

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. Wetland Reserve Easement Purpose

- (1) The purpose of the Wetland Reserve Easement component of the Agricultural Conservation Easement Program (ACEP-WRE) is to restore, protect, and enhance wetlands on eligible private or Tribal lands while maximizing wildlife habitat benefits and wetland functions and values.
- (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 under State law if less than perpetuity	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 groundwater.
- (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 part 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 part.

528.101 ACEP-WRE Application Process and Eligibility Overview

- A. This subpart provides information about the application process, land eligibility, and landowner eligibility criteria. (See subpart U of this part 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. Complete applications received prior to the cutoff date will be reviewed, ranked, and considered for funding. Complete applications received after the cutoff date may be considered in the next application period.
 - (2) Each fiscal year, establish in consultation with the State technical committee, a high threshold ranking score such that eligible applications that rank above the threshold may be tentatively selected for funding at any time during the fiscal year.
- C. NRCS evaluates and tentatively selects eligible applications for funding through three primary steps:
 - (1) Gathering landowner information, determining landowner eligibility, and conducting preliminary investigations.
 - (2) Conducting onsite land eligibility determination (which includes documenting in the file the legal and physical access to the proposed easement site), conducting ranking based on established environmental and economic factors, and developing a preliminary restoration plan including anticipated restoration practices, quantities, and cost estimates.
 - (3) Tentatively selecting for funding based on outcome of eligibility determinations, ranking priority, cost estimates, 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 or interfere with enrollment, restoration, or achieving the program purposes.

528.102 Landowner Information

A. Application

- (1) Landowners interested in participating in ACEP-WRE must apply by submitting a completed application (Form NRCS-CPA-1200, “Conservation Program Application” or successor form) and required application package materials. (See subpart U of this part 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. (See subpart T of this part, for specific definitions of terms used.)
- (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) NRCS provides the landowners with program information to help them decide whether to proceed with the application process, including a list of the documentation that the landowner must provide before NRCS can take action on the application. All landowners must be informed about landowner and payment eligibility requirements under the highly erodible land conservation (HELC) and wetland conservation (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.
- (2) Information provided to easement applicants includes—
 - (i) A (blank) sample copy of the most current warranty easement deed and associated exhibits appropriate for the enrollment option selected. The warranty easement deed is the document executed 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.
 - (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. If an AD-1158 is used, it will be recorded with the warranty easement deed.
 - (iv) A sample copy of the Form NRCS-LTP-31, “Agreement for the Purchase of a Conservation Easement” (APCE).

Note: The APCE form must be fully executed by the landowner and NRCS before NRCS incurs costs for surveys and closing services. However, NRCS may incur costs related to determining easement compensation amounts and for preliminary investigations as described below in section 528.103E prior to executing the APCE form.

- (3) Information provided to applicants for a 30-year contract on acreage owned by Indian Tribes includes—
- (i) A (blank) sample copy of the most current “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) Notification of landowner requirements to provide clear title to the land, to provide sufficient access rights, and to terminate any farming leases prior to execution of the 30-year contract.
 - (iii) A sample copy of the Form NRCS-LTP-40, “Agreement to Enter Contract for 30-Year Land Use” (AECLU).

Note: The AECLU form must be fully executed by the landowner and NRCS before NRCS incurs costs for surveys and contract execution. However, NRCS may incur costs related determining valuation and for preliminary investigations as described below in section 528.103E prior to executing the AECLU form.

C. Information Provided by Landowners

- (1) Before NRCS can determine landowner eligibility, all landowners, as listed on the current property deed or equivalent evidence of ownership documentation (hereafter ownership documentation), must be established in the Service Center Information Management System (SCIMS) or successor systems (i.e., Farm Service Agency (FSA) Business Partner database) and have the following documents completed, reviewed, and filed at the USDA service center (see subpart U of this part for sample landowner application checklist):
 - (i) A copy of the current ownership documentation, including a breakdown of ownership shares if applicable.
 - (ii) Documentation of legal access rights including, where applicable, documentation of legal access rights across adjoining landowners (e.g., executed right-of-way, executed agreement for granting right-of-way after survey).
 - (iii) Form AD-1026, “HELIC/WC Certification” for all landowners listed on the ownership documentation, including required members of legal entities, filed with FSA.
 - (iv) Form CCC-941, “AGI Certification and Consent to Disclosure of Tax Information,” and related forms, or equivalent successor forms as applicable for all landowners listed on the ownership documentation, including required members legal entities, filed with FSA.
 - (v) Evidence of signature authority as described below in section 528.103D.
 - (vi) When the landowner is a legal entity:
 - Form CCC-901, “Member’s Information,” or Form CCC-902, “Farm Operating Plan” (when the landowner is a legal entity), or equivalent successor forms as applicable, filed with FSA.
 - Proof that the legal 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.
- (2) Eligibility must be determined for all landowners of record, as listed on the current ownership documentation, including all individuals, legal entities, and entity members down to the individuals as required based on the “ACEP Landowner Eligibility Matrix” (see subpart U of this part for the ACEP landowner eligibility matrix). FSA is responsible for making payment eligibility determinations based on

