

**DEPARTMENT OF AGRICULTURE****Commodity Credit Corporation****7 CFR Part 1468**

[Docket No. NRCS–2014–0011]

RIN 0578–AA61

**Agricultural Conservation Easement Program**

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

**ACTION:** Final rule.

**SUMMARY:** NRCS published an interim rule, with request for comments, on February 27, 2015, to implement the Agricultural Conservation Easement Program (ACEP) that was authorized by the Agricultural Act of 2014. NRCS received 1,055 comments from 102 respondents to the interim rule. In this document, NRCS responds to comments, makes adjustments to the rule in response to some of the comments received, and issues a final rule for ACEP implementation.

**DATES:** This rule is effective October 18, 2016.

**FOR FURTHER INFORMATION CONTACT:** Kim Berns, Director, Easement Programs Division, U.S. Department of Agriculture, Natural Resources Conservation Service, Post Office Box 2890, Washington, DC 20013–2890; or email: [kim.berns@wdc.usda.gov](mailto:kim.berns@wdc.usda.gov), Attn: Farm Bill Program Inquiry.

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**SUPPLEMENTARY INFORMATION:****Background**

The Agricultural Conservation Easement Program (ACEP) is a voluntary program to help farmers and ranchers preserve their agricultural land and restore, protect, and enhance wetlands on eligible lands. The program has two easement enrollment components: (1) Agricultural land easements; and (2) wetland reserve easements. Under the agricultural land easement component, NRCS provides matching funds to State, Tribal, and local governments, and nongovernmental organizations with farm and ranch land protection programs to purchase agricultural land easements. Agricultural land easements may be permanent or the maximum duration authorized by State law. Under

the wetland reserve easement component, NRCS protects wetlands by purchasing directly from landowners a reserved interest in eligible land 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, or the maximum duration authorized by State law.

The 2014 Act kept much of the substance of the statutory provisions that originally existed for the Wetlands Reserve Program (WRP) and Farm and Ranch Lands Protection Program (FRPP), with land eligibility elements from the Grassland Reserve Program (GRP) incorporated. In particular, ACEP as authorized by the 2014 Act:

- Consolidates FRPP, GRP, and WRP easement options into one program, and repeals these three programs; and
- Incorporates elements of FRPP and GRP into the agricultural land easement component of ACEP, and elements of WRP into the wetland reserve easement component of ACEP.

The significant statutory differences from the source programs include:

- The agency has program-wide authority to subordinate, modify, exchange, or terminate an easement under certain circumstances, an expansion of authority that had previously applied only to WRP.
- The non-Federal contribution towards the purchase of the agricultural land easement varies slightly from the previous FRPP non-Federal contribution. In particular, if a landowner makes a charitable donation of a large percentage of the agricultural land easement's fair market value, the landowner donation will reduce the Federal government's contribution to a greater extent than previously required under FRPP.
- All ACEP easements will be subject to an easement plan. Previously, WRP and GRP required some form of easement plan for all easements and FRPP only required a conservation plan on highly erodible cropland.
- The landowner tenure requirement for wetland reserve easements is 24 months compared to 7 years under the former WRP.

On February 27, 2015, NRCS published an interim rule with request for comments in the **Federal Register** (80 FR 11032) that promulgated the ACEP regulations at 7 CFR part 1468. While ACEP required its own regulation for its implementation, there were very few new regulatory requirements for participants.

NRCS organized the ACEP regulation into 3 subparts. Subpart A includes those provisions that affect the entire program, Subpart B includes those provisions that affect only the Agricultural Land Easement (ALE) component, and Subpart C includes those provisions that affect only the Wetland Reserve Easement (WRE) component.

In particular, Subpart A of the interim rule addressed:

- Identification of the following lands as ineligible—
  - Federal lands except lands held in trust for Indian Tribes.
  - State-owned lands, including lands owned by agencies or subdivisions of the State or unit of local government.
  - Land subject to an existing easement or deed restriction that provides similar protection that would be achieved by enrollment.
  - Lands that have onsite or offsite conditions that would undermine meeting the purposes of the program.
- Authorization for easement subordination, modification, exchange, or termination of easements under specific criteria.
- Identification that lands enrolled in FRPP, GRP, and WRP are considered enrolled in ACEP.

Subpart B of the interim rule addressed the ALE component, including:

- Limiting the Federal share of the easement cost for projects that are not *grasslands of special environmental significance* to not exceed 50 percent of the *fair market value* of the agricultural land easement, while requiring the non-Federal share to be at least equivalent to the Federal share, with an eligible entity contributing at least 50 percent of the Federal share with its own cash resources.
- Identifying that eligible entities may include Indian Tribes, State governments, local governments, or nongovernmental organizations that have farmland or grassland protection programs that purchase agricultural land easements.
- Authorizing NRCS to pay up to 75 percent of the fair market value of the agricultural land easement for the enrollment of grassland of special environmental significance.
- Authorizing NRCS to waive the eligible entity cash contribution requirement with no increase in Federal share for projects of special significance where the landowner voluntarily increases the landowner contribution commensurate to the amount of the waiver and the property is in active agricultural production.

- Maintaining a certification process for eligible entities.
- Prohibiting the assigning of a higher priority to an application solely on the basis of lesser cost to the program.
- Requiring all easements to be subject to an *agricultural land easement plan*.

Subpart C of the interim rule addressed the WRE component including:

- Maintaining most elements of the WRP eligibility and administrative framework.
- Authorizing a waiver process to allow enrollment of Conservation Reserve Program (CRP) lands established to trees.
- Allowing ranking criteria to consider the extent to which a landowner or other person or entity leverages the Federal investment.
- Reducing length of ownership requirement prior to enrollment from 7 years to 24 months.
- Exempting “subclass w” soils in the land capability classes IV through VIII from county cropland limitations.
- Keeping the WRP easement compensation framework for wetland reserve easements.

NRCS originally solicited comments on the interim final rule for 60 days ending April 28, 2015. NRCS extended the comment period an additional 30 days to May 28, 2015, to provide interested parties additional time to review the new regulatory provisions and associated policy.

NRCS received 102 timely submitted responses to the rule, constituting of 1,055 discrete comments. NRCS welcomes this enthusiastic response to its new, consolidated, easement program, and will continue to obtain input from interested parties throughout its administration. This final rule responds to the comments received through the public comment period and makes changes that NRCS believes contribute to the effectiveness, equity, transparency, and clarity of the program.

#### *Summary of ACEP Comments*

In this preamble, the comments have been organized in alphabetic order by topic. Given the range of the number of comments received on each topic, NRCS attempts to enumerate the level of interest received for each subtopic within a topic area. The topics include: ACEP general information; ALE agreements; ALE deed requirements; ALE entity certification; ALE entity eligibility; application process and requirements; cost-share assistance and match requirements; definitions; and easement closing and payment

procedures; easement valuation and consideration; easement monitoring, management, and enforcement; land and landowner eligibility; national and State allocations; national priorities and initiatives; participation in other USDA programs; planning; ranking; Regional Conservation Partnership Program (RCPP); restoration; State Technical Committees; subordination, modification, exchange, and termination; Wetland Reserve Enhancement Partnerships (WREP); WRE Reservation of Grazing Rights, and WRE-miscellaneous.

The comments were generally supportive with recommendations for improvement. Most comments related to the ALE component of the program. In particular, most recommendations pertained to program eligibility, minimum easement deed terms and requirements, the criteria for the agricultural land easement plan, and ranking.

#### *ACEP General Information*

*Comment:* NRCS received four comments related to the topic of ACEP general information. Two comments expressed support for the program, one comment opposed public grazing, and one comment supported education classes in Hawaii for small and micro farms.

*NRCS Response:* ACEP does not enroll public lands and thus does not have a public grazing component to its program. NRCS is not authorized to use ACEP funds for education classes, but does provide technical assistance to applicants of all types of operations, including small and micro farms.

#### *ALE Agreements*

*Comment:* NRCS received 11 comments on the basic topic of ALE agreements. One comment recommended that restrictions related to historical or archaeological features should be consistent with the Secretary of the Interior’s standards, eight comments recommended that the NRCS State Conservationist have the delegated authority to approve substitutions of parcels under an ALE-agreement (including one comment that recommended that NRCS allow for more than a 1:1 easement substitution), and one comment recommended that certified entities obtain NRCS review and approval of a deed template prior to entering into a grant agreement. One comment recommended that NRCS allow negotiations with respect to ALE-agreements, including the ability to identify separately pre-closing and post-closing responsibilities.

*NRCS Response:* NRCS restrictions related to historical and archaeological features are consistent with the Secretary of the Interior’s standards. With respect to substitutions, NRCS policy currently delegates authority to the State Conservationist to approve substitutions. Substitutions are on a 1:1 basis to ensure that equal or greater conservation benefit is being obtained as a result of the substitution. NRCS will continue with this policy since it ensures better administration of ALE-agreements by allowing better tracking of funds and benefits achieved from the substitution, and additional parcels can always be added through amending the agreement. NRCS will provide the template ALE-agreement sooner in the process to allow eligible entities sufficient opportunity to review. Use of standard template ALE-agreements allows NRCS to use a more streamlined review and approval process for ALE-agreements helping to ensure agreements can be entered into within the same fiscal year as the initial selection for funding. NRCS adopted the recommendation that NRCS separately identify post-closing responsibilities to ease eligible entities’ review of the agreements.

#### *ALE Deed Requirements*

NRCS received 182 comments related to ALE deed requirements. Prior to discussing the specific comments and NRCS responses, NRCS would like to respond to those comments that requested NRCS provide clarification regarding the difference between the inter-related concepts of “minimum deed requirements” and “minimum deed terms.”

Section 1265B(b)(4)(C) of the ACEP statute identifies that an eligible entity will be allowed to use its own deed terms and conditions provided that NRCS determines that such terms and conditions are “consistent with the purposes of the program” and “permit effective enforcement of the conservation purposes of such easements.” To streamline program delivery, increase the transparency of program requirements, ease the deed review process and provide consistency and fairness between eligible entities, NRCS identified in the interim rule minimum deed requirements for ALE and then made available standard language that would meet these minimum deed requirements, *i.e.* a standard set of minimum deed terms. Minimum deed requirements that NRCS will now refer to as regulatory deed requirements, are the topics that must be addressed in an ACEP-funded agricultural land easement. Minimum

deed terms provide specific phraseology that NRCS has vetted as effective enforceable language for meeting the regulatory deed requirements. NRCS has revised § 1468.25 by re-organizing and consolidating the paragraphs in § 1468.25, without changing the substance, to better clarify the interface between regulatory deed requirements and minimum deed terms.

NRCS explained in the preamble of the interim rule that an agricultural land easement deed may be determined to meet program purposes by the eligible entity drafting all of the deed terms and conditions for an individual easement and submitting the entire deed to NRCS for review to ensure that the regulatory deed requirements have been met. Alternatively, the eligible entity may adopt the NRCS minimum deed terms as a whole along with the entity's own deed terms. In either scenario, the eligible entity may use their own terms and conditions, the difference being the review process by which NRCS ensures the purposes and requirements of the program are met. NRCS may review and approve at the State level those deeds submitted by eligible entities that have the NRCS minimum deed terms attached as written, whereas NRCS at the national level must review and approve all other deeds submitted by eligible entities.

NRCS further explained in the interim rule that the former approach was taken under FRPP and, based on the inconsistencies that arise with individual deed negotiations, NRCS decided it would provide more transparent and consistent implementation under ACEP to adopt the latter approach of requiring regulatory deed requirements and encouraging the adoption of minimum deed terms. An eligible entity, especially certified entities, can be confident that they have met ACEP funding and regulatory deed requirements if the easement deed incorporates the language from the available minimum deed terms.

The subtopics addressed by the ALE deed requirement comments included the following: Regulatory deed requirements in general (61 comments); modification and termination provisions (11 comments); incorporation of the ALE plan (8 comments); permitted and other uses (2 comments); mining, minerals, oil, and gas (5 comments); construction and building envelope (14 comments); commercial activities (1 comment); impervious surface limitations (12 comments); subdivision (17 comments); advisory committee (8 comments); right of enforcement (17 comments); access (3 comments);

acquisition purpose restrictions (8 comments); and miscellaneous (10 comments).

*General Comments:* The breakdown of the 61 general comments related to the regulatory deed requirements or the minimum deed terms, and the NRCS response to these comments, are as follows:

- Four comments expressed support for the minimum deed terms;
- Eight comments recommended eliminating the minimum deed term requirement; NRCS has determined that identifying regulatory deed requirements that address statutory purposes, including specific statutory requirements, provides an equitable and transparent basis upon which to achieve program purposes and make consistent programmatic decisions. In particular, this final rule retains the following regulatory deed requirements at § 1468.25, including provisions that must address: (1) Right of enforcement—statutory requirement; (2) compliance with an agricultural land easement plan—statutory requirement; (3) impervious surface limitation—statutory requirement; (4) indemnification—standard clause in conservation easements; (5) amendments must be in compliance with ALE purposes—ensure that deed will further statutory program purposes for easement term; (6) prohibition of commercial and industrial activities except those activities determined consistent with the agricultural use of the land—statutory purpose for limiting conversion to non-agricultural uses or protecting grazing uses and related conservation values; (7) prohibition or limitation of the subdivision of the property subject to the agricultural land easement, except where State or local regulations explicitly require subdivision to construct residences for employees working on the property or where otherwise authorized by NRCS and the Grantee—statutory purpose for limiting conversion to non-agricultural uses or protecting grazing uses and related conservation values; (8) specific protections related to the purposes for which the easement is acquired—statutory requirement; and (9) other terms as identified by the Chief in the agreement between NRCS and the eligible entity—necessary flexibility to address emerging resource issues. NRCS determined that these regulatory deed requirements ensure the financial and programmatic integrity of the program. This approach also retains flexibility for cooperating entities to determine regional, State, or local priorities within their deeds and for enrolling projects.

