



DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1468

[Docket ID NRCS-2019-0006]

RIN 0578-AA66

Agricultural Conservation Easement Program

AGENCY: Natural Resources Conservation Service (NRCS) and the Commodity Credit Corporation (CCC), United States Department of Agriculture.

ACTION: Final rule.

SUMMARY: This final rule adopts, with minor changes, an interim rule published in the *Federal Register* on January 6, 2020. The interim rule implemented changes to ACEP that were necessitated by enactment of the Agriculture Improvement Act of 2018 (the 2018 Farm Bill) and changes for administrative streamlining improvements and clarifications. This final rule makes permanent many of the changes made in the interim rule, responds to comments received, and makes further adjustments in response to some of the comments received.

DATES: Effective: [Insert date of publication in the *FEDERAL REGISTER*].

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SUPPLEMENTARY INFORMATION:

Background

The 2018 Farm Bill reauthorized and amended ACEP. The 2018 Farm Bill authorized the use of the existing regulations that had been implemented under the

Agricultural Act of 2014 for the remainder of FY 2019 to the extent that those regulations were consistent with the 2018 Farm Bill changes.

On January 6, 2020, CCC published an interim rule with request for comments in the *Federal Register* (85 FR 558 - 590) that implemented mandatory changes made by the 2018 Farm Bill or that were required to implement administrative improvements and clarifications. This final rule adopts, with minor changes, the interim rule.

Discussion of ACEP (7 CFR Part 1466)

ACEP helps farmers and ranchers preserve their agricultural land and restore, protect, and enhance wetlands on eligible lands. The program has two components:

- 1) Agricultural land easements (ACEP-ALE); and
- 2) Wetland reserve easements (ACEP-WRE).

The Secretary of Agriculture delegated authority to the Chief, NRCS, to administer ACEP.

Through ACEP-ALE, NRCS provides matching funds to eligible entities that are State, Tribal, and local governments, and nongovernmental organizations with farm and ranch land protection programs, to purchase agricultural land easements. Agricultural land easements are permanent or for the maximum duration authorized by State law.

Through ACEP-WRE, NRCS protects wetlands on eligible lands by purchasing an easement directly from eligible landowners or entering into 30-year contracts on acreage owned by Indian Tribes, in each case providing for the restoration, enhancement, and protection of wetlands and associated lands. Wetland reserve easements may be permanent, 30-years for acreage owned by Indian Tribes, or the maximum duration authorized by State law.

Participation in either ACEP-ALE or ACEP-WRE is voluntary.

The interim rule:

- Incorporated changes to the ACEP purposes to limit nonagricultural uses

that negatively affect agricultural uses and conservation values;

- Added language to specify general monitoring responsibilities under ACEP-ALE and ACEP-WRE;
- Removed references to the Regional Conservation Partnership Program (RCPP) as the 2018 Farm Bill revised RCPP as a stand-alone program, which is now in 7 CFR part 1464;
- Added definitions to reflect 2018 Farm Bill changes: buy-protect-sell (BPS) transaction, monitoring report, wetland restoration, easement administration action, grazing management plan, and nonindustrial private forest land;
- Removed definitions for: active agricultural production, forest land, forest land of statewide importance, and projects of special significance;
- Made changes to easement administration actions, including specifying the criteria that apply to each type of easement administrative actions;
- Made revisions to the environmental markets section in response to the 2018 Farm Bill;
- Removed the requirement that an eligible entity provide evidence at the time of application that they have funds available to meet the minimum cash contribution requirement;
- Eliminated the requirement that land with a certain amount of forest land have a forest management plan;
- Replaced the term “proposed” with “permitted” in text about the types of rights-of-way, infrastructure development, or other adjacent land uses whose impacts may cause land to be considered ineligible;
- Specified that under a BPS transaction, the eligible entity for meeting payment eligibility requirements (highly erodible land and wetland

conservation, and Adjusted Gross Income (AGI)) is the landowner unless the eligible entity sells the fee title to a qualified farmer or rancher prior to, or at the time of, the easement closing, in which case the farmer or rancher purchaser must meet payment eligibility requirements;

- To address BPS transactions, specified that eligible lands owned by the eligible entity may be eligible for enrollment if the land is owned, on a transitional basis, to protect the land through securing an agricultural land easement on the land and to transfer fee title ownership to a farmer or rancher;
- Specified eligibility requirements related to BPS transactions;
- Specified that NRCS will consider eligible entity cash contribution toward the easement purchase price and measures to increase agricultural viability as ranking criteria;
- Specified that appropriate terms and conditions must be included in the easement deed to address items agreed to by the eligible entity as a matter of ranking and basis for selection for funding;
- Removed the requirement for the eligible entity to contribute its own cash resources in an amount equal to 50 percent of the amount of the Federal share;
- Specified the incurred costs by the eligible entity associated with securing a deed to the easement that may be included in the calculation of the non-Federal share, and that the source and limit of other costs that may be included in the calculation of the non-Federal share;
- Removed reference to the availability of waivers for grasslands of special environmental significance since the specific eligible entity cash contribution requirement was removed;

- Added specificity to the right of enforcement conveyed to NRCS under the terms of an agricultural land easement;
- Removed the requirement that the agricultural land easement be subject to an ACEP-ALE plan;
- Specified the terms and conditions required by statute that must be addressed if the eligible entity chooses to allow subsurface mineral development on the land subject to the agricultural land easement;
- Revised the requirement for a conservation plan on highly erodible cropland;
- Provided that an eligible entity may include terms and conditions in the ACEP-ALE deed that are intended to keep the land subject to the easement under farmer or rancher ownership;
- Removed the stand-alone section regarding ACEP-ALE plans and captured in other sections the provisions related to development of required conservation plans or development of ACEP-ALE plans as agreed-to by the eligible entity;
- Incorporated two new categories under which an eligible entity may demonstrate that they meet the ACEP-ALE certification requirements and revised the criteria to require a minimum of 10 agricultural land easements under ACEP-ALE, or predecessor NRCS easement programs, for all eligible entities seeking certification;
- Specified the circumstances under which NRCS may exercise its right of enforcement under ACEP-ALE, including its right of inspection;
- Increased the percent of acres of total cropland in a county that may be subject to an ACEP-WRE easement to 15 percent;
- Removed the requirement for NRCS to seek input from the Secretary of

the Interior at the local level in the determination of eligible land;

- Included water quality as an additional priority along with the priority placed on acquiring wetland reserve easements based on the value of the easement for protecting and enhancing habitat for migratory birds and other wildlife;
- Specified that grazing under reserve grazing rights wetland reserve easement or 30-year contract must comply with a wetlands reserve plan of operations (WRPO) developed by NRCS, which may include a grazing management plan component, and identified that the plan may be reviewed and modified as necessary, at least every 5 years; and
- Included new provisions related to the evaluation and authorization of compatible uses on wetland reserve easements, including that in evaluating and considering compatible uses NRCS will consider whether the use will facilitate the practical administration and management of the easement or contract area and ensure that the use furthers the functions and values for which the land was enrolled.

Summary of ACEP Comments

The interim rule 60-day comment period ended March 6, 2020, and was extended to March 20, 2020, to provide the public an opportunity to consider the January 24, 2020, correction. Seventy commenters, including individuals, organizations, and agencies, submitted comments to regulations.gov. NRCS reviewed the input from these 70 commenters in response to the rule and identified 576 comments contained within these 70 entries. NRCS reviewed these 576 comments and categorized and summarized them according to the topics identified below. The topics that generated the greatest response were on ALE ranking, ALE BPS transactions, and definitions.

Overall, the comments expressed general support for the changes made in the interim rule. Six comments were not relevant to the ACEP interim rule. Ten comments expressed general support for the regulation and three comments criticized the regulation in general. These comments did not include any recommendations for change.

NRCS appreciates all comments submitted and thanks each person and organization who expressed an opinion related to ACEP or the interim rule. NRCS will continue the endeavor to improve its customer service and the equitable dispensation of benefits under ACEP.

In this rule, the comments have been organized alphabetically by topic. The topics include:

- ALE Buy-Protect-Sell Transactions;
- ALE Contribution Requirements;
- ALE Deed Requirements and Terms;
- ALE Entity Certification;
- ALE Land Eligibility Issues;
- ALE Planning;
- ALE Program Requirements;
- ALE Ranking;
- Definitions;
- Easement Administration Actions;
- Environmental Markets;
- Fund Allocations;
- Landowner Eligibility – AGI Limitation Waiver;
- Program Administration; and
- WRE Issues.

This final rule responds to the comments received by the public comment deadline and makes minor clarifying and related changes.

ALE Buy-Protect-Sell Transactions

BPS transactions are arrangements under ALE, first authorized under the 2018 Farm Bill, between NRCS and an eligible entity where the entity owns or will own the land prior to the acquisition of the agricultural land easement on the property, and the eligible entity either:

- 1) Sells fee title to the land to a farmer or rancher prior to or at easement closing;
or
- 2) Holds fee title at the time the agricultural land easement is conveyed on that land, and transfers ownership of the land subject to the easement to a farmer or rancher not later than 3 years after the date of acquisition of the agricultural land easement.

NRCS received comments related to BPS transactions, several of which expressed support for allowing BPS transactions. Remaining comments were as follows:

Comment: NRCS received comment related to the requirement to sell at agricultural value except that eligible entities could charge qualified farmers or ranchers certain holding and transactions costs. These comments requested a change to the amount an eligible entity may charge the qualified farmer or rancher as part of the sale of the property, recommending either that the 10-percent limitation be removed or increased to 10 percent of the total fair market value (FMV) of the property rather than 10 percent of the agricultural value. Other comments recommended that the sale be based on appraised agricultural value (rather than lesser of appraised agricultural value or original purchase price) to avoid a potential windfall to the purchaser that might raise private benefit or other issues under federal tax law if the eligible entity is a nongovernmental organization.

Response: The 10-percent limit was identified because NRCS may have to recover costs if the conveyance includes more than “reasonable holding and transaction costs.” It is consistent with industry standards and the use of a published upper limit removes the potential for arbitrary decision making and expensive challenges in cost recovery cases. Additionally, this transaction type aims to help farmers and ranchers gain access to affordable farmland, and a limit on the holding and transaction costs that may be charged to the farmer or rancher ensures that there is no circumvention of that intent.

A discussion of the federal income tax regulatory requirement that an organization described in section 501(c)(3) of the Internal Revenue Code (IRC) operate for the benefit of public rather than private interests is outside the scope of both the jurisdiction of the United States Department of Agriculture and this rule. For more information about the requirements applicable to tax-exempt organizations, including those described in section 501(c)(3) of IRC, visit the IRS’s Charities and Nonprofits page at www.irs.gov/charities-and-nonprofits.

The ACEP statute requires the sale to be at “agricultural value” plus any reasonable holding costs. A sale at FMV assumes that the impact of the placement of the easement on the land will result in the highest and best use of the land being agriculture, and thus agricultural value. The alternative value, the purchase price at which the entity purchased the land, would have been at most, theoretically, FMV of the land without being encumbered by the easement. If the original purchase price of the property was less than FMV of the land encumbered with the easement, then ACEP assistance through a BPS arrangement is not necessary for the entity to have a viable transaction that would result in the same outcome and could occur without an investment of taxpayer funds.

This requirement ensures that eligible entities do not profit from the BPS transaction at the cost of the qualified farmer or rancher. The provision requiring the eligible entity to sell the property at the original purchase price, if lower than the

appraised agricultural value, was similarly included to help farmers and ranchers gain access to affordable farmland. NRCS has clarified in the regulation that appraised agricultural value means agricultural value of the land. An eligible entity should seek tax or legal advice if a particular transaction, due to the entity's unique circumstances, could jeopardize its tax-exempt status. In those instances, the entity can move forward independently without ACEP assistance, especially if the entity would make a profit from the subsequent land transfer, which would negate the need for Federal funds.

No change is made to the regulation in response to this issue.

Comment: NRCS received comment requesting that the pre-closing transfer of BPS easements should allow for advance payments in addition to reimbursements.

