

## Subpart D - Program Eligibility

### 519.30 General Overview

State, local, and Tribal governments and nongovernmental organizations submit applications to NRCS to acquire conservation easements on productive farm and ranch lands. NRCS must determine the eligibility of the cooperating entity, each parcel of land, and the owners of each parcel of land.

### 519.31 Cooperating Entities' Eligibility

#### A. Description

- (1) Eligible entities include any agency of any State or local government or Federally recognized Indian Tribe (including a farmland protection board or land resource council established under State law).
- (2) Any nongovernmental organization that is—
  - (i) Organized for and, at all times since the formation of the organization, has been operated principally for one or more of the conservation purposes specified in clause (i), (ii), (iii), or (iv) of section 170(h)(4)(A) of the Internal Revenue Code of 1986.
  - (ii) An organization described in section 501(c)(3) of that code that is exempt from taxation under 501(a) of that code.
  - (iii) Described in paragraph (1) or (2) section 509(a) of that code or is described in section 509(a)(3) of that code and is controlled by an organization described in section 509(a)(2) of that code.

The clauses under section 170 address the following:

The preservation of land areas for outdoor recreation by, or the education of, the general public.

The protection of a relatively natural habitat of fish, wildlife, plants, or similar ecosystems.

The preservation of open space (including farmland and forest land) where such preservation is—

--For the scenic enjoyment of the general public.

--Pursuant to a clearly delineated Federal, State or local governmental conservation policy and will yield a significant public benefit.

The preservation of a historically important land area or a certified historic structure.

Section 501(c)(3) addresses corporations and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Sections 509(a) (1), (2), and (3) include churches, educational organization, and medical organizations.

Note: Eligible Tribal entities are federally recognized tribes. Tribes that are not Federally recognized may qualify under nongovernmental organization status (see section 519.31A).

#### B. Additional Requirements

State Conservationists determine program participation eligibility. A cooperating entity must—

- (i) Have an established farmland protection program.
- (ii) Have demonstrated a commitment to the long-term conservation of agricultural lands.
- (iii) Utilize a voluntary easement purchase or other legal devices to protect farmland.
- (iv) Have the authority and demonstrate the capability to acquire, hold, manage, or enforce conservation easements or their equivalent.
- (v) Have the ability to secure title searches and title insurance, subordinate encumbrances on titles, secure appraisals, and develop conservation easement deeds.
- (vi) Have staff capacity or formal agreement with other entities dedicated to monitoring and easement stewardship.
- (vii) Have sufficient funds available for easement acquisition (see section 519.52 for payment requirements).
- (viii) Have a pending offer signed by the landowner and a representative of the cooperating entity for each parcel (see section 519.34).

Note: Entities with delinquent monitoring reports on FRPP funded easements and entities with unspent FRPP funds obligated more than 2 years ago may be determined to be ineligible for additional funding.

C. Certification of Entities policy will be amended to this manual following publishing of Final Rule.

### 519.32 Land Eligibility

#### A. Description

(1) Eligible land is privately owned land on a farm or ranch that contains one of the following:

- (i) Prime, unique, or statewide or locally important soil.
- (ii) Historical or archaeological resources.
- (iii) Land that furthers a State or local policy consistent with the purposes of the program.

Note: For farms accepted into the program based solely on containing historical and archaeological resources, the conservation easement deed should address the protection of the archaeological or historical resource, in order to be eligible for FRPP funding.

Note: For farms accepted into the program based solely on furthering the policy of a State or local farm or ranch land protection program, the conservation easement deed should address the State or local policy that is being supported in order to be eligible for FRPP funding.

(2) Eligible land must also—

- (i) Be subject to a pending offer by an eligible entity.
- (ii) Include cropland, rangeland, grassland, pasture land, and forestland, as well as wetlands and other incidental land that are part of an agricultural operation. Forestland may not exceed two-thirds of the easement acreage.

Note: NRCS will only pay for forested acreage equal to the acreage amount occupied by the nonforested acreage in parcels that are acquired under the auspices of cooperative agreements from 2008 and prior years. NRCS will pay for up to two-thirds of the forested acreage in parcels that are acquired under the auspices of cooperative agreements from 2009 and subsequent years of the 2008 Farm Bill.

