

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

### **Subpart D – ACEP-ALE General Information and Eligibility Requirements**

#### **528.30 Overview of the Agricultural Land Easement (ALE) Component**

##### **A. Introduction**

- (1) The purposes of ACEP-ALE are to protect the agricultural use and future viability, and related conservation values, of eligible land by limiting nonagricultural uses of that land and to protect grazing uses and related conservation values by restoring and conserving eligible land.
- (2) To achieve these purposes, NRCS is authorized to facilitate and provide cost-share assistance through agreements, as defined in section 528.50, with eligible entities including State or local governments, Indian Tribes, and certain nongovernmental organizations for the purchase of agricultural land easements on eligible land from eligible landowners. The duration of each agricultural land easement will be in perpetuity or the maximum duration permitted by State law.
- (3) To participate in ACEP-ALE, eligible entities must submit applications to partner with NRCS and NRCS must determine the eligibility of the entity, the eligibility of each parcel of land offered for enrollment, and the payment eligibility of the landowner of each parcel of land.
- (4) Eligible entities with applications selected for funding must enter into an agreement with NRCS. Under the agreement, the Federal share of the cost of an agricultural land easement or other interest in eligible land will not exceed 50 percent of the fair market value of the agricultural land easement. The eligible entity will provide a share that is at least equivalent to the Federal share, and at least 50 percent of the eligible entity share is from the eligible entity's own cash resources unless otherwise specified in this part.
- (5) The type of agreement NRCS may enter into with an eligible entity is based on the status of the eligible entity as either a certified eligible entity, as defined in Subpart H, or a noncertified eligible entity. Hereinafter the term eligible entity includes both certified and noncertified eligible entities unless otherwise specified. Eligible entities may submit a certification request to NRCS. NRCS will enter into ACEP-ALE cooperative agreements with noncertified eligible entities and ACEP-ALE grant agreements with certified eligible entities. Hereinafter the term cooperative agreement applies to both cooperative agreements and grant agreements unless specified.

##### **B. Program Objectives**

The objective of ACEP-ALE is to facilitate the purchase by eligible entities of agricultural land easements on eligible lands that protect natural resources and the agricultural nature of the land and permit the landowner the right to continue agricultural production and related uses subject to the terms of the easement and the associated agricultural land easement plan.

##### **C. Authority**

This part contains specific policy guidance for ACEP-ALE implementation consistent with subtitle H of the Food Security Act of 1985 and 7 CFR Part 1468. Additional policy guidance for implementation of ACEP-ALE includes, but is not limited to, the following:

- (i) Title 180, National Planning Procedures Handbook (NPPH), Part 600
- (ii) Land Evaluation and Site Assessment (LESA) Handbook (1983 edition)
- (iii) Land Evaluation and Site Assessment Guidebook (1994 Edition)

- (iv) Title 310, General Manual (GM), Part 402, “Land Evaluation & Site Assessment System”
- (v) Title 180, National Food Security Act Manual (NFSAM)
- (vi) 120-GM, Part 401, Subpart I, “NRCS National Headquarters Grants and Agreements Review and Approval Process”
- (vii) 190-GM, Part 410, Subpart A, “Compliance with NEPA, Procedures for NRCS-Assisted Programs”

D. Uses of NRCS ACEP-ALE Funds

- (1) The United States, through the NRCS, on behalf of the CCC, may enter into a cooperative agreement with an eligible entity or a grant agreement with a certified eligible entity to provide matching funds for the purpose of acquiring agricultural land easements to protect agricultural lands from conversion to nonagricultural uses. NRCS enters into grant agreements with certified eligible entities because it anticipates less-than-significant government involvement in the acquisition of agricultural land easement by certified eligible entities.
- (2) Funds provided by NRCS to any eligible entity are limited to the Federal share of the fair market value of the agricultural land easement.
- (3) ACEP-ALE funds provided by NRCS may not be used for eligible entity expenditures for appraisals, areawide market analysis, legal surveys, access, title clearance or title insurance, legal fees, development of agricultural land easement plans or component plans by the eligible entity, costs of easement monitoring, and other related administrative and transaction costs incurred by the eligible entity.
- (4) When required, NRCS may procure and conduct its own technical and administrative review of appraisals, areawide market analysis, or other easement valuation reports and necessary hazardous materials reviews. NRCS will obtain these reviews through an appropriate procurement method and following proper contracting rules and procedures.
- (5) NRCS may provide direct technical assistance to landowners and eligible entities to develop an agricultural land easement plan or component plans or may provide ACEP-ALE funds to technical service providers (TSP) under 7 CFR Part 652 to develop the agricultural land easement plan or component easement plans.
- (6) NRCS is not authorized to use ACEP funding to support agricultural lands protection strategies that do not result in the purchase of an agricultural land easement, such as transfer of development rights programs, agricultural use taxation programs, voluntary agricultural district programs, or agricultural zoning programs.