Response: NRCS selected the reimbursement-only approach for pre-closing BPS transactions as it reduces the risk for cost-recovery by allowing NRCS and the entity to ensure the transaction meets all requirements prior to NRCS providing cost-share assistance. To ensure this risk is minimized across all BPS transactions, NRCS has clarified that payment of the Federal share will occur on a reimbursable basis for all BPS transaction types. Even under standard (non-BPS) ALE transactions, an advance payment may only be issued 30 days prior to closing. Therefore, the amount of time the eligible entity could be in receipt of easement funds in advance of the easement closing under the requested approach is minimal, whereas the reimbursement-only approach for BPS transactions significantly reduces risk and increases administrative savings for both the eligible entity and the Government. The regulation has been updated to make the Federal share payment provision more consistent across the BPS transaction types.

Comment: NRCS received comment related to adjusted gross income (AGI) waivers; two comments suggested adding AGI waivers for entities involved in BPS transactions who play an intermediary role as landowner. Another comment suggested

automatically waiving AGI for BPS transactions because entities only act as pass-through organizations for the purpose of the contract.

Response: The requesting and granting of AGI waivers for landowners that the Farm Service Agency (FSA) has determined do not meet the AGI limitations must ultimately be addressed prior to providing ACEP funds. Determinations to waive AGI for landowners that do not meet the AGI limitations, as set forth in 7 CFR part 1400, must be based on a case-by-case basis. NRCS policy addresses when NRCS makes its eligibility determinations, including AGI, based on the BPS transaction type and provides maximum flexibility with respect to the timing of conducting AGI determinations. No change is made to the regulation in response to this issue.

Comment: NRCS received comment regarding the length of ACEP-ALE agreements for BPS transactions, including request for an extension beyond the 3-year ACEP-ALE agreement length (and 12-month extension) for post-closing transfers to a qualified buyer or an extension to a 5-year agreement length.

Response: NRCS provides a period of 3 years, plus a potential additional 12 months, to find a qualified buyer, in addition to the initial 2-year period provided to close on the easement, for a total of 6 years for an individual transaction. NRCS selected the 12-month extension for several reasons, largely based on the administrative burden associated with extending transactions further.

Additionally, NRCS recognizes that post-closing BPS transactions compete for the same ACEP funds that otherwise would be available to protect land that is already owned by a private or Tribal landowner or qualified farmer or rancher. Under a post-closing BPS transaction, until transfer to a qualified farmer or rancher takes place, the intended purposes of ACEP for which the Federal funds have been invested, are not fully realized. If the property is not ultimately transferred, then those Federal funds have been rendered unavailable for 5 to 6 years during which time they could have been used to

protect another property that may have met ACEP purposes from the outset. Twelve months was chosen to ensure appropriate stewardship of Federal funds. No change is made to the regulation in response to this issue.

Comment: NRCS received comment requesting addition of an option to purchase at agricultural value (OPAV) for BPS agreements to maintain maximum flexibility.

Response: Encumbered land under a BPS transaction must be sold at agricultural value to a qualified farmer or rancher. The ACEP statute at 16 U.S.C. 3865b(b)(4)(D)(i) specifically allows the inclusion of additional deed terms to keep the land subject to the ALE under the ownership of a farmer or rancher, which includes easement deeds that are part of a BPS transaction. However, NRCS must provide oversight to ensure that the use of an OPAV term in BPS transactions does not create an incentive for strawman sales to a qualified farmer or rancher just to meet statutory BPS requirements and then have the qualified farmer or rancher sell the land immediately back to the entity at agricultural value under the OPAV term. No change is made to the regulation in response to this issue.

Comment: NRCS received comment recommending modification of the penalty for failure to complete BPS transactions to a sliding scale of restitution rather than full repayment.

Response: The ACEP statute requires that the “Secretary shall be reimbursed for the entirety of the Federal share of the cost of the agricultural land easement by the eligible entity if the eligible entity fails to transfer ownership.” NRCS does not have any flexibility with respect to the level of restitution and therefore no change is made to the regulation in response to this issue.

Comment: NRCS received comment requesting that eligibility for BPS transactions be expanded to include land owned by State and local governments.

Response: The statute identifies “eligible land” as “private or tribal land,” which land owned by a State or local government is not. However, this limitation does not preclude the involvement of a State or local government in a BPS transaction. A state or local government can serve as the interim easement holder while a non-governmental-eligible entity serves as the landowner until the land can be transferred to a qualified farmer or rancher. No change is made to the regulation in response to this issue.

Comment: NRCS received comment requesting that, in the development of its policy for BPS transactions, the entity not be required to identify the landowner or sale price during the application and agreement phase.

Response: NRCS does not require the identification of the landowner or sale price during the application phase. The timing of the identification of the landowner and the sale price is specified in the ALE-agreement terms and based on the specific BPS transaction type as either a pre-closing or post-closing transfer. No change is made to the regulation in response to this issue.

Comment: NRCS received comment requesting that land eligibility provisions be changed for BPS transactions, including removal of the "imminent threat" test example or addition of “advancing program goals” as a basis for eligibility.

Response: To align with the “Conference Report to Accompany H.R. 2 – Agriculture Improvement Act of 2018” (Managers’ Report), the ACEP-ALE “eligible land” definition for BPS transactions was modified to “allow for agricultural land to be owned by an eligible entity on a transitional basis to qualify for program participation, provided that the land subject to the agricultural land easement be transitioned to farmer or rancher ownership within 3 years.” Due to the transitional nature of this ownership, there are risks that the Federal investment in ACEP-ALE benefits will not be fully realized, risks that do not exist with standard ALE transactions. However, in some circumstances, such as an imminent threat of development, this risk is outweighed by the

benefit of placing an easement on land not owned by an otherwise eligible private or Tribal landowner at the time the Federal funds are invested in the easement.

NRCS therefore states in the ACEP regulation that, to be eligible for a BPS transaction, the land must be subject to conditions that necessitate the ownership of the parcel by the eligible entity on a transitional basis prior to the creation of an agricultural land easement, and that these conditions may include land subject to an “imminent threat of development, including, but not limited to, planned or approved conversion of grasslands to more intensive agricultural uses.” Other conditions may also satisfy that requirement. NRCS made a slight editorial clarification in the regulation with respect to the requirement that the eligible entity must, within 12-months of the BPS agreement, have completed the initial purchase of the land or have demonstrated that completion of the purchase of the land is imminent.

No other change is made to the regulation in response to this issue.

Comment: NRCS received comment on the issue of merger of title in BPS transactions, including comment recommending deed term stating merger does not apply. Another comment encouraged NRCS and Office of the General Counsel to rely on an opinion of counsel eligible to practice in the State in which the ALE project is located to the effect that no merger would result through the transaction if the eligible entity: 1) developed strong anti-merger language to allow it to grant an agricultural land easement to itself while still holding the fee title to the property, and then 2) reaffirmed the agricultural land easement at the time the eased parcel is sold to a farmer or rancher.

Response: ACEP-ALE is a nationwide program and State law varies on the effectiveness of an anti-merger clause; however, in general, entities may include a no merger clause in ALE deeds. However, NRCS does not believe that the combination of an anti-merger clause with the suggested attorney’s opinion sufficiently allows an eligible entity to temporarily hold the easement and the underlying fee at the same time. NRCS

contemplated this proposed BPS transaction structure in response to previous public comments. The comment received does not introduce new information resulting in a different determination with respect to the legal issues of easement creation, as an easement, by definition, are the rights held by someone in the land owned by another and is created at the time of the transfer to the other person.

The article supplied by the respondent reaffirmed this concept by identifying cases where courts determined that the doctrine of merger was not applicable due to the transfer of an easement to a third party. Merger of title addresses the extinguishment of an easement right due to a subsequent acquisition of fee title, while the BPS transactions present issues of easement creation. In addition to these issues, the conflict of interest inherent in this type of ownership scenario, which would impact enforcement, monitoring, and management of the easement and property, would not be mitigated by including an anti-merger provision. No change is made to the regulation in response to this issue.

Comment: NRCS received comment that parcel substitutions for BPS transactions should be allowed.

Response: Due to the unique and complex nature of BPS transactions, the ALE agreement includes terms that are specific to the individual transaction and ultimately constitute the ‘legal arrangement’ being entered into ‘relating to land owned...by an eligible entity’ for the purchase of an agricultural land easement on that particular piece of land. In contrast, the terms of the standard ALE agreement and contract appendix are applied universally to every parcel funded. No change is made to the regulation in response to this issue.

Comment: NRCS received comment recommending that changes to transaction type (pre-closing versus post-closing transfer) be allowed after entering into agreement.

Response: NRCS identified two types of BPS transactions in the interim rule: pre-closing and post-closing transfers, which are differentiated based on the timing of the sale of the fee title interest in the land to a qualified farmer or rancher relative to the timing of securing the agricultural land easement. The regulation specifies the requirements and ALE-agreement terms that apply to both types. NRCS will address in the terms of the ALE agreement how an eligible entity may request a modification to an ALE-agreement to change between these two types of BPS transactions. No change is made to the regulation in response to this issue.

Comment: NRCS received comment requesting clarification in the preamble as to whether a qualified farmer or rancher includes those who do not file a Schedule F, such as a farmer in an S corporation.

Response: IRS Form 1040 or 1040-SR, Schedule F, “Profit or Loss from Farming,” is the preferred documentation and is consistent with other NRCS and USDA programs. However, NRCS will also consider circumstances in which other forms of IRS documentation identifying the landowners’ engagement in an agricultural operation may be appropriate.

ALE Contribution Requirements

Under both the 2014 and 2018 Farm Bills, NRCS may provide a Federal share that does not exceed 50 percent of the FMV of the agricultural land easement and requires the eligible entity to provide a share at least equivalent to that provided by NRCS, except in the case of grasslands of special environmental significance. For grasslands of special environmental significance, NRCS may provide a Federal share that does not exceed 75 percent of the easement FMV and the non-Federal share requirement is adjusted accordingly. The 2018 Farm Bill removed the 50-percent cash contribution requirement on the part of the eligible entity and identified permissible sources of the non-Federal share. NRCS received the following comments.

Comment: NRCS received comment in support of removing the requirement for the eligible entity to provide a minimum cash contribution toward the purchase of the agricultural land easement and allowing donations of land by the landowner and eligible entity expenses for procured items to satisfy the non-Federal share requirements. Other comments did not support eligible entities no longer being required to provide a minimum cash contribution.

Response: The regulatory changes follow requirements of the 2018 Farm Bill. No change is made to the regulation in response to this issue.

Comment: NRCS received comment suggesting changes to how NRCS structured the non-Federal share in the regulation. They asked that the “and” at the end of the list be replaced with an “or.”

Response: NRCS is clarifying that the sources comprising the non-Federal share are listed in order, and proceeding through the list, once the minimum non-Federal share amount is met, additional sources and amounts do not need to be identified.

Additionally, given that an eligible entity’s contribution may be related to cash resources expended for the purchase of the land prior to the easement transaction, NRCS has clarified in the regulation that for BPS transactions, part of the non-Federal share provided by an eligible entity may include that portion of the fair market value of the agricultural land easement that is not provided as the Federal share.

Comment: NRCS received comment requesting clarification about the timing and the type of documentation that would be required for procured costs incurred by the eligible entity if relied upon to meet the non-Federal share requirement.

Response: The regulation states that documentation requirements for procured costs are included in the ALE agreement. NRCS recognizes that, at the time of agreement, costs for procured items are estimated amounts and have not yet been

incurred. Such estimates are needed in order to calculate the amount of the Federal share that may be obligated. No change is made to the regulation in response to this issue.

Comment: NRCS received comment requesting that baseline reports and mineral assessments be added to the list of procured costs that may be included in the non-Federal share.

Response: NRCS added baseline reports and mineral assessments to the list of items that may be included in the non-Federal share if these items are procured by the eligible entity from third parties.

Comment: NRCS received comment asking that a Federal share of up to 75 percent of easement costs be provided in communities that do not have eligible entities present.

Response: The statute limits NRCS's authority to provide a Federal share of up to 75 percent of the easement value to grasslands of special environmental significance only. No other types of transactions are authorized to receive up to 75 percent of the easement value, including transactions that occur in communities that do not have an eligible entity present. No change is made to the regulation in response to this issue.