- Two comments recommended eliminating the minimum deed terms; NRCS did not adopt this recommendation because minimum deed terms provide consistency and transparency to eligible entities and landowners about NRCS program requirements, and are required to ensure effective program delivery.

- Nine comments recommended eliminating priority given to eligible entities that adopt the minimum deed terms, while two comments supported the priority. Given the mid-fiscal year publication of the interim rule and the requirement to incorporate into the ALE-agreement the agreed-upon terms for funded easements, NRCS identified that it would give fund priority in fiscal year (FY) 2015 to eligible entities who were willing to adopt NRCS minimum deed terms. Several eligible entities, especially those accustomed to negotiating deed terms required as a condition of receiving Federal funds, expressed concern about priority being given to eligible entities willing to adopt the minimum deed terms. NRCS reiterates that eligible entities are authorized to use their own deed terms and that the minimum deed terms are in addition to the entity's deed terms. As described above, participation in ACEP requires the regulatory deed requirements to be addressed in the deed. Therefore, NRCS will continue to encourage eligible entities to adopt NRCS minimum deed terms because such adoption addresses the regulatory deed requirements and greatly facilitates reviews of both the ALE-agreements and the deeds, streamlines program delivery, and ensures long term consistency and equitable treatment of eligible entities and landowners. This encouragement will be implemented through a National ranking factor among other factors, and if an eligible entity adopts the minimum deed terms then such eligible entity will receive priority in the ranking. Eligible entities may opt to negotiate an entity-specific template that incorporates the minimum deed terms and are encouraged to do this prior to the start of a funding year. States may also decide whether they wish to screen applications from eligible entities that request such individualized negotiation dependent upon the State's ability to manage its workload. If an entity has an entity-specific template deed that has been approved by the national level in the fiscal year prior to ranking, this entity-specific template deed will also be captured in the ranking. However, any subsequent requests for changes to either the minimum deed terms or

approved entity-specific template deed may affect this ranking consideration.

- Three comments recommended NRCS create a process to allow approved minimum deed terms to be developed at the State level and two comments recommended allowing for modification of the minimum deed terms to create a better balance between national oversight and local needs by allowing more flexibility for easements to include local deed restrictions. NRCS has determined that program consistency is better served by the development of a standard set of minimum deed terms at the National level. However, State Conservationists in consultation with the State Technical Committee, may propose additional minimum deed terms that are State specific to address actual, local concerns that are not adequately encompassed by the National set of minimum deed terms. The proposed State-specific terms must be submitted by the State Conservationist to the National office for review and if the National office approves the additional State-specific terms, such terms would then be utilized uniformly throughout the State as the standard set of minimum deed terms for that State. Submissions for additional minimum deed terms that are State-specific must occur in the fiscal year prior to their proposed use to ensure adequate time for review and approval. Eligible entities may be authorized to use an approved set of State-specific minimum deed terms on any unclosed ACEP–ALE easements through an amendment to the ALE-agreement.

- Three comments recommended that State entities should be exempt from the regulatory deed requirements specified in the ACEP regulation; NRCS did not adopt this recommendation. ALE is a voluntary funding source that is available to eligible entities where mutual purposes can be met through a partnership arrangement. Just as State entities must ensure that their program purposes will continue to be met through the partnership arrangement, NRCS must ensure that ACEP purposes will be furthered by the expenditure of ACEP funds. NRCS recognizes that State entities may have special statutory restrictions, and State entities, like other eligible entities, have flexibility to use their own deed terms, and with the exception of the United States Right of Enforcement language, can request review and approval of an individual template deed if they are unable to use the standard minimum deed terms. NRCS will work with State entities, and others, where there are programmatic conflicts that must be addressed in

order to create an effective partnership arrangement.

- Five comments recommended replacing the minimum deed terms with an entity specific template that could be further modified on a per project basis. NRCS recognizes that individually-tailored provisions provide eligible entities with negotiation flexibility in their discussions with landowners. However, NRCS experience has revealed that individually-negotiated provisions create inconsistencies in how eligible entities and landowners are treated, which is inconsistent with how Federal funds should be administered. NRCS also has extensive and successful experience in administering Federal conservation program funds through the use of standard agreement and contract language and has found that the use of such standard language increases the transparency of the programs, ensures the equitable treatment of landowners and program participants, and ultimately aids in the enforceability of the agreement or contract to ensure the purposes for which the Federal funds have been invested are achieved and protected consistent with the statutory intent of the conservation program. An entity-specific template that is then further negotiated on an individual project basis is not considered a template but rather an individually negotiated deed and may affect any ranking consideration given for the use of an approved template. Therefore, NRCS encourages that the regulatory deed requirements be met through use of the minimum deed terms.

- One comment recommended that any easement template deed waiver should require approval of the other funding partners; NRCS did not adopt this recommendation. NRCS works with an eligible entity that must meet ACEP–ALE terms and conditions to receive ACEP funding, including having an easement deed that meets ALE program requirements. NRCS does not have a direct relationship with the other funding partners of the eligible entity and therefore it is the eligible entity's responsibility to ensure that its partners are notified about any matters that may affect the transaction and the partners' funding commitments.

- One comment recommended that NRCS provide more flexibility and clarity in determining whether an eligible entity's deed terms are consistent with program purposes. NRCS has outlined in the regulation the deed requirements that must be addressed in an eligible entity's deed, and has also made available minimum deed terms that have been determined to be consistent with program purposes

and that satisfy the regulatory deed requirements. NRCS will work with an eligible entity to answer questions that arise with respect to other deed provisions that the eligible entity may wish to include and how such provisions could further or inhibit ALE purposes.

- Two comments recommended that certified entities should be authorized to use their own deed terms and conditions so long as those terms and conditions meet the statutory requirements of the program, and two comments recommended that NRCS should review them upon request; NRCS did not adopt these recommendations. NRCS regulatory requirements apply to all eligible entities, including certified eligible entities. NRCS has determined the regulatory deed requirements specified in this regulation are essential to meeting ALE program purposes and statutory requirements. While an eligible entity may avail itself of a streamlined administrative process if certified, such streamlined process must also result in meeting ALE program purposes. NRCS believes that an eligible entity that has sufficient familiarity with ALE program purposes to be certified is also knowledgeable of the deed provisions that NRCS considers sufficient to meet program purposes. A certified entity has gained this familiarity through NRCS approval of an eligible entity's template deed prior to certification, and the transparent manner in which NRCS has made available the minimum deed terms that are similarly determined to be sufficient to meet program purposes. The availability of a grant agreement for certified entities is to minimize NRCS involvement in the prior review of each of the certified entity's easement transactions. The certified entity can use their own deed terms provided that the deed meets the regulatory deed requirements.

- Three comments recommended that NRCS ensure that future habitat restoration is not prohibited on an ALE easement, and that good riparian and floodplain management necessary to achieve salmon recovery and shellfish protection are implemented. NRCS recognizes that conservation organizations have different understanding about whether habitat restoration activities are consistent with agricultural uses of land. NRCS has determined that habitat restoration is generally consistent with ALE program purposes. However, NRCS does not believe that habitat restoration is a minimum program requirement for ALE enrollment like it is for WRE

enrollment, and therefore has not included it as a regulatory deed requirement. A State Conservationist, in consultation with the State Technical Committee, may request that a provision authorizing habitat restoration activities be included as an additional State-specific minimum deed term for ALE enrollment in their State.

- Three comments recommend NRCS clarify the difference between minimum deed terms and regulatory deed requirements and when they are or are not mandatory. As discussed above, NRCS identified in the interim rule the regulatory deed requirements that are the topics that must be addressed in an ACEP-funded easement, and addressing these regulatory deed requirements is mandatory in order to receive ALE funding. Alternatively, minimum deed terms, provide specific phraseology that NRCS has vetted as effective enforceable language for meeting the regulatory deed requirements. Mechanisms for the adoption and incorporation of the minimum deed terms into the eligible entities agricultural land easement deed are described in this rulemaking and more specifically addressed in policy and in the terms of the ALE-agreement.

- NRCS received one comment recommending that a specific minimum threshold be required for public access, particularly for those properties where there is not visual access from a public right-of-way. NRCS requires that a landowner provide the Grantee with access to facilitate required easement monitoring, and ensure that NRCS has sufficient access should NRCS ever need to exercise its right of enforcement. However, public access is a matter beyond the scope of protections needed to meet ALE purposes, and the landowner reserves the right to control public access consistent with the terms of an ALE easement deed.

- NRCS received one comment requesting clarification of the regulatory provision that the regulatory deed requirements may include “other minimum deed terms required by NRCS to insure that ACEP ALE purposes are met.” This provision provides the Chief with the flexibility to identify resource concerns that may be necessary to meet program objectives. For example, where ALE funds are used specifically to protect grassland habitat for sage grouse, the Chief may require a provision that prohibits the conversion of grassland to other uses.

- NRCS received two comments recommending that the regulatory deed requirements be consistent with other Federal law, including the Endangered Species Act and fiduciary obligations to protect tribal treaty reserved rights.

NRCS implements ALE, including its regulatory deed requirements, consistent with the legal framework associated with the implementation of a Federal program. No changes are required in response to these comments.

- NRCS received one recommendation to alter the language in the minimum deed terms to conform to the language found at § 1468.28(c) related to the protection of the interests of the United States. NRCS will ensure the United States Right of Enforcement language provided in the ALE-agreements and minimum deed terms are consistent with the applicable regulation and statute.

- NRCS received three recommendations related to having a clear template review and decision process. NRCS agrees and has established the following process for reviewing ALE deed templates for non-certified eligible entities that are outlined in the ALE-agreements. Those methods are:

1. Non-certified eligible entities seeking approval of an entity-specific ALE deed template will review the regulatory deed requirements and the minimum deed terms. Entities should notify NRCS whether they will be requesting an entity-specific ALE deed template as early in the process as possible, preferably prior to ranking. Such entities are likewise encouraged to submit the proposed entity-specific ALE deed template as early in the process as possible, preferably in the fiscal year prior to submitting an application and at a minimum prior to entering into the ALE-agreement.

2. The entity will draft a proposed entity-specific ALE deed template that addresses all of the regulatory deed requirements, incorporates the required United States Right of Enforcement language without alteration, and to the greatest extent practicable will incorporate the minimum deed terms as written. The entity will identify in their request for approval the specific terms within the proposed ALE deed template that meet the regulatory deed requirements by citation and where applicable the minimum deed terms.

3. Eligible Entities will submit the proposed entity-specific ALE deed template to the State Conservationist of the State in which they plan to apply for ACEP-ALE funding.

4. The State Conservationist will review the proposed entity-specific ALE deed template for conformance with program requirements and submit the template for National review.

5. The Easement Programs Division (EPD) Director will review the proposed entity-specific ALE deed template and

then approve, reject, or approve with required changes.

6. The EPD Director decision will be communicated in writing to the eligible entity and the State Conservationist.

7. Eligible entities with an approved entity-specific ALE deed template must use the language of the template as approved, and if further changes are made, the deed must be re-submitted for EPD Director approval and will be treated as an individual deed for review.

8. If an entity is provided ranking points for having an approved entity-specific ALE deed template, that template must have National-level approval in the fiscal year prior to submitting an application for that parcel.

- NRCS received one recommendation to remove requirements of the Grantee, *i.e.* eligible entity, from the minimum deed terms; NRCS did not adopt this recommendation because it is essential to the program structure that the Grantee, which has affirmative duties, is identified as having the lead responsibility for enforcement of the deed terms. Therefore, in the enforcement clause, both the Grantor and Grantee must comply with the deed terms.

*Modification and termination provisions (11 comments):* Of the 11 comments that NRCS received related to the modification and termination provisions of the minimum deed terms, one comment recommended allowing for boundary line adjustments when the adjacent properties are also under conservation easement; one comment recommended allowing land to be substituted for repayment when an easement is extinguished or condemned; two comments recommended allowing for fee simple road takings for minor road improvements or defer to State law on the topic; three comments recommended not giving the United States exclusive power, or any authority, to reject a proposed easement administration action affecting the United States' interests, and four comments recommended changes to the valuation calculations for termination actions, such as incorporating language from the Internal Revenue Service regulations; providing the State with a specific pro rata share; or provide alternative deed forms in order to protect landowners who wish to take a charitable donation deduction.