### **528.31 ACEP-ALE Application Process and Eligibility Overview**

A. NRCS accepts ACEP-ALE applications on a continuous basis. At the discretion of the State Conservationist and in coordination with any required national application cutoff dates, States may establish and advertise one or more application cutoff dates during the fiscal year. Complete applications received prior to the cutoff date will be reviewed, ranked and considered for funding. Applications received after the cutoff date may be considered in the next application period.

B. NRCS evaluates and selects parcels for funding through four primary steps, as follows:

- (1) Reviewing application information and supporting documentation provided by the entity to determine entity eligibility, land eligibility, and landowner eligibility
- (2) Conducting onsite ranking and land eligibility determinations
- (3) Selecting parcels for funding based on fund availability, ranking priority, eligibility and waiver determinations, preliminary reviews of title and access sufficiency, and evaluations of

onsite or offsite conditions exist that would preclude the lands ability to meet program purposes

- (4) Entering into cooperative agreements with eligible entities to purchase agricultural land easements on parcels selected for funding and obligating ACEP-ALE funds to those agreements

C. Applications for Cost-Share Assistance

- (1) Entities applying for cost-share assistance must submit the following:
  - (i) Entity application (Form NRCS-CPA-41 or successor form) and required supporting documentation
  - (ii) Parcel sheet (Form NRCS-CPA-41A or successor form) and required supporting documentation for each parcel in the application
  - (iii) Copy of the evidence of the landowner's current legal ownership, such as a recorded deed of ownership, of the eligible land or a fully executed purchase agreement wherein the eligible landowner has agreed to purchase the eligible land
  - (iv) Copy of the written pending offer to acquire agricultural land easements for each parcel in the application
  - (v) Application items identified in subpart E
- (2) Eligible entities must certify at the time of application that they have the required funds available for each parcel (see section 528.43 for further details on entity matching funds requirements).
- (3) Each eligible entity that will hold or co-hold an ACEP-ALE funded easement must—
  - (i) Provide information to the Farm Service Agency (FSA) for entry into the Service Center Information Management System (SCIMS).
  - (ii) Provide and maintain current registration in the Dun and Bradstreet Data Universal Numbering System (DUNS).
  - (iii) Meet the Central Contractor Registration (CCR) requirements through the System for Award Management (SAM) or successor registry. Evidence of current registration must be provided at the time of application, must be valid at the time of obligation of funds and must be maintained for the duration of the cooperative agreement.

### 528.32 Entity Eligibility Requirements and Responsibilities

A. General.—To be eligible to receive ACEP-ALE funding, an entity must be one of the eligible entity types listed in paragraph B and must provide NRCS sufficient evidence of their ability to meet the requirements and responsibilities of an eligible entity.

B. Types of Entities That are Eligible.—To be eligible, an entity must be one of the following:

- (1) An agency of any State or local government or Indian Tribe (including a farmland protection board or land resource council established under State law)
- (2) A nongovernmental organization that certifies that it is—
  - (i) Organized for and, at all times since the formation of the organization, have 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 the Internal Revenue Code of 1986 that is exempt from taxation under 501(a) of that code
  - (iii) Described in paragraph (1) or (2) section 509(a) of the Internal Revenue Code of 1986 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.
- (3) A Tribal entity is an “Indian Tribe” as defined by section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. Section 450b(e)), i.e. “federally recognized Tribes.” The Bureau of Indian Affairs publishes in the Federal Register a list of Indian Tribes that are identified as federally recognized Indian Tribes (see <http://www.bia.gov/cs/groups/public/documents/text/idc-020700.pdf>). Indian Tribes that are not federally recognized may qualify under nongovernmental organization status above.