Comment: NRCS received comment requesting a change to clarify that the non-Federal share provided by the eligible entity for ACEP-ALE grasslands of special environmental significance must comprise the difference between the Federal share and the remainder of the FMV. The comment requested removal of the provision that, in the event the non-Federal share provided by the eligible entity is less than such amount, NRCS will provide a Federal share equivalent to the non-Federal share being provided.

Response: The interim rule mirrors the statute. Additionally, the language allows for the possibility that, in the event that the non-Federal share provided by the eligible entity does not comprise the difference between the Federal share and the remainder of the FMV of the easement, NRCS could still provide a lesser amount that is equivalent to

the non-Federal share. Although this is unlikely, removing the language from the regulation would eliminate this possibility. No change is made to the regulation in response to this issue.

ALE Deed Requirements and Terms

NRCS received comment related to the topic of ALE deed requirements and deed terms as follows:

Comment: NRCS received comment related to the ALE deed template review, recommending that the deed template review be limited to ensuring that the minimum deed terms are incorporated and that other terms are not contrary to the purpose of ACEP.

Response: The NRCS review of ALE deed templates focuses on ensuring that minimum deed terms (MDT) are incorporated and ensuring other terms are not contrary to the purpose of the program. Review of other items may be necessary to ensure that the document will work effectively as a template for the acquisition of agricultural land easements on multiple parcels. No change is made to the regulation in response to this issue.

Comment: NRCS received comment about deed provisions related to agricultural use, including a request to strike the phrase "consistent with agricultural use" and replace it with the phrase "does not negatively affect agricultural use" as to commercial uses. Another comment recommended that NRCS limit its ability to impose greater deed restrictions in instances where the State definition of agricultural uses may result in the degradation of the soils, agricultural nature of the land, or related natural resources.

Response: This phrase 'consistent with agricultural use' is unchanged from the previous ACEP regulation and is expansive enough to apply to farmland and grassland enrollments and is sufficient to prevent commercial uses that may negatively affect agricultural uses. NRCS may impose deed restrictions needed to ensure ACEP-ALE

purposes will be met in exchange for the Federal investment. No change is made to the regulation in response to this issue.

Comment: NRCS received comment expressing general support for various elements of the deed requirements set forth in the interim rule, including commending NRCS for the revised mineral development language; language regarding an entity's use of their own deed terms and conditions; and supporting the U.S. right of enforcement and right of inspection language in the interim rule.

Response: NRCS thanks respondents for their input. No change is made to the regulation in response to these issues.

Comment: NRCS received comment related to amendment clauses that must be included in each agricultural land easement deed, recommending splitting the amendment provision in the regulation to avoid confusion between "amendments" and the various types of easement administration actions (subordination, modification, exchange, and termination actions).

Response: NRCS appreciates the request for clarification regarding the requirement that each agriculture land easement deed include clauses that address amendments or changes that may occur after recordation of the easement. To clarify, NRCS uses the term "amendment" in the regulatory deed requirement in § 1468.25(d)(4) broadly to include each type of easement administration action: subordination, modification, exchange, and termination. In practice, NRCS provides two separate clauses in the minimum deed terms to address this regulatory deed requirement and fully encompass the various types of easement administration actions. NRCS revised the text in the final rule to clarify and remove ambiguity regarding the various types of changes to the easement deed or easement area that must be approved in advance by NRCS.

Comment: NRCS received comment regarding the interim rule's impervious surface limitations that must be specified in ACEP-ALE easement deeds, including

comments recommending that NRCS authorize a blanket impervious surface waiver to ACEP-ALE easement deed language and cap the waiver authority at 5 percent of the easement area.

Response: The impervious surface limitation and the current cap are well-established. NRCS explained in prior rulemakings the basis for its use of a 2-percent limitation and the flexibility of having a waiver that allows up to 10 percent based upon site-specific factors. In particular, this limitation provides a reasoned balance between ensuring the future capacity of agricultural land use with flexibility to allow for changes to the agricultural operation.

NRCS requires a parcel-by-parcel determination because impervious surface limitations are site-specific. NRCS will not approve a blanket waiver or grant eligible entities a right to create blanket waivers for a greater impervious surface limit.

However, there is an existing waiver option available that may have been underutilized. Specifically, when an eligible entity has a waiver process consistent with NRCS limitations and it is based on parcel-by-parcel determinations made by the entity, the entity may request authority from NRCS to use its own process. In this case, separate individual parcel waivers from NRCS would not be necessary.

No change is made to the regulation in response to this issue.

Comment: NRCS received comment regarding the subsurface mineral deed provisions. The comments requested:

- A requirement that native plants be used to remediate subsurface mining impacts;
- A requirement that involves State technical committees when determining impact of mineral development;
- That NRCS seek guidance on timing and responsibility for the development of the subsurface development plan; and

- That NRCS provide flexibility in the identification of de minimis gravel extraction sites.

Response: NRCS recognizes the preference for the use of native plants for remediating sites in general, but the determination of the appropriate vegetation for any particular easement must be based upon site-specific factors.

While the State technical committee can provide input on the impact of mineral development to particular land uses or locations in the State, such input would be inappropriate on an individual easement basis.

The eligible entity is responsible for providing the subsurface mineral development plan to NRCS, which must be approved by NRCS prior to initiation of the mineral development activity, as set forth in § 1468.25(d)(7)(v).

The de minimis gravel extraction matter is not a regulatory issue but the comment responds to text that exists in the current minimum deed terms.

NRCS would like to clarify that de minimis gravel extraction is through surface methods and therefore not encompassed by the subsurface mineral deed. Additionally, the current minimum deed terms authorize such de minimis gravel extraction for on-farm purposes. No change is made to the regulation in response to these issues.

Comment: NRCS received comment recommending that certified entities need not be required to seek NRCS approval for subdivision and other activities that currently require NRCS approval under regulatory deed requirements and allow only notice to NRCS of these actions as sufficient.

Response: The interim rule language did not change from prior rules. Certified entities have broad discretion already but still must meet regulatory deed requirements. NRCS, as a fiduciary, must approve those actions that can so fundamentally affect program purposes.

Comment: NRCS received comment with respect to the requirement of the United States right of enforcement in the agricultural land easement deed, including request that a reference to § 1468.28 be added to the right of enforcement definition, recommendation that the word "contingent" should be inserted before the term "United States right of enforcement", and a statement that the right of enforcement does not include the ability of the NRCS enforce the terms of an ALE plan if such a plan exists.

Response: NRCS removed the term "contingent" many years ago to remove confusion that such right is a currently vested right. The term "contingent" indicates that NRCS's exercise of its right of enforcement is conditioned on particular events. It does not mean that the right itself is contingent, such that it would only be vested upon some future event.

NRCS has not included any cross references to the various sections which relate to the United States right of enforcement in the definition itself since such cross-referencing is unnecessary.

Agricultural land easements acquired under the 2018 Farm Bill are not required to have or be subject to an ALE plan. NRCS enforces highly erodible land conservation plans on highly erodible cropland as required by the ACEP-ALE statute; however, NRCS does not otherwise identify in the regulation the enforcement of an ALE plan.

No change is made to the regulation in response to this issue.

Comment: NRCS received comment stating that the statutory requirement of providing notice and right to participate when exercising the right of inspection should be added to the rule and deed terms.

Response: The circumstances under which NRCS may enter upon and inspect an easement pursuant to the United States right of enforcement is included in the full right of enforcement clause provided to all eligible entities and must be used in all ACEP-funded agricultural land easement deeds. The ACEP regulation clarifies that NRCS will provide

the agricultural land easement holder and the landowner a reasonable opportunity to participate if NRCS exercises its right of inspection.

Comment: NRCS received comment recommending that deed terms should allow site potential tree height (SPTH) forested riparian buffers as a permissible provision in western Washington.

Response: The ACEP regulation includes a “catch-all” provision that allows States to have additional minimum deed terms. NRCS recommends that the commenters and any stakeholders with similar concerns should work with their applicable State Conservationist. No change is made to the regulation in response to this issue.

Comment: NRCS received comment related to how the ALE-agreement references the deed requirements.

Response: The ALE agreement must specify the deed requirements as set forth in the regulation so that they are enforceable.

ALE Entity Certification

NRCS received comment related to ALE entity certification as follows:

Comment: NRCS received comment on the term of agreements with certified eligible entities recommending that NRCS allow for a minimum 5-year term.

Response: NRCS is changing the regulatory language in response to this comment to specify that agreements with certified entities will be for a minimum of 5 fiscal years following the fiscal year the agreement is originally executed, but may not exceed 7 fiscal years following the fiscal year the agreement is originally executed. NRCS has found that an upper limit is necessary to limit the administrative burden associated with implementing agreements that cross different farm bills.

Comment: NRCS received comment urging NRCS to expand eligibility for certification for State agencies, recommending a broadening of language for which types

of prior conservation easements would be counted, and requesting that NRCS drop the number of required prior conservation easement transactions from 10 to 5.

Response: The terms for certification of State agencies are set forth in statute, including the type of easements that can be counted and the number of prior transactions required, and NRCS does not have discretion to waive or amend those provisions. No change is made to the regulation in response to this issue.

Comment: NRCS received comment requesting additional guidance on the entity certification process, including evaluation criteria, how NRCS will address partnerships between certified and non-certified eligible entities, what technical assistance NRCS may provide to certified entities (with regards to things like title review and appraisal), the benefits of certification, and the definition of a plan for administering easements. The comment detailed recommendations about the kind of transparency NRCS should have for its process and the timeline. Another comment requested a streamlined process for certifying eligible entities, including State agencies and land trusts.

Response: The internal certification review process is found at 440 Conservation Programs Manual (CPM) Part 528 and may be accessed at <https://directives.sc.egov.usda.gov/>. NRCS will continue its ongoing efforts to streamline processes through new business tools to be as efficient and effective in program delivery as possible while operating within legal authorities. NRCS will continue to make publicly available any new policy or guidance. No change is made to the regulation in response to this issue.

Comment: NRCS received comment expressing support for changes made in the interim rule to the entity certification process.

Response: NRCS appreciates this support.

ALE Land Eligibility Issues

NRCS received comment related to ALE land eligibility as follows:

Comment: NRCS received comment about forest land eligibility issues. Many supported maintaining the two-thirds limitation on non-industrial private forest land (NIPF) eligibility under ACEP-ALE and offered that programs like the Regional Conservation Partnership Program (RCPP), Healthy Forests Reserve Program (HFRP), and Forest Legacy Program can all be used currently to protect forest lands. Another comment requested the two-third limitation on NIPF in ACEP-ALE be struck.

Response: To minimize duplication, overlap, and conflict with other USDA forest easement programs, the interim rule and this regulation maintain the existing eligibility provision that land enrolled in ACEP-ALE cannot include NIPF greater than two-thirds of the ACEP-ALE easement area unless waived by NRCS with respect to forest lands dedicated to sugar bush that contribute to the economic viability of the parcel.

NRCS specifically requested public comment in the interim rule on whether RCPP or HFRP could protect lands on which NIPF is the predominant use at levels beyond the scope of ACEP-ALE. Regarding the two-third limitation, NRCS cannot authorize parcels that are 100 percent NIPF because statutory eligibility criteria is phrased as NIPF contributing to the economic viability of an offered parcel or serving as a buffer to protect land from development. Thus, the eligibility of NIPF is in relationship to other eligible land. This has long been NRCS's interpretation of this eligibility criterion under ACEP-ALE and its predecessor Farm and Ranch Lands Protection Program. Congress specifically rejected language that would have expanded eligibility in the 2018 Farm Bill. NRCS concurs that the availability of other USDA easement programs that specifically protect forested lands warrants the continued focus of ACEP-

ALE more broadly on other agricultural lands. No change is made to the regulation in response to this issue.

Comment: NRCS received comment about the definition of grasslands of special environmental significance (GSES) under ACEP-ALE, including support for the definition of GSES and the prioritization and management of native vegetation and habitats in relationship to GSES. A comment also encouraged the return of land to heritage marshes and vernal pools wherever possible on GSES enrollments. Another comment supported allowing only native vegetation to be categorized as GSES.

