

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

### **Subpart O – ACEP-WRE Contract Administration**

#### **528.140 Overview**

This subpart provides guidance on the administration of ACEP Wetland Reserve Easement (ACEP-WRE) easements and contracts, including contracting and fund management activities. In particular, this subpart addresses topics related to the development, obligation, and management of easement restoration agreements to implement wetland reserve plan of operations (WRPOs), payments for acquisition, related costs, and restoration, annual contract reviews, and cancellation and termination of conservation program contracts. All easement and 30-year contract obligations and payments for the acquisition of the easement or 30-year contract itself must comply with the most current easement acquisition enhanced internal controls policy. Notwithstanding the payment type, NRCS must not provide tax advice, including any representations about the tax implications of any easement, contract, or financial transaction. Several topics addressed in this subpart are covered in greater detail in other agency policy. Wherever possible, these policies have been cross-referenced.

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

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

- (1) NRCS provides funding for implementing the WRPO, to the extent that NRCS determines that it is appropriate and in the public interest, based on the availability of funds. NRCS provides technical and financial assistance for implementing and establishing conservation practices, components, measures, and activities necessary for the restoration and enhancement of all enrollment types. NRCS also may provide technical and financial assistance for management and maintenance on existing easements and repairs for all enrollment types.
- (2) To provide this technical and financial assistance, NRCS may use different procurement and payment methods, depending upon the individual enrollment type, service being obtained, phase of the project, and nature of the payment being made.
- (3) In general, NRCS may obtain WRPO implementation from a vendor, through partners or other agencies, or through the landowner using appropriate methods, including but not limited to the following:
  - (i) Federal contracts, such as blanket purchase agreements, indefinite delivery and indefinite quantity contracts, or cost-type contracts (see Federal Acquisition Regulation (FAR) and applicable NRCS and FPAC-BC acquisitions and contracting policy, guidance, and customer guides).
  - (ii) Such agreements as cooperative agreements, contribution agreements, or interagency agreements (see Title 120, General Manual (GM), Part 401, “Agreements”; Title 120, Federal Grants and Cooperative Agreements Handbook (FGCAH), Part 600; National Instruction (NI)-120-301, “Processing Grants, Agreements, and Memorandums of Understanding”; NI-120-348, “NHQ Interagency Agreement Standard Operating Procedures”; and other applicable NRCS and FPAC-BC grants and agreements policy, guidance, and customer guides).
  - (iii) Conservation program contracts with the landowner.

- (4) Policy and procedures unique to ACEP-WRE regarding conservation program contracting with the landowner are specified in this section and will prevail; additional information on procedures for conservation programs contracts can be found in Title 440, Conservation Program Manual (CPM), Part 530.
- (5) “Conservation program contract” (CPC) is the collective term for the set of documents that comprise the agreement with the landowner to implement scheduled practices, which includes—
  - (i) Form NRCS-CPA-1202 “Conservation Program Contract,” or successor form, which sets forth contract length and parties, and identifies attachments.
  - (ii) Form NRCS-CPA-1202-Appendix, “Appendix to the Conservation Program Contract,” or successor appendix form, which identifies terms, special provisions, and violations.
  - (iii) Form NRCS-CPA-1155, “Conservation Plan Schedule of Operations,” or successor form, along with required signature pages, and any applicable Form NRCS-CPA-1156, “Revision of Plan/Schedule of Operations or Modification of a Contract,” or successor form, which set the practices, extents, and costs.
  - (iv) Standard Form (SF)-1199, “Direct Deposit,” which is needed for obligation of funds.

B. Contractual Arrangements for WRPO Implementation

- (1) The provision of ACEP-WRE funds for the implementation of practices, components, measures, and activities as described in the WRPO for restoration, enhancement, management, maintenance and repair of an easement or 30-year contract is conducted through an easement restoration agreement.
- (2) Easement Restoration Agreement
  - (i) Under the terms of the easement or 30-year contract, NRCS acquires from the landowner the right to implement the restoration practices and activities identified in the WRPO. NRCS may provide funding to implement these activities through an easement restoration agreement entered into with the landowner or someone other than the landowner, as determined by NRCS. NRCS may use CPCs, Federal contracts, contribution agreements, cooperative agreements, interagency agreements, or other appropriate procurement methods to secure implementation of restoration practices and activities on easement and 30-year contract lands. NRCS refers to the documents used to secure restoration implementation on the easement or 30-year contract lands as the “easement restoration agreement.”
  - (ii) When working with a landowner through a CPC, the planned practices, costs, and extents to implement the final restoration design are identified on Form NRCS-CPA-1155, “Conservation Plan Schedule of Operations.” The costs are based on NRCS cost lists, including actual contractor’s bids or the engineer’s cost estimates for the individual project available at the time the NRCS-CPA-1155 is created. The CPC must be signed by all landowners or the appropriately authorized representative. Prior to approval by the State conservationists, the CPC must be reviewed to ensure that it is properly completed, has all required landowner signatures, and includes the start and end dates of the contract.
  - (iii) When NRCS implements the WRPO’s restoration activities through a contribution, cooperative, interagency, or other agreement or through a Federal contract, the agreement or contract must include the specific work to be completed (e.g., practices or activities), amounts and costs of work to be completed, and the period of performance, and must be signed by the person or persons with authority to sign the agreement or contract documents on behalf of

the partner or vendor. The restoration costs will be based on estimated quantities included in the final WRPO and the associated costs derived from the NRCS cost list, the independent government cost estimate, or the budget estimate submitted by the partner or vendor at the time of selecting the partner or vendor and developing the agreement or Federal contract or at the time specific deliverables or task orders are issued against an existing agreement or Federal contract. The agreement or contract will be reviewed and approved by appropriate NRCS or FPAC-BC agreements or acquisitions staff to ensure its proper completion.

- (iv) Once the appropriate CPC, agreement, or Federal contract documents are reviewed, determined complete and proper, and funds availability is verified, the State conservationist signs the appropriate obligating document. Funds availability is determined first from the preliminary obligation of restoration funds for the individual enrollment. If no funds remain in the preliminary obligation, then States may determine funds availability using their current fiscal year allocation. Funds are then obligated in the Financial Management Modernization Initiative (FMMI) or successor system, or in the Integrated Acquisition System (IAS) for Federal contracts.