compliance with AGI provisions pursuant to 7 CFR Part 1400 and FSA policy and procedures (see FSA Handbook 5-PL, “Payment Eligibility, Payment Limitation, and Average Adjusted Gross Income - Agricultural Act of 2014,” and compliance with HELC/WC provisions pursuant to 7 CFR Part 12 and FSA policy and procedures (see FSA Handbook 6-CP, “Highly Erodible Land Conservation and Wetland Conservation Provisions”).

- (3) In accordance with FSA policy and procedures (see FSA Handbooks 1-CM, “Common Management and Operating Provisions,” and 11-CM, “Customer Data Management”), FSA will work with customers to gather any additional information needed to complete the records in the FSA systems through SCIMS, or successor system. Using the information listed above, FSA will establish the specific business type for each landowner.

For land held by a trust that files using the same Social Security number as an individual, the landowner and FSA must ensure that the landowner as identified on the ownership documentation is in SCIMS or successor system and has proper documentation of landowner eligibility.

- (4) NRCS is under no obligation to rank an application until all required application materials have been submitted by the landowner sufficient for NRCS to determine that all current landowners of record are eligible and that the land eligibility requirements can be met. Applications will remain in a “draft” or “pending” status until all landowner and land eligibility documents required from the landowner have been provided. Eligibility must be determined for the fiscal year in which the agreement to purchase (APCE form or AECLU form) is executed, which may require the landowner to submit updated application materials.

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 of this part for the ACEP landowner eligibility matrix):

- (i) Evidence of current ownership documentation 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 below in section 528.103B.
- (ii) Evidence documented in the file 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. This evidence must include a map depicting the location of the proposed enrollment area, the location and name of the public road from which the proposed enrollment area will be accessed, and the access route between the public road and the proposed enrollment area. The map should note where and if third-party lands are being crossed.
- (iii) Documentation from FSA that all persons and legal entities on the ownership documentation, including required entity members, are compliant with the HELC/WC provisions of the Food Security Act of 1985.
- (iv) Documentation from FSA that all persons and legal entities on the deed, including required landowner-legal entity members, are eligible for payment

based on the AGI provisions of the Food Security Act of 1985 so that NRCS can determine whether any landowners or landowner-legal entity members that do not meet the AGI limitation provisions will be requesting a waiver of the AGI limitation or whether a payment reduction applies as described below in section 528.103C.

- (v) Evidence of signature authority to determine its sufficiency as described below in section 528.103D.
- (vi) Proof that the legal 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) Proof of ownership of sufficient water rights, when needed for wetland restoration.