Response: NRCS believes that the current GSES definition supports the recommendation about prioritization of native vegetation and habitat. In particular, the GSES definition identifies sensitive or declining native prairie or grassland types or grasslands buffering wetlands. However, there are grasslands that, while not native vegetation, provide critical habitat for at-risk species that warrant the increased Federal investment to protect. Thus, NRCS will not limit GSES to native vegetation only. No change is made to the regulation in response to this issue.

Comment: NRCS received comment related to ALE land eligibility, including:

- A request that confined animal feeding operations (CAFOs) not be eligible for an ALE-funded easement;
- A comment addressing the ineligibility criteria related to on-site and off-site conditions;
- A comment commending NRCS for including criteria related to permitted rights-of-way and requesting that NRCS clarify how off-site conditions are deemed suitable for the purpose of making ALE land eligibility determinations;
- A comment requesting that NRCS broaden the definition of access and the eligibility requirements so that air access can qualify; and

- A comment requesting additional clarification as to whether a farmer or rancher can participate in both ALE and Conservation Reserve Program (CRP).

Response: For any proposed easement containing a CAFO, the confined area is a heavy use area that must be evaluated by NRCS to determine if the on-site or off-site conditions render the site ineligible and make a determination as to whether the land meets the required land eligibility criteria. This is a case-specific determination and broad categorization of land eligibility simply based on type of operation is not appropriate. NRCS has set forth in national policy, which is publicly available, the procedures and forms NRCS uses to make land eligibility determinations for ACEP-ALE, including assessing the potential of onsite and offsite conditions to undermine the purposes of ACEP. Ultimately, land eligibility determinations are site-specific and rely upon programmatic and technical assessments based on criteria set forth broadly in national policy and more specifically at the State level. For more information, see: 440 CPM part 528 at <https://directives.sc.egov.usda.gov/>.

Legal access to agricultural land easements is critical to the ability of the eligible entity, and NRCS, under its right of enforcement, to monitor and enforce the terms of the easement and ensure that program purposes are achieved. Effective monitoring and enforcement ultimately require ground inspection and verification. Access to an easement that can only be achieved by aircraft would require both the eligible entity and NRCS to maintain, in perpetuity, aircraft that can provide personnel access to monitor and land on the easement property and would require the landowner to maintain, in perpetuity, a landing strip or helipad on the property. NRCS does not maintain its own aircraft for easement monitoring purposes and cannot evaluate the safety and suitability of aircraft owned by the eligible entity or the landowner's landing strip or helipad. All

lands that do not have sufficient legal, physical access are ineligible to receive Federal funds under ACEP, including those that are only accessible by air.

The 2018 Farm Bill specifies that a farmer or rancher who owns eligible land subject to an agricultural land easement may enter into a CRP contract. Determinations of land eligibility for enrollment in CRP are under the purview of FSA and we have therefore shared the comment with FSA. No change is made to the regulation in response to these issues.

ALE Planning

NRCS received comment related to ALE planning and ALE plans as follows:

Comment: NRCS received comment related to ALE planning generally and some of them urging NRCS to require a grassland management plan for grasslands of special environmental significance given the higher environmental value of these easements. Another comment recommended that NRCS continue to encourage planning on ALE easements, while a comment did not support how NRCS encouraged planning.

Response: The 2018 Farm Bill removed language requiring that ACEP-ALE easements enrolled under the 2018 Farm Bill be subject to an ALE plan, including grasslands of special environmental significance. However, in the Managers' Report, the Managers "encourage USDA and eligible entities to work with landowners entering into an ALE easement to undertake conservation planning activities on their land in order to maximize the environmental value of the protected land." Therefore, NRCS will continue to encourage planning on ACEP-ALE enrollment, including grasslands of special environmental significance. No change is made to the regulation in response to this issue.

Comment: NRCS received comment strongly supporting the recognition ALE plan as a measure that maintains or increases the agricultural viability of the land in the ranking criteria, and identified that the ranking criterion should strongly weight ALE

plans for grasslands of special environmental significance and that a plan should be required for any application that is prioritized based on carbon sequestration or climate change resiliency goals. Another comment expressed that an ALE plan should not be recognized in the ranking criteria because it is no longer required by statute.

Response: As described in the preamble of the interim rule, NRCS identified that the development and maintenance by the eligible entity of an ACEP-ALE plan could be a ranking consideration at the State level to prioritize applications from eligible entities. NRCS believes that conservation planning is the base upon which sound conservation stewardship originates. To eliminate support for planning would undermine the quality of stewardship that would be encouraged on lands in which the public provides a sizable financial investment. Additionally, as a ranking criterion this consideration does not prohibit eligible entities from being able to access program funding but instead acknowledges that eligible entities committed to long-term conservation planning are helping to ensure an agricultural land easement yields the greatest benefits for the landowner, conservation, and the public funds invested in that easement. No change is made to the regulation in response to this issue.

Comment: NRCS received comment related to the definition of the ALE plan, with some advocating for the removal of the ALE plan definition entirely because plans are no longer mandated by statute. Another comment supported the definition of ALE plans and commended NRCS for clearly defining that the plan is developed by the eligible entity and not as a component of the deed. Comment also expressed support for limiting conservation plans to only highly erodible croplands.

Response: NRCS supports conservation planning as the cornerstone of land stewardship efforts. NRCS retained the definition of the ALE plan in the ACEP regulation. No change is made to the regulation in response to this issue.

ALE Program Requirements

NRCS received comment related to ALE program requirements as follows:

Comment: NRCS received comment requesting clarification as to how NRCS will determine if a landowner entity is compliant with AGI.

Response: NRCS uses the AGI eligibility determinations made by the FSA. NRCS accesses such determinations through the agencies' shared database services. No change is made to the regulation in response to this issue.

Comment: NRCS received comment related to the requirement that eligible entities must provide evidence of their financial capacity for transactions in which the non-Federal share does not include at least a 10-percent cash contribution from the eligible entity for payment of easement compensation to the landowner. Other comment requested removal of the requirement that the entity provide specific evidence of funds available for stewardship of the easement and suggested that entity eligibility requirements that apply to all ACEP-ALE transactions regardless of entity cash contribution amounts are sufficient. Other comment commended NRCS on including the requirement but requested clarification as to what would constitute specific evidence of funds available for stewardship.

Response: All entities must demonstrate capability and capacity as an eligibility requirement. Under the 2014 Farm Bill, NRCS could use an entity's ability to provide at least the required cash contribution amount for all ACEP-ALE transactions as an indication that the entity is able to meet capability and capacity requirements. Where an entity is unable to provide at least a minimum cash contribution, questions arise as to the entity's financial capacity to assume responsibility for the easement acquisition. NRCS has, therefore, specified in the regulation the conditions under which additional capability and capacity evidence will always be required. However, it is always the entity's responsibility to establish that it meets basic ACEP-ALE eligibility requirements and as

identified in the rule, the entity must provide to NRCS sufficient information to establish that the applicable entity eligibility criteria have been met.

Comment: NRCS received comment recommending that the definition of a farm or ranch succession plan be expanded to include transfers of land and deeds to non-relatives and other long-term protections for agricultural productivity. Also, comment recommended specifying that successions plans may include options to purchase at agricultural value or preemptive purchase rights.

Response: The key part of a succession plan is that the landowner makes arrangements for the future management of the land as a farm or ranch once the landowner retires or dies. NRCS does not limit those types of arrangements. The definition of the succession plan in the regulation used intra-family succession agreements or business asset transfer strategies as examples. NRCS has added language to clarify that the examples included in the definition are not all-inclusive.

Comment: NRCS received comment related to the easement valuation methods available under ACEP-ALE, encouraging NRCS to provide guidance on information required for easement valuation methods used other than the Uniform Standards of Professional Appraisal Practice (USPAP) appraisals, including areawide market analysis or other industry-approved methods. Comment also expressed support for the current availability of ACEP-ALE valuation options beyond USPAP appraisals.

Response: NRCS provides guidance in policy with respect to what is required if an eligible entity elects to use an alternative easement valuation methodology, including a “Specification and Scope of Work for Areawide Market Analysis for ACEP-ALE.”

These items are published and publicly available in NRCS directive Title 440, Conservation Programs Manual (440-CPM), Part 528, Section 528.53, and in 440-CPM, Part 527, Subpart E, which can be accessed on the NRCS Electronic Directives system at

<https://directives.sc.egov.usda.gov/>. No change is made to the regulation in response to this issue.

Comment: NRCS received comment recommending that NRCS be required to consult with the State technical committee on ACEP-ALE prioritization for ranking, special eligibility, and all other State-decided criteria.

Response: Statutory authority states that State technical committees assist in implementation and technical aspects of conservation programs under Title XII of the Food Security Act, such as ACEP. Sections 1468.2 and 1468.22 of the ACEP interim rule incorporate this role, including that State technical committees provide input on the development of ranking criteria and other matters. No change is made to the regulation in response to this issue.

Comment: NRCS received comment related to the ACEP-ALE application process and the new option for ALE-program agreements, requesting that NRCS make the application form and new option for ALE-program agreements form more usable and that the process be streamlined. Other comments wished to have greater guidance about how producers could participate and supported the new ALE program agreement option and requested additional clarification regarding its availability.

Response: NRCS appreciates the complexity of easement transactions, including the extent of information that must be collected from applicants and participants on various program forms. NRCS has made several efforts to streamline the ACEP-ALE enrollment process. In FY 2020, NRCS released various new or updated forms used to administer ACEP-ALE. Additionally, NRCS piloted in fiscal year 2019 and is implementing more widely in fiscal year 2020 the use of ALE program agreements, making available several automated eligibility and payment processes previously only available to NRCS financial assistance programs. Also, the use of a program agreement framework under ACEP-ALE allows NRCS and eligible entities to more easily address

enrollment changes, such as parcel substitution or acreage modifications. Since NRCS does not receive landowner applications directly for ACEP-ALE enrollment, NRCS will provide outreach to States to help landowners interested in ACEP-ALE identify eligible entities in their geographic area. No change is made to the regulation in response to this issue.

Comment: NRCS received comment recommending that NRCS allow water supply entities to participate in ACEP-ALE as eligible entities.

Response: An eligible entity must meet the definition of an eligible entity established by statute and incorporated into the ACEP regulation. NRCS does not have authority to expand the basic eligible entity definition. No change is made to the regulation in response to this issue.

ALE Ranking

NRCS received comment related to ALE ranking as follows:

Comment: NRCS received comment related to removing the factor associated with national ranking criterion that takes into consideration whether the cash contribution is being provided by the eligible entity toward the payment of easement compensation to the landowner. Other comments:

- Recommended consideration of State and local tax incentives be added to this factor;
- Recommended NRCS prioritization of landowner donation in the ranking; and
- Agreed with including the eligible entity's cash contribution in the ranking.

Response: The Managers report introduced flexibilities to provide better access to ACEP in States where conservation easement funding is limited. The Managers stated

that they did not intend for NRCS to reject cash matches entirely but broadened the options available to eligible entities. NRCS recognizes that any time the eligible entity's cash contribution is reduced, the landowner receives less compensation for the sale of an easement on their land, which may result in ACEP funds being the only funds paid to the landowner for the easement. Additionally, the increased donation by the landowner will frequently satisfy the minimum non-Federal share requirement under ACEP-ALE. By considering the cash contribution as a positive attribute in ranking, NRCS is encouraging enrollment while ensuring that ACEP is implemented equitably. Each State has the ability to calibrate the relative importance of cash contributions in the prioritization of applications for enrollment in that State. No change is made to the regulation in response to these issues.

Comment: NRCS received comment related to ranking priority for actions related to the future, agricultural, and long-term viability of enrolled land. Comment supported adding information to the succession plan portion of the ranking, such as specifically identifying OPAV, Purchase of Development Rights (PDR), and other succession planning options that maintain agricultural viability or awarding points for innovative succession requirements. Comment also:

- Recommended expanding the ranking criteria to prioritize applications that increase opportunities for historically underserved farmers;
- Supported the maintenance of agricultural viability as a ranking criterion; including supporting its inclusion as both a national and State ranking factor;
- Suggested that such inclusion is duplicative;
- Recommended that agricultural viability be included in the national ranking criteria; and

- Recommended that succession planning be removed from the ranking criteria.