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

NRCS may share the costs of establishing or implementing conservation practices, components, measures, or activities outlined in the WRPO and specified in the easement restoration agreement, subject to the following restrictions:

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

### **528.142 Contract Development for WRPO Implementation**

#### A. General

- (1) NRCS may use any appropriate procurement method to implement the easement restoration agreement. The primary factor in determining the amount and type of funds to use is when the actual “bona fide need” for the funds exists. Allowance holders and fund certifiers must determine if the bona-fide needs rule is satisfied prior to entering into each obligation. Funds may not be obligated without a documented bona fide need.
- (2) The bona fide need for NRCS to conduct restoration exists at the time Form NRCS-LTP-31, “Agreement for the Purchase of Conservation Easement” (APCE) or Form NRCS-LTP-40, “Agreement to Enter Contract for 30-Year Land Use” (AECLU) is signed. Therefore, NRCS may obligate funds for restoration at the time the acquisition funds are obligated.
  - (i) Prior to executing the APCE form or AECLU form and obligating acquisition funds, States must complete, at a minimum, a preliminary WRPO that includes

costs estimates sufficient to serve as the basis for the initial obligation of funds for restoration. The initial obligation of restoration funds based on the preliminary WRPO cost estimates is for internal NRCS accounting purposes only. Therefore, no payments may be made based on this obligation, no obligation documents may be signed by anyone other than NRCS, and no one is authorized to incur restoration costs, initiate restoration activities, or implement restoration practices based on this obligation.

- (ii) States use the “Supplement to Agreement for the Purchase of Conservation Easement or 30-Year Contract for Preliminary Obligation of Restoration Funds” to complete the preliminary obligation of restoration funds as described below in section 528.142B. This preliminary obligation of restoration funds is completed to ensure the funds for the restoration of the easement, or 30-year contract lands are obligated in the same fiscal year the agreement to purchase (APCE or AECLU) is executed and the acquisition funds are obligated. The “Supplement to Agreement for the Purchase of Conservation Easement or 30-Year Contract for Preliminary Obligation of Restoration Funds” and either the APCE or AECLU should be executed concurrently (within days or weeks of each other) as both executed documents are needed to complete the preliminary obligation of the restoration funds.
- (3) The final WRPO as approved by NRCS is the basis for the easement restoration agreement. Upon development of the final WRPO, the existing preliminary obligations for restoration are the initial basis for determining funds availability and whether additional funds from the current fiscal year allocation are also needed. The fully executed easement restoration agreement documents constitute the final obligating documents through which ACEP-WRE funds may be expended only after the easement is recorded or 30-year contract is executed. A final WRPO and fully executed easement restoration agreements must be in place before any restoration payments can be processed. Since a landowner, vendor, or partner may not be capable of implementing all the restoration practices required under the final WRPO, there may be one or more active easement restoration agreements for an individual easement or 30-year contract.

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

- (4) Funds for restoration may be obligated to an easement restoration agreement based on a final WRPO prior to easement closing or 30-year contract execution. However, States must advise landowners that any practices commenced prior to the easement’s closing or 30-year contract’s execution will not be eligible for payment without a waiver, as described below in paragraph D of this section.
- (5) In cases where withholding of the landowner’s share of restoration costs is required, such as for less-than-permanent enrollments, financial contributions from a partner may be used to satisfy all or a portion of the landowner’s required share of the restoration costs. Any partner contributions provided to cover the landowners required share of restoration costs are not reflected in the ranking as a reduction in NRCS costs. The landowner’s share of the restoration costs is still withheld from the easement payment as described below in section 528.143A(3) and any of the

withheld landowner funds remaining after the restoration is complete are returned to the landowner.

- (6) ACEP-WRE does not prohibit the use of other non-USDA Federal funds as a match, though the other awarding Federal agency may.

**B. Obligating Preliminary Easement Restoration Funds Prior to Development of the Final WRPO**

- (1) States complete a preliminary WRPO as part of the ranking and selection process. The preliminary WRPO will describe the planned practices and locations, estimate the quantities and extents, and include cost estimates as described in subpart L, section 528.112 of this part. States must account for the estimated cost of restoration when determining how many eligible applications to select for funding in a given fiscal year.

**NOTE:** The preliminary WRPO may be developed by NRCS staff, or by an appropriately qualified NRCS-approved third party designated to assist in the development of the preliminary WRPO.

- (2) States complete the supplement for preliminary obligation of restoration funds based on the preliminary WRPO (see subpart U of this part for the “Supplement to Agreement for the Purchase of Conservation Easement or 30-Year Contract for Preliminary Obligation of Restoration Funds”). The costs and extents used in the preliminary WRPO are estimates and are refined upon further planning in development of the final WRPO and the associated easement restoration agreements.
- (3) The supplement for preliminary obligation of restoration funds is strictly an internal NRCS budgeting document and is not signed by the landowners.
- (4) States document funds availability on the “Supplement to Agreement for the Purchase of Conservation Easement or 30-Year Contract for Preliminary Obligation of Restoration Funds” using budget object classification code (BOC) 3212 and the same work breakdown structure (WBS) code for the restoration funds as the agreement to purchase.
- (5) For all WRE agreements to purchase executed in fiscal year 2016 and later, both the agreement to purchase (APCE or AECLU) and the associated supplement for preliminary obligation of restoration funds must be submitted at the same time to the FPAC-BC Payment Operations Section (POS) (formerly accounts payable team) following the procedures outlined in the most current customer guide. The preliminary obligation of restoration funds will not be obligated directly to the landowners.
- (6) While the easement or 30-year contract is in the process of being acquired, States develop the final WRPO in accordance with the timing required in subpart N, section 528.134A(5) of this part.
- (7) Each fiscal year States must review and determine whether the preliminary obligation of restoration funds is still needed and document this determination as part of an annual review of open obligations. These annual reviews and determinations must occur until the final WRPO is completed and the associated easement restoration agreements are executed or the agreement to purchase (APCE or AECLU) expires or is cancelled. If restoration funds are determined to no longer be needed, they must be deobligated according to the procedures in the current FPAC-BC POS customer guide. Restoration funds may only remain obligated to the supplement for the 3 fiscal years following the fiscal year the agreement to purchase is entered into.
- (8) Upon completion of a final WRPO and after the easement closing or 30-year contract execution, States must complete the easement restoration agreement documents used

to implement the restoration and obtain the necessary State and national approvals based on easement restoration agreement type.