B. Twenty-Four-Month Ownership Review and Waiver Process

- (1) All landowners 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 a landowner has not owned the land for the requisite time period, NRCS must notify the applicant they are ineligible and may submit a new application once they have owned the land for the requisite length of time or may submit a written waiver request that describes or provides documentation that one of the three above-listed ownership waiver criteria applies. If the applicant submits a waiver request, the designated conservationist must forward the applicant's waiver request and documentation to the State conservationist. (See subpart U of this part for sample 24-month ownership and waiver information letter.)
- (3) When evaluating ownership waiver requests, 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 their personal or financial circumstances. A 24-month ownership waiver request worksheet must be completed for all 24-month ownership waiver request determinations. (See subpart U of this part for the 24-month ownership waiver request worksheet.)
- (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 that resulted in 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, grandchildren, or siblings).
 - (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 submits all other 24-month ownership waiver requests to the Chief through the Deputy Chief for Programs on **applications ranked high enough to be tentatively selected for funding and after all other eligibility requirements have been verified**. The State conservationist provides 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 of this part 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 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 of this part for a sample ineligibility determination letter.)
- (9) All 24-month ownership waiver requests, approved or denied, must be reported in the easement business tool (e.g., the National Easement Staging Tool (NEST)) by answering the “Land Owned for 24 Months” data element on the application record. Documentation of the basis for the request and the determination made by the State conservationist or Chief must be uploaded to the easement business tool (e.g., “Documents” page of the NEST record, with a document type of “24-Month Waiver Documentation” selected).
- (10) If the enrollment agreement is not executed 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.
- (11) If a waiver is not requested or if the request is denied, the application will be identified as ineligible in the easement business tool (e.g., NEST). If the landowner submits a new application at a later date, a new application record will be created in the easement business tool (e.g., NEST) and the date of the subsequent application will be the basis for determining whether the land has been owned for the requisite period of time.

C. Adjusted Gross Income (AGI) Review

- (1) All landowners, including required members of landowner-legal entities, must meet the AGI limitations as set forth in 7 CFR Part 1400 and must file with FSA all documents required by FSA to meet AGI filing requirements. All landowners, including required members of landowner-legal entities, must file with FSA the AGI certification, Form CCC-941 or successor form, in accordance with FSA requirements. Landowners that are a legal entity or general partnership must provide member information and percentage of ownership documentation on the forms CCC-901 or CCC-902 submitted to FSA. FSA is responsible for completing determinations on all AGI certifications.

Note: Indian Tribes are not subject to AGI provisions.

- (2) NRCS must confirm with FSA that all landowners of record, including members of landowner-legal entities, are eligible for payment under the AGI provisions. NRCS must determine for landowners or members of landowner-legal entities determined by FSA to exceed the AGI limitation, whether a waiver of the AGI limitation or a payment reduction may be applicable. A determination of AGI eligibility must be made for the fiscal year the agreement to purchase (APCE form or AECLU form) is executed by NRCS. In accordance with 7 CFR Part 1400, eligibility for payment based on the AGI provisions is applicable as follows—
 - (i) AGI-eligible and no commensurate reduction of payment will apply if:
 - FSA has determined that all landowners as listed on the most current ownership documentation, whether a person, a legal entity, or general partnership, including all required members of a landowner-legal entity or general partnership, do not to exceed the AGI limitation, or
 - FSA has determined that a landowner exceeds the AGI limitation or a landowner-legal entity is subject to a commensurate reduction in payment due to entity members that FSA has determined do not meet the AGI provisions, and the affected landowners have requested and received a waiver of the AGI limitation from NRCS.
 - (ii) AGI-eligible but a commensurate reduction of payment will apply if FSA has determined all landowners as listed on the most current ownership documentation do not exceed the AGI limitation, but such landowners that are legal entities or general partnerships include members that FSA has determined to be AGI-ineligible, including those landowner-legal entities that request and are not granted a waiver of the AGI limitation by NRCS. In such cases, the ACEP-WRE payments for the affected landowner-legal entity or general partnership must be reduced by an amount commensurate to the percent ownership of such landowner-legal entity or general partnership held by AGI-ineligible entity members.
 - (iii) Ineligible and cancelled, if any landowner as listed on the current ownership documentation is ineligible based on the AGI provisions, including:
 - Landowners that do not file the paperwork required to complete such determinations.
 - Landowners that FSA has determined exceed the AGI limitation, including those that have requested and are not granted a waiver of the AGI limitation by NRCS.
 - Landowner-legal entities or general partnerships with members that do not meet the AGI provisions and are unwilling to accept a commensurately

reduced ACEP-WRE payment, including those that have requested and are not granted a waiver of the AGI limitation by NRCS.