### C. Entity Eligibility Requirements

- (1) To participate in the ACEP-ALE, eligible entities must provide sufficient documentation for the State Conservationist to make a determination that the entity has—
- (i) Authority to purchase and hold agricultural conservation easements.
  - (ii) An established a farmland protection program that purchases conservation easements for the purpose of protecting agriculture use and related conservation values by limiting conversion to nonagricultural uses of the land.
  - (iii) Demonstrated a commitment to the long-term conservation of agricultural lands.
  - (iv) The authority and capability to acquire, manage, and enforce agricultural land easements or their equivalent.
  - (v) Staff capacity (either directly or through formal agreement with other entities) dedicated to monitoring and easement stewardship.
  - (vi) The availability of funds at the time of application sufficient to meet the eligible entity’s contribution requirements for each parcel proposed for funding.
  - (vii) The ability to meet the requirements of the program.
- (2) Entities with existing ACEP-ALE or Farm and Ranch Lands Protection Program (FRPP) agreements or easements that are delinquent or deficient in satisfying the terms of those agreements or easements may be determined ineligible for funding under ACEP-ALE until such time as deficiencies are addressed. These deficiencies may include, but are not limited to—

- (i) Failing to conduct or provide annual monitoring reports to NRCS or providing annual monitoring reports that are insufficient or late.
- (ii) Existing FRPP or ACEP-ALE agreements with funds remaining more than 2 years after the attachment execution date without any expenditures or actions towards closings of easements in the third year.

#### D. Eligible Entity Responsibilities

The eligible entity must—

- (i) Perform necessary legal and administrative actions to ensure proper acquisition and recordation of valid agricultural land easements.
- (ii) Pay all costs of agricultural land easement valuation and procurement.
- (iii) Hold title to the agricultural land easements.
- (iv) Meet the requirements of the cooperative agreement with NRCS and the terms of the easement.
- (v) Ensure that an agricultural land easement plan is completed prior to closing and updated as necessary based on annual monitoring.
- (vi) Meet performance deadlines in the cooperative agreement and submit all required documentation with requests for reimbursements, advances, or extensions by required deadlines.
- (vii) Maintain DUNS and SAM registration for each holding and co-holding eligible entity.
- (viii) Conduct monitoring at least annually and report the results of the monitoring to the State Conservationist at least annually.
- (ix) Enforce the terms of the agricultural land easement, including the agricultural land easement plan.
- (x) Carry out all responsibilities specified in the cooperative agreement.
- (xi) Provide information to the FSA for entry into SCIMS.
- (xii) After consultation with and approval by NRCS, an eligible entity may assign another entity to manage and enforce the agricultural land easement or other interest in land. The entity assigned the management and enforcement responsibilities must have the appropriate expertise and capacity to carry out such responsibilities.
- (xiii) Entities that meet ACEP-ALE entity eligibility criteria may take title as a co-holder of the agricultural land easement once they have become a party to the cooperative agreement or provided NRCS an acknowledgement of the requirement to comply with the terms of the cooperative agreement, see section 528.60A(5).

### 528.33 Land Eligibility

A. Land Eligibility Overview.—An onsite review by NRCS is required prior to the NRCS making a land eligibility determination. To be eligible for ACEP-ALE, land must meet each of the following criteria:

- (1) Private or Tribal land that is agricultural land, including land on a farm or ranch
- (2) Subject to a written pending offer for purchase of an agricultural land easement from an eligible entity
- (3) Land that meets at least one of the following criteria:
  - (i) Has prime, unique, or other productive soil
  - (ii) Contains historical or archaeological resources
  - (iii) The enrollment of which would protect grazing uses and related conservation values by restoring and conserving land
  - (iv) The protection of which will further a State or local policy consistent with the purposes of ACEP

- (4) Land that is at least one of the following:
  - (i) Cropland
  - (ii) Rangeland
  - (iii) Grassland or land that contains forbs, or shrubland for which grazing is the predominant use
  - (iv) Located in an area that has been historically dominated by grass land, forbs, or shrubs and could provide habitat for animal or plant populations of significant ecological value
  - (v) Pastureland
  - (vi) Nonindustrial private forest land that contributes to the economic viability of an offered parcel or serves as a buffer to protect such land from development
- (5) Land that is in an area that has access to agricultural markets for its products, infrastructure appropriate for supporting agricultural production, and other support services
- (6) Land that faces development pressure from nonagricultural use

B. Eligible Land Types.—Eligible land must be privately owned or Tribal land on a farm or ranch that meets one of the four following land eligibility criteria:

- (1) Prime, Unique, or Other Productive Soil.—To meet the soils eligibility criteria, the offered parcel must contain at least 50 percent prime, unique, statewide, or locally important soil.
  - (i) Prime, unique, statewide, or locally important soil designations are located in NRCS State or field office technical guides and are defined as follows:
    - 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 NRCS.
    - Unique Farmland.—Land other than prime farmland that is used for the production of specific high-value food and fiber crops, as determined by NRCS. 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.
    - Farm or Ranch Land 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, bio-fuels, 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.
    - The term “Other productive soils covered in the ACEP-ALE” refers to the definitions of farm and ranch land as described above.
  - (ii) The State Conservationist, with the advice of the State Technical Committee, may elect to increase or decrease the required percentage of prime, unique, statewide, or locally important soil for a specific area or region of the State. The State Conservationist must document in a general memorandum the area or region affected and the basis of the increase or reduction. A copy of the general memorandum must be kept in the easement case file for each parcel determined eligible based on this criteria. The detailed explanation should document—