- (9) The supplement for preliminary obligation of restoration funds is used to ensure there are adequate funds available for subsequent obligation to the individual easement restoration agreements used to implement the final WRPO. States obtain funds availability for each individual easement restoration agreement by first looking to the preliminary obligation of restoration funds for that enrollment. States must not request a separate funds reservation for the easement restoration agreement if sufficient funds are already obligated to a supplement for preliminary obligation for that enrollment. If the preliminary obligation does not have sufficient funds to cover the final restoration costs, States must use their available allocated funds, or request additional funds as needed, to cover the final restoration costs.
- (10) States submit the supplement for preliminary obligation of restoration funds, the completed easement restoration agreement, the vendor information for the obligation of the easement restoration agreement, and other required documents to FPAC-BC POS. FPAC-BC POS deobligates all or a portion of the preliminary obligation of restoration funds in FMMI and documents the deobligation on the supplement. Based on the type of easement restoration agreement, States provide FPAC-BC POS with the following information:
  - (i) For restoration conducted through a Federal contract, States have 5 business days to enter a requisition request into the IAS from the time of FPAC-BC POS notification that funds were deobligated from the preliminary obligation. Therefore, States entering into Federal contracts must work with the FPAC-BC Acquisition Division (AD) well in advance of the deobligation of the preliminary restoration funds to ensure that the contracts for services are in place at the time of the requisition.
  - (ii) For restoration conducted through a landowner CPC, the final obligation of restoration funds to the vendor based on the final WRPO and the associated easement restoration agreement obligating documents occurs concurrent with the deobligation of the preliminary obligation of those same restoration funds from the supplement.
  - (iii) For restoration conducted by a third party through a cooperative, contribution, or interagency agreement, the final obligation of restoration funds to the vendor based on the final WRPO occurs as follows:
    - The State must set up a funds precommitment using funds from the preliminary obligation, and
    - Enter the request for the agreement into the EZ Fed Grants system (eFG) for development of the agreement by the FPAC-BC Grants and Agreements Division (GAD).
- (11) **Under no circumstances may the supplement for preliminary obligation of restoration funds be used to authorize or initiate restoration activities on an offered easement or 30-year contract area. Additionally, no payments for restoration activities may be made from the preliminary obligation of restoration funds.**

C. Easement Restoration Agreement Practice Implementation Schedule

- (1) Any needed easement restoration agreements should be entered into within 1 year of the easement recording or 30-year contract execution date. The easement restoration agreement must include a practice scheduled to commence within the first 12 months of the easement restoration agreement. The practice schedules in the easement

restoration agreements must also ensure that all restoration practices are complete within 3 years of the easement recording or 30-year contract execution date.

- (2) If the contract or agreement holder fails to commence a practice during the first 12 months or otherwise fails to follow the easement restoration agreement schedule, a waiver or extension may be granted if requested by the contract or agreement holder and approved by NRCS.
- (3) If at any time the contract or agreement holder fails to complete the agreed-to items as scheduled, and a waiver or extension is not requested or is requested and denied, NRCS may terminate the easement restoration agreement in accordance with the applicable contracting or agreement procedures. NRCS may select a different contracting or agreement method through a new easement restoration agreement to secure implementation of the final WRPO.
- (4) If restoration activities will not be completed within 3 years of the easement recording or 30-year contract execution date, the State conservationist must document the extenuating circumstances and their approval to allow the implementation of the restoration practices and activities to occur over a longer-time period.

#### D. Practices Commenced Prior to Easement Restoration Agreement Approval

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

“I/We acknowledge that the implementation of restoration practices identified below on the land enrolled in ACEP-WRE is at my/our own risk and that my/our ability to

receive ACEP-WRE funding for such practices is contingent upon NRCS and the landowner [closing on the easement or executing the 30-year contract] and entering into an easement restoration agreement. I/we understand that payment may only be provided based on NRCS determining that the practice or practices are established according to the final wetlands reserve plan of operations and NRCS standards and specifications. I/We further understand that we are responsible for obtaining all necessary Federal, State, and local authorizations and permits needed to implement such restoration practices.”

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

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

- (1) Identification and evaluation of historic, cultural, and other environmental resources within an ACEP-WRE project area is an essential component of NRCS conservation planning and environmental compliance responsibilities. State conservationists use technical assistance funds for these activities within a project’s area of potential effect. Technical assistance activities include resource identification and evaluation of significance. Technical assistance funds are also used for follow-up activities that include cultural resources investigations and biological assessments needed before applying the conservation practice.
- (2) In circumstances where the conservation planning process reveals that a particular ACEP-WRE project will require unusual, extensive, or complex investigations or assessments to meet NRCS environmental compliance responsibilities, the State conservationist may use ACEP-WRE financial assistance funds to obtain these services when this work is being performed by non-NRCS personnel. These compliance activities would normally occur during step 8 (implementation) of the conservation planning process. For example, ACEP-WRE financial assistance funds may be used for—
  - (i) Extended cultural resource evaluation studies, resource treatment, and data recovery, including site excavation and recording.
  - (ii) Meeting terms and conditions identified in a memorandum of agreement or programmatic memorandum of agreement with the State historic preservation officer, Tribal historic preservation officer, or the Advisory Council on Historic Preservation, in accordance with 36 CFR Part 800.
  - (iii) Obtaining the services of a biologist certified to handle federally listed species, through service approval from the agency with jurisdiction (U.S. Fish and Wildlife Service or National Marine Fisheries Service) or as a holder of an incidental take permit under the Endangered Species Act, to be onsite as needed to comply with specific requirements set forth in a biological opinion for the



listed species found or anticipated to be on the site that may be impacted during restoration activities.

- (iv) Meeting terms and conditions identified in a biological opinion.
- (v) Meeting mitigation measures identified in an NRCS environmental evaluation.
- (3) All cultural, historic, and other environmental resource compliance services that use financial assistance funds are procured by NRCS through an agreement or Federal contract. The use of landowner CPCs for procuring these services is not authorized. It is not appropriate to use financial assistance funds for services and activities typically provided by NRCS personnel.
- (4) In all cases in which financial assistance funds are to be used for cultural, historic, or other environmental resource compliance, the State conservationist must explicitly approve, in writing, the expenditure and ensure that the costs are reasonable, appropriate, and consistent with NRCS policy. The State conservationist may not delegate this decision.

### **528.143 Payments**

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

- (1) General
  - (i) State conservationists, with support from State and national easement and financial staff, are responsible to ensure easement and 30-year contract acquisitions are compliant with internal controls requirements and conducted pursuant to applicable laws and policy.
  - (ii) After completion of required internal control reviews, the agreement to purchase (APCE or AECLU) may be executed by the landowner and NRCS, and acquisition funds for the easement or 30-year contract obligated to the landowner.
  - (iii) NRCS calculates and identifies in the APCE or AECLU the total estimated easement or 30-year contract consideration amount based on the estimated acres and the applicable easement compensation values as described in subpart M, section 528.122F of this part.
  - (iv) Based on the final determination of acreage, the enrollment type, and the application of any landowner-offered amount to accept less funding made after the agreement to purchase was originally executed, NRCS calculates the final consideration amount. NRCS identifies in the “Warranty Easement Deed” or “30-year Contract” the final total acreage based on the approved boundary survey of the easement or 30-year contract area and the full easement consideration amount as described in subpart M, section 528.122G of this part. Documentation identifying the final acreage and consideration amount must be kept in the easement case file and submitted to the appropriate financial specialist for adjustment of the obligation. (See subpart U of this part for sample easement and contract compensation adjustment document.)
  - (v) If a commensurate reduction is required due to an adjusted gross income (AGI)-ineligible member of an otherwise AGI-eligible landowner-legal entity as described in subpart K, section 528.103C of this part, the reduction is applied to the payment and is not reflected in the consideration amounts shown on the APCE or AECLU form, or the “Warranty Easement Deed” or “30-year Contract.” The APCE or AECLU form and the “Warranty Easement Deed” or “30-year Contract” must identify the appropriately calculated full consideration amount with no commensurate reduction applied. Similarly, the obligation