Note: To be eligible as forest land, forested acreage of parcels that are the products of cooperative agreements in 2009 and subsequent years must have a forest management plan if the forested acreage is the greater of:

Note: Forest land is areas of native trees grown under natural conditions regardless of the products harvested (timber, maple syrup, nuts, berries, vines, mushrooms). Land covered by trees is considered cropland when the trees are not native species (orange groves, fruit and nut tree orchards) or native species that are cultivated (planted in rows, fertilized, and cultivated).

Note: Other incidental land that would not otherwise be eligible, but when considered as part of a pending offer, may be considered eligible, if inclusion of such land would significantly augment protection of the associated farm or ranch land. Incidental land includes farmstead areas, other areas with agricultural buildings and infrastructures, and nonforested wetlands.

#### B. General

(1) There must be written documents prepared by State, Tribal, or local governments or nongovernmental organizations showing a pending offer to acquire a conservation easement submitted by one or more willing landowners (see section 519.34 or information on pending offers). NRCS will enroll all or part of a farm or ranch so long as the portion FRPP is acquiring—

- (i) Contains one of the following:
  - At least 50 percent of some combination of prime, unique, and farm land of statewide or local importance unless otherwise determined by the State Conservationist, who may approve a reduction in soil percentage requirements
  - Historic or archaeological resources
  - Land that furthers the policy of a State or local farm and ranch land program as part of a systematically protected area
- (ii) Is in an area that has access to agricultural markets for its products, infrastructure appropriate for supporting agricultural production, and other support services.
- (iii) Faces development pressure.

Note: If the State Conservationist, in consultation with the State Technical Committee, approves a reduction in the requirement for prime, unique, and important farmland soil for a given area or region of the State, documentation explaining the basis of the reduction should be added to the administrative record for each parcel explaining why the reduction was granted. That explanation should cite the scarcity of prime, unique, and important farmland soil in the area in which the parcels are located. The explanation should also document the characteristics of the parcels that warrant FRPP funding. These characteristics may include the viability of the farms or ranches due to size and access to markets infrastructure, the contributions of the farm to the agricultural industry, and the conservation of natural resources in the area.

(2) The following are not eligible:

- (i) Land that is already subject to an easement or other deed restriction that prevents its conversion to nonagricultural use, including the Wetlands Reserve Program (WRP), Grasslands Reserve Program (GRP), Healthy Forest Reserve Program (HFRP), and conservation Reserve Enhancement Program (CREP)

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- (ii) Land owned by the Federal Government
  - (iii) Land owned by a State or local government
  - (iv) Land owned by a State or local government or nongovernment organization, whose purpose is to protect historical or natural resources, such as open space, wildlife habitat, and cultural resources, or land owned by other groups and associations incorporated to protect land and which meet the requirements for a "qualified organization" in section 170(h)(3) of the Internal Revenue Code of 1986, unless the acquisition is approved pursuant to paragraph C below.
- (3) Landowners who enroll in FRPP are eligible to participate in USDA's conservation cost-share programs, including the following:
- (i) Agricultural Management Assistance Program (AMA)
  - (ii) Agricultural Water Enhancement Program (AWEP)
  - (iii) Chesapeake Bay Watershed Initiative (CBWI)
  - (iv) Conservation Reserve Enhancement Program (CREP) (long-term contracts only)
  - (v) Conservation Reserve Program (CRP)
  - (vi) Conservation Stewardship Program (CSP)
  - (vii) Grassland Reserve Program (GRP) (long-term contracts only)
  - (viii) Environmental Quality Incentives Program (EQIP)
  - (ix) Wildlife Habitat Incentives Program (WHIP)
  - (x) Wetlands Reserve Program (WRP) (long-term contracts only)

C. Land Owned by the Federal Government, a State or Local Government, or a Nongovernment Organization

NRCS will protect only privately owned farm and ranch land; however, NRCS will assist public agencies and nongovernment organizations with protecting land if the acquisition is temporary and the land is sold to a private landowner prior to easement closure. NRCS will not disburse FRPP payments to the public entity or nongovernmental organization until the fee simple title has been transferred to a private landowner.