- The scarcity or abundance of prime, unique, and important farmland soil in the area in which the minimum 50 percent requirement is modified.
  - The conservation values of the parcels that warrant protection by an agricultural land easement despite this scarcity or abundance, which may include the—
    - Agricultural viability of the farm or ranch due to size and access to markets and support infrastructure.
    - Contributions of the farm or ranch to the agricultural industry.
    - Conservation of natural resources contributing to agricultural viability in the area.
  - How the restrictions in the conservation deed will preserve the documented conservation values.
- (2) Historical or Archaeological Resources.—Parcels containing historical or archaeological resources may be eligible for ACEP-ALE.
- (i) For the parcel to be eligible under this criterion, the historical or archaeological sites must be on a farm or ranch to be enrolled and be—
- Listed in the National Register of Historic Places (established under the National Historic Preservation Act (54 U.S.C. Section 302101 et seq.)), including registered traditional cultural properties as defined in National Register Bulletin 38.
  - Formally determined eligible for listing in the National Register of Historic Places (by the State historic preservation office (“SHPO”) or Tribal historic preservation office (“THPO”) and the Keeper of the National Register.
  - Formally listed in the State or Tribal register of historic places.
  - Included in the SHPO or THPO’s inventory with written justification as to why it is eligible for the National Register of Historic Places.
- (ii) For parcels determined eligible based on containing historical and archaeological resources, the agricultural land easement deed must address the protection of the historical or archaeological resources as required by Secretary of the Interior’s “Standards for the Treatment of Historic Properties.”
- (3) Protection of Grazing Uses and Related Conservation Values.—Land the enrollment of which would protect grazing uses and related conservation values by restoring and conserving land may be eligible for enrollment in ACEP-ALE. Such land must be one of the following:
- (i) Grassland, rangeland, pastureland, land that contains forbs, or shrubland for which grazing is the predominant use
- (ii) Located in an area that has been historically dominated by grassland, forbs, or shrubland, and the State Conservationist, with advice from the State Technical Committee, determines that it is compatible with grazing uses and related conservation values and either of the following apply:
- Could provide habitat for animal or plant populations of significant ecological value if the land is retained in grazing uses and related conservation values
  - Would address State, regional, and national conservation priorities
- (iii) Grasslands of special environmental significance, which is defined in 7 CFR Section 1468.3 as grasslands that contain little or no noxious or invasive species, as designated or defined by State or Federal law; are subject to the threat of conversion to nongrassland uses or fragmentation; and the land—
- Is rangeland, pastureland, or shrubland on which the vegetation is dominated by native grasses, grass-like plants, shrubs, or forbs, or is improved, naturalized pastureland and rangeland.
  - And the land provides, or could provide, habitat for threatened or endangered species or at-risk species, protects sensitive or declining native prairie or grassland types, or provides protection of highly sensitive natural resources.

- (iv) For parcels determined eligible based on protecting grazing uses and related conservation values, the agricultural land easement deed must address the protection of those grazing uses or grassland values. The parcel must have a grasslands management plan included as component of the agricultural land easement plan.
- (4) Land that Furthers a State or Local Policy.—The State or local policy must be consistent with the purposes of ACEP-ALE and the protection of such land must further the State or local policy.
  - (i) States must document how the State or local policy is consistent with the purposes of ACEP-ALE and how preservation of the parcel is consistent with that policy. This documentation must be retained in the easement case file for each parcel.
  - (ii) For parcels determined eligible based this eligibility type, the agricultural land easement deed must address the ACEP-ALE purposes that are being supported by a specific State or local policy.

### C. Eligible Land Uses

- (1) To be eligible, land must meet the land eligibility requirements, be one of the eligible land types, and must be in one of the following uses:
  - (i) Cropland
  - (ii) Rangeland
  - (iii) Grassland or land that contains forbs, or shrubland for which grazing is the predominant use
  - (iv) Located in an area that has been historically dominated by grass land, forbs, or shrubs and could provide habitat for animal or plant populations of significant ecological value
  - (v) Pastureland
  - (vi) Nonindustrial private forest land that contributes to the economic viability of an offered parcel or serves as a buffer to protect such land from development
- (2) Forest Land Requirements.—Forest land is areas of native trees grown under natural conditions regardless of the products harvested (timber, nuts, berries, vines, mushrooms). Forest land is defined as land cover or use category that is at least 10-percent stocked by single-stemmed woody species of any size that will be at least 13 feet tall at maturity. Also included is land bearing evidence of natural regeneration of tree cover (cutover forest or abandoned farmland) that is not currently developed for nonforest use. Ten-percent stocked, when viewed from a vertical direction, equates to an aerial canopy cover of leaves and branches of 25 percent or greater.