amount is based on the full consideration amount and is not reduced based on an anticipated commensurate reduction. At the time of payment, the amount of any applicable commensurate reduction is applied against the full calculated consideration amount stated on the “Warranty Easement Deed” or “30-year Contract.” At the time the easement or 30-year contract payment is requested, the easement program specialist must provide the financial specialist with the proper payment amount reflecting the applied commensurate reduction and any remaining acquisition funds must be deobligated after the payment is issued.

- (vi) NRCS must not acquire any easement or 30-year contract unless the landowner accepts the amount of the easement or 30-year contract payment that NRCS offers. The easement payment may or may not equal the fair market value of the interests and rights to be conveyed by the landowner under the easement.
- (2) Issuing the Easement Payment
- (i) An easement payment may only be issued after NRCS has received a title opinion from the Office of the General Counsel (OGC) setting forth the requirements to secure sufficient title to the land and NRCS has determined that the requirements set forth in the OGC title opinion can be satisfied. A copy of the OGC title opinion must be provided to the financial specialist for easement payment processing. A separate Form NRCS-CPA-1245, “Application for Payment,” or successor form is not required in order to process the easement payment.
  - (ii) Easement payments are issued through a closing agent unless an alternative method has been agreed to by the State, Easement Programs Division (EPD), and OGC per subpart M, section 528.125G of this part.  
  
**Note:** 30-year contract payments are issued directly to the landowner. Payments are made using electronic fund transfers. See subpart M of this part for additional information.
  - (iii) The APCE form authorizes NRCS to provide payment to the landowner through an escrow account managed by the closing agent. The landowner approves payment to the escrow account through the execution of the APCE form; therefore, a separate Form CCC-36, “Assignment of Payment,” or successor form) does not need to be executed by the landowner.
  - (iv) A completed copy of the ACEP-WRE “Easement Acquisition Internal Controls Review Certification Checklist” is required to process the easement payment. The financial specialist will identify the closing agent as an assignee or alternate payee in FMML.
  - (v) The closing agent handles the funds in the escrow account and issues the appropriate Internal Revenue Service (IRS) Form 1099 in accordance with NRCS closing instructions and OGC title opinion for ultimate disbursement of the proceeds to the landowner and provide NRCS documentation of disbursement of those funds, such as a Form HUD-1, “Settlement Statement,” or closing disbursement statement. See subpart M of this part for more detailed information about the closing process.
- (3) Withholding Landowners Restoration Costs from the Acquisition Payment
- (i) For all less-than-permanent easements and 30-year contract enrollments, sufficient funds must be withheld from the easement or 30-year contract payment to cover the landowner’s share of the restoration costs based on the final WRPO. The easement will not be closed or the 30-year contract will not be executed until a final WRPO has been completed and the easement restoration agreement cost estimates have been determined.

- (ii) Based on the final restoration cost estimates, NRCS holds the landowner's share of the restoration cost in an appropriate account. Funds withheld from the easement payment for the landowner's share of restoration costs must be documented on the closing or settlement statement.
- (iii) FPAC-BC and NRCS financial management staff must follow current policy on processing and monitoring easement payment withholdings for landowners' restoration costs. States must coordinate with the appropriate financial management staff to administer the payment and tracking of these funds. Any excess funds remaining at the completion of the restoration are issued to the landowner.

**Note:** If NRCS determines during implementation that the restoration costs are higher than originally estimated, NRCS must obtain the proportional additional funds from the landowner prior to proceeding with the practices or activities that will incur the additional costs. NRCS has no mechanism to exceed the 75-percent limit for restoration costs on a less-than-permanent easement or 30-year contract. Therefore, it is imperative that NRCS have comprehensive, complete, and accurate cost estimates prior to easement closing or 30-year contract execution to ensure sufficient funds are withheld from the easement or 30-year contract payment and to avoid the need for additional funds to be obtained from the landowner after the easement has closed or the 30-year contract has been executed.

- (iv) The IRS Form 1099 received by the landowner must reflect the full amount of the consideration identified on the warranty easement deed or 30-year contract. The value stated on Form 1099 is not reduced by the amount held in reserve for restoration.
  - (v) The costs identified in the easement restoration agreement must reflect the percent of the practice costs that will be paid by NRCS using a combination of the obligated NRCS funds (up to 75 percent) and the withheld landowner funds.
- (4) Easement or 30-Year Contract Payment Schedule
- (i) For easements or 30-year contracts valued at \$500,000 or less, NRCS provides a single payment or up to 10 annual installment payments, as requested by the landowner and as specified in the APCE or AECLU.
  - (ii) For easements or 30-year contracts valued at more than \$500,000, NRCS makes a single payment unless annual installment payments are requested by the landowner. The landowner must specify on the APCE or AECLU form, the number, between a minimum of 5 to a maximum of 10, of annual installment payments being requested.
  - (iii) When the landowner elects annual installment payments, after the first installment payment, subsequent annual installment payments are paid after October 1 of the calendar year following the first installment payment.
  - (iv) All landowners for an individual easement or 30-year contract must agree on either a lump sum or annual installment payments. Payments to individual landowners under a single transaction may not be split between lump-sum single payments and annual installments.
  - (v) NRCS must explain the installment payment options, limitations, and requirements to the landowner and ensure that the agreed-to number of installment payments is entered correctly on the APCE or AECLU form prior to execution by the State conservationist.
  - (vi) The landowner must be issued an IRS Form 1099 for each year a payment is issued. The IRS Form 1099 for the initial easement payment is issued by the

closing agent, and subsequent IRS Form 1099s are issued by FPAC-BC financial staff for all annual installment payments in the years following the initial easement payment.

- (vii) Landowners that receive annual installment payments may request at any time to receive a lump sum of the total remaining amount, provided all landowners agree to the receipt of the total remainder of the funds. States must coordinate with the FPAC-BC financial staff to issue the remainder of the funds to the appropriate recipients and issue the final IRS Form 1099. States must also reflect the change in the easement business tool (e.g., National Easement Staging Tool (NEST)).

