if the EPD director recommends approval, he or she will provide the materials to the Chief for final determination. Easement termination may only be approved by the Chief, and such approval may not be delegated. At least 90 days prior to taking any termination action, written notice of such termination action will be provided to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate.
- (8) The project proponent is responsible for all costs associated with actions involved in the easement administration actions. Easement administration actions may involve many of the same processes that were necessary when the original easement was recorded, including a determination of value, easement boundary description, title search, subordination of any intervening liens, a new policy of title insurance, and recording of the deed of easement amendment.
- (9) Approved easement administration actions made in an amended easement or an subordination agreement, must be duly prepared and recorded in conformity with standard real estate practices, including requirements for title approval, subordination of liens, and recordation.

- (10) If NRCS denies an easement administration action request at any level, the State Conservationist will notify the project proponent that the request will not be approved. A decision to deny an easement administration action request is not appealable as such decision is in the sole discretion of NRCS and does not affect any right or benefit of the landowner, title holder, third party, or the project proponent has in ACEP.

528.172 Infrastructure Project Requests

A. Infrastructure project requests are subject to the same easement administration action requirements as any other easement administration action request, but given the involvement of a project proponent other than the original landowner, further information to address this type of request is provided herein.

B. As NRCS increases the acreage enrolled in ACEP, the number of requests to allow infrastructure projects will increase as well. Infrastructure projects may include, but are not limited to—

- (1) Overhead and buried electrical transmission lines.
- (2) Transportation projects.
- (3) Airport expansion or installation.
- (4) Wind and solar power generation farms.
- (5) Various types of pipelines, such as crude oil, natural gas, water supply, or carbon dioxide.

C. The first response to a request for an easement administration action to allow any infrastructure project is a request from the State Conservationist to the proponent to avoid NRCS easement lands. The infrastructure project proponent is responsible for providing sufficient evidence to NRCS that all criteria for an easement administration action have been met, including that the easement lands cannot be avoided. In circumstance where it has been clearly demonstrated that avoidance of the ACEP easement is not practicable, NRCS may consider easement administration action request affecting an ACEP easement, on a case-by-case basis, using the same procedures as identified in section 528.171.

D. NRCS will review an easement administration action request for infrastructure projects the same as any other request, including whether practicable alternatives exist to avoid the impacts to the ACEP easement. However, NRCS will minimize the potential for conflict with infrastructure projects by coordinating with applicable agencies regarding propose routes, rights-of-way, and NRCS enrollment activities. If NRCS at any level is provided notice of an infrastructure project that has the potential to affect one or more NRCS easements, the State program manager in the affected State must be notified immediately. The State program manager will consult with the State Conservationist, EPD, and the State program managers in other affected States as necessary and will provide direction to the field on how to proceed.

E. NRCS will avoid enrolling land into ACEP where the intended purpose of the enrollment is to interfere with a proposed infrastructure project. To assist potential project proponents in similarly avoiding existing NRCS easements, each NRCS State office should share Geographic Information System (GIS) shapefiles showing closed easement locations with electrical companies, gas pipeline companies, States' departments of transportation, and other Federal agencies on an annual basis for planning purposes and to facilitate avoidance of ACEP easements when planning for infrastructure. Any information shared must be in accordance with the guidance provided in subpart A, section 528.02.

F. States should notify EPD and the regional OGC office immediately of any eminent domain proceedings. NRCS easement lands are not subject to condemnation through eminent domain proceedings, except Federal transportation projects where the U.S. Department of Transportation (DOT) has specific authority to set aside Federal lands (23 U.S.C. Section 317) for such Federal

transportation projects. State Conservationists should confer with DOT regarding any potential actions and request that DOT not exercise that authority on existing ACEP easements.

G. The right to grant a right-of-way for a proposed infrastructure project that may cross land encumbered by a WRE easement resides primarily with NRCS as the holder of the majority of the surface rights and partly with the landowner as the remaining fee title owner. The rights and interests conveyed to the United States under a WRE easement give NRCS authority to restrict projects from and on easement lands, and WRE lands may not be condemned by State or local entities. NRCS must ensure that lands subject to WRE easements support the intended conservation purposes for which the easements were acquired.

H. The right to grant a right-of-way for an infrastructure project to go across land encumbered by an agricultural land easement is often addressed in the terms of the agricultural land easement deed itself, and involve rights and interests of the landowner, the easement holder, and NRCS under the United States right of enforcement. Where a right-of-way may impact the scope of the United States' right of enforcement, NRCS will notify the project proponent of this easement administration action process and that NRCS will address its interests in the land according to these policies and procedures.

I. Projects permitted by such Federal agencies as the Federal Energy Regulatory Commission, Federal Aviation Administration, Department of Energy, Department of State, US Army Corps of Engineers, US Bureau of Reclamation, or others, require analysis of environmental impacts, in accordance with NEPA. Under these circumstances, NRCS may request cooperating agency status and participate in the permitting agency or Department's NEPA process. NRCS must conduct an EE (Form NRCS-CPA-52) to determine the level of NEPA analysis required according to NRCS policy and regulations. If NRCS is not a cooperating agency, it must conduct its own independent NEPA analysis. Instances in which NRCS is not a cooperating agency will likely occur when permitting of infrastructure is done by a State or local government agency, and there is no Federal permitting agency. Under these circumstances, NRCS must comply with all Federal laws, including NEPA, if it considers taking any action relative to ACEP easements. Again, the proponent of the infrastructure project must provide the documentation needed for NRCS to complete its environmental review.

J. EPD will contact the appropriate Federal permitting agency or Department and will notify State Conservationists of new infrastructure projects and proposed multistate infrastructure routes. If a State is contacted by a Federal permitting agency, Department, or infrastructure project proponent, it will notify EPD immediately. State offices will maintain contacts with appropriate Federal, State, and local permitting agencies.

K. In cooperation with the permitting agency, States will ascertain whether proposed infrastructure routes will impact existing easements, and will notify EPD and OGC of any projects that may be impacted.

L. When the proposed infrastructure lies entirely within the boundaries of a single State, the State Conservationist or his or her designee serves as the responsible Federal official (RFO). When the proposed infrastructure crosses multiple States, EPD and the appropriate Regional Conservationist will coordinate with the affected States to determine which State Conservationist will serve as the agency RFO.

528.173 Minor Administrative Corrections

The State Conservationist may approve minor administrative corrections without seeking approval from EPD director, including—

- (1) Typographical errors.

Title 440 – Conservation Programs Manual

- (2) Minor changes in legal descriptions as a result of survey or mapping errors.
- (3) Address changes.