**Note:** 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).

- (i) To be eligible for enrollment in ACEP-ALE, the nonindustrial private forest land must contribute to the economic viability of an agricultural operation or serve as a buffer to protect an agricultural operation from development, as determined by NRCS.
  - ACEP-ALE easements may contain forest land on up to two-thirds of the ACEP-ALE easement area. The State Conservationist may waive the two-thirds limitation for acreage that NRCS determines is a sugar bush operation that contributes to the economic viability of the operation.
  - NRCS may contribute funds to a portion of a larger easement where the overall forest land of the easement exceeds two-thirds of the larger easement area so long as the ACEP-ALE easement is a subcomponent of the larger easement and all of the following apply:
    - The forest land on the ACEP-ALE easement is not in excess two-thirds of the ACEP-ALE easement area.



- The deed of easement clearly identifies the portion of the easement area that is in the ACEP-ALE easement.
  - The ACEP-ALE easement is a single contiguous land parcel, though it may be traversed by a public roadway or utility easement.
  - The fair market value of the ACEP-ALE is appraised separately from the non-ACEP-ALE easement area and a separate value provided. The value of the ACEP-ALE may be reported in the same appraisal as the non-ACEP-ALE area.
  - The Federal share of the ACEP-ALE will be based on the fair market value of the ACEP-ALE only.
  - Any eligible entity or landowner contribution to the purchase price of the easement area outside of the ACEP-ALE easement area is not used as matching funds for the ACEP-ALE eligible entity contribution.
- (ii) If the forested acreage is the greater of 40 acres or 20 percent of the ACEP-ALE easement area, the forested acreage must have a forest management plan as a component of the agricultural land easement plan.
- (3) Incidental Land.— Incidental land includes such land as farmstead areas, other areas with agricultural buildings and infrastructure, forest land, and nonforested wetlands. The acres of incidental land must not exceed the acres of otherwise eligible land. Taken together, the eligible land and incidental land may not include forest land of greater than two-thirds of the total ACEP-ALE area unless the two-thirds acreage limitation is waived by the State Conservationist for sugar bush lands. Land that is incidental to the eligible land and that is not otherwise eligible, may be included in an ACEP-ALE easement if the State Conservationist determines any of the following apply to the incidental land:
- (i) Is necessary for the efficient administration of an agricultural land easement
  - (ii) Significantly augments the protection of the associated farm or ranch land
  - (iii) Contributes to the grassland functions and values and related conservation values and is included as part of a written pending offer

#### D. Additional Land Eligibility Requirements

- (1) Written Pending Offer.—Eligible land must be subject to a written pending offer by an eligible entity.
- (i) A pending offer is a written bid, contract, or option to convey a conservation easement for any of the following purposes:
    - Protecting agricultural productivity by limiting conversion to nonagricultural uses
    - Protecting historical or archaeological sites from destructive practices
    - Protecting grazing uses and related conservation values by restoring and conserving land
    - Furthering ACEP-ALE policy or policy consistent with the purposes of ACEP-ALE
  - (ii) The written pending offer may be extended by the eligible entity to the landowner to acquire the conservation easement or may be from the landowner to the eligible entity to sell the conservation easement. The State Conservationist will determine the sufficiency of the written pending offer for the purposes of determining ACEP-ALE eligibility.
  - (iii) A written pending offer may take the form of a signed option-to-purchase agreement or other type of purchasing agreement, a letter of intent to sell the easement, an offer letter from the landowner to the eligible entity, or other similar documentation. A pending offer may document a landowner's intent to sell the easement without a commitment to a purchase price as many offers are made before the appraisals are completed.
  - (iv) Pending offers must be for a conservation easement in perpetuity, except where State law does not authorize permanent easements.
  - (v) A copy of the written pending offer must be provided by the entity at the time of application and must be retained in the easement case file for the individual parcel.