Response: Based on national and State ranking criteria in the ACEP regulation, NRCS at the State level develops ranking factors and associated weights. Broadly identifying State ranking criteria in the regulation provides the needed flexibility for States to develop the specific ranking criteria that best address State and local priorities. Regarding long-term maintenance of agricultural viability, the national ranking criteria ensures, consistent with the statute, that this criterion is considered in every ACEP-ALE application by assessing whether a succession plan exists.

The existence of State ranking criteria enables States to develop nuanced approaches to address long-term agricultural viability, which may include more specific identification or prioritization of certain types of succession plans or succession planning strategies. NRCS does not wish to limit agricultural landowners' choices or restrict who could be involved in succession planning. Such specificity is not necessary in the regulation itself.

NRCS includes in the regulatory definition of a farm or ranch succession plan strategies that create opportunities for historically underserved landowners. NRCS also includes a State ranking criterion related to the multifunctional benefits of farm and ranch land protection, of which social and economic considerations may be included.

No change is made to the regulation in response to these issues.

Comment: NRCS received comment about eliminating the potential for prioritization of applications for which eligible entities agree to use the ACEP-ALE minimum deed terms.

Response: In the interim rule, NRCS indicated that it may prioritize transactions where an eligible entity uses NRCS's standard set of minimum deed terms. This potential prioritization also existed for enrollment during the 2014 Farm Bill and its

inclusion as a factor in the State's ranking criteria is at the State's discretion. An eligible entity's use of the standard set of minimum deed terms streamlines the easement approval process and eliminates the need for NRCS review of the conservation easement deed for individual transactions. The efficiency by which easement transactions are completed, including the use of available administrative streamlining options, is an appropriate consideration in ranking, and no change was made in this final rule. No change is made to the regulation in response to this issue.

Comment: NRCS received comment related to the State ranking criteria for multifunctional benefits for the protection of a particular farm or ranch, recommending that NRCS at the State level have the option to specify 'other related conservation benefits' under this multifunctional benefits criterion. Comment also recommended adding 'species of economic significance' to the consideration for at-risk species protection under this ranking criterion. Another comment recommended the criteria be 'other related benefits,' striking 'conservation' from the consideration, and other comments recommended that NRCS add ranking criteria about related conservation values.

Response: NRCS agrees that evaluating the multifunctional benefits that may result from parcel protection is an important prioritization criterion. NRCS has enumerated in the regulation some potential benefits that may be considered and has included 'other related conservation benefits' to provide States with the flexibility to identify such conservation benefits and establish the associated ranking factors and priorities. NRCS believes the State ranking criterion is sufficiently expansive for NRCS to tailor ranking factors at the State and local level. No change is made to the regulation in response to this issue.

Comment: NRCS received comment and appreciation related to various State ranking criteria, including requesting that NRCS provide specific references to

geographic differences for States to use in ranking. Other comment stated that prioritizing land in areas zoned for agricultural use may inadvertently exclude agricultural lands. Comment also recommended that protection of native prairie and other native habitats, including protection or improvement of habitat for pollinators, be added to the State ranking criteria related to the diversity of natural resources to be protected or improved, and requested that riparian buffers be ranked as the highest ACEP-ALE priority.

Response: NRCS believes that the regulation provides a sufficient framework under which the various items brought forth in these comments can all be addressed at the State level with input from the State technical committee. No change is made to the regulation in response to these issues.

Comment: NRCS received comment related to various national ranking criteria. One comment indicated that it is contradictory to limit forest land enrollment to two-thirds of an easement area while also having the extent of forestland as part of a ranking criterion. Another comment encouraged NRCS to clarify in the regulation that it will use the 'median' county average farm size and requested higher priority be given to parcels adjacent to existing easements or protected areas.

Response: Comment related to forest lands refers to the national ranking criteria for the percent of cropland, rangeland, grassland, historic grassland, pastureland, or nonindustrial private forest land permitted in a protected parcel. Each State is able to tailor the specific ranking factor to prioritize enrollment of land that contains the amounts and types of land and agricultural uses that are most at risk in their State. For example, a western State may establish the ranking factor to prioritize parcels with a larger percentage of historic grassland since those lands may be at the greatest risk of conversion. In contrast, a midwestern State may prioritize the percentage of cropland in a parcel since those lands may be at the greatest risk of conversion.

Comment regarding median county average farm size refers to the national ranking criteria that considers the ratio of the size of the parcel compared to the average farm size in the county. As identified in the regulation, the USDA Census of Agriculture is the data source for this national ranking criterion; the term ‘average size of farm’ is contained in the Census. Based on ALE application and enrollment data, use of this nationally available data item continues to be appropriate. NRCS affirms that proximity to other protected lands continues to be one of the national ranking criteria set forth in the regulation.

No change is made to the regulation in response to these issues.

Comment: NRCS received comment recommending that NRCS allow ACEP-ALE eligible entities to participate in State technical committee recommendations for ACEP-ALE ranking determinations.

Response: Eligible entities may participate in the State technical committee; however, they may not participate in developing ranking factors for programs in which they participate. If potential participants had input into ranking factors, NRCS selection decisions would be suspect. NRCS will provide training to State offices describing the roles of eligible entities. No change is made to the regulation in response to this issue.

Comment: NRCS received comment supporting various aspects of the ACEP-ALE ranking provisions, including: commending NRCS for not using cost as a ranking criterion; commending NRCS’s consideration of proximity to other protected land as a ranking criteria; and commending the straightforward implementation of ranking that allows States to prioritize parcels through ranking criteria.

Response: NRCS appreciates the comments.

Comment: NRCS received comment recommending landowners who have protected their land through ACEP-ALE receive priority for funding under NRCS’

financial assistance programs, such as the Environmental Quality Incentives Program (EQIP).

Response: NRCS receives input on program priorities, including priorities for enrollment in its financial assistance programs, from the State technical committees. There is no need to identify priorities for other programs' enrollment in the ACEP regulation. No change is made to the regulation in response to this issue.

Definitions

NRCS received comment related to the definitions in the ACEP interim rule as follows:

Comment: NRCS received comment related to the terms “future,” “agricultural,” and “long-term” with respect to the term “viability.” Comment recommended that greater consistency be applied throughout the final rule for the three terms with respect to the term “viability;” the definition of “agricultural viability,” as referenced in the Managers' Report language, be clarified; and various items be added to, or deleted from, the definition of “future viability.”

Response: Since the creation of ACEP in the 2014 Farm Bill, the statute uses the phrase “agricultural use and future viability” in the program purposes statement. In response to comments on the February 2015 ACEP interim rule, NRCS included a definition of “future viability” to identify that ACEP-ALE purposes include the legal, physical, and financial conditions under which the land itself will remain capable and available for continued sustained productive agricultural or grassland uses. The 2018 Farm Bill maintained the reference to “agricultural uses and future viability” in the context of the program purposes and introduced the term “agricultural viability” in the context of potential application prioritization. NRCS believes that the existing definition of “future viability,” which is sufficiently expansive without being overly prescriptive, includes such concepts as accessibility to beginning farmers or ranchers and continued

affordability. To address the request for clarity, NRCS has included a reference to the adoption of a farm or ranch succession plan as another example of a condition that supports the future viability of the protected land.

Comment: NRCS received comment related to the definition of historically underserved landowner, recommending that socially disadvantaged farmers be specifically identified, be included in the definition of historically underserved landowners, and be added to the definition of “socially disadvantaged farmer or rancher.” This comment refers to the provision in the interim rule associated with farm or ranch succession planning that identifies new or beginning farmers or ranchers, veteran farmers or ranchers, or “other historically underserved landowners.”

Response: The definition of historically underserved landowner includes beginning, limited resource, socially disadvantaged, and veteran farmer or ranchers. As a result, the definition of farm or ranch succession plan has been modified in this final rule to refer simply to “historically underserved landowner” since this term is all-encompassing. The definition of socially disadvantaged farmer or rancher has been in the definitions section since the ACEP regulation was first promulgated in 2015.

Comment: NRCS received comment that suggested replacing the concept of watersheds with “watershares.”

Response: NRCS has long been involved in watershed and watershed planning, and the term “watershares” is not a universal term. No change is made to the regulation in response to this issue.

Comment: NRCS received comment requesting that the definition of “riparian areas” be modified to eliminate the “movement for wildlife” as an element.

Response: The definition of riparian areas has long included reference to the movement of wildlife as it is one of the critical functions of riparian areas. No change is made to the regulation in response to this issue.

Comment: NRCS received comment requesting removal of reference to species that are “likely to undergo” population decline from the definition of “at-risk species.” The commenter objected to an unnamed agency imposing restrictions through an unknown process.

Response: The interim rule identified the determination of “likely to undergo population decline” is made by the NRCS State Conservationist, with advice from the State technical committee or Tribal Conservation Advisory Council. The definition is shared across NRCS conservation programs, all of which are voluntary. No change is made to the regulation in response to this issue.

Comment: NRCS received comment requesting a change to the definition of “agricultural commodity” so that the intent to harvest annually rather than tillage is used as the determining mechanism.

Response: The definition of agricultural commodity is contained in statute. No change is made to the regulation in response to this issue.

Easement Administration Actions

NRCS received comment related to easement administration actions as follows:

Comment: NRCS received comment related to the identification of the sequencing procedures under the National Environmental Policy Act (NEPA) with respect to easement administration actions, recommending that easement administration actions related to sequencing considerations be classified as categorical exclusions for NEPA analysis. Other comment suggested that the provision be amended to eliminate NEPA sequencing review if the easement administrative actions either enhance purposes of the ACEP-ALE program or do not materially threaten the ALE's protection of agricultural viability or other conservation values, and requested removal of reference to NEPA entirely. Comment also requested clarification about how NEPA sequencing considerations may affect NRCS approval of easement administration actions.

Response: The decision to modify or terminate a Federal interest has long been subject to NEPA review, and NRCS must comply with NEPA statutory, regulatory, and policy requirements during its review of a requested easement administration action. These requirements include reviewing whether adverse impacts associated with an easement administration action can be avoided, minimized, or mitigated. Since the impacts and outcomes of an easement administration action cannot be categorized generally, a specific review is necessary. As NRCS evaluates the NEPA analyses developed for the individual easement administrative actions, it is gathering evidence that may be used to propose categorical exclusions for certain easement administrative actions in the future. NRCS may identify new categorical exclusions, through issuing new NEPA procedures (including by amending NRC's current regulations implementing NEPA at 7 CFR part 650), consistent with the Council on Environmental Quality's regulations for implementing the procedural provisions of NEPA, published at 40 CFR parts 1500 through 1508. No change is made to the regulation in response to this issue.

Comment: NRCS received comment related to adding references or additional requirements to the easement administration action criteria, including a reference to the easement administration criteria indicating that any easement modification or termination conform to State law requirements, and including a reference that easement administration actions must conform to section 170(h) of IRC and associated U.S. Department of the Treasury (Treasury) regulations. Comment also requested that easement administration actions align more closely with Land Trust Alliance (LTA) industry standards.

Response: Easement administration actions are documented in land records in accordance with State law. NRCS's authority to approve easement administration actions is not subject to requirements in section 170(h) of the Treasury or associated regulations related to charitable donations. However, entities are not prevented from incorporating

language that addresses their own compliance with section 170(h) in their part of the conservation easement deed terms. NRCS must implement easement administration actions in accordance with Federal law and responsibilities; private land trusts are not subject to these requirements when conducting actions without Federal involvement. It would not be appropriate for NRCS to adopt “industry standards” that do not account for these Federal standards. No change is made to the regulation in response to this issue.

Comment: NRCS received comment related to the various easement administration action requirements, including:

- Recommending that NRCS remove the 10-percent limitation on easement administration actions so that an easement modification or exchange action would just need to meet one of the two thresholds: 1) the action provide equal or greater conservation functions and values and 2) equal or greater economic values;
- Recommending removal of the standard of no net loss of easement acres required for easement subordination, modification, or exchange actions; and
- Recommending a change to the definition of easement termination to acknowledge compensation that may be owed to other interest holders in a conservation easement.