D. Soils

- (1) To meet the soils eligibility criteria, easements must contain at least 50 percent prime, unique, statewide, or locally important soil unless otherwise determined by the State Conservationist. The State Conservationist, with the advice of the State Technical Committee, may elect to increase or decrease the percentage of prime, unique, statewide, or locally important soil required for eligibility.
- (2) Prime, unique, statewide, or locally important soil designations are located in NRCS State or field office technical guides and are defined as follows:
  - (i) Prime Farmland.—Land that has the best combination of physical and chemical characteristics for producing food, feed, fiber, forage, oilseed, and other agricultural crops with minimum inputs of fuel, fertilizer, pesticides, and labor, without intolerable soil erosion, as determined by the Secretary.
  - (ii) Unique Farmland.—Land other than prime farmland that is used for the production of specific high-value food and fiber crops, as determined by the Secretary. It has a special combination of soil quality, location, growing season, and moisture supply needed to economically produce sustained high quality or high yields of specific crops when treated and managed in accordance with acceptable farming methods. Examples of such crops include citrus, tree nuts, olives, cranberries, fruits, and vegetables. Additional information on the definition of prime, unique, or other productive soil can be found in 7 CFR Parts 657 and 658.
  - (iii) Farmland of State and Local Importance.—Land other than prime or unique farmland that is of statewide or local importance for the production of food, feed, fiber, forage, or oilseed crops. The appropriate State or local government determines statewide or locally important farmland with concurrence from the State Conservationist. Generally, these farmlands produce high yields of crops when treated and managed in accordance with acceptable farming methods. In some States and localities, farmlands of statewide and local importance may include tracts of land that have been designated for agriculture by State law or local ordinance.

Note: The term "Other productive soils covered in the FRPP" refers to the definitions of farmland as described above.

E. Farmland Containing Historic or Archaeological Resources

Farm or ranch land containing historic or archaeological resources is eligible for FRPP. For the farm or ranch to be eligible under this criterion, historic or archaeological sites must be on a farm or ranch and be—

- (i) Listed in the National Register of Historic Places (established under the National Historic Preservation Act (16 U.S.C. Section 470 et seq.)).
- (ii) Formally determined eligible for listing in the National Register of Historic Places (by the State historic preservation office or Tribal historic preservation office and the Keeper of the National Register in accordance with section 106 of the National Historic Preservation Act).
- (iii) Formally listed in the State or Tribal register of historic places of the State historic preservation office or Tribal historic preservation office.
- (iv) Included in the State or Tribal historic preservation office's inventory with written

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justification as to why it meets National Register of Historic Places criteria.

F. Hazardous Material Records Search and Inspection

(1) FRPP will not obligate funds for the acquisition of eligible lands in a cooperative agreement, if the State Conservationist determines that the protection provided by FRPP would be ineffective due to onsite or offsite conditions. Such conditions include, but are not limited to, the presence of hazardous materials on the parcel or a neighboring site.

(2) NRCS will conduct an on-site visit of the offered parcel and complete the Hazardous Materials Substance Worksheet (Exhibit 519.97) and perform a Hazardous Materials Database Search (HMDS) within 120 days of the execution of the cooperative agreement. This will ensure the parcel being considered for FRPP does not have any hazardous substance issues that may delay the easement acquisition.

(3) If the HMDS report recommends further investigation of any hazardous materials sites associated with the offered parcel, the State Conservationist will determine if an Environmental Professional will be hired to conduct a Phase 1 Environmental Site Assessment (ESA). If a Phase I ESA identifies significant hazardous materials on or affecting the offered parcel, the parcel will be removed from consideration for FRPP funding. The cooperating entity may offer a substitute parcel as outlined in 519.32 I.

(4) A Phase 1 Environmental Site Assessment conducted by an Environmental Professional on behalf of the cooperating entity may be used to satisfy the requirement for NRCS to conduct a Hazardous Materials Database Search and an on-site inspection of the parcel. If hazardous materials are discovered during the Phase 1 Environmental Site Assessment conducted on behalf of the cooperating entity, the site will be eliminated from consideration for funding

G. Incompatible Adjacent Land Use

FRPP will not fund the acquisition of eligible lands if the NRCS State Conservationist determines that the protection provided by FRPP would be ineffective due to onsite or offsite conditions. Such conditions include, but are not limited to the close proximity of the site to an area with an existing land use of development or recreational use that will be negatively impacted by agricultural operations such as agricultural waste or pesticide application or land use plans and zoning that promote those types of land uses.