- (2) **Agricultural Land.**—Real property is considered to be agricultural land or land in agricultural use, including land on a farm or ranch, if it is consistent with the State’s program to purchase agricultural conservation easements. If there is no State program, the definitions of a farm, ranch, or agricultural use in the State’s agricultural use assessment program will be used to define agricultural land.
  - (i) The NRCS State Conservationist must be familiar with the State’s definition of agricultural use. If the State Conservationist determines the State’s definition of agriculture to be so broad that an included use could lead to the degradation of soils, they may determine a farm or ranch whose use degrades the soil ineligible for ACEP-ALE. Agricultural land easement deeds will restrict the agricultural uses permitted in the deed to uses that will not degrade the soils.
  - (ii) ACEP-ALE funds will not be used to purchase an easement on lands that are in an agricultural use prohibited by Federal law, even if such use is authorized under State law. The agricultural land easement deeds must include a provision that requires agricultural uses to be in compliance with all applicable law, including Federal laws prohibiting the production of controlled substances.
- (3) **Tribal Lands.**—For the purposes of ACEP-ALE, Tribal lands are eligible under certain conditions and are those defined in 7 CFR Section 1468.3 as “Acreage Owned by Indian Tribes”, which means lands held in private ownership by an Indian Tribe or individual Tribal member and lands held in trust by a native corporation, Tribe, or the Bureau of Indian Affairs. The various interests that American Indian and Alaskan Native Tribes may 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.
  - (i) Tribes may apply for ACEP-ALE as an eligible entity or as a landowner.
    - When the Tribe is a landowner in an eligible entities’ application, the eligible entity must be independent of the Tribe and with no apparent conflicts of interest holding and managing the ACEP-ALE easement.
    - When the Tribe applies as an eligible entity it may not be a landowner of the lands to be protected.
  - (ii) Because of these various forms of real property interest, statutory restraints against alienation often exist. When the land offered for enrollment is on Tribal lands held in trust by the Bureau of Indian Affairs, the landowner 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 ACEP-ALE. Tribal land may not be listed as a funded parcel on a cooperative agreement with NRCS under ACEP-ALE without the prior approval of the Bureau of Indian Affairs.

### **528.34 Ineligible Lands**

A. **Ineligible Lands – General.**—The following lands are not eligible for cost-share assistance under ACEP-ALE. See detailed descriptions in section B below for additional information on each ineligible land type.

- (1) Lands owned by an agency of the United States, other than land held in trust for Indian Tribes.
- (2) Lands owned in fee title by a State, including an agency or a subdivision of a State, or unit of local government.

- (3) Land owned by a nongovernmental organization whose purpose is to protect agricultural use and related conservation values.
- (4) Land subject to an easement or deed restriction which, as determined by NRCS, provides similar restoration and protection as would be provided by enrollment in the ACEP-ALE.
- (5) Land where the purposes of the program would be undermined due to onsite or offsite conditions, such as risk of hazardous substances, proposed or existing rights of way, infrastructure development, or adjacent land uses.
- (6) Land that NRCS determines to have unacceptable exceptions to clear title or insufficient legal access.
- (7) Land on which gas, oil, earth, or mineral rights exploration has been leased or is owned by someone other than the landowner unless NRCS determines that the third party rights will not harm or interfere with achieving the ACEP-ALE purposes.

#### B. Ineligible Lands – Detailed Descriptions

- (1) Land Owned by the Federal Government, a State or Local Government, or a Nongovernment Organization.—Lands owned by an agency of the United States, other than land held in trust for Indian Tribes; lands owned in fee title by a State, including an agency or a subdivision of a State, or a unit of local government; and lands owned by a nongovernmental organization whose purpose is to protect agricultural use and related conservation values are ineligible for ACEP-ALE cost-share assistance except as provided below:
  - (i) NRCS may provide ACEP-ALE cost-share assistance for the purchase of agricultural land easements on land owned by a State or local government or nongovernmental organization if all of the conditions below are met:
    - Ownership by the State or local government or nongovernmental organization is temporary.
    - The prospective landowner meets the ACEP-ALE eligibility requirements.
    - The land meets the ACEP-ALE land eligibility requirements.
    - The eligible entity and an eligible prospective landowner have executed a purchase agreement for the parcel at the time of application.
    - The land is sold to the eligible private or Tribal landowner prior to easement closure.
  - (ii) NRCS will not disburse ACEP-ALE payments to the State or local government entity or nongovernmental organization until the fee simple title has been transferred to an eligible private landowner.
- (2) Land Subject to a Similar Easement or Deed Restriction.—Land that is already subject to an easement or other deed restriction that prevents its conversion to nonagricultural use are not eligible. These protections may include, but are not limited to—
  - (i) Enrollment in other USDA easement or set-aside programs such as ACEP-Wetland Reserve Easement (WRE), the Wetlands Reserve Program (WRP), Grasslands Reserve Program (GRP), Healthy Forest Reserve Program (HFRP), and Conservation Reserve Enhancement Program (CREP), Emergency Watershed Protection Program – Floodplain Easements (EWPP-FPE).
  - (ii) Lands owned by an eligible entity unless the acquisition is approved pursuant to paragraph (1) above.
  - (iii) Acreage already preserved by a transfer of development rights may not be enrolled under ACEP-ALE or used to meet any of the land eligibility requirements (e.g., 50-percent prime soils requirement). Where land is preserved through the sale of transfer of development rights, the acreage in question will not be counted as part of a landowner or eligible entity's match.