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

- (1) NRCS may pay up to 100 percent of costs related to acquiring and perfecting an easement or 30-year contract, such as preliminary title searches, environmental record searches, areawide market analysis, a Uniform Standards for Professional Appraisal Practices (USPAP) appraisals, closing costs, legal boundary surveys and descriptions, and final title insurance. NRCS may procure these services by contracting directly with the vendor, entering into an agreement with a partner or other agency or, for certain items, through an agreement with the landowner. All acquisition-related costs for products completed by qualified non-NRCS personnel use financial assistance funds.
- (2) Payments for these acquisition-related costs should be issued only after the product has been delivered to and reviewed by appropriate NRCS personnel, and a determination has been made that the product meets the applicable specifications, statements of work, task order, agreement terms, or other NRCS instructions. For example, payments for—
  - (i) Preliminary title search information should only be issued after the title document has been reviewed to determine, at minimum, that the correct and entire offered area has been searched and that all underlying documents identified in the search have been received.
  - (ii) Areawide market analysis should only be issued after the product has been reviewed by an authorized official who has confirmed that it meets applicable NRCS policy and statement of work.
  - (iii) Individual appraisals should only be issued after acceptance by a technical reviewer, National Headquarters national appraiser, or both, if required (see 440-CPM, Part 527, Subparts E and F, for appraisal review and approval requirements).
  - (iv) Easement boundary surveys should only be issued after the meeting in the field with the landowner to confirm that the surveyed area is correct, the verification has been documented to the file, and all paper and electronic copies of the boundary survey have been received and reviewed to determine compliance with specifications and scope of work for easement boundary surveys.
  - (v) Closing services should only be issued after the final title insurance policy has been reviewed to determine compliance with NRCS closing instructions and OGC title opinion requirements (see subpart U of this part for example NRCS closing instructions letter).
- (3) A copy of an invoice or receipt and any required acceptance or review documentation must be included with the appropriate payment request form. The individual payment request forms will depend on the procurement method used. Refer to relevant agency and FPAC-BC policy governing Federal contracts (FAR) or agreements (120-GM, Part 401; 120-FGCAH-600; NI-120-301; NI-120-348; or other

applicable grants and agreements policy, guidance, and customer guides) based on the procurement method used. If items were obtained through an agreement with the landowner, such as the easement boundary survey, Form NRCS-CPA-1245 or successor form and a copy of the receipts or invoices must be submitted by the landowner.

C. WRPO Implementation Payments

- (1) Restoration payments for conservation practices, components, or activities—
  - (i) Are made only after NRCS certifies that the conservation practices, functional components, or activities are completed satisfactorily, either in accordance with standards and specifications for conservation practices or components, or in accordance with the WRPO for activities.
  - (ii) Are based on the actual cost at the time the practice is installed.
  - (iii) Must be accompanied by supporting receipts or invoices.
- (2) Partial practice payments are not allowed; therefore, incremental payments may not be made if the practice does not function until fully installed. However, a single practice with either multiple functional components or extents that can be completed and certified as functional as installed, may be scheduled and paid for as separate line items in a contract.
  - (i) Example 1-Partial Payment.—If the wetland restoration design calls for a dike to be installed around the perimeter of a 50-acre wetland unit, payment may not be issued at the 50-percent completion point when the dike has only been completed on two sides of the field, as it will not function as designed.
  - (ii) Example 2-Component.—If the wetland restoration design calls for a dike to be installed on a 50-acre parcel that will create two 25-acre wetland units, these could be scheduled as two separate line items and payment could be issued when the dike around one of the 25-acre wetland units has been completed, as it would be a functional unit as designed and installed.
- (3) Conservation Program Contracts (CPC)
  - (i) Payments made for conservation practices or activities implemented through CPCs with the landowner are based on the information provided on the Form NRCS-CPA-1245 or successor form. The form is prepared by NRCS and signed by the landowner or authorized representative. The landowner is established as the vendor in FMMI and payments are made to the vendor unless payment has been assigned through a properly executed “Assignment of Payment” (Form CCC-36 or successor form) to another person or entity.
  - (ii) Adjustments to the total obligation are not needed to deobligate funds remaining as individual contract line item payments are made. Funds will only be deobligated from the CPC if there are funds remaining after the CPC has been fully completed or a modification to the CPC is executed that results in a downward adjustment to the total amount obligated.
- (4) Contribution, Cooperative, and Interagency Agreements  
Payments for conservation practices or activities completed through—
  - A contribution or cooperative agreement payment request are made by submitting a completed payment request package (e.g., SF-270, “Request for Advance or Reimbursement.” with specific documentation), as stipulated in 120-FGCAH-600, Subpart E, Section 600.43, “Payments” and applicable FPAC-BC GAD customer guides.

- An interagency agreement made in accordance with guidance in the standard operating procedures issued with NI-120-348 and applicable FPAC-BC GAD customer guides.

(5) Federal Contracts

Federal contracts must be entered through IAS and payments will be issued through the Invoice Processing Platform (IPP) or successor system. FPAC-BC acquisitions division (AD) guidance, along with FAR, IAS, and IPP policy and procedures must be followed regarding what forms and documents are required to initiate and issue a payment.

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

(1) Payments to Landowners

NRCS first determines a landowner's eligibility for payment under the AGI provisions and the HELC/WC provisions at the time of application to ensure that NRCS is working with an eligible landowner. The landowner's AGI determination is rechecked at the time of enrollment and remains in effect for the duration of the enrollment unless there is a change as described in subpart M, section 528.121H of this part. The landowner's HELC/WC determination must be rechecked at the time of enrollment and at the time of each payment, as provided below.

- Easement and 30-Year Contract Payments
  - When an easement payment or 30-year contract payment, including each installment payment, is to be made to any landowner, the landowner's eligibility under the HELC/WC provisions is rechecked to ensure that all landowners as listed on the current ownership documentation are eligible for the payment. NRCS will not make the easement or 30-year contract payment if any landowner is not compliant with the HELC/WC provisions when payment is requested.
  - Prior to easement closing or execution of the 30-year contract, a landowner may request to withdraw from program enrollment if NRCS determines that the landowner is ineligible for payment under the HELC/WC provisions. If a landowner withdraws from ACEP-WRE enrollment based upon the NRCS determination of ineligibility for payment under the HELC/WC provisions, the landowner is in violation of the APCE or AECLU.
- Easement Restoration Agreement through CPC
  - NRCS does not need to revisit the landowner's AGI eligibility determination if NRCS enters into an easement restoration agreement with the landowner through a CPC, since the AGI determination is in effect for the duration of the program enrollment. However, NRCS must revisit the landowner's HELC/WC eligibility at the time an easement restoration agreement is entered through a CPC. If a landowner is determined ineligible under the HELC/WC provisions after easement closing, NRCS may implement the easement restoration agreement through a Federal contract or an agreement (contribution, cooperative, or interagency). (See paragraph (2) below)
  - When an easement restoration agreement payment is made to a landowner through a CPC, the landowner's eligibility under the HELC/WC provisions

is rechecked to ensure that all landowners are eligible for the payment. If a landowner is not compliant with the HELC/WC provisions when payments are requested, NRCS will not pay the landowner, and payments for practices completed by the landowner during the period of ineligibility are forfeited, unless a good-faith exemption has been granted in accordance with 7 CFR Part 12. Modification of the CPC to reschedule practices to avoid forfeiture of payment because of HELC/WC compliance issues is not allowed.