- (3) For landowner-legal entities, NRCS will review forms CCC-901 or CCC-902 submitted to FSA at the time of application and again prior to obligation to verify that the landowner-legal entity or general partnership and all required members are AGI eligible, including any requested and granted AGI waivers, or if a commensurate payment reduction is applicable due to AGI-ineligible members of an otherwise eligible landowner-legal entity or general partnership. Any required commensurate reduction in payments for AGI-ineligible members of an otherwise AGI-eligible landowner-legal entity should be discussed with the landowners before continuing to process the application or agreement to purchase to determine if the landowners will elect to proceed with a commensurate reduction applied, withdraw their application, or for 2018 Farm Bill enrollments only, will request a waiver of the AGI limitation. NRCS will coordinate with the financial management staff to ensure that the full calculated easement consideration value is identified on the agreement to purchase and obligated in FMFI and that any necessary reductions occur at the time of payment (see subpart O, section 528.143 of this part for additional detail). (See subpart U of this part for sample letter notifying landowner of commensurate reduction.)
- (4) AGI Waiver.—2018 Farm Bill enrollments only: landowners may request a waiver of the AGI limitation from NRCS if FSA has determined a landowner exceeds the AGI limitation or if a landowner-legal entity is subject to a commensurate reduction in USDA payments due to entity members who do not meet the AGI limitation provisions. The AGI limitation may be waived for such landowners on a case-by-case basis for enrollments that will result in the protection of environmentally sensitive land of special significance in accordance with 7 CFR Part 1400. The request must be submitted in writing by the affected landowner to the appropriate State conservationist. This includes, that for AGI-eligible landowner-legal entities that are subject to a commensurate reduction due to AGI-ineligible entity members, the written AGI waiver request must be submitted by the landowner legal-entity, the individual AGI-ineligible members of such entity do not have to submit a written request for a waiver of the AGI provisions. NRCS may bundle the written AGI waiver requests received from each affected landowner of record associated with a single application for enrollment. Following the receipt of the written landowner requests, NRCS will review, process, track, and report AGI waiver requests and determinations in accordance with the requirements set forth in the supplemental guidance specific to AGI waiver procedures.
- (5) The AGI eligibility determinations completed by FSA and the subsequent issuance of any AGI waivers by NRCS, must occur prior to NRCS execution of the agreement to purchase and prior to NRCS execution of any documents required for landowner changes that occur after enrollment and prior to easement acquisition (see subpart M, section 528.121H of this part). The AGI determinations, including any AGI waiver determinations, used for the purposes of enrollment remain in effect for the duration of the enrollment unless there is a change in land ownership, the enrolled area, or the treatment of the land under the agreement that would affect the AGI determination, including the applicability of an approved AGI waiver. Furthermore, NRCS may not approve waivers of the AGI limitation after the enrollment agreement has been executed by NRCS except for changes in land ownership as described in subpart M, section 528.121H of this part, or for changes to the enrolled area or approved land treatment that are within the scope of the existing agreement or contract and warrant consideration.

Note: AGI waivers are not available for ACEP-WRE agreements originally executed under the 2014 Farm Bill.

- (6) The AGI eligibility determination for all landowners of record, including any documentation related to AGI waivers or commensurate reductions, must be documented in the easement business tool (e.g., NEST) and the individual easement case file.

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 agreements and filed articles of partnership, certificates of formation, resolutions of the legal entity board of directors, or others. When specific or sufficient signatory authority is not provided in the legal entity documents, all members must sign the agreement to purchase and deed or 30-year contract documents, or must amend the legal entity documents to identify an authorized signatory, or must 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,” or CCC-902, “Farm Operating Plan”	<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” (provided appropriate selections have been made and signatures notarized)	<ul style="list-style-type: none"> • Application • Conservation program contract • Agreement for purchase of conservation easement • Payment applications 	<ul style="list-style-type: none"> • Warranty easement deed

Form Number and Name	Sufficient Authority to Sign	Insufficient Authority to Sign
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.

- (5) All signature authority documents must be reviewed by NRCS to determine adequacy and applicability and a copy retained in the individual easement case file or uploaded to the easement business tool (e.g., NEST). 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 information needed to determine eligibility, as required by this section (528.103) has been provided by the landowner and determined to be adequate by NRCS, ACEP-WRE funds may be used to obtain preliminary investigation services. The preliminary investigations include, at a minimum, a review of the documents assembled as part of the preliminary title search and a limited phase-I environmental site assessment (limited phase-I).
- (2) The preliminary title search and underlying documents are used to determine if title issues exist that may affect valuation or the ability of the land to meet program purposes, including issues that may preclude or delay enrollment, closing, or restoration of the land. The preliminary title search must cover at least the entire area proposed for enrollment and must include copies of all the underlying documents for each individual title exception. 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 of this part for additional information on title review and closing agent requirements.
- (3) NRCS conducts the limited phase-I to identify whether there are existing or potential onsite or offsite hazardous materials issues that may affect valuation or the ability of the land to meet program purposes, including issues that may preclude or interfere with successful enrollment, closing, and restoration of the land. This limited phase-I must include, at a minimum, an environmental records search, current landowner interviews, and an onsite visit to view present conditions. The limited phase-I must cover at least the entire area proposed for enrollment. NRCS will not enroll property where hazardous materials 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 NRCS execution of the forms APCE or AECLU to enroll the land in ACEP-WRE unless there are extenuating circumstances and the State has received written authorization from Easement Programs Division (EPD) director to execute the forms APCE or AECLU and obligate funds prior to completing all preliminary investigations. All investigations must be completed prior to easement closure or 30-year contract execution.
- (5) When conducted and provided by qualified non-NRCS personnel, preliminary title and environmental record searches and reports use financial assistance funds.