- (3) Adverse Onsite or Offsite Conditions.—Offsite or onsite conditions that could undermine the purposes of the program, as determined by NRCS, render the site ineligible for ACEP-ALE. These adverse conditions may include, but are not limited to—
- (i) The presence or potential presence of hazardous substance issues on the parcel or a neighboring site.
    - NRCS will conduct an onsite visit of the offered parcel and complete a limited phase-I environmental site assessment, which includes, at a minimum: 1) an environmental record search, 2) current landowner interviews, and 3) an onsite visit to view present conditions (see Subpart U, “Exhibits,” for the “Hazardous Materials Field Inspection Checklist” and the “Hazardous Materials Landowner Interview”). NRCS will procure and review the environmental record search within 120 days of identifying a parcel as selected for funding on an attachment to the cooperative agreement. NRCS conducts the limited phase-I to identify whether the parcel has any hazardous substance issues that may preclude or delay the easement acquisition.
    - If the limited phase-I identifies the need for further investigation of any hazardous substance issues associated with the offered parcel, the State Conservationist will determine if further investigation should be conducted or whether sufficient information exists to determine the parcel ineligible. Further investigation conducted by or paid for by NRCS is limited to a full phase-I environmental site assessment (full phase-I ESA) that meets the requirements of 40 CFR Part 312.
    - The eligible entity may obtain a full phase-I ESA conducted by a qualified environmental professional and provide it to NRCS to satisfy the requirement for NRCS to conduct a limited phase-I assessment.
    - NRCS will not enroll property where hazardous substance concerns are identified and that NRCS determines pose an unacceptable risk or a risk sufficient to undermine the purposes and objectives of the program. If NRCS determines based on a limited phase-I or full phase-I ESA that there are hazardous substances on or affecting the offered parcel or that a phase-II Environmental Site Assessment is needed, the parcel is ineligible and will be removed from consideration for ACEP-ALE funding or from the cooperative agreement. NRCS will not reconsider the parcel unless and until the landowner provides sufficient documentation that all necessary assessments have been completed and that the site has been fully remediated. The eligible entity may offer a substitute parcel as provided in paragraph H below.
  - (ii) Proposed or existing rights of way, either onsite or offsite, such as transmission lines, highways, pipelines or other existing or proposed infrastructure that introduce disturbances or risks that undermine the purposes of the easement.

For example, transmission lines or roads fragmenting parcels offered for enrollment under grassland or grasslands of special environmental significance for protection of sage grouse or other at-risk species.
  - (iii) Adjacent land uses that could impede the continued agricultural viability of the parcel such as the close proximity of the site to an area with existing, planned, or zoned land uses of development or recreational use that will be negatively impacted or incompatible with ongoing agricultural operations or cultural practices such as agricultural waste or pesticide application.
- (4) Unacceptable Title or Access Issues.—NRCS must be able to determine that ACEP-ALE funds will result in long-term agricultural protection, therefore land which NRCS determines to have unacceptable exceptions to clear title or insufficient legal access for ACEP-ALE purposes are not eligible for enrollment. NRCS, at its sole discretion, may deny funding for any application where there are unacceptable exceptions to clear title or insufficient legal

access to any property. Such issues may include but are not limited to, existing easements, rights-of-way, leases, or other encumbrances owned or leased by a third party that—

- (i) Have a high likelihood of resulting in conversion to a nonagricultural use.
  - (ii) Allow a scope or intensity of use that could interfere with the agricultural use of the property.
  - (iii) May limit the entity's ability to monitor or enforce the easement.
  - (iv) Are mortgages or liens that cannot be removed or subordinated as required.
- (5) Mineral Exploration.—Land on which gas, oil, earth, hard rock, stone, gravel, geothermal, or mineral rights exploration has been leased or is owned by someone other than the landowner is ineligible under ACEP-ALE unless it is determined by NRCS that all of the following criteria are met:
- (i) The third party rights will not harm or interfere with the conservation values or agricultural uses of the easement.
  - (ii) Any methods of exploration and extraction will have only a limited and localized impact on the easement.
  - (iii) The limitations are specified in the ALE deed.