(2) Payments to Others

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

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

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

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

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

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

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

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

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

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



- (ii) Executing modifications to existing contracts for approved in-scope changes will depend upon the specific contract vehicle, as indicated below. Modifications to existing contracts have the same signatory requirements as the original contract. Additional funds, if needed, for any modifications must be documented as available prior to obtaining signatures and obligation.
    - Federal contract modifications will be entered into IAS in accordance with appropriate FARs and processed in accordance with FPAC-BC and NRCS requirements for Federal contracts.
    - CPC modifications will be completed on a Form NRCS-CPA-1156, “Revision of Plan/Schedule of Operations or Modification of a Contract,” or successor form. Funds for the contract change, if needed, are obligated once the landowner and authorized NRCS official sign the required forms.
    - Contribution, cooperative, and interagency agreement modifications will be made on the appropriate forms and according to procedures in 120-FGCAH and other applicable FPAC-BC GAD guidance.
  - (iii) Contract change requests determined to be outside the scope of the original contract require a new contract. The contract type and any competition requirements will depend upon the contract vehicle used.
    - Federal Contracts.—If the proposed change is determined to be “outside-of-scope,” either a new contract for the changed portion must be competed or the entire contract with the addition of the changes must be recompleted in accordance with the FAR by an authorized contracting officer. If deemed appropriate by the contracting officer, there may be instances in which an outside-of-scope modification may be authorized, based upon the concept of different site conditions or other criteria
    - CPC With the Landowner.—A new CPC, consisting of all component documents, the contract (Form NRCS-CPA-1202, “Conservation Program Contract,” or successor form), NRCS-CPA-1202 appendix, and schedule of operations (Form NRCS-CPA-1155 or successor form), must be generated, a new CPC contract number provided, and signatures obtained from the landowner. Funds may be obligated once the landowner and NRCS authorized officials’ signatures are obtained.
    - Contribution, Cooperative, or Interagency Agreements—A new agreement must be generated and processed according to procedures in 120-FGCAH, and other applicable FPAC-BC GAD guidance.
- (3) Funding Change Requests
- (i) Once a determination has been made regarding scope by the authorized official, State program staff and appropriate State and national administrative staff must coordinate and follow current financial management policies for obligation, adjustment, and deobligation procedures.
  - (ii) The total cost of each individual easement restoration agreement (CPC, agreement, Federal contract) is obligated in FMMI as a single, total obligation amount. The total obligation amount in FMMI for the individual easement restoration agreement is often comprised of individual component line items for individual conservation practices (i.e., individual line items). Upward or downward adjustments for individual conservation practices (individual line items) within easement restoration agreements may be made without adjusting the overall total obligation in FMMI.
    - Adjustments to increase the total obligation in FMMI may only be made when NRCS determines additional funds are needed to fully implement the

planned practices, changes are determined to be within the scope of the original easement restoration agreement, and appropriate modifications to the easement restoration agreement are executed.

- Adjustments to decrease the total obligation in FMFI may be made once the easement restoration agreement has been fully implemented and all scheduled restoration practices have been completed, at which time any remaining funds will be deobligated from the FMFI obligation for the individual easement restoration agreement. A portion of the funds may be deobligated if the easement restoration agreement is modified downward to adjust the total amount obligated to the agreement due to practices that are determined to no longer be necessary to meet the program purposes and goals for the easement or 30-year contract area.

(4) Types of Contract Changes and the Authorizing Official

- (i) State conservationists must establish procedures and identify staff to perform initial scope determinations and second-level reviews of in-scope determinations. Although the State conservationist is responsible for the second-level review and concurrence, he or she may delegate this authority. The authority may not be delegated lower than the member of the State management team responsible for ACEP-WRE, which in most States is the Assistant State conservationist. Figure 528-O1 below provides examples of change requests and whether they are generally considered within-scope or outside-of-scope requests.
- (ii) It is critical to remember that the types of **situations identified below as outside-of-scope requests may not be considered within-scope requests**. However, it is possible that a change request shown below as generally being a within-scope request could be considered an outside-of-scope request when applying the “reasonable” test. For example, a cost overrun due to inflation is generally considered a within-scope request. However, it is possible that the magnitude of the change could cause the request to fail the reasonable test, so the change would be considered outside-of-scope.
- (iii) Once the existing contract has been completed, all requests for additional funds for practices are new procurements and require the use of new contract instruments. This includes requests for additional restoration or enhancement practices or when the initial restoration did not adequately restore the site as anticipated, provided this determination is made after the original contract is completed.
- (iv) Although figure 528-O1 below is primarily focused on restoration activities, the same principles apply to agreements to purchase that NRCS executes with the landowner, and to any contract for any service in ACEP-WRE, such as closing services, acquisition, surveys, or appraisals, and to contracts and agreements with third parties to conduct activities for NRCS.

**Example:** NRCS has a signed APCE, but prior to easement closing the landowner decides to offer twice the amount of acres for enrollment. This increase was never considered by the landowner or NRCS at the time of application and would double the size of the easement. This would be considered an outside-of-scope change and require a new agreement to purchase to be executed between the landowner and NRCS for the full extent of the area to be enrolled and subject to eligibility determinations made in the fiscal year the new agreement to purchase is executed.

- (v) In figure 528.O1 below—

Title 440 – Conservation Programs Manual

- All determinations in the “within-scope” or “outside-of-scope” columns are based on passing the reasonable test.
- “Practice” should be read as “practice, component, or activity.”