Preliminary investigation services are procured using an appropriate procurement method, and funds are obligated to the procurement document for obtaining title and record search services.

528.104 Ineligible Landowners

A. HELC and WC Compliance

- (1) Landowners must be in compliance with the HELC/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 current ownership documentation are required to be in compliance with both the HELC and WC provisions for the application to be considered eligible for enrollment. If any landowner listed on the most current ownership documentations is ineligible, the application is ineligible.
- (3) If the landowner is a legal entity, the entity must be HELC and WC compliant, and required members of the legal entity must be in compliance (see subpart U of this part for ACEP landowner eligibility matrix). If any member of a legal entity that requires member eligibility is not in compliance with the HELC and WC provisions, the application is ineligible. If the landowner regains compliance with those provisions, a new application may be filed.
- (4) The landowner’s HELC/WC compliance must be rechecked at the time of enrollment and at the time of each payment. See subpart O of this part for further details regarding applicability of HELC/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 AGI provisions and limitations. Those determined ineligible that request and are not granted a waiver of the AGI limitation or for whom a commensurate payment reduction is not applicable are also ineligible. See subpart O of this part 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. For land to be determined eligible, NRCS must determine that—
 - (i) The land is either privately owned or acreage owned by Indian Tribes.
 - (ii) 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, management, and monitoring.

- (iv) Such land meets the eligible land or other eligible land types identified in this section.
 - (v) The land is capable of having wetland hydrology and native vegetative communities restored, including a determination that adequate water rights are available, if applicable, to carry out desired wetland restoration and management efforts for the duration of the enrollment period.
 - (vi) The offering is of sufficient size and has properly configured boundaries that allow for the efficient restoration, management, maintenance, monitoring, and enforcement of the enrollment area.
 - (vii) 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.
 - (viii) Otherwise promotes and enhances ACEP-WRE objectives.
 - (ix) There are no offsite or onsite legal or physical issues that would preclude or interfere with successful conveyance, restoration, management, maintenance, monitoring, or enforcement of the enrollment area (see section 528.106 below for additional information).
- (2) NRCS determines land eligibility for ACEP-WRE enrollment through an onsite evaluation process, described 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 below identifies ineligible land criteria.
- (3) For the purposes of enrollment in ACEP-WRE, a “certified” or “official” wetland determination, as defined by Title 180, National Food Security Act Manual (NFSAM), is not required to determine land eligibility.
- (4) The easement case file must contain documentation that identifies which technical land eligibility criteria apply to which portions of the offered area and to the final surveyed easement area. 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. (See subpart U of this part for a sample “Land Eligibility Documentation” worksheet.)

B. Onsite Determination

Land eligibility is initially determined by NRCS during onsite field reviews and as available, an appropriate interdisciplinary team of partner specialists, which may include the U.S. Fish and Wildlife Service (FWS). The landowner should be invited to participate in these field reviews. The State conservationist has discretion to require that all requirements outlined in section 528.103 above be completed to the satisfaction of NRCS before NRCS will conduct its onsite field reviews. During the onsite field reviews, NRCS will—

- (i) Determine if the land offered for enrollment 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 below.
- (ii) Collect the information needed to complete a ranking of the offered area in accordance with subpart L.