NRCS recognizes that several parties have an interest in the implementation of the easement administration provisions in the deed, especially as these provisions may affect the future

administration, use, terms, or configuration of the easement area or whether the easement is considered a qualified conservation contribution for the tax treatment of the transaction itself. In particular, the Internal Revenue Code (IRC) permits taxpayers to deduct from their taxable income the value of a qualifying charitable contribution, including a qualified conservation contribution (also known as a bargain sale to a charitable organization) 26 U.S.C. 170(a)(1). The donation of a conservation easement can properly provide the basis of a deduction under the IRC if the restriction is granted in perpetuity. The Treasury Regulations offer an exception to the requirement that a conservation easement impose a perpetual use restriction where a subsequent unexpected change in the conditions surrounding the property makes impossible or impractical the continued use of the property for conservation purposes. In these limited situations, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding and the proceeds from a subsequent sale or exchange of the property are used by the Donee organization in a manner consistent with the conservation purposes of the original contribution. Several of the concerns raised by the comments relate to how the easement administration deed terms affect the treatment of the transaction under the tax code. For example, modifying an easement boundary, accommodating a future roadway, valuation at condemnation, extinguishment, or termination, or the treatment of proceeds from a condemnation action may all have impacts on how the IRS views the permanence of the easement for charitable deduction purposes. Therefore, NRCS will consider alternate valuation options for these types of actions that ensures NRCS will be reimbursed for the Federal investment in the agricultural land easement and receive its proportionate share of the proceeds. As to the other recommendations on the easement modification and termination provision, all parties who have an interest identified in the easement deed, including the United States, have a right to oppose an easement administration action, or include specific provisions with in the deed that relate to their specific authority to modify or terminate an easement once acquired.

*Incorporation of the ALE plan (8 comments):* Of the eight comments NRCS received related to the deed terms incorporating reference to the ALE plan,

one comment requested NRCS explain what is meant by the phrase “excluding NRCS-approved conservation practices developed under the ALE Plan” in the collective impervious surface footprint paragraph; one comment recommended NRCS clarify the ALE plan requirements; two comments recommended removing the requirement that the Grantee has to file and revise ALE plans, including approving erosion and sedimentation control plans; two comments recommended removal of the requirement that Grantee take all reasonable steps to secure compliance with the ALE Plan; one comment recommended that NRCS de-emphasize the ALE plan and instead focus on conservation practices that are required by statute; and one comment recommended NRCS eliminate the cross-reference to the ALE plan in the various terms related to permitted uses. As described more fully below under the topic of “Planning”, the ACEP statute requires that the terms and conditions of an ALE easement include an agricultural land easement plan. Thus, the terms of an agricultural land easement deed are not separate from the requirement that there must be an agricultural land easement plan, and to ensure that the deed terms and the agricultural land easement plan are consistent, the applicable minimum deed terms cross-reference to management decisions made by the landowner that are documented in the agricultural land easement plan. Additionally, conservation practices identified in the ALE plan are excluded from the calculation of the impervious surface limitation. Given that the agricultural land easement plan is a required element of the easement deed, the eligible entity and landowner have primary responsibility for ensuring that it is updated to reflect accurately the nature of the agricultural operations on the easement area.

*Permitted and other uses (2 comments):* Of the two comments received on the “permitted and other uses” term in the minimum deed terms, one comment recommended that NRCS not make the “permitted uses” term mandatory, and the other comment recommended eliminating the minimum deed term that allows a Grantee to approve “other uses.” The minimum deed terms for ALE no longer include a “permitted uses” section. Instead, NRCS has identified that agricultural uses must be protected under the terms of the deed. Therefore, NRCS has removed the references to uses that are not necessary to protect agricultural uses, and an

eligible entity has the flexibility to have more restrictive limitations in the deed terms. NRCS did not, however, change the term that allows a Grantee to approve other uses.

*Mining, minerals, oil, and gas (5 comments):* Of the five comments NRCS received related to the minimum deed terms for mining, minerals, oil, and gas, one comment recommended complete prohibition of these activities, one comment recommended complete allowance of these activities, and the remaining three comments recommended options ranging between allowance and prohibition. These activities, including their impacts upon the agricultural values of enrolled easements, vary significantly regionally and by eligible entity. If these activities occur in the agricultural landscape, they must be addressed because they may result in a conversion to a non-agricultural use or may threaten the protection of grazing uses and related conservation values. Therefore, NRCS provides alternatives within the minimum deed terms, and an eligible entity can choose the option that fits best for its transactions. An eligible entity can include its own additional deed terms that are more restrictive.

*Construction and building envelope (14 comments):* Of the 14 comments related to the construction and building envelope term, one comment recommended that NRCS remove the requirement that the Grantee approve construction activities; four comments recommended that NRCS remove or reduce the stringency on building envelope requirements; four comments recommended NRCS clarify that landowners may construct and maintain agricultural structures outside of building envelopes with prior written approval from the Grantee; two comments recommended NRCS eliminate the requirement that utilities or agricultural structures outside of building envelopes follow NRCS-approved conservation practices consistent with the ALE plan; two comments recommended allowing alternative building envelope sites with a final selection in the future if local laws prohibit or make it economically infeasible to locate in the original location; and one comment recommended that the deed term should not allow agricultural structures outside of the building envelope. NRCS requires the identification of a building envelope because the location of potential impervious surfaces is often as important to the future agricultural viability of a parcel as the extent of the impervious surface. NRCS accommodates the desire for flexibility

in the building envelopes by allowing adjustments to the identified location of building envelopes with approval from the Grantee, and NRCS also allows agricultural structures to be built outside the building envelope with Grantee approval.

*Commercial activities (1 comment):* NRCS received one comment recommending that the commercial activities minimum deed term allow for activities related to interpretation of the property as a historic resource, such as charging a fee for a battlefield tour or other similar event. NRCS has incorporated this recommendation into its minimum deed terms.

*Impervious surface limitations (12 comments):* Of the 12 comments NRCS received related to the impervious surface limitation provision in the minimum deed terms, five comments recommended that entities be allowed to establish their own limit up to 10 percent; four comments recommended NRCS only waive the 2 percent limitation on impervious surfaces for farms of a certain size; one comment recommended waivers be limited to 6 percent rather than up to 10 percent; and 3 comments recommended to remove the availability of the waiver or scale it to various categories of easement acreage. NRCS has 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. This limitation provides a reasoned balance between ensuring the continued agricultural viability of the land itself with flexibility to allow for changes to the agricultural operation. The existing NRCS approach is within the range of comments received, therefore no changes were made in response to these recommendations. An eligible entity can always include its own additional deed terms that are more restrictive.

*Subdivision (17 comments):* Of the 17 comments NRCS received about the subdivision minimum deed term, 10 comments recommended that NRCS eliminate the requirement that subdivided parcels not be below the median size of farms in the county or parish; two comments recommended that NRCS prohibit subdivision on protected parcels; two comments recommended subdivision requirements should defer to State law; two comments supported the adoption of "median farm size" as the threshold; and one comment recommended that subdivisions be allowed to facilitate the building of residences that are permitted under the deed. NRCS currently provides three options related to subdivision under the existing

minimum deed terms, allowing the entity to select which option they prefer in the deed terms. The current options are as follows:

Option 1: Outright prohibition of future subdivision.

Option 2: Future subdivision allowed and boundaries identified prior to easement closing and approved by the entity and NRCS as part of the initial easement acquisition.

Option 3: Future subdivision allowed, but must be reviewed and approved by the entity and NRCS, prior to division occurring.

Under option 2, NRCS evaluates the proposed parcels identified for potential subdivision using the program eligibility criteria. Under option 3, since the entity is electing to have the flexibility to identify the subdivision of parcels after the easement has closed, NRCS does not use all of the program eligibility criteria to evaluate the individual parcels proposed for subdivision but rather has adopted the threshold of the median size of farms, including ranches, in the county or parish as an objective criterion upon which to base decisions. The use of median farm size is an objective indicator that the subdivided parcels are of a minimum size, based on county-level data that indicates the parcels would remain viable for agricultural use. Since the data is evaluated at the county level, it accounts for localized agricultural trends and the use of the median rather than the mean data provides a more generous threshold for the minimum size.

*Advisory committee (8 comments):* NRCS received eight comments recommending that NRCS convene a national easement deed advisory committee to provide input on easement deed terms and conditions. NRCS does not believe that an advisory committee is the appropriate vehicle for obtaining input. NRCS published the deed terms and utilized the comment period associated with the interim rule as an avenue to receive broad and open public input on the minimum deed terms. Additionally, NRCS may receive input on program implementation matters, including minimum deed terms, through the State Technical Committee process. The State Technical Committees are exempt from the Federal Advisory Committee Act and provide the best opportunity for all stakeholders to have fair and equal access to provide NRCS input on program implementation.

*Right of enforcement (17 comments):* Of the 17 comments NRCS received about the United States right of enforcement language in the minimum deed terms, two comments recommended removal of the recovery

of administrative and legal costs from the Grantor or the Grantee associated with enforcement or remedial action related to enforcement; one comment recommended NRCS have co-responsibility to ensure compliance with any violation in the easement; one comment recommended that the provision should also include the reasonable costs incurred by the eligible entity holding the conservation easement; four comments recommended that the right of inspection be "corrected" to refer to a "right of enforcement" and not to a "right of inspection"; two comments recommend that the right of inspection should not be part of right of enforcement; one comment recommended that NRCS' right of enforcement or inspection only be exercised in cases where the annual monitoring report is insufficient, is not provided in a timely manner, or if the eligible entity fails to adequately enforce the terms of the easement; two comments recommended that NRCS limit the right of enforcement further and create defined cure mechanisms that must be used prior to the United States exercising its right of enforcement; one comment recommended that the United States should be required to prove its rights and claims in litigation; one comment recommended NRCS explain what constitutes an insufficient monitoring report; one comment recommended NRCS should be required to notify both the Grantor and the Grantee of an ongoing non-compliance in order to have the Grantee take corrective action; and one comment recommended NRCS eliminate the 180-day restriction for corrective actions.

Section 1265B(b)(4)(C)(iii) requires that any easement purchased with ACEP-ALE funds: "(iii) include a right of enforcement for the Secretary, that may be used only if terms of the easement are not enforced by the holder of the easement." Additionally, Section 1265B(b)(4)(E) sets forth the authorities in the event of a violation "If a violation occurs of a term or condition of an agreement under this subsection—(i) the Secretary may terminate the agreement; and (ii) the Secretary may require the eligible entity to refund all or part of any payments received by the entity under the program, with interest on the payments as determined appropriate by the Secretary."

NRCS held numerous meetings with stakeholder organizations about the scope and wording of the United States right of enforcement language, incorporating and addressing most of the stakeholder comments and concerns. However, several aspects of

the United States right of enforcement are necessary in order for NRCS to protect the Federal investment and exercise the right in accordance with statute, including the ability to inspect the easement area to ensure that the Grantor and Grantee are meeting their responsibilities under the easement deed, the requirement for the Grantee to enforce the terms of the easement deed as primary easement holder, and the ability to recover costs if NRCS must enforce the easement because the Grantee failed to do so. NRCS requires the identical language for the right of enforcement for all ALE-funded easements. NRCS believes that this right and the consistency of its terminology and application are necessary to ensure equitable treatment of landowners and eligible entities, and is critical to the protection of the Federal investment in these transactions. NRCS will publish the required right of enforcement language in the ALE-agreements and in the ALE policy.

All NRCS program participants are required to meet the terms of the program requirements, and if they fail to do so, NRCS has the ability to recover costs. However, unlike the 30-day timeframe given financial assistance participants under other NRCS conservation programs, ALE participants are given 180 days to correct any deficiencies prior to NRCS taking further action with respect to violations. Additionally, recovery of costs is authorized specifically by the ALE statute and ensures that the eligible entity maintains its role as primary title holder of the easement under the terms of the ALE agreement. Given the statutory basis for the level of recovery and that such level is consistent with the administration of other NRCS conservation programs, NRCS has modified the minimum deed term language and the regulation to limit NRCS' cost recovery from a Grantee for the Grantee's failure to enforce the easement to the amount of financial assistance provided to the eligible entity by NRCS. Further, NRCS reserves the right to pursue other equitable or legal remedies should the conduct of the eligible entity be considered scheme, device, fraud, misrepresentation, waste, or abuse.

*Access (3 comments):* Of the three comments NRCS received about the access provision in the minimum deed terms, one comment recommended NRCS modify access requirements under ALE to provide reasonable flexibility, particularly in cases where ALE parcels are surrounded by Federal land; one comment encouraged NRCS to adopt greater flexibility for ALE access

requirements; and one comment supported the ACEP manual interpretation of "reasonable" access. NRCS is clear in the regulation and policy that it is the landowner's and eligible entity's responsibility to provide sufficient access to the easement area. However, NRCS has provided flexibility under ACEP-ALE for alternative access when the landowner currently has physical access from a public roadway across lands owned in fee by the United States to the Parcel and current legal access is authorized by any of the following:

1. Use of roads owned and maintained by the United States and managed by Federal agencies such as the Bureau of Land Management (BLM) or United States Forest Service (USFS), this may include numbered system roads;

2. Use of rights of way established under the Federal Land Management Policy Act of 1976;

3. Use of reciprocal rights of way between the landowner and a Federal agency;

4. Long-term access permits issued by a Federal agency, 30 years or greater in length that may be renewed upon agreement of the landowner and the Federal agency; and

5. A letter from an authorized representative of a Federal agency establishing the landowner's permission to cross the Federal land for casual use. Since NRCS first adopted this policy, NRCS has been able to complete high-priority transactions where a checkboard pattern of Federal and private land ownership exists.