Figure 528-O1

Type of Request	Additional Examples or Description	Within Scope	Outside of Scope
Inflation	Cost of the practice increases due to inflation in cost of materials or labor.	Yes	
Increase in quantity	Quantity of a practice increases over the original estimated amount, which may include increased acreage of easement purchase due to final boundary survey.	Yes	
Reapplication	Practice is certified for payment but is not considered fully established and has failed due to no fault of the landowner. This will generally only apply to vegetative practices that require a period of time before determining that the practice is fully established. Additionally, the contract schedule may include subsequent years of treatment for establishment. Failure of a practice because of circumstances within the control of a participant, such as lack of required maintenance, constitutes a violation of the terms and conditions of the contract.	Yes	
Repair	A practice is completed, is considered fully established, and certified for payment. The practice is damaged or destroyed later through no fault of the landowner. For example, a dike is installed, certified, and paid for, and 2 weeks later it is washed out by unanticipated flooding.		Yes
Maintenance	The practice has been installed and certified as complete. Over time, rodent damage occurs and needs to be corrected to protect the integrity of the structure. This does <b>not</b> include damage done through landowner violation, such as tree planting destroyed by unauthorized grazing.		Yes
Management	Practices not originally scheduled but later determined necessary to manage the vegetation and hydrology of the site, such as brush management.		Yes
Substitution	Practice planned in the existing contract will be replaced with a practice that serves the same purpose but does it more efficiently, more economically, etc. It could also be that the original, planned practice was found on final design to be infeasible and that the current practice will serve the same purpose and is feasible.	Yes	
New Practice	This includes practices for enhancement of the original restoration or because original restoration did not meet expectations. It includes practices inadvertently omitted from the existing contract that are not necessary for proper functioning of practices in the existing contract.		Yes
Facilitating Practice	Practice was omitted from existing contract but is necessary for the proper functioning of one or more practices in the existing contract.	Yes	

**528.145 Contract Status Review**

A. Easement restoration agreements that have open obligations must be reviewed annually until all scheduled practices have been implemented. The timing, method, content, and

documentation of the review is based on the specific easement restoration agreement mechanism: Federal contract, agreement, or landowner CPC.

B. For landowner CPC's, annual contract reviews are conducted onsite to assess current conditions and progress in implementing the easement restoration agreement. Contract reviews should be done late enough in the calendar year to allow for the observation of performance of scheduled practices and should include the landowners to the extent possible.

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

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

- (1) Maintenance of practices previously applied
- (2) Application of practices scheduled in the current year
- (3) Items in noncompliance
- (4) Need for changes in time schedule or practices
- (5) Adequacy of applied conservation practices in relation to the programs objectives and the WRPO and associated plans
- (6) Determination of whether land under contract is still under the landowner's control
- (7) Items needing attention next year
- (8) Agreement items not carried out as scheduled will be noted on the Form NRCS-CPA-13 along with the reason, if delayed
- (9) No-cost agreement items, for which NRCS provides no financial assistance funds
- (10) Contract disbursements and remaining estimated obligations

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

F. See 440-CPM-527-P, for information on annual monitoring requirements.

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

### **A. General**

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

- (i) Cancellation.—A cancellation is an equitable remedy that allows both parties to the contract to mutually end the contractual relationship (a cancellation may also be referred to as a "termination for convenience"). A recovery of financial assistance payments may or may not be appropriate, as determined by the State conservationist, depending upon the circumstances included in the program participant's written request for cancellation. The participant is not afforded appeal rights, since cancellations are mutually agreed upon by the participant and NRCS.

- (ii) Termination.—A contract is subject to termination as a result of a material breach of the terms and conditions included in the CPC (may also be referred to as terminations for cause). As such, a contract termination meets the definition for an adverse decision in accordance with 7 CFR Section 11.1, “National Appeals Division Rules of Procedure.” The cause for termination and the procedure used by NRCS to ensure that the landowner has been provided an opportunity to remedy the violation of the contract as required by the specific program regulation must be fully documented. Terminations for cause usually result in an assessment of damages for recovery of costs associated with the administration of the breached contract.

B. Cancellation of CPC

- (1) Cancellation of CPCs for easement restoration agreements must follow guidance given in this section and in 440-CPM, Part 530. Landowners with an active CPC may request that a CPC be cancelled. Landowners must request cancellation in writing, provide reasons for the cancellation, and, if applicable, provide information on availability of any transferees.
- (2) If a CPC is cancelled, the landowner forfeits all rights to any payments under the contract and may be required to refund payments as described in the CPC appendix. When a contract is cancelled, the State conservationist must—
  - (i) Document the effective date of cancellation on the CPC documents.
  - (ii) Fully document the reasons for the CPC cancellation.
  - (iii) Inform the landowner, in writing, of the approval of the cancellation request, including the forfeiture of all future payments under the CPC and repayment requirements to complete the process. (See subpart U of this part for a sample cancellation letter.)
  - (iv) Request deobligation of remaining funds after all certified practices have been paid and any advances liquidated or otherwise processed.

C. Termination of CPC

- (1) Termination of CPCs must follow guidance given in 440-CPM-530. Documentation of termination should include Form NRCS-CPA-13, “Contract Reviews,” and Form NRCS-CPA-153, “Agreement Covering Non-Compliance with Provision of Contract,” if a breach of contract is involved; the latter should be signed by the landowner. (See subpart U of this part for a sample termination letter.)
- (2) If NRCS terminates a CPC, the landowner forfeits all rights to future payments under the CPC and may be required to refund all or part of the payments received, plus interest. In addition, NRCS is entitled to recover any and all administrative and legal costs, including attorney’s fees or expenses, associated with any enforcement or legal action related to the termination.
- (3) A CPC termination is effective immediately upon a determination by the State conservationist that the landowner has—
  - (i) Submitted false information.
  - (ii) Filed a false claim.
  - (iii) Engaged in any act for which a finding of ineligibility for payments is permitted under this part.
  - (iv) Taken actions (or inactions) that NRCS deems to be sufficiently purposeful or negligent to warrant a termination without delay.

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

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

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

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

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

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

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

A. To request an increase in duration of an existing closed easement from 30-years to permanent, the landowner must sign a new application, Form NRCS-CPA-1200, “Conservation Program Application” or successor form, and indicate on it the desire to increase the duration of an existing 30-year easement to a permanent easement. States must have a final title opinion from OGC for the original 30-year easement prior to processing an application to increase the duration of an existing easement from 30-year to permanent.

B. The landowner may request to extend the easement duration on the entire 30-year easement area or something less than the entire easement area. No new acres may be added to the existing easement area. Conversions of less than the entire easement area have additional requirements, as described throughout this section.

- (1) If the request is to convert the entire 30-year easement area, a new application record is not entered in the easement business tool (e.g., NEST), but instead the request must be noted in the existing 30-year easement record and a copy of the application containing the request to extend the easement duration uploaded to the 30-year easement record.
- (2) If the request is to convert less than the entire 30-year easement area, a new application record must be created in the easement business tool (e.g., NEST), a copy of the application containing the request to extend the easement duration uploaded to

the new application record, and a memorandum to the file identifying a “conversion” must be started at the time the new application record is created.