Response: NRCS uses the 10-percent limitation requirement to minimize the effects of administration actions. NRCS selected the 10-percent level based upon review of the scope of prior requests for easement administration actions and for consistency with other NRCS conservation programs.

It is a statutory requirement that an easement modification or exchange action must meet both thresholds (equal or greater conservation value and equal or greater economic value).

As to the threshold for an easement subordination, modification, or exchange to result in no net loss of easement acres, NRCS believes, based on long-standing experience, that the existing standard ensures that the public investment in conservation easements endures for the life of the easement and that NRCS is able to make credible determinations of equal or greater conservation and economic value as required by statute. The definition of easement termination addresses only the United States' rights or interests in an easement, including that the United States must be fully compensated for the termination of such rights and interests that are held by the United States. The easement termination language does not address or affect compensation that may be owed to other interest holders.

No change is made to the regulation in response to these issues.

Comment: NRCS received comment that requested NRCS modify language regarding easement termination to clarify that it also applies to the partial termination of an easement.

Response: NRCS has clarified that partial termination of an easement is subject to the easement termination requirements to the same extent as the full termination of an easement. All easement termination actions are subject to review at both the NRCS State office and National Headquarters levels.

Comment: NRCS received comment that supported allowing the use of updated deed provisions when making easement amendments, cautioned that flexibility be granted to do simple amendments, and advised NRCS not to require updates to new language that may be contained in updated deed provisions if those provisions are unnecessary or unacceptable to the landowner.

Response: NRCS appreciates the support received for deed amendment process requirements. Deed amendments to ACEP-ALE easement deeds must be approved by NRCS, as discussed above. No change is made to the regulation in response to this issue.

Environmental Markets

Comment: NRCS received comment expressing support for updates to the section on environmental markets.

Response: NRCS appreciates the comments.

Fund Allocations

NRCS received comment related to ACEP fund allocations as follows:

Comment: NRCS received comment supporting the historic division of fund allocations across ACEP, that is based on demand for funding. Approximately 70 percent of ACEP funding is dedicated to wetland conservation through ACEP-WRE and 30 percent is for agricultural land preservation through ACEP-ALE. Another comment urged greater flexibility with respect to fund allocations.

Response: NRCS has not specified in the regulation an allocation of program funds between the two components of the program. NRCS maintains program flexibility year-to-year to respond to program demand. No change is made to the regulation in response to this issue.

Comment: NRCS received comment recommending continued use of ACEP-WRE authorities to enter into agreements and contracts with non-governmental organizations, State agencies, and other partners to continue to leverage resources and expertise.

Response: NRCS relies on its partners to assist NRCS in its delivery of ACEP-WRE and will continue to utilize its authorities to coordinate with these valuable partners. No change is made to the regulation in response to this issue.

Comment: NRCS received comment supporting the continued allocation of a portion of ACEP funds for monitoring and management of existing easements and recommending that State Conservationists have discretion to determine the appropriate

portion of the individual State allocation to be used for monitoring and management of existing easements.

Response: NRCS National Headquarters provides on-going coordination, guidance, and support to State Conservationists to ensure that sufficient funds are dedicated and used to appropriately monitor, manage, and enforce stewardship lands. No change is made to the regulation in response to this issue.

Landowner Eligibility – Adjusted Gross Income (AGI) Limitation Waiver

NRCS received comment related to the AGI limitation waiver as it affects landowner eligibility to enroll in ACEP as follows:

Comment: NRCS received comment related to the definition and criteria for environmentally sensitive lands of special significance, including encouraging NRCS in its AGI waiver determinations to give the most consideration to lands with the highest conservation value, particularly lands of special significance that can demonstrate significant linkages with the conservation objectives of migratory bird, wetlands conservation, and water quality programs, plans, or initiatives. Comment also requested that environmentally sensitive land of special significance be explicitly defined.

Response: NRCS will consider the factors noted in the comment in granting AGI waivers. Terms associated with the AGI waiver are set forth in the regulations governing payment limitation and payment eligibility requirements, including AGI provisions, at 7 CFR part 1400. No change is made to the regulation in response to this issue.

Comment: NRCS received comment suggesting that NRCS expand eligibility for AGI waivers, including allowing the waiver for all ACEP-ALE enrollment, automatically waiving AGI for BPS transactions, and interpreting AGI waiver factors broadly.

Response: NRCS may only grant waivers on a case-by-case basis where the waiver criteria are met. Broadening the waiver authority to eliminating AGI applicability

to all ALE enrollment types is outside statutory authority. No change is made to the regulation in response to this issue.

Comment: NRCS received comment seeking increased streamlining and guidance regarding AGI waivers.

Response: NRCS will continue its ongoing efforts to streamline processes through the use of new tools. NRCS will continue to develop and release specific guidance as needed. No change is made to the regulation in response to this issue.

Comment: NRCS received comments expressing support for the use of AGI waiver authority in ACEP.

Response: NRCS appreciates support for its AGI waiver process.

Program Administration

NRCS received comment on the topic of program administration as follows:

Comment: NRCS received one detailed comment emphasizing the importance of protecting endangered and at-risk species through ACEP. This comment specifically referred to salmonid species.

Response: NRCS appreciates the importance of protecting threatened and endangered species and its responsibility to comply with the Endangered Species Act (ESA), including ESA section 7(a)(1). As part of its conservation planning framework and site-specific NEPA process, NRCS also considers impacts to at-risk species as required by its NEPA implementing regulations (7 CFR part 650). No change is made to the regulation in response to this issue.

Comment: NRCS received comment related to outreach activities, including recommending that: NRCS retain its outreach focus on historically underserved farmers and ranchers; funds expended for historically underserved purposes be identified and made public; and NRCS ensure that the process is streamlined to ensure access to disadvantaged and underserved populations. Comment also reminded NRCS regarding

sovereign-to-sovereign consultation for Farm Bill easement programs having Tribal implications.

Response: NRCS will continue to evaluate options to enhance opportunities for historically underserved producers and focus resources on ensuring parity in program enrollment. NRCS conducted several Tribal meetings in FY 2019 and FY 2020 and State Conservationists obtained input on program implementation from the Tribal Conservation Advisory Committees. No change is made to the regulation in response to this issue.

Comment: NRCS received comment expressing specific support for various aspects of program administration, including supporting NRCS discretion to waive certain program administration provisions and commending NRCS for continuing to obtain input from State technical committees, other Federal and State agencies, conservation districts, and other organizations.

Response: NRCS appreciates the support it has received for ACEP administration.

Comment: NRCS received comment urging continued or increased consultation with partners and stakeholders, including State technical committees, non-governmental organizations, and the U.S. Fish and Wildlife Service.

Response: NRCS will continue to seek stakeholder input on how to improve program administration, especially input that NRCS receive on State and local resource issues. No change is made to the regulation in response to this issue.

Comment: NRCS received comment asking that technical assistance provided by NRCS regarding compliance with easement terms be clarified and recommending creation of ACEP-specific forms. Comment also recommended guidance on conflicts of interest and information on the implementation of Voluntary Public Access and Habitat Incentives Program (VPA-HIP).

Response: NRCS will continue its ongoing efforts to streamline processes, including modifying its required forms, through the use of new tools. Additionally, NRCS will continue to develop and release guidance on specific topics as needed. NRCS regulation and policy regarding VPA-HIP is provided separately and can be found in 7 CFR part 1455, and associated agency policy is available on the NRCS website. No change is made to the regulation in response to this issue.

Comment: NRCS received comment recommending that NRCS include text regarding ACEP ranking that prioritizes lands enrolled in the Transition Incentives Program under the Conservation Reserve Program (CRP-TIP). Section 1235(f)(1)(E) of the CRP statute requires that priority enrollment be given to land subject to a CRP-TIP contract into EQIP, Conservation Stewardship Program (CSP), and ACEP.

Response: Section 1468.22(b)(11) of the ACEP interim rule identifies as a national priority for ALE enrollment grasslands currently enrolled in CRP in a contract that is set to expire within 1 year. Section 1468.32(c) of the ACEP interim rule identifies as a potential State priority for WRE enrollment whether land is farmed wetland and adjacent land that is currently enrolled in CRP in a contract that is set to expire within 1 year. However, neither ALE nor WRE identify a specific priority ranking for CRP-TIP land. Therefore, NRCS is adding a specific priority in the ACEP regulation for CRP-TIP.

Comment: NRCS received comment related to the practices and activities administered through ACEP, including:

- Encouraging NRCS to adopt the "Active River Area Concept" to its management scheme;
- Proposing that all easements go through a plant and plant community survey by a botanist prior to enrollment;
- Seeking confirmation that NRCS would not enter into agreements with entities who would preclude forested riparian buffers;

- Recommending that NRCS recognize specifically intensive rotational grazing as one of the best management tools; and
- Recommending that diverse native plant mixes be prioritized in ACEP wetland and grassland restoration and management plans.

Response: NRCS addresses how best to administer its practices and activities through technical and program policy implemented at the State level through the discretion given NRCS State Conservationists. In general, NRCS supports the development and implementation of plans and restoration activities that consider the value of management and restoration activities that provide for a diverse assemblage of native plants, including pollinator-friendly species. However, NRCS believes that specific resource management issues are best addressed at the State level. No change is made to the regulation in response to this issue.

Comment: NRCS received comment related to program administration that did not fit neatly into any single subtopic:

- Require landowners to assume responsibility for operation and maintenance of easements;
- Provide sufficient staffing to meet customer service needs;
- Concern over the authorization of permanent easements;
- Make publicly available information related to easement enrollments such as acres enrolled, soil classification of land, and before and after land use;
- Condition ACEP so that all funded efforts achieve consistency with State water quality standards and salmon recovery plan habitat objectives; and
- Review easement deed terms at least every 100 years to ensure consistency with existing conditions.

Response: The operation and maintenance that may occur on ACEP easements and who may perform such activities is addressed in the terms of the easement deeds.

NRCS staffing is not a part of this rulemaking, but the agency will continue providing the highest quality customer service and program implementation with its resources.

Permanent easements are authorized and prioritized by statute.

As NRCS collects data, the agency generates multiple reports on a variety of impacts, which are typically made available to the public upon request.

NRCS will consider the recommendation regarding consistency with water quality standards and recovery plan habitat objectives as it continues to evaluate and refine ranking and eligibility criteria.

Review of easement deed terms at least every 100 years is beyond the scope of current regulation and policy.

No change is made to the regulation in response to these issues.

Comment: NRCS received comment related to source water protection issues including:

- Recommending that NRCS acknowledge source water protection as a goal of ACEP;
- Adding discussion about how source water protection priorities will be included in the implementation of ACEP and other NRCS conservation programs;
- Addressing how ACEP will be included in accounting for overall source water expenditures by publishing a plan for comment;
- Adding source water protection in the ACEP ranking criteria;
- Ensuring adequate attention given to source water protection at State technical committees; and
- Recommending that NRCS address how spatial data related to source water areas will intersect with ACEP.

Response: Source water protection is a statutory priority and NRCS Headquarters provides guidance to ensure that all its programs are contributing to the protection of source water protection areas. The ACEP regulation includes water quality as a consideration in the list of ranking criteria for both ALE and WRE and the State Conservationist, in consultation with the State technical committee, may develop and include specific considerations for source water protection as part of their State's ranking factors. NRCS uses geographic information system tools to help identify source water protection areas and easement enrollment. No change is made to the regulation in response to this issue.

WRE Issues

NRCS received comment related to ACEP-WRE topics as follows:

Comment: NRCS received comment supporting revisions to the definition of wetland restoration in the interim rule regarding ACEP-WRE. Comment highlighted that the expanded flexibility would benefit wetland functions and habitat values. Comment also encouraged NRCS to engage robustly with State technical committees when devising the State-specific NRCS criteria and guidelines for wetland restoration.

Response: NRCS appreciates support for the revised definition of wetland restoration.

Comment: NRCS received comment related to compatible use authorizations under ACEP-WRE, expressing support for the inclusion of water management and supporting the use of such management activities to maintain, enhance, and diversify wetland habitats on ACEP-WRE easements. Comment also recommended removing "hunting and fishing" from the list of activities that can be authorized as a compatible use in § 1468.37(a)(2)(ii) because undeveloped recreational uses, including hunting and fishing, are listed as one of the five rights reserved by the landowner in the ACEP-WRE warranty easement deed. Comment also identified that NRCS should seek input from the

State technical committee on technical matters related to compatible use designations and guidelines.