*Acquisition purpose restrictions (8 comments):* The eight comments that NRCS received about the minimum deed terms that impose additional restrictions based upon the purpose for which an easement is being acquired are as follows:

• One comment recommended that NRCS require additional deed restriction language for grassland of special environmental significance (GSS). Currently NRCS requires protection for grassland resources to be addressed in the easement deed but allows the eligible entity to provide greater protection.

• One comment recommended that NRCS retain the GSS deed restriction language in the final rule; NRCS has maintained the GSS deed restriction language in this final rule.

• Three comments recommended that NRCS change the term related to management activities during nesting season to include additional language to allow haying during nesting season if it provides critical habitat outside the

breeding season; NRCS did not adopt this recommendation because of the critical need to protect at-risk species during the nesting season.

• One comment recommended that NRCS clarify that bird nesting restrictions are required for grassland enrollments only, and are not required for traditional ALE projects; the bird nesting season restrictions are required for all ALE enrollments that have grassland uses but only for at-risk species. Determinations of nesting seasons for at-risk bird species will be made in writing to the landowners prior to closing, or set forth within the ALE plan developed with the landowners. Please see preamble discussion below under "Definitions" section about comments related to NRCS adding a definition of at-risk species to this regulation.

• One comment recommended that new roads on grassland enrollments should be allowed with the prior approval of the eligible entity and subject to the 2 percent impervious surface limit; NRCS did not adopt this recommendation because allowing new roads on grassland enrollments would create fragmentation of habitat.

• One comment expressed support for the language in the minimum deed term language.

*Miscellaneous minimum deed term comments (10 comments):* Of the 10 comments NRCS received on miscellaneous topics, the comments made the following recommendations or observations:

• One comment recommended revising the fencing language for grassland enrollments; NRCS has adopted this recommendation and updated the minimum deed terms.

• One comment recommended NRCS remove the deed language that specifies the terms that are controlling between NRCS terms and the eligible entity's; The language referenced in the comment applies to provisions that NRCS included in the minimum deed terms when such terms would be appended to an eligible entity's deed as a separate attachment. NRCS included this language to ensure that in the event of a conflict between the minimum deed terms language in the Federal attachment and the eligible entity's deed, the Federal minimum deed term language would control. However, there are several deed terms where an eligible entity may have more stringent requirements, and the statement identifies that where the terms in the main body of the eligible entity's deed are more stringent than the attached Federal minimum deed terms, the deed

terms in the main body of the eligible entity's deed will control.

- One comment recommended revising the environmental warranty to reference the Phase I audit report, identifying that a landowner should not warrant that they are in compliance with environmental laws when that is contradicted by the Phase I report accepted by and approved by NRCS. NRCS is not adopting the language recommended by the comment because a landowner must be able to warrant that they are in compliance with environmental laws. However, NRCS is reviewing the concern with the deed language raised by this comment about awareness of known prior environmental law violations that have since been remediated, and may adjust the deed language accordingly.

- One comment recommended NRCS list the activities that are and are not consistent with the agricultural uses of the land; NRCS did not adopt this recommendation because it is impractical to list all such potential activities. Activities that are consistent with the agricultural use of the land are highly site- and region-specific. An eligible entity can include its own additional deed terms that are more specific.

- One comment recommended NRCS remove the reference to the Chief in the oversight and approval requirements. NRCS did not adopt this recommendation because the purpose of identifying the Chief is to ensure that NRCS has maximum flexibility with respect to delegating such responsibilities in the future.

#### *ALE Entity Certification*

*Comment:* NRCS received 59 comments related to entity certification, of which 10 comments related to the criteria and process for certification; 8 comments related to corrections to the regulatory references; 15 comments related to the deed requirements that apply to certified entities including the recommendation that certified entities only be subject to statutory deed requirements; 18 comments related to NRCS quality assurance reviews including the potential for NRCS to revoke funding for a breach of the grant agreement; 5 comments related to a dedicated fund pool; and 2 comments related to the administrative flexibility process identified in the regulation.

*NRCS Response:* The majority of the concern expressed by the comments related to the deed requirements and whether a certified entity will be required to repay ALE funding if the entity's deed terms are subsequently determined to be insufficient to meet

program purposes. More particularly, several comments recommended that certified entities only be subject to statutory deed requirements, and not the regulatory deed requirements that were outlined in the interim rule. This topic was discussed in part above under the topic of ALE deed requirements, including the NRCS determination that a certified entity, through their familiarity with ALE program requirements, will already have extensive understanding of the deed terms that NRCS considers sufficient to meet program requirements and address the regulatory deed requirements.

The ACEP statute specifies the statutory deed requirements that any eligible entity, including a certified entity, must meet. Based upon statutory deed requirements and the statutory purposes of ALE to protect the agricultural use and future viability, and related conservation values, of the easement area by limiting non-agricultural uses or to protect grazing uses and related conservation values, NRCS identified as regulatory deed requirements the provisions it believed were necessary to meet those statutory requirements and purposes. In the ACEP interim rule, the regulatory deed requirements that meet specific statutory requirements include the right of enforcement (16 U.S.C.

3865B(b)(4)(C)(iii)), ALE plan (16 U.S.C. 3865B(b)(4)(C)(iv)), impervious surface limitations (16 U.S.C. 3865B(b)(4)(C)(v)), and an amendment clause requiring post-recordation changes to be consistent with deed and ALE purposes (16 U.S.C. 3865D(c)). To ensure the deed terms are consistent with ALE statutory requirements that they meet program purposes (16 U.S.C. 3865(b)(4)(C)(i)) and permit effective enforcement (16 U.S.C. 3865B(b)(4)(C)(ii)), the regulatory deed requirements also include: (1) An indemnification clause concerning landowner actions; (2) a prohibition of commercial and industrial activities except those activities that are consistent with the agricultural use of the land; (3) a limitation of subdivisions except where State or local regulations explicitly require subdivision to construct residences for employees working on the property or where otherwise authorized by NRCS; (4) specific protections related to the purposes for which the agricultural land easement is being purchased; and (5) other minimum deed terms specified by NRCS to ensure that ACEP-ALE purposes are met.

NRCS has determined that there is no basis for exempting certified entities from its regulatory determination of the deed requirements that are essential for

meeting ALE program purposes and statutory requirements, and therefore all eligible entities will remain subject to the regulatory deed requirements in the regulation. Certified entities have flexibility to use their own policies and procedures and, with the exception of specific language of the United States Right of Enforcement, are not required to use the minimum deed terms.

Of the comments related to regulatory corrections, NRCS has made the corrections to the typographical errors that the comments identified were in the interim rule.

The five comments related to the dedicated pool requirement requested clarification and increased flexibility in a certified entity's ability to meet the requirement. NRCS requires by policy that a dedicated fund be capitalized with a minimum of \$50,000, and such requirement only applies with respect to certified nongovernmental entities. NRCS has amended the definition of "dedicated fund" to clarify that the requirement only applies to certified eligible entities that are nongovernmental organizations. Eligible entities are able to form or participate in a risk pool with sufficient resources to satisfy the dedicated fund requirements for certified nongovernmental organizations, provided it is explicit about what activities are encompassed. For example, most risk pools cover enforcement and associated litigation, but not monitoring, so monitoring would need to be specifically identified.

The remaining two comments related to the request that certified entities be able to set their own thresholds for impervious surface area, that they not be required to obtain a waiver on a parcel-by-parcel basis, and that certification of eligible entities provide flexibility to allow contracting of monitoring to conservation districts. NRCS requires a parcel-by-parcel determination because impervious surface limitations are fact-specific, and NRCS believes that certification should not equate to reduced protection of the parcels being protected with ALE funding. NRCS wishes to clarify that there is no limitation on whether monitoring can be done by conservation districts.

#### *ALE Entity Eligibility*

*Comment:* NRCS received 19 comments related to the topic of ALE entity eligibility, of which seven comments related to eligibility criteria; five comments related to contribution agreements; one comment related to policy development; two comments related to forms; and four comments related to donations.

*NRCS Response:* Of the seven comments related to eligibility criteria, five comments recommended that NRCS replace the requirement that all of the entity's matching funds be available at the time of application with the requirement that the entity instead provide proof of application to other funding programs along with evidence of funding availability through that program. NRCS did not adopt this recommendation. NRCS requires more definitive evidence, such as a grant award, that the eligible entity has the necessary resources to complete the transaction for which it is seeking Federal involvement. Furthermore, NRCS allows the entity to self-certify that they have sufficient funds available at the time of application, but the submission of additional verifying documentation may be required by the State Conservationist either at the time of application or as part of a quality assurance review. One of the comments recommended that NRCS allow grant contracts or other bona fide promises to provide cash match from partner sources to qualify as sufficient evidence of the availability of matching funds at the time of application, and NRCS has and continues to accept this type of documentation as evidence of match so no change is needed to address this recommendation. One of the comments recommended that NRCS require eligible entities to use a resource management plan to be considered eligible for ALE funding. NRCS did not adopt this recommendation as NRCS believes that such an approach may be too restrictive and instead has adopted a more voluntary progressive planning approach as discussed more fully under the "Planning" topic heading below.

Of the five comments about contribution agreements, one comment recommended NRCS hold title to the grassland easements instead of the eligible entity, which NRCS cannot do under the program statute; one comment recommended that NRCS only be able to charge costs of enforcement against the landowner or eligible entity if NRCS is the prevailing party, which NRCS believes is counter to the purposes for which it obtains the right of enforcement; two comments recommended that all references to the term "cooperative agreement" in the eligible entity certification section at § 1468.27 of the ACEP rule be changed to reference the term "grant agreement", which NRCS has addressed by amending the definitions in § 1468.3 by removing the definition for "cooperative agreement" and introducing a new term, "ALE-agreement", which includes

references to the use of either a "cooperative agreement" that is the type of ALE-agreement used with non-certified eligible entities or "grant agreement" that is the type of ALE-agreements used with certified entities. NRCS use of either a cooperative agreement or a grant agreement used in ACEP implementation is governed by the Federal Grants and Cooperative Agreements Act. NRCS believes this more global term and definition, ALE-agreement, more effectively addresses the concern raised by the comments; one comment recommended that the terms of ALE-agreements be negotiable, which NRCS currently allows non-certified eligible entities to make a request for limited changes to the terms of the template ALE-agreement if there are specific circumstances that prohibit the entity from executing the agreement as written, such as a statutory prohibition. Beyond these limited circumstances, NRCS does not allow the terms of the ALE-agreements to be individually negotiated as the ALE-agreement is the program level agreement between NRCS and the eligible entity. Executing a standard program enrollment agreement is a standard practice across all NRCS cost-share programs and ensures that all eligible entities are subject to the same terms and conditions to be a recipient of Federal cost-share assistance. Furthermore, template ALE-agreements are reviewed and approved pursuant to the Federal Grant and Cooperative Agreement Act of 1977 and the uniform regulation for grants and agreements at 2 CFR parts 25, 170, 200 and 400, such that the published templates have been determined to meet the applicable policy and regulations governing agreements generally as well as ACEP specifically. As a result, changes to the template ALE-agreements require the agreement to be re-reviewed at the National-level for compliance with applicable authorities; therefore, NRCS also identifies that such agreements may not obtain the same priority. However, the terms of the ALE-agreement with certified entities, which uses a template grant agreement for certified entities, unlike the ALE-agreements with non-certified entities that use a template cooperative agreement format, are not negotiable, as the terms of the grant agreement are inherently more flexible and the entity's agreement to use the template grant agreement as published is a condition of certification.

The comment about policy development recommended that eligible entities be involved in the creation of certification processes and procedures.

NRCS used the opportunity of the interim rule's public comment period to obtain input from the public, including eligible entities, about the certification process. Additionally, NRCS may receive input on program implementation matters, including the certification processes and procedures, through the State Technical Committee process. The State Technical Committees are exempt from the Federal Advisory Committee Act and provide the best opportunity for all stakeholders to have fair and equal access to provide NRCS input on program implementation.

Two comments recommended that NRCS combine forms 41 and 41A into the SF-424 forms. NRCS did not adopt this recommendation because the SF-424 forms are Standard Forms used government-wide, and thus not subject to change for a particular agency program.

Four comments recommended NRCS provide greater clarity about the restriction related to donations of easement value, including donations to stewardship funds. NRCS established its policy about the limits to which a landowner contributes to an eligible entity's endowment fund to ensure that the eligible entity meets its responsibilities under the ACEP statute requiring contribution of its own cash resources towards an easement transaction. Several eligible entities have been investigated by the Office of Inspector General (OIG) over the years and were found to be fraudulently representing their contribution of cash resources, hiding landowner donations in other entity accounts and then representing these funds as independent entity cash resources. More troubling, many of these same entities required the landowner to make such donations in order for the eligible entity to fund their transaction.

Two of the comments expressed concern about IRS requirements to ensure that landowners could continue to claim charitable deductions, and NRCS will consider alternative deed language addressing valuation of proceeds in the event of an approved condemnation or other termination actions proposed by eligible entities in an effort to reduce potential conflicts between IRS and NRCS requirements as was discussed above in the topic about ALE deed requirements.