**Note:** NRCS may use Remoteness Tests, Mineral Assessments or the Mineral Matrix available at 440-CPM, Part 527, or other materials for the evaluation of such third party rights. NRCS may also review similar documents provided by the eligible entity or landowner.

## 528.35 Payment Eligibility Criteria Applied to Landowners as Beneficiary

### A. Adjusted Gross Income

- (1) Prior to obligating funds, NRCS must confirm based on documentation from the Farm Service Agency (FSA) that all landowners on the deed are eligible for payment based on the adjusted gross income (AGI) provisions of the Food Security Act of 1985. This determination is made in the year the individual parcel is selected for funding and must be documented in NEST and the individual easement case file.
- (2) Section 1001D of the Food Security Act of 1985, as amended, establishes payment eligibility for conservation programs based upon the average adjusted gross nonfarm income for persons and legal entities. FSA promulgated regulations to implement section 1001D payment limitations at 7 CFR Part 1400 AGI provisions. For AGI purposes, the term “person” means an individual, natural person and does not include a legal entity. Additionally, the term “legal entity” means an entity created under Federal or State law. All landowners will file the AGI certification, Form CCC-941, “Average Adjusted Gross Income (AGI) Certification and Consent to Disclosure of Tax Information,” or successor form with FSA. FSA is responsible for completing all AGI certifications.

**Note:** Indian Tribes are not subject to AGI provisions.

- (3) NRCS must determine whether a payment reduction applies. In accordance with 7 CFR Part 1400, an application will be considered—
  - (i) Eligible and no commensurate reduction of payment will apply if the land is owned by—
    - A person who is eligible for payment under the AGI provisions.
    - Multiple persons, when all persons are eligible for payment under the AGI provisions.
    - An AGI-eligible legal entity in which all members are eligible for payment under the AGI provisions.
  - (ii) Ineligible and cancelled, if the land is owned by—
    - One person, and the person is determined to be ineligible for payment.

- Multiple persons, a legal entity, or a combination thereof, and any of the persons or legal entities are ineligible for payment based on the AGI provisions.
- (iii) Eligible, but the ACEP-ALE easement payment will be reduced by an amount commensurate to the percent ownership of any AGI ineligible member of that legal entity.
- (4) The required reduction in the ALE easement payment should be discussed with the applicants before continuing to process the application to determine if the applicants wish to continue in the process. The landowner will provide percentage of ownership documentation. NRCS will verify this information, determine whether landowners are eligible or the commensurate payment reduction is applicable due to ineligible member of otherwise eligible legal entity, and coordinate with the financial management staff to ensure that correct obligations and any necessary payment reductions occur.

#### B. Conservation Compliance

- (1) Prior to obligating funds, and again prior to making payment to the eligible entity, NRCS must confirm based on documentation from FSA that all persons and legal entities on the deed are compliant with the Highly Erodible Land and Wetland Conservation (HEL/WC) provisions of the Food Security Act of 1985.
- (2) Through operation of “affiliated persons” under 7 CFR Section 12.8, all landowners on the deed are required to be in compliance with both the HEL and WC provisions for the application to be considered eligible for enrollment. If any landowner listed on the deed is ineligible, the application is ineligible.
- (3) If the landowner is a legal entity, the entity must be HEL- and WC-compliant, and required members of the legal entity must be in compliance. (see Subpart U, “Exhibits,” for ACEP eligibility matrix) If any member of a legal entity that requires member eligibility is not in compliance with the HEL and WC provisions, the application is ineligible. If the landowner regains compliance with those provisions, a new application may be filed.

### **528.36 Participation in Other USDA Programs**

Land enrolled in ACEP-ALE may be enrolled in some of USDA’s conservation programs provided the eligibility requirements of the other programs are met, including the following:

- (1) Agricultural Management Assistance Program (AMA)
- (2) Regional Conservation Partnership Program (RCPP)
- (3) Conservation Reserve Program (CRP) rental contracts to the extent authorized by the FSA
- (4) Conservation Stewardship Program (CSP)
- (5) Environmental Quality Incentives Program (EQIP)
- (6) The ACEP-Wetland Reserve Easement component or the Emergency Watershed Protection Program – Floodplain Easement Program, provided any necessary subordinations or releases are obtained and the easement valuation accounts for existing deed or land use restrictions