Response: NRCS appreciates support for the inclusion of water management and recognizes the potential utility of this activity to wetland functions and values when properly prescribed and implemented on ACEP-WRE easements through the compatible use authorization process. Hunting and fishing are specifically identified in the ACEP statute as a 'compatible use' that is subject to NRCS determination of compatibility. NRCS has implemented this provision by identifying in all ACEP-WRE easement deeds that undeveloped hunting and fishing, subject to the terms of the easements, is a reserved right. However, any hunting and fishing activities that extend beyond that reserved right are prohibited unless determined compatible by NRCS through the compatible use authorization process. In the ACEP interim rule, NRCS included compatible use criteria and related matters in the expanded list of examples provided in § 1468.2(b) regarding subjects on which the State technical committee may provide advice to the State Conservationist.

Comment: NRCS received comment regarding wetland restoration and management activities, encouraging that the technical requirements for grazing management plans and exhibits for ACEP-WRE grazing reserved rights enrollments be developed in consultation with State technical committees and that the individual grazing management plans be dynamic to accommodate wildlife and habitat conservation along with producer needs. Comment also recommended that NRCS prioritize activities supporting migratory waterfowl and other wetland-dependent wildlife through science-based management and recommended levee setbacks and forested riparian buffers be allowed on all easements in Washington State.

Response: NRCS appreciates comment related to grazing management plans and ACEP-WRE reservation of grazing rights enrollments. The ACEP interim rule provided

clarifying changes consistent with these recommendations, including addition of a grazing management plan definition that is specific to ACEP-WRE and provisions related to the review and modification of such plans for reserved grazing rights enrollments. NRCS conducts and supports monitoring and research on its wetland easements to obtain data and information that informs technical decisions related to prioritization and selection of new easements and restoration and management of existing easements. NRCS will continue to collaborate with partners and institutions to obtain the information needed to make science-based decisions to maximize wildlife benefits and wetland functions and values on every ACEP-WRE easement. The concern related to restoration activities in the State of Washington do not rise to a nationwide level and are not addressed in the regulation. The ACEP regulation and other NRCS planning procedures provide the States the needed flexibilities to make technical decisions related to enrollment, restoration, and management of ACEP-WRE lands. NRCS recommends that stakeholders with concerns should work with their applicable State Conservationist.

Comment: NRCS received comment related to WRE land eligibility: recommending that NRCS allow cropping on the WRE easement area; supporting the increase in the percentage of easements that can be enrolled on cropland in a county from 10 percent to 15 percent; and requesting flexibility with respect to the 2-year ownership requirement for land that the farmer has managed for numerous years prior to purchase.

Response: NRCS prohibits cropping on ACEP-WRE enrolled lands because the purpose of the program is to restore the wetland functions and values and crop production is inconsistent with such purposes. NRCS appreciates the comments related to the county cropland limitation. The 2-year ownership provision in the ACEP regulation is a specific statutory requirement, but flexibility exists through the waiver process. When deciding whether to waive the 2-year ownership requirement, NRCS considers whether the land

has been managed by the landowner as part of their operation prior to acquiring ownership of the land. No change is made to the regulation in response to these issues.

Comment: NRCS received comment relating to factors used to prioritize enrollments in ACEP-WRE, including support for prioritizing permanent easements over non-permanent easements and including water quality as a conservation benefit.

Response: NRCS appreciates support for the ACEP-WRE prioritization factors.

Comment: NRCS received comment recommending NRCS consider funds from other Federal sources as contributions for ranking purposes.

Response: Section 1265C(b)(3) of the ACEP statute authorizes as a ranking factor whether the landowner or other person offers to contribute to the cost of the easement and thereby leverage Federal funds. The statutory priority is that Federal funds, not just ACEP-WRE funds, be leveraged by other sources, and NRCS has incorporated this factor into the regulation. NRCS State Conservationists, with input from State technical committees, may consider other priorities that further program goals, including other sources of contribution. However, other Federal sources of contribution may have restrictions on the use of their funds and NRCS must ensure that there is no augmentation in contravention of appropriations law. No change is made to the regulation in response to this issue.

Comment: NRCS received comment supporting and encouraging NRCS to continue to seek advice and input on implementation of ACEP-WRE from the U.S. Fish and Wildlife Service, State fish and wildlife agencies, and State technical committees.

Response: Both ACEP regulation and policy require the NRCS to seek continued engagement from these partners. No change is made to the regulation in response to this issue.

Comment: NRCS received comment related to the Wetland Restoration Enhancement Partnership (WREP), recommending that NRCS restore the 5 percent

match requirement for the WREP partner contributions and maintain historic levels of partner contributions at 25 percent. Another comment recommended that NRCS provide an annual allocation for WREP of between \$35-50 million per year.

Response: NRCS appreciates the support for WREP. NRCS has not established any regulatory level of match that is required for WREP and bases such determination upon the focus of each year's WREP effort. No change is made to the regulation in response to this issue.

Notice and Comment, Paperwork Reduction Act, and Effective Date

In general, the Administrative Procedure Act (APA) (5 U.S.C. 553) requires that a notice of proposed rulemaking be published in the *Federal Register* and interested persons be given an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation, except when the rule involves a matter relating to public property, loans, grants, benefits, or contracts. This rule involves matters relating to benefits and therefore is exempt from the APA requirements. Further, the regulations to implement the programs of chapter 58 of title 16 of the U.S. Code, as specified in 16 U.S.C. 3846, and the administration of those programs, are:

- To be made as an interim rule effective on publication, with an opportunity for notice and comment;
- Exempt from the Paperwork Reduction Act (44 U.S.C. ch. 35); and
- To use the authority under 5 U.S.C. 808 related to congressional review.

Consistent with the use of the authority under 5 U.S.C. 808 related to Congressional review for the immediate effect date of the interim rule, this rule is also effective on the date of publication in the Federal Register.

Executive Orders 12866 and 13563

Executive Order 12866, “Regulatory Planning and Review,” and Executive Order 13563, “Improving Regulation and Regulatory Review,” direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) designated this rule as significant under Executive Order 12866 and therefore, OMB has reviewed this rule. The costs and benefits of this rule are summarized below. The full regulatory impact analysis is available on <https://www.regulations.gov/>.

Clarity of the Regulation

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to the substantive comments NRCS received on the interim rule, NRCS invited public comments on how to make the rule easier to understand. NRCS has incorporated these recommendations for improvement where appropriate. NRCS responses to public comment are described in more detail above.

Cost-Benefit Analysis

One of the most significant ACEP changes in the 2018 Farm Bill is to the existing contribution requirements for the non-Federal share under ACEP-ALE. Previously, there were only two sources of non-Federal contribution—the entity’s cash resources towards the purchase and the donation by the entity—with cash resources towards the purchase required for half of the non-Federal contribution. The 2018 Farm Bill eliminated the requirement for cash resources towards the purchase and allows the entity to consider other costs, previously not included, toward the non-Federal match. This change adds

flexibility for eligible entities to meet the non-Federal share requirement by no longer specifying a minimum cash contribution amount to be provided by the eligible entity and allowing the total of the non-Federal share to be comprised of a charitable donation or qualified conservation contribution from the private landowner. It also includes provisions for costs related to securing the easement to be included in the calculation of the non-Federal share. While removing a potential hurdle to entity participation, the additional flexibility is not intended to supersede the conservation benefits possible under ACEP.

There are six states and one territory (Alabama, Arkansas, Hawaii, Louisiana, Missouri, North Dakota, and Puerto Rico) that currently have no enrollment in ACEP-ALE. This may have been due to a lack of available financial resources for an eligible entity to meet the minimum cash contribution requirement or may be due to a lack of entities that meet the eligibility requirements to participate in ACEP-ALE. The changes to the non-Federal share requirements may result in increased ACEP-ALE enrollments in areas where enrollment has been limited due to a lack of financial resources available for entities that meet the ACEP-ALE eligibility requirements. To address these statutory changes, in this final, we eliminated a specified minimum cash contribution amount and incorporated provisions for considering costs related to securing the easement. These changes are applicable to all eligible entities in all States and as a result, it is anticipated that the amount of the Federal contribution toward ACEP-ALE easements will increase by 8 to 10 percentage points.

Another change under the 2018 Farm Bill provides NRCS with authority to enter into legal arrangements with eligible entities to conduct BPS transactions under ACEP-ALE. Under a BPS transaction, NRCS may provide ACEP-ALE cost-share assistance to an eligible entity for the purchase of an agricultural land easement on private or Tribal agricultural land owned on a transitional basis by an eligible entity when the ownership

of that land will be timely transferred to a qualified farmer or rancher. BPS transactions are intended to help farmers and ranchers acquire agricultural land they could not otherwise afford and to protect agricultural land that may have otherwise been developed or removed from agricultural production.

NRCS continues to have the discretion to rank and prioritize projects and to select individual applications based on their ability to achieve program purposes and to assess and determine the appropriate allocation of funds for the acquisition of agricultural land and wetland easements. The 2018 Farm Bill does not limit NRCS's discretion to determine the allocation of funds between ACEP-WRE and ACEP-ALE. The relative emphasis NRCS places on these two program components depends on State and national priorities, environmental impacts, and local demand. It is anticipated that enrollment in ACEP will be consistent with historic enrollment trends.

Land enrolled in ACEP-WRE easements produces onsite and offsite environmental benefits. Those include: restoring and protecting high value wetlands; controlling sheet and rill erosion as lands are restored from cropland to wetlands and associated habitats; restoring, enhancing, and protecting habitat for fish and wildlife, including threatened and endangered species and migratory birds; improving water quality by filtering sediment and chemicals; reducing flooding and flood-related damage; recharging groundwater; protecting biological diversity; controlling invasive species with planting of native vegetation; and providing opportunities for educational, scientific, and recreational activities. Soil health and air quality are improved by reduced wind erosion, reduced soil disturbance, increased organic matter accumulation, and an increase in carbon sequestration.

For land enrolled in ACEP-ALE, the suite of conservation effects on protected grasslands are different than those on protected farmland; the impacts are not valued here as one being more beneficial than another. For example, ACEP-ALE easements on

grasslands limit agricultural activities to predominantly haying and grazing, whereas easements on farmland allow crop cultivation and pasture-based agriculture. As such, farmland protection effects are derived from onsite and ecological services, as well as preserving highly productive agricultural areas from development or fragmentation. Impacts on grasslands are derived from onsite and ecological impacts as well as preventing conversion to nongrassland uses. The net conservation effects through time from farmland protection include direct access benefits (pick-your-own, agri-tourism, and nature based activities like hunting), indirect access benefits (open spaces and scenic views), and nonuse benefits (wildlife habitat and existence values). Grassland protection conservation effects include direct, indirect, and nonuse benefits, and also on-farm production gains and carbon sequestration.

The authorized level of funding for ACEP for the period of FY 2019 through 2023 is \$2.25 billion (assuming future funding is set at authorized amounts). This represents an increase in ACEP average annual funding over the 2014 Farm Bill of 11 percent—from \$405 million per year to \$450 million per year in nominal dollars.

The regulatory impacts of ACEP funding consist of payments for the purchase of easements or real property interests; the costs incurred related to the acquisition, such as title companies, appraisers, licensed land surveyors; and the costs of restoring wetlands. Although these transfers create incentives that likely cause changes in the way society uses its resources, NRCS lacks data with which to identify where these resources would otherwise be used.

NRCS also recognizes that applicants and participants incur costs in terms of time used to gain access to ACEP. We estimate the imputed value of applicant and participant time spent in accessing the program from FY 2019 through 2023 at \$1.1 million for the 5 years.

Our estimates of costs, benefits and transfers of ACEP on an annual basis are reported in Table 1. Given a 3 percent discount rate, the projected annualized real cost to producers of accessing the program is \$229,000 and the projected annualized real transfers are \$433 million. Conservation benefits from the easement are difficult to quantify at a national scale but have been described by studies at an individual project or watershed or local scale.