#### *Application Process and Requirements*

*Comment:* NRCS received 10 comments about the ALE application process and requirements. Of these 10 comments, 4 comments recommended changes to the impervious surface

limitations. The remaining 6 comments provided recommendations to improve the application process, including recommending that the NRCS application deadline should occur shortly after the first week of June to accommodate the State's application period, delegating to the NRCS State Conservationist the authority for approving parcel substitution, and creating a time period during which eligible entities have the opportunity to review and negotiate the terms and conditions of the ALE-agreement.

*NRCS Response:* NRCS has not adopted the recommended changes to the impervious surface limitation given that the requirement to include a limit on impervious surfaces is statutory and the extensive review and adjustments NRCS has made through the years of its farmland easement administration about the essential need to limit impervious surfaces to protect the viability of agricultural lands, and the flexibility for waving this limitation be based upon case-specific needs and conditions. NRCS did not adopt the recommendation about the June deadline for project proposals since NRCS accepts applications on a continuous basis and such date is three quarters of the way into the Federal fiscal year, though NRCS believes the no-year funding will help smooth out the respective funding cycles. NRCS currently has delegated to the State Conservationist the authority to make substitution decisions, and only references the Chief in the regulation due to the nature of agency delegation authority. The conditions under which a non-certified eligible entity can request limited changes to the terms of the ALE-agreement are described above and NRCS recommends that any such requests be made prior to or at the time of application for funding for that Federal fiscal year.

#### *Cost-Share Assistance and Match Requirements*

*Comment:* NRCS received 64 comments related to the match requirements for ACEP funding. Of these 64 comments, 27 comments related to the criteria and match for ALE projects of special significance; 11 comments related to the respective match requirements for standard ALE projects; 11 comments related to the availability of the cash match for ALE eligible entities; 6 comments related to ALE restrictions on landowner contributions; 4 comments related to other assistance that NRCS can provide to the ALE transactions; and 5 comments related to the Wetland

Reserve Enhancement Project (WREP) match requirements.

*NRCS Response:* Of the 27 comments about ALE projects of special significance criteria, 6 comments expressed supported the criteria and availability of a waiver, and the remaining 21 comments made suggested recommendations to add or replace the criteria identified in the interim rule. Section 1265B(b)(2) requires that the Federal share of the cost of the purchase of an agricultural land easement must not exceed 50 percent of the fair market value of the agricultural land easement. The eligible entity must provide a share that is at least equivalent to that provided by NRCS but may include a charitable donation by the landowner provided the eligible entity contributes its own cash resources in an amount that is at least 50 percent of the NRCS contribution. However, for "projects of special significance", NRCS may waive any portion of the eligible entity cash contribution requirement, subject to an increase in the private landowner donation that is equal to the amount of the waiver, if the donation is voluntary, and the property is in active agricultural production.

NRCS identified in the interim rule the criteria by which a project may be determined to be one of special significance, including but not limited to, if:

- The project is listed on the National Register of Historic Places;
- the location is within a micropolitan statistical area and 50 percent of the adjacent land is agricultural land;
- the location is within a metropolitan statistical area;
- the project will increase participation in agriculture by underserved communities, veterans, or beginning or disabled farmers and ranchers;
- the farm or ranch is used as an education or demonstration farm focused on agricultural production and natural resource conservation.

Among the recommended changes to the criteria, several comments recommended changes that were not based upon the attributes of the parcel itself, but aspect of the eligible entity's program, such as the incorporation of an Option for Purchase at Agriculture Value (OPAV). NRCS did not adopt the criteria that were not based upon the conservation benefits of enrolling a particular parcel. However, among the recommended criteria, NRCS will adopt the following:

- Several parcels within a special project area being offered for enrollment in that fiscal year that are being

protected pursuant to a comprehensive plan approved by the State Conservationist, with input from the State Technical Committee, for the permanent protection of a large block of farm or ranch land.

- A parcel that is part of a comprehensive plan to facilitate transfers to new and beginning farmers approved by the State Conservationist, with input from the State Technical Committee, for the permanent protection of a block of farm or ranch land that, if implemented, will facilitate the transfer of farmland to a next generation farmer.

- A parcel that is the subject of a conservation buyer transaction where a member of underserved community, veteran, beginning farmer or rancher, or a disabled farmer or rancher has a valid purchase and sale agreement to acquire the property subject to an agricultural land easement. Or

- A parcel that has an existing NRCS Resource Management System (RMS) level plan with NRCS conservation practices applied or under contract to be applied in accordance with NRCS standards and specifications, and the landowner has agreed that the ALE plan will be developed at the RMS level in accordance with the purposes for which the ALE easement is being acquired.

Five of the 11 comments about the match requirements for standard projects requested clarification, especially as the match requirements related to the enrollment of forest land. The remaining six of the comments either expressed support for the cash requirement, requested reduction in the cash requirement, or complete removal of the cash requirement of the eligible entity. In the interim rule, NRCS identified that NRCS may approve a waiver of the two-third limitation for forest land eligibility for sugar bushes. If so, then the acreage associated with the sugar bush are to be included in the eligible land for which cost-share is provided. Forest land beyond the two-thirds, if not waived for sugar bush, is not eligible for ALE cost-share assistance. NRCS cannot adopt the recommendation that NRCS provide a "no cash match" option, with easements using only NRCS funding and the donation of value by the landowner. Not only does this option not meet statutory requirements, but it undermines the nature of the transaction where all parties have financially invested in its success from the outset. The circumstances under which the entity cash contribution can be lowered are described above in the section on ALE 'projects of special significance'.

Of the 11 comments about the requirement that the eligible entity document that they have their match available at the time they apply for ALE funding, two comments supported the requirement; five comments recommended that standard of evidence for cash match availability should be one of high probability as can be evidenced by a successful history in being awarded matching funds in the past; two comments recommended that NRCS substitute this requirement with a requirement that eligible entities be allowed to adequately demonstrate their ability to obtain the requisite funds; and two comments recommending allowing eligible entities to submit a plan for obtaining matching funds when they do not have cash match available on hand. NRCS has always required an eligible entity to certify the availability of match at the time of application as it is a matter of eligibility in determining whether the entity is in fact eligible for the program. Prior to tying up Federal funds for the eligible entity's transaction, an entity must establish that it is eligible and that it is able to perform under the terms of the ALE-agreement. The easement transaction is the eligible entity's transaction, for which they are acquiring title and for which they wish to obtain cost-share assistance from the Federal government for the entity's purchase of an agricultural land easement. Therefore, the NRCS funds are to match an eligible entity's funds that have been set aside for the eligible entity's transaction, not an eligible entity's funds to match NRCS funds that have been set aside for the transaction. NRCS recognizes that an eligible entity may not have its match in its own account, and therefore already provides flexibility for the match to be established through self-certification and, as needed, supplemental documentations such as an award letter or other documentation that the funds have been set aside for the transaction. NRCS believes it has balanced maximum flexibility for the eligible entities with responsible administration of Federal funds and thus no additional flexibility is warranted.

Of the four comments about the restrictions that NRCS has identified in the interim rule related to landowner contributions, two comments recommended eliminating the restriction on landowner contributions to eligible entities and two other comments recommended that NRCS eliminate the reference to landowner contributions to a stewardship endowment. As explained above, NRCS adopted these restrictions to meet the

statutory requirement that an eligible entity contribute its own cash resources to a transaction. During the OIG investigations referenced above, landowners had been misled, threatened, and otherwise coerced into making contributions to other accounts of an eligible entity to hide the eligible entity's inability to contribute its own cash resources. NRCS recognizes that this behavior is limited, but believes strongly that providing reasonable parameters on what NRCS will accept as evidence of a voluntary landowner contribution removes the potential for these types of inappropriate behaviors. NRCS did not make any changes to the regulation in response to this comment, but is reviewing the policy levels established for this limitation.

Of the four comments about the availability of other NRCS assistance, two comments recommended that NRCS reimburse land trusts for transaction costs once the easement has been recorded; one comment recommended NRCS provide 10 percent of the administrative costs to eligible entities to reduce financial burden; and one comment recommending that NRCS make funding available to cover the conservation organizations' dedicated fund in NRCS funded transactions. NRCS did not adopt any of these recommendations as they are not supported by the statute. Under ALE, NRCS only has authority to provide cost-share assistance for the cost of an easement, and appropriate technical assistance, and no other activities are authorized to be funded. All other financial responsibilities belong to the purchaser of the easement that is the eligible entity.

Of the five comments about the WREP match requirements, three comments recommended NRCS use the 5 percent minimum requirements instead of the new 25 percent requirement, and two comments recommended that the WREP match requirements be available through the Regional Conservation Partnership Program (RCPP). NRCS did not adopt either recommendation. WREP is a component of ACEP-WRE through which NRCS enters into agreements with eligible partners to target and leverage resources to carry out high-priority wetland protection, restoration, and enhancement activities and improve wetland and associated habitats on eligible lands. In FY 2015, NRCS published a request for WREP proposals and awarded approximately \$30 million in financial assistance (FA) funds to competitive projects. NRCS believes the 25 percent match requirement encourages meaningful partnership effort and represents a

match requirement well-established in similar watershed and conservation efforts. The non-Federal match also expands the number of wetland acres that can be protected and restored, resulting in an even more cost-effective use of Federal financial resources. NRCS provides flexibility concerning the component of the project upon which a partner's contribution will be based. Given the match requirements that must be met in WREP, NRCS prefers not to complicate WREP implementation efforts with RCPP implementation efforts and allow each partnership effort to remain distinct.

#### Definitions

*Comment:* NRCS received 63 comments about the Definitions section, § 1468.3, of the interim rule. The comments made recommendations about the following definitions:

- Access (4 comments)
- Active agricultural production (4 comments)
- Agricultural commodity (1 comment)
- Agricultural Land Easement (3 comments)
- Agricultural Land Easement Plan (5 comments)
- Agricultural uses (3 comments)
- At-risk species (5 comments)
- Beginning farmer or rancher (1 comment)
- Dedicated funds (2 comments)
- Easement administration definitions (4 comments)
- Eligible entity (1 comment)
- Fair market value (3 comments)
- Farm viability (2 comments)
- Grassland Management Plan (4 comments)
- Grassland of special environmental significance (11 comments)
- Historical and archaeological resources (1 comment)
- Succession plan (7 comments)
- Request for terms to be defined (2 comments)

To ease readability, NRCS describes the comments received for each of the definitions in its response to such recommendations below.

*NRCS Response:* Of the four comments about the definition of *access*, one comment requested that the definition add a phrase to clarify that access is over at least one adjacent or contiguous parcel; one comment requested that the definition match the definition that appears in the ACEP manual; one comment recommended NRCS rely on established real estate laws and customs of the region in which the ALE easement is acquired; and one comment requested clarification of how access appears in the easement deed.

NRCS cross-checked the definition and the referenced citation in the ACEP manual and no change to the regulatory definition is needed. The referenced manual provision simply provides guidance to NRCS personnel about how to determine whether sufficient access to the easement area exists, and does not affect the definition of access itself. NRCS needs only one route identified, but that route must be able to facilitate access to the entire easement area, otherwise multiple routes may be needed to ensure there is sufficient access to the entire easement area. NRCS has identified that access must be described in the deed document.

Of the four comments received about the definition of *active agricultural production*, two comments supported the definition and two comments recommended that the word “timber” be included in the definition. NRCS did not adopt this recommendation as the definition already references land on which “forest-related products” are produced, and NRCS believes this sufficiently encompasses land in timber production.

The one comment received about the definition of *agricultural commodity* recommended that the definition include all agricultural commodities or eliminate the definition completely. NRCS did not adopt this recommendation. Section 1201 of the Food Security Act of 1985, as amended, defines the term for all Title XII programs, which includes ACEP.

The three comments related to the definition of *Agricultural Land Easement* recommended that NRCS specifically include States with easements subject to duration restrictions. NRCS did not adopt this recommendation as duration restrictions are already addressed in the program requirements criteria. In particular, § 1468.20(a)(4) specifies that the “duration of each agricultural land easement or other interest in land will be in perpetuity or the maximum duration permitted by State law.”

Of the five comments related to *Agricultural Land Easement plan*, two comments recommended that the definition should be defined as a plan that meets Resource Management System standards; one comment expressed support for the definition; one comment recommended that the definition only require conservation practices in component plans for highly erodible soils and grasslands; and one comment recommended that less discretion be given to ALE applicants. NRCS did not adopt these recommendations as the current

definition provides the basic framework as based upon statutory requirements.

Of the three comments related to the definition of *agricultural uses*, one comment supported the definition; one comment requested that the agricultural use must be made by a “qualified farmer”; and one comment recommended that NRCS provide a single definition with its own terminology specific to the purposes of the program. As described in the interim rule, the ACEP definition of “*agricultural uses*” employs a more universal term of “farm or ranch land protection program” than was used previously under FRPP to ensure that programs that have the principal purpose of protecting grasslands or grazing uses are included. Given that NRCS provides assistance to State and local agricultural land easement program efforts, NRCS will continue to refer to the State definition of agricultural use found in either its farm and ranch land protection program or tax assessment authority, but reserves the right to impose deed restrictions to comply with Federal law or to protect soil or related natural resources. NRCS believes that making determinations of who would be considered as a “qualified farmer” leads to inappropriate subjective determinations and would interfere with the ability to implement the program in a fair and equitable manner.