H. Restrictions on Future Land Use

(1) **Impervious Surfaces.**—Impervious surfaces are permanent, nonseasonal rooftops and concrete and asphalt surfaces. Impervious surfaces include residential buildings, agricultural buildings (with and without flooring), and paved areas both within and outside the protected property's building envelopes. Impervious surfaces may not exceed 2 percent of the total acreage of the protected property. Conservation practices listed in the Field Office Technical Guide are exempt from the impervious cover limitation.

(2) **Seasonal structures are exempt from the impervious surface limitation.** An example of a seasonal structure is a "hoop house": a floorless, framed structure covered with plastic during the colder months that is removed, exposing the soil surface, during the warmer months. Conservation easement deed language should clearly define which surfaces and practices create an "impervious surface" and which do not.

(3) **State Conservationists may waive the above-mentioned impervious surface limitation up to 10 percent on a parcel-by-parcel basis if the waiver is requested by the landowner.** In the event such a waiver is requested, the State Conservationist must use the template available in Section 519.105, "Sample Worksheet for 2-Percent Impervious Surface Waiver Determination," in order to determine if such a waiver is allowable under FRPP policy. If the State Conservationist deviates from the national template provided in section 519.106, he or she must retain the criteria listed but may modify the factors' points within each criterion, provided a sliding scale of points within each of the criterion is retained and the maximum impervious coverage does not exceed 10 percent.

(4) **A cooperating entity may request permission to use its own worksheet for all of its parcels.** If permission is requested, the basis for the cooperating entity's request must be in accordance with the policies of the FRPP. The cooperating entity's rationale for allowing more than 2 percent impervious surfaces must be based on a set of criteria similar to those in section 519.105 in order to determine if such a waiver is allowable under FRPP policy. The cooperating entity's rationale must be approved by the Deputy Chief for Easements and Landscape Planning in the NRCS National Headquarters.

(5) **Subdivision.**—Subdivision of the Protected Property should generally be prohibited. Cooperating entities should be advised that, if a landowner's intention is to subdivide a parcel in the future, proposals should be submitted for the intended subdivided parcels so ranking will be done on the smaller-sized parcels. If the smaller parcels are ranked high enough to warrant funding, separate conservation easements can be developed on the separate parcels even if the subdivision would not take place for many years.

(7) **All construction is subject to the limitation on impervious surfaces.** The FRPP manager must ensure that permission to construct the additional dwelling is included in the conservation easement deed and considered in determining the appraised fair market value of the protected property.

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(8) The ownership of mineral rights must be identified at the time that the FRPP application is submitted by the cooperating entity. A mineral assessment must be conducted by a qualified professional to determine the likelihood of the minerals being extracted.

(9) All mining is prohibited on FRPP easements. Exceptions to the rule are allowed for limited mining to the extent that the materials mined (e.g., sand, gravel, or shale) are used for agricultural operations on the protected property. In this case, extraction must be limited to a small, defined area or acreage. If the minerals are likely to be extracted, those mineral rights must either be subordinated to the terms of the conservation easement deed or the proposed parcel will not be considered for funding.

I. Substituting Offered Acres

(1) The substitution of acres within a pending offer must not decrease the value of the offered easement or the value of the parcel in meeting the program purposes. If lands of lesser value are substituted in the pending offer, the payment must be reduced according to an appraisal. The State Conservationist may require substituted pending offers to be reranked.

(2) With approval of the State Conservationist, a cooperating entity may substitute pending offers within their cooperative agreement. The parcel in the substituted pending offer and the landowner of the parcel must meet the eligibility criteria under sections 519.32 and 519.33 and at the State Conservationist's discretion, be reranked. Landowners must meet the adjusted gross income limitation for the year in which the parcel is substituted.

J. Agricultural Uses

(1) Real property is considered to be a farm or ranch if it is an agricultural operation in accordance with the State's program to purchase agricultural conservation easements. If there is no State program, the definitions of a farm or ranch in the State's agricultural use assessment program will be used.

(2) The NRCS State Conservationist must become familiar with the State's definition of agricultural use. If the State Conservationist finds the State's definition of agriculture to be so broad that an included use could lead to the degradation of soils, he or she may determine a farm or ranch whose use degrades the soil ineligible for FRPP at the time that land is being evaluated for eligibility. Conservation easement deeds approved by the Office of the General Counsel or NRCS National Headquarters staff will restrict the agricultural uses permitted in the deed to uses that will not degrade the soils.