C. Applications to increase duration of an existing easement are not required to be ranked; however, the State conservationist must determine the additional protection to be of significant environmental value and that the existing 30-year easement is in compliance based on the most recent monitoring report (green condition) and has no outstanding violation or enforcement issues. Additionally, prior to selection for funding, updated onsite reviews, eligibility determinations, due diligence, and preliminary investigation activities must be conducted for the area proposed for conversion in accordance with subpart K of this part and compensation amount determined as described below.

D. Valuation and Compensation Determination.—At the time of recording the 30-year easement, the easement payment provided to the landowner was not to exceed 75 percent of the easement value for a perpetual easement. For the conversion from a 30-year to a permanent easement, the landowner is compensated for the remainder of the easement value by providing up to 25 percent of the applicable geographic area rate cap (GARC) approved for use in the fiscal year the conversion is selected for funding and applied to the easement area being converted to a permanent easement. The fair market value of the land is determined based on the land use in place at the time the 30-year easement was originally enrolled. If there is a current approved areawide market analysis (AWMA) and associated GARC rates for the original land uses in that geographic area, the landowner would receive 25 percent of the applicable GARC value for the acres being converted. If there is not an approved and applicable AWMA, an individual appraisal is used to determine the fair market value of the land based on the land uses in place at the time the 30-year easement was originally enrolled and the current approved appraisal GARC rate would then be applied to the appraised fair market value. Contact the national appraiser for specific guidance before procuring an individual appraisal. The method used to determine the fair market value, either an AWMA or individual appraisal, is not limited by the method originally used to determine the easement value for the 30-year easement.

- (1) Example With a Current AWMA.—Irrigated cropland in Smith County was enrolled in a 30-year easement in fiscal year (FY) 2006. The landowner was paid 75 percent of the appraised \$1,400 per-acre value, or \$1,050 per acre. In FY 2020, the landowner requests conversion to a permanent easement. In FY 2020 there is an approved AWMA, with a GARC rate of \$2,000 per acre for irrigated cropland (original land use) in Smith County where the land is located. The payment to the landowner to convert from a 30-year to a permanent easement will be 25 percent of the current applicable FY 2020 GARC rate of \$2,000 per acre for irrigated cropland in Smith County, which is \$500 per acre.
- (2) Example Using an Individual Appraisal.—Irrigated pasture in Jones County was enrolled in a 30-year easement in FY 2012. In FY 2012, there was an approved AWMA and an associated GARC for irrigated pasture in Jones County. The landowner was paid 75 percent of the FY 2012 irrigated pasture GARC rate of \$1,200 per acre, which was \$900 per acre. In FY 2019, the landowner requests conversion to a permanent easement. The State is not using an AWMA in FY 2019, therefore, an individual USPAP appraisal is ordered and the appraiser is instructed to base the fair market value determination on the irrigated pastureland use that was in place at the time the 30-year easement was originally enrolled. The appraised fair market value of the land as irrigated pasture is \$1,700 per acre and the approved FY 2019 appraisal-GARC for the State is 80 percent, which is \$1,360 per acre. The

payment to the landowner to convert from a 30-year to a permanent easement will be 25 percent of the calculated GARC value of \$1,360 per acre, which is \$340 per acre.

E. All conversions from a 30-year easement to permanent easement must undergo a national-level internal controls preobligation review prior to executing the “Agreement to Extend the Easement Duration.” Funds may be obligated only after all required reviews are completed and the State conservationist signs the “Agreement to Extend the Easement Duration.” (See subpart U of this part for a copy of this document.)

F. If the landowner proposes to convert less than the entire existing 30-year easement area and NRCS determines the reduced area meets the required eligibility criteria, NRCS must also obtain a new easement boundary survey to describe the permanent easement area, including ensuring there is sufficient access to the permanent easement area.

G. The standard ACEP-WRE easement acquisition activities and requirements in subparts K and M of this part must be followed including, but not limited to, onsite visits, updated title search and review, sufficient access, boundary surveys as needed, an updated title opinion from OGC, necessary title clearances, and use of a closing agent to ensure the deed is closed and recorded in accordance with the OGC title opinion and NRCS closing instructions, including any additional instructions specific to the closing and recordation of a conversion of an existing 30-year easement to a permanent easement. Internal control reviews must be completed prior to payment in accordance with current internal controls policy applicable to conversions to increase easement duration.

H. The perpetual easement will be recorded using the most current version of Form NRCS-LTP-30, “Warranty Easement Deed in Perpetuity” and unless directed otherwise by OGC, must include a clause on the “Warranty Easement Deed” approved by OGC and EPD, that addresses the following items:

- (1) For a conversion of the entire easement area from a 30-year to a perpetual easement, a clause approved by OGC must be included to effect the change of the original 30-year easement deed to a perpetual easement, identify the current landowners of record, and state the consideration for the conversion.
- (2) For a conversion of less than the entire easement area from a 30-year to a perpetual easement, for the portion that will become a permanent easement, the most current version of the “Warranty Easement Deed” must be executed and recorded and include a clause approved by OGC to effect the change of the original 30-year easement deed for the portion of the easement that will be permanent, identify the current landowners of record and state the consideration for the conversion. An easement boundary description and survey for the portion that will be converted to a permanent easement must be attached as an exhibit to the new “Warranty Easement Deed.” The OGC-approved clause on the new deed must also identify that the area outside of the exhibit identifying the boundary of the perpetual easement remains subject to the original “Warranty Easement Deed.”

I. States will be provided the appropriate clause by EPD upon approval of the required national internal controls (IC) preobligation review of the conversion. The clause must be added to the draft “Warranty Easement Deed” that is sent to OGC when requesting the preliminary title opinion for the conversion. If OGC requires a clause different than the clause provided by EPD (or requires removal of the clause provided by EPD), States must follow the direction provided by OGC.

J. Following closing and recording of the new “Warranty Easement Deed” for the perpetual easement, States must complete the postclosing activities as described in subpart M, section



## Title 440 – Conservation Programs Manual

528.125G of this part, including the request and receipt of a final title opinion from OGC and complete the following steps in the easement business tool (e.g., NEST):

- (1) For conversion of the entire 30-year easement area, States must upload a copy of the fully executed and recorded “Warranty Easement Deed” in the existing record for the 30-year easement and submit a memo to the file for “conversion.”
- (2) For a conversion of less than the entire 30-year easement area, States must upload a copy of the fully executed and recorded warrant easement deed, including a copy of the legal boundary description for the permanent easement area, to the new agreement record created from the application record for the conversion. Identify in the memo to the file for conversion the original agreement number for the original 30-year easement and the new agreement number associated with the portion that has been converted to a perpetual easement.