Of the five comments about the definition of *at-risk species*, one comment recommended that NRCS add the definition and four comments recommended that such a definition be consistent with other NRCS conservation programs. NRCS has adopted these recommendations as the term “at-risk species” is used in other definitions, and is an important concept in ACEP implementation and prioritization of efforts. Therefore, NRCS has added the following definition to the final rule:

*At-risk species* means any plant or animal species listed as threatened or endangered; proposed or candidate for listing under the Endangered Species Act; a species listed as threatened or endangered under State law or Tribal law; State or Tribal land species of conservation concern; or other plant or animal species or community, as determined by the State Conservationist, with advice from the State Technical Committee or Tribal Conservation Advisory Council, that has undergone, or is likely to undergo, population decline and may become imperiled without direct intervention.

The one comment about the definition of *beginning farmer or rancher* recommended amending that NRCS establish a minimum of at least three

years’ experience providing “substantial day-to-day labor and management of the farm.” NRCS did not adopt this recommendation because the definition is established by statute, and NRCS uses the same definition for all its conservation programs.

Of the two comments about the definition of *dedicated funds*, one comment recommended adopting the Land Trust Alliance’s definition for dedicated funds, and one comment recommended removing the restriction that the account cannot be used for other purposes. NRCS believes that the Land Trust Alliance’s discussions about dedicated funds is similar to the NRCS definition, but believes that the NRCS definition more adequately addresses the needs for ALE program implementation. NRCS did not adopt the second recommendation because, as the definition implies, the fund must be dedicated for the eligible entity’s stewardship responsibilities.

Of the four comments about the definitions for the various types of easement administration actions—easement exchange, easement modification, easement subordination, and easement termination—one comment recommended minor changes to the easement modification definition; two comments requested clarification to each of the definitions; and one comment requested clarification to the definition of “compelling public need.” NRCS developed the definitions to provide a clear distinction between each type of easement administration action so, for example, an easement modification is readily distinguished from an easement exchange. NRCS based these definitions on its experience with processing easement administration action requests under the predecessor authorities, and familiarity with other Federal agency requirements under similar authorities. NRCS finds that these definitions provide clarity to landowners, provide for the long-term protection of critical resources, and ensure the integrity of the Federal investment in easements.

The comment about the definition of *eligible entity* recommended that NRCS reflect the statutory definition verbatim. NRCS did not adopt this recommendation because NRCS believes that the regulatory definition fully encompasses the statutory definition and does so in simpler language and thus improves the accessibility of the program. Additionally, the definition includes criteria related to an eligible entity that are either identified explicitly in the statute or are needed as a matter of consistent and effective program administration.

The one comment about the definition of *fair market value* recommended that NRCS give equal valuation to easements subject to State mandated duration restrictions as perpetual easements. NRCS did not adopt this recommendation because the shorter duration easements do not have the same impact on land value as permanent easements and landowners who provide a permanent easement should receive the commensurate greater compensation.

Of the two comments about the definition of *farm viability*, one comment requested clarification of how the mechanisms to preserve farm viability will function, and one comment recommended replacing the language for the term “future viability” with “availability for continued agricultural use; continued capacity for productive agriculture by independent farmers and ranchers; accessibility to beginning farmers and ranchers; and continued affordability for purchase by working farmers and ranchers for generations to come.” NRCS has added the term “Future Viability” to the definition section and it has been defined as “the legal, physical, and financial conditions under which the land itself will remain capable and available for continued sustained productive agricultural or grassland uses while protecting related conservation values.”

Of the four comments about the definition of *grassland management plan*, one comment expressed support for the definition and three comments recommended adding haying as a management tool. The grassland management plan relates to the enrollment of land for which grazing is the predominant use, but is also required for grassland located in an area that has been historically dominated by grassland, forbs, or shrubs and could provide habitat for animal or plant populations of significant ecological value. The focus on grazing as a component of the grassland management plan is a holdover from the Grassland Reserve Program, and NRCS has modified the definition to include a reference to haying as landowners may also conduct haying on grasslands protected under ALE.

Of the 11 comments about the definition of *grassland of special environmental significance*, three comments expressed support for the definition especially with the added definition of “at-risk species”; three comments focused on “highly sensitive natural resources” recommending that the State Conservationist consult with the State Technical Committee on the

appropriateness of a particular parcel’s enrollment and allowance of habitat for native pollinators as a highly sensitive natural resource; three comments recommended including language that they must be identified in State, regional, or national conservation plans or initiatives; and three comments about including grasslands located around wetlands or in regions with high wetland densities.

NRCS recognizes the benefit of these recommendations and has adopted many of them in the definition. In particular, NRCS has provided guidance to its State offices to obtain State Technical Committee input about highly sensitive natural resources within the State, including the ability of States to consider whether such lands are identified in special initiatives or plans.

The one comment about the definition of *historical and archaeological resources* recommended that battlefield properties should be identified as a separate subcategory. NRCS did not adopt this recommendation as the existing subcategories sufficiently encompass historic battlegrounds.

Of the seven comments about the definition of *succession plan*, three comments recommended replacing the term “historically underserved landowner” with “beginning, limited resource, or socially disadvantaged farmer or rancher” and four comments recommended including an Option to Purchase at Agricultural Value (OPAV) as a type of qualifying succession plan. NRCS did not adopt the first recommendation because the meaning of the term “historically underserved landowner” includes reference to the three categories of farmers or ranchers to whom NRCS provides special priority in the administration of its conservation programs. NRCS did include an OPAV as a type of qualifying succession plan because OPAV is a deed term negotiated by the Grantor and Grantee in the course of the implementation of the Grantee’s program.

There were two comments that recommended that NRCS define additional terms, one comment recommending that “Future Viability of Agricultural Land” be defined, and one comment recommending that “Amendment for the minimum deed terms” be defined. NRCS has added a definition of Future Viability, as described above. NRCS has also provided further clarification on the purpose and use of the minimum deed terms, and has determined that an additional definition is not necessary to provide further clarification.

#### *Easement Closing and Payment Procedures*

*Comment:* NRCS received one comment recommending that NRCS shorten the time needed to close an easement transaction.

*NRCS Response:* Through policy, NRCS has changed its easement business process to require as much due diligence as possible to be completed prior to entering into an agreement. This practice will significantly reduce the time it takes to close on an easement as it will reduce the number of agreements entered into on parcels with outstanding issues such as unacceptable title encumbrances, hazardous substance contamination issues, boundary disputes or insufficient access, and other issues that tend to result in delays in closing if not discovered until after an agreement has been entered into. Additionally, in FY 2015, NRCS piloted an Easement Support Services (ESS) team to assist States with improving the quality and efficiency of easement acquisition activities. Under ESS, teams managed by the National Office assume various tasks related to easement acquisition, including closing, for a group of States, thus providing a more centralized, consistent process. ESS is expected to expand nationwide by FY 2018, and NRCS believes that this focused, specialized team combined with other efforts to strengthen communication between the States and the National Office, will help resolve issues earlier in the process, clarify policy, provide training, and serve as a platform to provide a more consistent process by which easements will be acquired. NRCS believes that this process will reduce the time needed to close an easement consistent with program requirements.

#### *Easement Monitoring, Management, and Enforcement*

*Comment:* NRCS received 34 comments related to the topic of easement monitoring, management, and enforcement, of which five comments related to the authority under WRE to delegate such authorities; four comments related to easement management; 11 comments related to easement monitoring; nine comments related to easement violations; and five related to the right of enforcement.

*NRCS Response:* Of the five comments about delegation, two comments supported the delegation language; two comments recommend NRCS allow State and Federal agencies that have fee title ownership of an easement parcel to receive delegation of authority; and one comment

recommended that NRCS policy limiting such delegations only apply to future formal delegations. NRCS adopted the policy about not delegating easement responsibilities to fee title landowners due to issues that have arisen where the fee title landowner's program policies and authorities are inconsistent with ACEP. NRCS has been reviewing its prior delegations to ensure that appropriate stewardship of NRCS-funded easements is being conducted by the partners who have received the delegation of authority in the past, and is working with these partners to ensure the appropriate follow-up where problems have been identified.

Of the four comments related to easement management, one comment recommended NRCS increase opportunities and incentives to utilize haying and grazing as a wetlands management tool, which NRCS does through the compatible use authorization process to improve quality of management on WRE easements; one comment recommended eliminating "lesser of 2% or \$20,000" restriction on landowner contributions to endowments, which NRCS explained above that a limitation on endowment contributions is important to ensure the voluntary nature of landowner donations to ALE easement acquisitions and adherence to the statutory requirements but the level of the limitation may be adjusted upon review and approval by NRCS prior to closing. One comment recommended that NRCS require ALE eligible entities to incorporate necessary deed restrictions related to grasslands of special environmental significance, which NRCS already does, and one comment recommended existing easements should not be retroactively subject to and required to comply with new stewardship and management requirements of ACEP, the passage of the new ACEP does not affect the terms of any existing recorded easements or the terms of agreements entered into prior to February 7, 2014. However, the statute identifies that lands enrolled in the predecessor programs are considered enrolled in ACEP, therefore the new authorities related to easement administration actions and delegations are applicable to all FRPP, GRP, WRP, and ACEP easements.

Of the 11 comments about easement monitoring, one comment requested that NRCS clarify that NRCS may only monitor an ALE easement after formally exercising the right of enforcement. This is inaccurate because NRCS monitors easements, including review of eligible entities' monitoring reports, to ascertain whether there is cause for NRCS to

exercise its right of enforcement. Three comments recommended NRCS prohibit NRCS staff from monitoring an ALE easement when visiting a property for other reasons. NRCS did not adopt this recommendation because it is irresponsible for the Agency to ignore possible violations it becomes aware of in the performance of its duties. Two comments recommended that NRCS clarify when certified entities will lose certification or an ALE-agreement due to failure to monitor or enforce its easements, which NRCS has done in its ACEP policy manual at 440 CPM 528.75. One comment recommended increasing monitoring and enforcement to ensure easement compliance, which NRCS will consider when it updates its monitoring policy for all easements. For current entity-held easements, NRCS policy requires NRCS to conduct onsite monitoring 1 in 5 years and review of the entity's monitoring documents the remaining 4 in 5 years. However, NRCS recognizes that the Grantee has primary responsibility to conduct monitoring and enforcement. Two comments recommended NRCS work with eligible entities to add, if necessary, additional questions to the eligible entities existing monitoring forms, such as any "required questions", which NRCS will do. The NRCS monitoring form is available to the public on the NRCS Web site and it contains the required monitoring questions that NRCS must answer to complete its annual report on easement condition. One comment recommended NRCS provide review and comment about an eligible entity's monitoring activities, which NRCS will do upon request by the eligible entity. One comment recommended NRCS clarify the required conditions regarding dedicated funds. NRCS clarifies these conditions at 440 CPM 528.72, including specifying the dedicated fund will be considered committed to these purposes if it is held in a separate account and may not be used for other purposes, the dedicated fund is considered sufficient if it has at least \$50,000 for legal defense and \$3,000 per easement for management and monitoring, and clarification that a sufficiently capitalized risk pool will satisfy the requirement of a dedicated fund.

Of the nine comments about easement violations, one comment recommended NRCS notify the eligible entity's other funding partners when there is a violation, which NRCS did not adopt as it is the eligible entity's responsibility to notify the partners from which the entity received funding; three comments recommended that damage or

destruction caused by natural events should not be considered an easement violation, which is already the case; one comment recommended clarifying violations of the ALE plan, which as NRCS has explained is the responsibility of the eligible entity with the exception of violations of the conservation plan component of the agricultural land easement plan for which verification of compliance is the responsibility of NRCS in accordance with the conservation compliance provisions at 7 CFR part 12. One comment recommended always requiring notice to landowners about violations, which by policy, NRCS notifies the landowner for WRE easements and notifies the Grantee for ALE easements if NRCS discovers the violation prior to the Grantee despite the Grantee having primary enforcement responsibility, though there may, however, be emergency circumstances where written notice prior to addressing a violation is not practicable; two comments recommended that a violation notice does not negate or circumvent the role of funding partners to assist in determinations of violations, entitlements to recovery of fees and expenses, determination of easement termination valuations, and proportional dispensation of termination proceeds, which NRCS agrees it does not; and two comments that NRCS should only be entitled to recover costs if the eligible entity was negligent in its enforcement role, which would be the most likely circumstance if the eligible entity failed to enforce its easement.

Of the five comments related to the right of enforcement, two comments recommended that NRCS notify land trusts if they are inadequately reporting and also create an opportunity to resolve any issues before NRCS asserts its enforcement rights, which NRCS will do in situations where all parties are acting in good faith; one comment recommend NRCS amend the right of enforcement language to include a provision by which the entity could repay the value of the easement to avoid enforcement action, which NRCS finds fundamentally in opposition to the statutory purposes of the program; and one comment recommended that the ACEP manual should not focus on NRCS' stewardship, monitoring, and enforcement responsibilities because entities have primary responsibility in these areas, which NRCS recognizes in policy. But this does not alleviate NRCS' responsibility to ensure that the statutory program purposes are met and

the substantial Federal investment is being protected.