K. Tribal Lands

American Indian and Alaskan Native Tribal land is eligible for FRPP under certain conditions. The various interests that American Indian and Alaskan Native Tribes can hold in real property represent a unique form of property right in the American legal system. Interests in real property have been acquired by American Indian and Alaskan Native tribes through various means, such as by aboriginal title, treaty, act of Congress, or executive action. Because of these various forms of real property interest, statutory restraints against alienation often exist. A Tribe may not be able to enter into a cooperative agreement with NRCS under FRPP without the prior approval of the Bureau of Indian Affairs, if at all. When a Tribe is interested in participating in FRPP on Tribal lands, the Tribe will contact the Bureau of Indian Affairs to determine whether the Tribe must receive any necessary clearances from the Bureau of Indian Affairs to be considered eligible. Those contracts and clearances will accompany the application for FRPP. Tribes may apply for FRPP as an entity or as a landowner. When the Tribe applies as a landowner, there must be a cooperating entity not associated with the Tribe holding and managing the FRPP easement.

**519.33 Landowner Eligibility**

A. Adjusted Gross Income

(1) For parcels that are acquired under the auspices of cooperative agreements from FY 2008 and prior years, landowners that have an average adjusted gross income limitation exceeding \$2.5 million for the 3 tax years immediately preceding the year the cooperative agreement was signed are not eligible to receive program benefits or payments. However, an exemption is provided in cases where 75 percent of the adjusted gross income limitation is derived from farming, ranching, or forestry operations. For additional information on the adjusted gross income limitation policy, see Title 440, Conservation Programs Manual (CPM), Part 512, Subpart C, Section 512.22D, "Basic Eligibility Requirements."

(2) For parcels that are acquired under the auspices of cooperative agreements from 2009 and subsequent years through the term of the 2008 Act, landowners with an average adjusted gross income limitation exceeding \$1 million for the 3 tax years immediately preceding the year the cooperative agreement is signed are not eligible to receive program benefits or payments. However, an exemption is provided in cases where two-thirds of the adjusted gross income limitation is derived from farming, ranching, or forestry operations. For additional information on the Adjusted Gross Income Limitation policy, see 440-CPM, Part 512, Subpart C, Section 512.22D, "Basic Eligibility Requirements."

Note: For FRPP, NRCS will confirm that landowners have met the average adjusted gross income requirements before obligating funds in the cooperative agreement. For entities, the FRPP easement payment will be reduced by an amount commensurate with the percentage ownership of any AGI

ineligible member of a legal entity. For individuals, any individual on the deed as coowner and exceeding the AGI will disqualify the eligibility of all individuals with individual ownership of the property.

#### B. Conservation Compliance

The Farm Security and Rural Investment Act of 2002 and the Food, Conservation, and Energy Act of 2008 require FRPP participants to be in compliance with highly erodible lands (HEL) and wetland conservation (WC) provisions (see 7 CFR Part 12) of the Farm Bill prior to receiving FRPP funding. NRCS will confirm compliance with the highly erodible lands (HEL) and wetland conservation (WC) provisions before obligating funding in the cooperative agreement. Therefore, if a landowner is found out of compliance, the landowner is ineligible for FRPP or other USDA payments for that crop year and all subsequent years that the person remains out of compliance. For more information, consult the National Food Security Act Manual. However, if the landowner fails to comply on an associated farm after the easement is already recorded, the easement is not considered to be in violation.

#### 519.34 Pending Offer

##### A. Pending Offer Definition

A pending offer is a written bid, contract, or option extended to a landowner by an eligible entity to acquire a conservation easement for the purpose of limiting nonagricultural uses of the land.

Pending offers by an eligible entity must be for acquiring easements in perpetuity, except where State law prohibits a permanent easement.

Notes: At the discretion of the State Conservationist, a pending offer may take the form of a signed option-to-purchase agreement or other type of purchasing agreement or intent to sell the easement. A pending offer may document a landowner's intent to sell the easement without a commitment to a purchase price. Many offers are made before the appraisals are completed.

##### B. Pending Offer Requirements

The pending offer to sell a conservation easement must consist of written offers for the primary purposes of—

- (i) Protecting agricultural productivity by limiting conversion to nonagricultural uses.
- (ii) Protecting historical or archaeological sites from nondestructive practices.
- (iii) Furthering the policy of a State or local farm and ranch land protection plan.