- (iii) Complete preliminary planning activities sufficient to develop cost estimates 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” to determine if there are unacceptable offsite or onsite conditions (see subpart U of this part for these two documents). In most cases, if hazardous materials issues are found, the site is not eligible for enrollment.
- (v) Determine if any onsite or offsite issues not identified in paragraph (iv) above would make the land ineligible for enrollment.
- (vi) Begin the National Environmental Policy Act (NEPA) evaluation process and assemble required documentation to ensure compliance with NEPA provisions by conducting an environmental evaluation and documenting alternatives and findings on the Form NRCS-CPA-52, “Environmental Evaluation Worksheet,” or successor form.

Note: Form NRCS-CPA-52 or successor form must be completed along with appropriate supporting documentation and signed by the responsible Federal official (RFO) prior to execution of an agreement to purchase (forms APCE or AECLU).

- (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 of this part for landowner disclosure worksheet.) NRCS should request the landowner provide copies of any written, unrecorded leases or agreements at this time.
- (viii) Verify that the proposed boundary and ingress and egress route are acceptable to NRCS. At minimum, land access to the proposed enrollment area must be all-wheel-drive accessible.
- (ix) Identify if initial changes in the configuration of the offered area are necessary based on the outcome of these reviews, determine whether the landowner is interested in proceeding with a revised offered area, and ensure the evaluations and determinations made in this section are applicable to the area offered for enrollment.

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(6) below.
- (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 180-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).

States are encouraged to document in the State-specific WRCG, the technical criteria and thresholds used to evaluate whether such impacts are significant and can be substantially restored. For example, a State may identify for certain wetland types, that the degradation may be considered significant only if more than 75 percent of the hydrology functions (e.g., surface area, depth, frequency, timing, or duration) have been impacted due to long-term grazing or silvicultural management practices, such as diversions, dams, ditches, or other water management infrastructure. The State may identify that such degradation may only be considered substantially restorable if more than 90 percent of the identified hydrology impacts will be directly addressed through the implementation of the WRPO and will result in the majority of the wetland functions and values for the identified wetland type being successfully restored on the site. NRCS then uses applicable technical criteria to aid in evaluating whether an individual application meets the requirements of this land eligibility category on a case-by-case basis.

- (iii) Lands Substantially Altered by Flooding.—Agricultural 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 and the resultant wetland functions and values 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 resulting in the development of wetland characteristics and providing wetland functions and values.
- 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) resulting in the development of wetland characteristics and providing wetland functions and values.

D. Eligible Land Types – Croplands or Grasslands Flooded by Overflow of a Closed Basin Lake or Pothole

- (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 landowners' self-

certification of water 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 a 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 EPD 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 below.
- (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 1 mile apart may be granted by the State conservationist.
- (6) The riparian areas, including the linking wetlands if enrolled under the same easement transaction, are 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 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 already been restored to or under ACEP-WRE will be restored to a condition that maximizes 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 privately or under a local, State, or Federal restoration program, on which the restored wetland areas meet or are capable of meeting NRCS restoration standards and specifications are eligible. These may include but are not limited to wetlands restored under the restoration cost-share agreement enrollment option of the former Wetlands Reserve Program (WRP), the former NRCS Wildlife Habitat Incentives Program (WHIP), or another similar restoration program, such as the FWS Partners for Fish and Wildlife Program, and may during the agreement period or after, be enrolled in ACEP-WRE. Such wetlands that have already been restored but are not fully protected will be considered a positive attribute in ranking.

Note: Lands that have been entered into the ACEP-WRE (including WRP) 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”).

- (2) 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 subject to the following requirements:
 - (i) 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.
 - (ii) If the deed restriction or other interest is held by another Federal agency, a satisfactory agreement as to the respective rights of each agency must be reached and documented to the satisfaction of NRCS and OGC before NRCS may proceed.
 - (iii) At least one of the following must apply, as determined by NRCS:
 - ACEP-WRE enrollment would provide significant additional resource protection, such as additional cropping restrictions.
 - The additional restoration and protection would provide critical habitat for targeted threatened or endangered species.
 - The existing easement or deed restrictions do not provide for full restoration of the wetland functions and values.
- (3) 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 conservation value added.
 - (ii) A site may be 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 may be 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.

- (4) Individual appraisals are required to determine the easement compensation values for lands subject to an existing easement or deed restriction that are 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 (see subpart M, section 528.122 of this part for additional detail).