#### *Easement Valuation and Consideration*

*Comment:* NRCS received 40 comments on the topic of easement valuation and consideration, of which three comments were about the valuation methods in general, five comments related Geographic Area Rate Caps (GARCs) and Area-Wide Market Analyses (AWMAs); three comments related to alternative valuation methodologies; three comments related to the appraisal effective date; seven comments related to appraisal reviews; eight comments related to appraisal specifications; and 11 comments related to projects of special significance.

*NRCS Response:* The comments related to the valuation methods expressed support for the methods identified. One of the commenters requested NRCS specify that following the Uniform Standards for Professional Appraisal Practices (USPAP) Standard 6, the Mass Appraisal Standard, is only appropriate in certain circumstances. However, NRCS does not reference Standard 6, and for the last two years NRCS referenced USPAP Standards 4 and 5—the consulting standards. Since these standards were omitted in the latest version of the USPAP, NRCS handles the AWMAs with reference to Standards 1 and 2, as these place the appraiser in a better situation with respect to the valuation opinion. The remaining four comments related to the GARCs and AWMAs expressed support for the regulatory language.

Of the three comments related to the availability of alternative valuation methodologies for ALE, one comment expressed support; one comment sought assurance that industry-approved appraisal standards will be sufficient; and one comment recommended that NRCS use the Farm Credit Association's "benchmark valuation" model. NRCS will review any standards submitted by eligible entity and compare to the appraisal standards under USPAP or the Uniform Appraisal Standards for Federal Land Acquisition (UASFLA) to determine if the alternative methodology sufficiently determines the fair market value of the easement. NRCS reviewed the benchmark valuation model but has determined that this methodology alone is not sufficient because it only derives market value of the fee estate, and does not derive easement value as required by statute.

The three comments about the adjustments to the ALE appraisal effective date supported the change that NRCS made to policy allowing approved appraisals to have an effective

date that is either within one year of the closing date, or within six months on either side of the signing of the ALE-agreement.

Of the seven comments about the appraisal review process, one comment expressed support for the process; one comment recommended NRCS review the current appraisal contracts and instructions to review appraisers; one comment recommended NRCS work with eligible entities to review the current contract for review appraisers; one comment requested NRCS clarify the definition of technical appraisal review; one comment recommended NRCS require communication between the appraiser and the review appraiser during the development of the preliminary scope of work; one comment recommended that review appraisers meet an ASFMRA Real Property Review Appraiser program, ASA Appraisal Review and Management, or NAIFA Independent Fee Appraiser Agricultural (IFAA) designation to be qualified to competently perform as a review appraiser; and one comment recommended that NRCS strengthen the review appraisal function.

NRCS continuously reviews the appraisal instructions with its contracted technical review appraisers. It is difficult to make reviews consistent since they are professional opinions and not simply a checklist. However, NRCS will note that it may identify problems with an appraisal that do not affect validity of the determination of value. NRCS has not adopted the recommendation that would allow eligible entities to review the current contract NRCS has with review appraisers because the review appraisers are to provide an independent review of the appraisal submitted by the eligible entity. A technical appraisal review is a review completed by a State certified general appraiser. NRCS cannot require communication between the review appraiser and appraiser during the development of the preliminary scope of work of the appraisal because of the timing issues since the eligible entity often does not know that NRCS funding will be sought or obtained at the time the appraisal is being conducted. However, the NRCS appraisal specification and scope of work and appraisal technical review specification and scope of work are both publically available on the NRCS Web site and can be accessed by the eligible entities or the appraisers at any time. Additionally, the appraiser always has access to the NRCS National Appraiser should questions arise during the development

of the original appraisal. With respect to the comment recommending various designations, NRCS requires review appraisers to meet strict qualifications, though the referenced designations are not required. NRCS continually reviews its procedures to ensure the quality of the appraisal and appraisal review functions meet program requirements.

Of the eight comments about NRCS appraisal specifications, one comment requested NRCS clarify the appraisal scope of work to bar appraisers who have had disciplinary actions that did not result in suspension but did result in a license restriction, which NRCS will adopt as an appropriate additional consideration. One comment requested NRCS specify that USPAP and UASFLA be identified as appraisal thresholds, which NRCS already does in both the regulation and policy manual. One comment recommended that a survey should not be required as part of the appraisal report if a current recorded deed meets closure requirements under State law, which is the current standard NRCS applies, if a survey is available then it should be included, but otherwise the existing recorded legal description is sufficient if it meets the State law and describes the area to be encumbered by the easement. One comment recommended using an UASFLA appraisal instead of USPAP when discounted cash flow valuation method is used, which NRCS did not adopt as UASFLA actually discourages the use of the cash flow valuation method. One comment recommended NRCS allow landowners to obtain the appraisal and another comment recommended that NRCS allow the landowner to be listed as a client on an appraisal, neither of which NRCS adopted because conflict of interest concerns prohibit such steps, as do prior OIG audit management actions. NRCS policy, however, does allow landowners to be identified as a user and to pay for the appraisal, but does not allow the landowner to select the appraiser or direct the appraiser as the client. One comment opined that UASFLA is the most accurate and proven method for developing an opinion of "fair market value" for fractional and partial interests, such as those involved in the ALE program, which is why NRCS considers it as an acceptable methodology to use. One comment requested NRCS clarify that a farm with excess forestland can be protected under one easement as long as the additional forestland is not included in the appraisal, which NRCS considers as much a program issue as an appraisal issue, and simply requires that the

appraisal upon which NRCS bases its cost-share assistance must be of the area being enrolled in ALE only.

Of the 11 comments about projects of special significance, three of the comments recommended establishing a time limit for NRCS consideration of requests of an eligible entity's cash contribution, which NRCS will not adopt as an unnecessary prioritization of a program implementation action; additionally the eligible entity has the flexibility to request a project of special significance determination before or after the ALE-agreement is entered into. The remaining comments requested clarification or recommended replacing the national criteria with considerations such as whether the parcel is: Owned by a new or beginning farmer; part of a comprehensive plan to protect a block of farms or ranchland adjacent to Federal or State lands dedicated to conservation or military use; an education or demonstration farm; or would include an Option to Purchase at Agricultural Value (OPAV) in the deed, or the project would have significantly lower probability of happening without a reduction in the required eligible entity cost-share.

Section 1265B(b)(2) requires that the Federal share of the cost of the purchase of an agricultural land easement must not exceed 50 percent of the fair market value of the agricultural land easement. The eligible entity must provide a share that is at least equivalent to that provided by NRCS, but may include a charitable donation by the landowner provided the eligible entity contributes its own cash resources in an amount that is at least 50 percent of the NRCS contribution. However, for projects of special significance, NRCS may waive any portion of the eligible entity cash contribution requirement, subject to an increase in the private landowner donation that is equal to the amount of the waiver, if the donation is voluntary, and the property is in active agricultural production.

While at first it appears that identifying parcels owned by a new or beginning farmer as a project of special significance would prioritize such enrollment, the actual impact of such identification would result in the eligible entity providing less financial compensation to a landowner who, given the newness of the operation, would best benefit from the capital investment of the eligible entity. Therefore, NRCS has incorporated criteria specifically to encourage enrollment of parcels owned by historically underserved landowners as projects of special significance where such criteria do not have such

unintended consequences. NRCS does consider "buy-sell-protect" or "conservation buyer" parcels that are subject to a valid purchase and sale agreement to transfer land to historically underserved buyer at the closing of the ALE as a project of special significance. NRCS has added such criteria, as discussed above, to the regulation. NRCS also believes that a parcel could qualify as a project of special significance if it is one of several parcels within a special project area being offered for enrollment in that fiscal year that are being protected pursuant to a comprehensive plan approved by the State Conservationist, with input from the State Technical Committee, for the permanent protection of a large block of farm or ranch land. However, agricultural zoning or being identified for protection by an established farmland protection program is not sufficient to meet this standard. NRCS already provides priority for enrollment of parcels near military installations or other conservation lands, and while these efforts are standard among farmland protection efforts, the proximity of a parcel to such lands in conjunction with other factors may qualify a parcel as a project of special significance. As discussed above, OPAVs are an administrative tool used by eligible entities and do not represent any special resource condition of the parcel itself, and therefore NRCS will not identify parcels that will have OPAV provisions as a project of special significance.

#### *Land and Landowner Eligibility*

*Comment:* NRCS received 122 comments related to the topic of land and landowner eligibility. Of the 122 comments, in descending order of number of comments: 32 Comments related to lands in entity ownership; 17 comments related to ALE forest land eligibility; 15 miscellaneous comments; 11 comments related to ACEP landowner requirements; nine comments related to ALE eligibility criteria; seven related to ALE infrastructure; six comments related to grasslands eligibility; six comments related to prime farmland eligibility; five related to mineral rights; four comments related to the ALE written pending offer; four related to WRE enrollment of Conservation Reserve Program acres; three comments related to access; two comments related to ALE State or local policy eligibility; and one comment related to historical and archaeological significance.

*NRCS Response: Lands in entity ownership:* Of the 32 comments about the eligibility of lands owned by an

eligible entity, one comment recommended that such land be ineligible and the remaining comments recommended either temporary or permanent eligibility of such lands. NRCS did not adopt these recommendations due to the statutory framework of the program. More particularly, the statutory framework for eligible land and eligible landowners prevents NRCS from providing ALE funds for the reservation of an easement in land currently owned by an eligible entity. As to eligible land, the definition of an agricultural land easement is: "an easement [or other interest] in eligible land that—(A) is conveyed for the purposes of protecting natural resources and the agricultural nature of the land; and (B) permits the landowner the right to continue agricultural production and related uses subject to an agricultural land easement plan, as approved by the Secretary.

The statutory definition of "eligible land" is private or tribal agricultural land that is "subject to a pending offer for purchase of an agricultural land easement from an eligible entity." Section 1265A(3)(A)(i) (Emphasis supplied).

As to limitations imposed by the definition of eligible landowners, to qualify as an eligible landowner an eligible entity would need to comply with adjusted gross income limitations (AGI) and conservation compliance requirements. Currently under ACEP-ALE, eligible entities are not evaluated for AGI or conservation compliance as the benefits of the program and therefore the landowner eligibility requirements are attributed to the landowner. However, if an eligible entity were to apply for ACEP-ALE as a landowner then they would be subject to AGI and conservation compliance checks. While AGI is unlikely to limit eligible entities, the conservation compliance check would present a new and significant hurdle for an eligible entity. Furthermore, because only private and tribal land is eligible an eligible entity that is a State or local government cannot be an eligible landowner.

Further, under Section 1265B(b)(1) of the ACEP statute, cost-share assistance is only authorized to be provided for "purchasing agricultural land easements." In a situation where the eligible entity already owns the land, an agricultural land easement is not being purchased but reserved and the residual fee title is being sold to a private landowner. NRCS has developed policy to address temporary buy-sell-protect situations. By including within the definition of a landowner those buying

eligible land under a purchase agreement, NRCS has enabled eligible entities to engage in buy-sell-protect or conservation buyer transactions through ALE. Typically, eligible entities will act as a conservation buyer when the land is of high conservation value and is subject to an imminent threat that is incompatible with the preservation of the land's conservation values and, as a result, time is of the essence. In such a scenario, eligible entities may acquire eligible land, enter into a valid purchase agreement with an eligible landowner, apply for ALE cost-share assistance before the landowner acquires fee title and then acquire an ALE using the Federal cost-share assistance only after the eligible landowner acquires a fee title. Combining conservation buyer strategies and ALE allows eligible entities to act quickly to protect land, ensures the lands are held in ownership by an eligible landowner in order to meet ALE program requirements, and preserves the conservation values in perpetuity with assistance from NRCS.

*Forest land eligibility:* Of the 17 comments received about forest land eligibility, 11 comments supported the waiver of the forest land limitation for sugar bush acreage but requested further clarification; four comments requested that non-industrial forest land would either be exempt from the forest land restrictions or qualify for a waiver; and the remaining two comments simply expressed support for the continued restriction on the enrollment of forest land in ALE. In the interim rule, NRCS explained that NRCS would continue the former FRPP determination that forest land was only eligible if it did not exceed two-thirds of the easement area, and that NRCS would reduce its cost-share in proportion to the extent that an easement protects forest land that exceeds two-thirds of the easement area. However, NRCS also identified that it may waive the two-thirds forest land limitation for sugar bush acreage that contributes significantly to the economic viability of the parcel being offered for enrollment, since landowners manage their sugar bush as an integral part of their overall agricultural operations. Thus, if the waiver is granted, then NRCS would provide cost-share assistance for the enrollment of the land subject to the waiver. NRCS did not adopt the recommendations concerning non-industrial private forest land since the ALE currently limits the eligibility of forest land to "non-industrial private forest land that contributes to the economic viability of an offered parcel or serves as a buffer to protect such land

from development." NRCS believes that the two-thirds restriction on the enrollment of non-industrial forest land meets this criteria, and the waiver for sugar bush provides sufficient flexibility to this restriction.

*Miscellaneous:* Of the 15 miscellaneous comments, one comment requested NRCS clarify which types of unrecorded interests might impact a property's chances of receiving funding. There are numerous types of unrecorded interests that can affect the quality of title that a landowner is able to provide, including, but not limited to, those that could interfere with the future agricultural use of the land, such as oil extraction leases with no limitation, adverse possession claims, unresolved boundary disputes, utility or infrastructure options, 'floating' leases or rights-of-way with third parties, or other unrecorded agreements for non-compatible uses that cannot be cancelled, revoked, or otherwise subordinated prior to closing. The due diligence and title evaluation documents NRCS uses when conducting its own due diligence activities are available to the public on the NRCS Web site and provide a good reference for eligible entities to identify the types of issues NRCS evaluates in the course of determining eligibility and quality of title.