Table 1: Annualized Real Estimated Costs, Benefits, and Transfers^a

Category	Annual Estimate
Cost ^b	\$229,000
Benefits	Qualitative
Transfers.....	\$433,000,000

^aAll estimates are discounted at 3 percent to 2019. Note that this table focuses on the costs, benefits, and transfers of the entire program, not the marginal change in a comparison of the 2014 and 2018 Farm Bills.

^b Imputed cost of applicant time to gain access to the program.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare a regulatory analysis of any rule whenever an agency is required by APA or any other law to publish a proposed rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule is not subject to the Regulatory Flexibility Act because this rule is exempt from notice and comment rulemaking requirements of the APA and no other law requires that a proposed rule be published for this rulemaking initiative.

Environmental Review

The environmental impacts of this rule have been considered in a manner consistent with the provisions of NEPA (42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and the NRCS regulations for compliance with NEPA (7 CFR part 650). NRCS conducted an analysis of the ACEP

interim rule and NRCS's analysis determined there would not be a significant impact to the human environment and as a result, an environmental impact statement (EIS) is not required to be prepared (40 CFR 1501.5 and 1501.6). The Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) were available for review for 30 days from the date of publication of the interim rule in the *Federal Register*. NRCS considered comments received during the 30-day period and determined minor changes to the ACEP EA and FONSI were sufficient, and that no information warranting preparation of an EIS was received. The final ACEP EA and FONSI have been posted to the NRCS homepage at <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/farmland/?cid=stelprd b1263599>.

Executive Order 12372

Executive Order 12372, "Intergovernmental Review of Federal Programs," requires consultation with State and local officials that would be directly affected by proposed Federal financial assistance. The objectives of the Executive order are to foster an intergovernmental partnership and a strengthened federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and direct Federal development. For reasons specified in the final rule-related notice regarding 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), the programs and activities in this rule are excluded from the scope of Executive Order 12372.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, "Civil Justice Reform." This rule will not preempt State or local laws, regulations, or policies unless they represent an irreconcilable conflict with this rule. Before any judicial actions may

be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR part 11 are to be exhausted, consistent with 7 U.S.C. 6912(e).

Executive Order 13132

This rule has been reviewed under Executive Order 13132, “Federalism.” The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, except as required by law. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires federal agencies to consult and coordinate with Tribes on a Government-to-Government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

The USDA’s Office of Tribal Relations (OTR) has assessed the impact of this rule on Indian Tribes and determined that this rule does not have significant Tribal implications that require Tribal consultations at this time for ACEP, which is a beneficial voluntary program. Notwithstanding this conclusion, OTR believes that continued focused outreach to Tribes could increase engagement in ACEP and provide assistance with water quality issues for Tribes. OTR states that NRCS has adhered to the spirit and intent of Executive Order 13175. If a Tribe requests consultation, NRCS and CCC will work with OTR to ensure meaningful consultation is provided where changes, additions,

and modifications identified in this rule are not expressly mandated by the 2018 Farm Bill. Tribal consultation for this rule was included in the 2018 Farm Bill Tribal consultation held on May 1, 2019, at the National Museum of the American Indian, in Washington, D.C. The portion of the Tribal consultation relative to this rule was conducted by Bill Northey, USDA Under Secretary for the Farm Production and Conservation mission area, as part of the Title I session. There were no specific comments from Tribes on ACEP during this Tribal consultation.

Additionally, NRCS held sessions with Indian Tribes and Tribal entities across the country in the spring of FY 2019 to describe the 2018 Farm Bill changes to NRCS conservation programs, obtain input about how to improve Tribal and Tribal member access to NRCS conservation assistance, and make any appropriate adjustments to the regulations that will foster such improved access. NRCS invited State leaders for FSA and Rural Development (RD), as well as Regional Directors for the Risk Management Agency (RMA) to discuss their programs also.

As a result, approximately 50 percent of the comments received as a result of these sessions were directed to FSA, RMA, RD, and other USDA agencies, with many comments specific to hemp production and the surrounding regulations. Over 40 percent of the feedback pertained to NRCS programs. Comments listed challenges specific to Tribes that impact eligibility and inhibit access to USDA programs. None of the feedback received necessitated a change to the regulation.

NRCS will continue to work with our Tribal stakeholders to address the issues raised in order to facilitate greater technical assistance and program delivery to Indian country.

Separate from Tribal consultation and the sessions discussed above, communication and outreach efforts are in place to assure that all producers, including Tribes (or their members), are provided information about the regulation changes.

Specifically, NRCS obtains input through Tribal Conservation Advisory Councils. A Tribal Conservation Advisory Council may be an existing Tribal committee or department and may also constitute an association of member Tribes organized to provide direct consultation to NRCS at the State, regional, and national levels to provide input on NRCS rules, policies, programs, and impacts on Tribes. Tribal Conservation Advisory Councils provide a venue for agency leaders to gather input on Tribal interests.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4), requires Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal Governments or the private sector. Agencies generally must prepare a written statement, including cost-benefits analysis, for proposed and final rules with Federal mandates that may result in expenditures of \$100 million or more in any 1 year for State, local or Tribal Governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates, as defined under Title II of UMRA, for State, local, and Tribal Governments or the private sector. Therefore, this rule is not subject to the requirements of UMRA.

Federal Assistance Programs

The title and number of the Federal Domestic Assistance Programs in the Catalog of Federal Domestic Assistance to which this rule applies is: 10.931— Agricultural Conservation Easement Program.

E-Government Act Compliance

NRCS and CCC are committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased

opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 7 CFR Part 1466

Agricultural, Flood Plains, Grazing lands, Natural resources, Soil conservation, and Wildlife.

Accordingly, the interim rule published January 6, 2020, at 85 FR 558, is adopted as final with the following changes:

PART 1468—AGRICULTURAL CONSERVATION EASEMENT PROGRAM

1. The authority citation for part 1468 continues to read as follows:

Authority: 15 U.S.C. 714b and 714c; 16 U.S.C. 3865–3865d.

Subpart A—General Provisions

§ 1468.3 [Amended]

2. Amend § 1468.3 as follows:

a. In the definition of “Beginning farmer or rancher”:

i. In paragraph (1), remove the words “farm or ranch or” and add in their place the words “farm, ranch, or” each time they appear;

ii. In paragraphs (2) and (3), remove the words “farm or ranch” and add the words “farm, ranch, or NIPF” in their place each time they appear;

b. In the definition of “Eligible land”, add the word “land” immediately after the word “private”;

c. In the definition of “Farm or ranch succession plan”, remove the words “include specific” and add the words “include, but is not limited to, specific” in their place and remove the words “new or beginning farmers or ranchers, veteran farmers, or other”;

d. In the definition of “Future viability”, add the words “or adoption of a farm or ranch succession plan” immediately after the word “plan”; and

e. In the second sentence in the definition of “Maintenance”, add the word “performed” immediately after the word “work”.

§ 1468.6 [Amended]

3. Amend § 1468.6 in paragraph (a)(3)(iii) by removing the cross reference “paragraph (a)(4)” and add in its place add the cross reference “paragraph (a)(5)”.

Subpart B— Agricultural Land Easements

§ 1468.20 [Amended]

4. Amend § 1468.20 in paragraph (b)(1)(ii) by adding the word “demonstrated” immediately before the word “capability”.

5. Amend § 1468.22 as follows.

a. Revise paragraph (b)(11); and

b. In paragraph (c)(2), add the word “annually” immediately after the words “monitored” and “reported”.

The revision reads as follows:

§ 1468.22 Establishing priorities, ranking considerations, and project selection.

* * * * *

(b) * * *

(11) Whether the land is currently enrolled in CRP in a contract that is set to expire within 1 year and is grassland that would benefit from protection under a long-term easement or is land under a CRP contract that is in transition to a covered farmer or rancher pursuant to 16 U.S.C. 3835(f);

* * * * *

§ 1468.23 [Amended]

6. Amend § 1468.23 as follows:

a. In paragraph (b)(1), remove the words “Up to” and add “A minimum of” in their place and add the words “and not to exceed 7 fiscal years” immediately after the words “5 fiscal years”; and

b. In paragraph (b)(2), remove the words “Up to” and add “At least” in their place.

7. In § 1468.24 revise paragraphs (b)(2)(i), (iii), and (iv) to read as follows:

§ 1468.24 Compensation and funding for agricultural land easements.

* * * * *

(b) * * *

(2) * * *

(i) The eligible entity's own cash resources for payment of easement compensation to the landowner or for a buy-protect-sell transaction, the amount of the fair market value of the agricultural land easement, less the amount of the Federal share, that is provided through the conveyance of the agricultural land easement by the eligible entity;

* * * * *

(iii) Where the amounts as identified in paragraphs (b)(2)(i) and (ii) of this section are not sufficient to meet the non-Federal share amount, the eligible entity may also include the procured costs paid by the eligible entity to a third-party for an appraisal, boundary survey, phase-I environmental site assessment, title commitment or report, title insurance, baseline reports, mineral assessments, or closing cost; and

(iv) Where the amounts as identified in paragraphs (b)(2)(i) through (iii) of this section are not sufficient to meet the non-Federal share amount, the eligible entity may

also include up to 2 percent of the fair market value of the agricultural land easement for easement stewardship and monitoring costs provided by the eligible entity.

* * * * *

8. In § 1468.25 revise paragraphs (c) and (d)(4) to read as follows:

§ 1468.25 Agricultural land easement deeds.

* * * * *

(c) The eligible entity may use its own terms and conditions in the agricultural land easement deed, but the agricultural land easement deed must provide for the effective administration, management, and enforcement of the agricultural land easement by the eligible entity or its successors and assigns and must address the deed requirements as specified by this part and by NRCS in the ALE-agreement.

(d) * * *

(4) Include clauses requiring that any changes to the easement deed or easement area made after easement recordation, including any amendment to the easement deed, any subordination of the terms of the easement, or any modifications, exchanges, or terminations of some or all of the easement area, must be consistent with the purposes of the agricultural land easement and this part and must be approved by NRCS and the easement holder in accordance with § 1468.6 prior to recordation or else the action is null and void.

* * * * *

§ 1468.26 [Amended]

9. Amend § 1468.26 in paragraph (b)(1) by removing the words “up to” and adding “a minimum of” in their place and adding “and not to exceed 7 fiscal years” after the words “5 fiscal years”.

10. Amend § 1468.27 as follows:

a. In paragraph (c)(1), add the words “the purchase of the land” after the word “completed”;

b. In paragraphs (c)(3)(ii) and (c)(4), add the words “of the land” after the word “value”;

b. Redesignate paragraphs (e)(4)(iii) and (iv) as paragraphs (e)(4)(iv) and (v);

c. Add a new paragraph (e)(4)(iii).

The addition reads as follows:

§ 1468.27 Buy-Protect-Sell transactions.

* * * * *

(e) * * *

(4) * * *

(iii) The Federal share for the agricultural land easement will be provided on a reimbursable basis only, after the agricultural land easement has closed and the required documents have been provided to and reviewed by NRCS.

* * * * *

11. Amend § 1468.28 as follows:

a. Revise paragraph (c); and

b. In paragraph (f), add the words “in whole or in in part,” immediately after the word “terminated”.

The revision reads as follows:

§ 1468.28 Violations and remedies.

* * * * *

(c) Notwithstanding paragraph (a) of this section, NRCS reserves the right to enter upon and inspect the easement area if the annual monitoring report provided by the agricultural land easement holder documenting compliance with the agricultural land easement is insufficient or is not provided annually, the United States has a reasonable

and articulable belief that the terms and conditions of the easement have been violated, or to remedy deficiencies or easement violations as it relates to the conservation plan in accordance with 7 CFR part 12. Prior to its inspection, NRCS will notify the agricultural land easement holder and the landowner and provide a reasonable opportunity for the agricultural land easement holder and the landowner to participate in the inspection.

* * * * *

Subpart C— Wetland Reserve Easements

§ 1468.32 [Amended]

12. Amend § 1468.32 in paragraph (c)(2) by adding the words “or land under a CRP contract that is in transition to a covered farmer or rancher pursuant to 16 U.S.C. 3835(f), and such land” immediately after the word “application”.

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