H. Other Eligible Lands – Hydric Soil Minor Components (Inclusions) and Problematic Hydric Soils (Atypical 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 and evaluation of the soils 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 use 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 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 enrollment area includes eligible lands as described in paragraphs C through H of this section, the proposed enrollment area 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 are incidental but necessary for the practical administration and management of the enrolled area.
 - (ii) The acres of adjacent lands must not exceed the acres of otherwise eligible land to be enrolled.
 - (iii) The adjacent lands are considered to be primarily upland buffer and associated areas but may also include riparian areas that do not meet the requirements of paragraph E of this section, restored nonagricultural wetlands, created wetlands, artificial wetlands, and noncropped natural wetlands.
- (2) The State conservationist may authorize a waiver allowing such adjacent land acres to exceed eligible land acres for certain unique situations. Unique situations that may warrant a waiver to allow adjacent lands acres to exceed eligible lands acres may include the following situations:

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- (i) Enrollment of unique or critical wetland complexes whose functions and values inherently depend on adjacent lands that do not meet one of the eligible land types. 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.
 - (ii) Enrollment targeting at-risk wetland dependent species that require additional upland areas for successfully completing their life cycle.
 - (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 of the wetland functions and values on the eligible lands acres.
 - (iv) Enrollment where the strict application of the ratio would create unmanageable boundaries, negatively impacting the practical administration or management of the enrolled area by NRCS.
 - (v) Enrollment where the strict application of the ratio would leave areas of land remaining outside the enrolled area that would be impractical or cost prohibitive for the landowner.
- (3) The State conservationist, with input from the State technical committee and FWS, must include in the wetland restoration criteria and guidelines (WRCG) the State-specific technical considerations and parameters used to make determinations about the inclusion of adjacent lands (see subpart N, section 528.131 of this part for additional information). For the purposes of making land eligibility determinations related to the inclusion of any adjacent lands acres, the State-specific WRCG document must include—
- (i) A description of the wetland types that meet the eligible land criteria that are typically enrolled in ACEP-WRE in the State, along with a description of types of adjacent lands that may be typically associated with such wetlands, including the characteristics and attributes of the adjacent land types and how such adjacent lands commonly contribute to the functions and values of the associated wetlands.
 - (ii) The technical criteria used to determine the extents or proportions of adjacent lands acres that may be appropriate for inclusion. And prior to the authorization of any waivers, the associated conditions under which a waiver to authorize the adjacent land acres to exceed the eligible land acres may be warranted for the different wetland types identified.
 - (iii) An upper limit on the ratio of adjacent lands acres to eligible lands acres based on what is appropriate for the identified wetland types and the purpose for which adjacent lands may be enrolled with such wetlands. The upper limits on the ratio of adjacent lands to eligible lands may differ based on the wetland type but may not for any wetland type exceed a ratio of 5 to 1 (five adjacent lands acres to one eligible land acre). The higher the proportion of adjacent lands the more rigorous the technical determination to ensure the inclusion of such lands is appropriate and necessary to achieve program purposes.
- Note:** The technical considerations and limitations applicable to a waiver to address the unique situations identified in paragraphs (2)(iv)-(v) above must also be described in the State-specific WRCG document but do not have to be broken out by wetland type and in general should not exceed a ratio of 2 to 1 (two adjacent lands acres to one eligible land acre).
- (4) State conservationists are not authorized to grant waivers exceeding a ratio of 5 to 1 adjacent land acres to eligible land acres without prior written approval from the EPD

director. Requests to exceed the 5 to 1 ratio may be submitted by the State conservationist to the EPD director on an individual project basis or for specific wetland types in a designated area and must document the rationale for the request and be supported by the technical conditions and parameters described in the State-specific WRCG.

- (5) Based on the technical conditions and parameters documented in the State-specific WRCG, the State conservationist determination to grant a waiver authorizing an individual enrollment to include more adjacent lands than eligible lands must be made on an individual easement basis. These determinations and waivers must be documented in the individual easement case file and must describe how the configuration of the individual enrollment meets the land eligibility requirements of this part and the applicable criteria identified in the State-specific WRCG document.
- (6) 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 above.

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 above in section 528.105I(6).
- (ii) Lands established to trees under a CRP contract, except as provided below in paragraph B(2) 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, such as risk of

hazardous materials or petroleum products, permitted or existing rights-of-way, infrastructure development, or adjacent land uses.

- (viii) Restoration, maintenance, management, or monitoring costs to the Federal Government that are 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 180-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, the State conservationist may determine these lands to be eligible if the application meets all other ACEP-WRE eligibility criteria and one of the following two conditions are met:
 - (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 and document if plantings failed or were established and failed.
 - (ii) The State conservationist determines and documents that the enrollment of such lands would further the purposes of the program based on all of the following criteria being met:
 - 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 the easement business tool (e.g., 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 in ACEP-WRE easements (ACEP-WRE easements include existing easements previously enrolled in WRP and Emergency WRP (EWRP)). In addition, no more than 15 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 must verify the current enrollment limits with FSA.
 - (v) NRCS and FSA must concur before a waiver of the 25-percent county cropland limit may 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 15-percent limitation of ACEP-WRE easements on cropland.
 - (xi) States with counties that were previously at or near the 15-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, deed restriction, or other interest 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, deed restriction, or other interest will interfere or restrict NRCS in its exercise of the rights to be acquired under the ACEP-WRE easement and existing easement, deed restriction, or other interest cannot be removed or subordinated.
 - (iii) That the existing easement, deed restriction, or other interest is held by another Federal agency, and a satisfactory agreement as to the respective rights of each agency cannot be reached and documented to the satisfaction of NRCS and OGC.
- (5) Adverse Onsite or Offsite Conditions.—Offsite or onsite conditions that could undermine, preclude, or interfere with achieving program purposes 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 materials issues.
 - If hazardous materials issues arise during the limited phase-I (record search, landowner interview, or NRCS field visits), 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 materials issues identified during any part of the limited phase-I record search, onsite field visits, 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 State conservationist determines in consultation with OGC and EPD that the landowner has provided 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) Permitted 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 or military aviation facilities.
 - 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—
 - (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 deposition, erosion, or invasive species problems that cannot be reliably or cost-effectively addressed and may impact successful restoration of the site.
 - (iv) Easement 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 rights-of-way through the easement, or other boundary configurations that NRCS determines may negatively impact the restoration, protection, management, monitoring, 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, enforcement, 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 successfully 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 an 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 an existing Federal interest and the pre-existing interest that would purportedly result in a merger or extinguishment of the lesser estate based on operation of State law, the existing Federal interest is incompatible and will not be released or subordinated, or the existing Federal interest is compatible, but the agencies fail to reach and document agreement as to the treatment of the respective rights of each agency.
 - (iii) 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 for NRCS easements in 440-Conservation Programs Manual (CPM), Part 527).

Note: When access to the proposed easement area is across a road under the jurisdiction of the U.S. Forest Service (USFS) across which the landowner has access for themselves, but is unable to secure sufficient legal access that is

unencumbered, transferable, and unrestricted, NRCS may be able to obtain for its own uses a long-term “Road Use Permit for Access to Conservation Easement” under the 2016 memorandum of understanding (MOU) between USFS and NRCS. Under these circumstances, States must consult with a national EPD realty specialist for specific assistance in determining whether the landowner’s own access is sufficient to address easement purposes, if NRCS can secure access across the USFS roads for itself under the MOU, and if OGC will be willing to accept such access. With EPD concurrence, the application will not be determined ineligible due to lack of access and the State may proceed in processing the application. If the application moves forward, the State must also consult with the national EPD realty specialist throughout the agreement, road access permitting, and easement acquisition process. The “Road Use Permit for Access to Conservation Easement” must be documented on the certificate of use and consent, signed by USFS and the State conservationist, recorded in the real property records of any county in which the USFS road covered by the road use permit is located, and retained in the easement case file. (See subpart U of this part for the “2016 MOU between the USDA USFS and the USDA NRCS” and the “USDA USFS Template Road Permit for Access to Conservation Easement.”)

- (10) The State conservationist may determine, on a case-by-case basis and in consultation with FWS, OGC, and EPD, to enroll certain lands with evaluated risk conditions if it is determined the benefits warrant such enrollment and the conditions will not undermine, preclude, or interfere with achieving program purposes or the successful implementation of restoration. If such lands are determined to be eligible, individual appraisals are required to determine the easement compensation values for such lands unless the fair market values determined through an applicable areawide market analysis (AWMA) have been developed taking into consideration the presence of such conditions (see subpart M, section 528.122 of this part for additional detail).

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 440-CPM 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 of this part for a sample ineligibility determination letter.)