Six of the 15 comments recommended that Confined Animal Feeding Operations (CAFOs) should be ineligible for ACEP-ALE funding by adding CAFOs at § 1468.20e "ineligible land criteria" as these lands impair groundwater, surface water, and air quality. 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 whether the land meets the required land eligibility criteria. This is necessarily a case specific determination and therefore broad categorization of land eligibility simply based on type of operation would not be appropriate.

With respect to WRE land eligibility, one comment requested clarification about the WRE water depth factor for determining eligibility of potholes and closed basins. As an eligibility determination, the "6.5 foot or less" criterion refers to the depth of flooding at the time of application and is not based upon any hydrologic features that could be planned to be constructed for the project. One comment requested NRCS give flexibility at the NRCS State level when consulting with the United States Fish and Wildlife Service to

determine how to maximize wildlife benefits and wetland values and functions, which NRCS already does. One comment recommended prohibiting commercial game farms and shooting preserves on NRCS easements, which NRCS will not do as some related activities may be consistent with the long term wetland purposes of the easement, as determined by NRCS through the compatible use authorization process.

Two of the 15 comments requested that NRCS emphasize that land enrolled in WRE would not be eligible for wetland mitigation credit. WRE easements and contracts provide NRCS the authority to restore, protect, and enhance enrolled wetlands and associated habitats in a manner that will maximize wildlife habitat and other wetland functions and values. The assumption is that WRE lands will receive the conservation attention from NRCS necessary to achieve this full degree of protection, restoration, and enhancement. Therefore, NRCS does not allow another entity to expend mitigation funds on any of the land treatment conservation actions that would be appropriate and practicable to fund under WRE. This policy extends to any compensatory action taken by a third party to mitigate adverse ecological impacts, including but not limited to, the Federal Water Pollution Control Act (*i.e.* Clean Water Act), the Endangered Species Act of 1973, and the Marine Mammal Protection Act of 1972.

However, there may be limited opportunities when enhancement activities under a mitigation project would go beyond those conservation actions normally carried out under a WRE. NRCS notifies landowners who wish to enter into mitigation arrangements that if they enter into an agreement with a third party that such agreements are subordinate to the WRE and that if the agreement requires the exercise of rights held by the United States, such actions are subject to the compatible use authorization process.

Furthermore, NRCS recognizes that environmental benefits will be achieved by implementing conservation practices, components, measures, and activities funded through WRE, and that environmental credits may be gained as a result of implementing activities compatible with the purposes of a WRE easement or contract. NRCS asserts no direct or indirect interest in credits generated by activities not funded through WRE. Landowners should be aware that any applicable credits may be subject to additional requirements

and may not be possible on certain WRE lands.

The remaining three comments expressed support for the exemption of wetland land capability classes from the county cropland limitation. NRCS would like to clarify that the subclass exemption also applies to easements enrolled through the predecessor program, the Wetlands Reserve Program.

*ACEP Landowner requirements:* Of the 11 comments about ACEP landowner requirements, four comments supported the reduction of the ownership requirement from seven years to 24 months; three comments recommended eliminating the Adjusted Gross Income (AGI) requirements, which NRCS cannot do as AGI is required by statute; three comments recommended that landowners who participate through the Regional Conservation Partnership Program should not obtain a waiver of AGI, which NRCS did not adopt as such flexibility is provided by statute; and one comment recommended that the Farm Bill be amended to allow governmental entities that are landowners to participate and enroll projects in WRE, which is outside of NRCS authority.

*ALE Eligibility criteria in General:* Of the nine comments about ALE eligibility criteria, one comment recommended delineating the four criteria for land eligibility, which NRCS has done by slightly modifying § 1468.20(d); one comment expressed support for the inclusion of expiring CRP acres as eligible land; two comments requested clarification about what on-site and off-site conditions may render a site ineligible, which NRCS has not done as while an infrastructure project with documented approval or existing environmental contamination can be readily evaluated it is difficult to draw a line that covers all cases (whether an off- or on-site condition impairs the conservation value of a property will depend on the specific condition and the specific conservation values that NRCS and the eligible entity are seeking to protect on the parcel and NRCS has delegated this evaluation to the State Conservationist and provided guidance in policy); two comments recommended emphasizing “protecting and enhancing related conservation values of the land”, which NRCS adopted in substance by making the necessary changes to the definition of “pending offer” and how that term is used at § 1468.20(a) by using the purpose terminology from the statute that includes these concepts; two comments recommended that program requirements should include protection and restoration of Tribal treaty-reserved

resources, which may occur through limiting non-agricultural uses of the land but is not a specific program requirement established in the statute; and one comment requested the regulation be revised with respect to incidental lands to clarify that it can be enrolled with any eligible land, which is not needed as the clear language of § 1468.20(d)(2) states that if land offered for enrollment is determined eligible, then “NRCS may also enroll land that is incidental to the eligible land.”

*Access:* Of the three comments about access as an eligibility criterion, one comment recommended that NRCS lessen the requirements for establishing sufficient access under ALE and two comments recommended that NRCS apply ALE access requirements to WRE easements. NRCS did not adopt either of these recommendations. NRCS has reviewed what is required for access under the respective components of the program, and has provided greater flexibility to ALE participants since NRCS must only ensure its ability to access the parcel to exercise its right of enforcement in the event the Grantee does not fully protect the interests provided to the Grantee under the easement. However, under the WRE component of the program, NRCS must acquire access sufficient to restore, protect, and enhance the wetland functions and values of the easement as the easement holder and thus what is sufficient access for purposes of providing cost-share assistance to a third-party easement holder under ALE is not sufficient for the purposes of NRCS administering a Federally-held easement under WRE.

*Specific ALE eligibility criteria:* Four comments made recommendations about the requirement for a written pending offer; six comments made recommendations about grassland of special environmental significance; six comments made recommendations to eliminate the prime farmland requirement; two made recommendations about State or local policies consistent with ALE purposes; and one comment made recommendations about historical and archaeological resources.

NRCS cannot adopt the recommendations to eliminate the written pending offer requirements as it is a statutory requirement. However, a purchase agreement is not required. NRCS has made available, upon request, an example model pending offer that can be adopted by eligible entities.

Of the ALE grasslands eligibility recommendations, three comments recommend adopting flexibility to include grasslands of special

environmental significance with noxious or invasive species where the grasslands are supported by State, regional, or national plans, and three comments recommended that NRCS clarify that land eligible for grazing uses and other conservation values do not need to contain historical or archaeological resources to be eligible. To be eligible as grasslands of special environmental significance, NRCS requires that the grassland have little to no noxious or invasive species. If a grassland is supported by State, regional or National plans, but contains noxious or invasive species that occupy more than a minor extent of the grassland or are not under effective control, those lands may be eligible as a general ALE grassland enrollment, but would not be eligible as a grassland of special environmental significance. NRCS has clarified that land eligible for grazing uses and related conservation values does not also need to contain historical or archaeological resources by listing more discretely the eligibility criteria as outlined in § 1468.20(d).

NRCS will not eliminate the 50 percent prime or unique farmland requirement as this requirement can be waived, is only one of four land eligibility options, and the agency already has significant flexibility to ensure that the most important lands, whether identified nationally or locally, are eligible for enrollment.

NRCS will not adopt the recommendation that agricultural historic resources receive a priority review during land eligibility determinations, since State screening criteria or ranking factors can accommodate this concern for priority if identified at the State level.

Of the two comments about ALE State or local policy consistent with the purposes of the ACEP–ALE, one comment requested NRCS clarify the process whereby an eligible entity may meet this requirement, and one comment recommended NRCS eliminate the deed requirement that the agricultural land easement must address the purposes for which the land was acquired if the land is being acquired because it “furthers a State or local policy.” NRCS does not define what constitutes a State or local farmland protection policy that is consistent with ALE as such a definition may inadvertently limit the potential for effective farmland protection efforts. However, if an easement transaction depends upon the eligibility of the land being based on the protection of land furthering a State or local policy, the eligible entity must submit to NRCS the documentation necessary for NRCS to

review and determine whether the State or local policy is tied in an effective way to the protection of the agricultural uses of the land by limiting conversion to non-agricultural uses or to the protection of grazing uses and related conservation values. Land must be able to meet land eligibility criteria at the time of NRCS' selection for funding, and thus the State or local policy must exist at the time of application and documentation of how the parcel will further such State or local policy submitted as part of the application package for such parcel.

While it is unlikely that a parcel will be enrolled as eligible solely because it furthers a State or local policy consistent with ALE, if its enrollment is based upon such criteria then NRCS must ensure that such criteria will be furthered by the purchase of an agricultural land easement. For parcels determined eligible based this eligibility type, the agricultural land easement deed must address the ACEP-ALE purposes that are being supported by a specific State or local policy.

*Specific ALE Ineligibility Criteria:* NRCS received five comments related to how mineral rights are addressed under ALE, and seven comments related to how NRCS addresses infrastructure projects. Both of these activities can affect whether NRCS will determine that a parcel is eligible to receive ALE funding based upon the significant, uncontrollable risk that such activities present to the conversion of agricultural lands to a non-agricultural use or to the protection of grazing uses and related conservation values. NRCS does not, however, determine that land is ineligible simply because the gas, oil, earth, or mineral rights have been leased or are owned by someone other than the landowner. NRCS recognizes that the risks presented by exploration and development activities differ by region, and that, in some cases, appropriate limitations can reduce the risks associated with these activities. Therefore, NRCS evaluates the purposes and methods of the infrastructure development due to the statutory mandate to limit conversion to non-agricultural uses or to protect grazing uses and related conservation values, but may allow the development of mineral rights and energy infrastructure when surface disturbances can be minimized and localized within specific thresholds. NRCS provides a range of options in the minimum deed terms that provides sufficient flexibility related to mineral exploration and development. An eligible entity can always include its own additional deed terms that are more restrictive.

With respect to infrastructure projects, if there is an existing or known infrastructure project that introduces disturbances or risks that could undermine the purposes of the easement and there are documented routes approved by a government authority, the land may be determined ineligible or may require reconfiguration in order to become eligible because NRCS will not knowingly interfere with the proposed infrastructure project objectives of another agency. However, if an infrastructure project is not definitive as to its location and scope, then NRCS will not determine a parcel ineligible simply because an infrastructure project is under consideration in an area.

*WRE Enrollment of CRP Acres:* NRCS received four comments supporting the enrollment of CRP acres, including the process outlined in § 1468.30(g)(2) to allow WRE enrollment of land established to trees under CRP. NRCS considers all CRP sites that meet the basic eligibility criteria as eligible, subject to the stipulations for lands established to trees under CRP as outlined in § 1468.30(g)(2), and then uses the State ranking processes to determine whether an existing CRP parcel is a good candidate for the ACEP-WRE, especially sites that will benefit migratory bird or at-risk species habitat objectives.

#### *National and State Allocations*

*Comment:* NRCS received 20 comments on the topic of national and State allocations. Of these 20 comments, 5 comments related to funding levels requesting an increase to ACEP funding levels, encouragement of continued apportionment of adequate technical assistance for wetland restoration, and encouragement for NRCS to continue to find ways to leverage funding through partnership opportunities. The remaining 15 comments made recommendations about the allocation of funds between the two components of the program, with 11 comments recommending that NRCS maintain the historic proportion of funding between the programs subject to producer demand, 2 comments recommending a minimum of 40 percent share to ALE, and 2 comments recommending that grassland of special environmental significance (GSS) receive its own allocation under ALE.

*NRCS Response:* The ACEP allocation between the program components is based upon demand. NRCS recognizes that there is strong demand for both components of ACEP, including demand for enrollment of grassland of special environmental significance, and

that this demand may fluctuate year to year. NRCS, therefore, works diligently to provide an appropriate allocation of acres and funds across States between the ACEP program components to respond to demand. Over the course of the 2008 Farm Bill, the predecessor easement programs received an average of \$780 million annually. The historic proportion of funding was approximately 73 percent WRP funds and 27 percent GRP and FRPP funds. The current average funding available under ACEP will be approximately \$368 million annually, about 47 percent of the amount available under the repealed programs. As a result, NRCS is able to fund only approximately 30 percent of the total ACEP applications received each year. In both FY 2014 and FY 2015, the demand under ACEP has been approximately 65 to 70 percent demand for WRE and 30 to 35 percent demand for ALE, this breakdown in demand is in both number of applications being submitted for funding and dollars requested. In FY 2014 and FY 2015, an average of 130,000 acres of have been enrolled in ACEP each year. This includes 80,000 acres annually of farm and ranch lands protected through new ACEP-ALE enrollments, and 50,000 acres annually of wetlands restored and protected through new ACEP-WRE enrollments, a split of 61 percent ACEP-ALE acres and 39 percent ACEP-WRE acres. The associated funding split has averaged approximately 39 percent ACEP-ALE and 61 percent ACEP-WRE. While the reduced funding under ACEP resulted in reduced enrollments across the entire program compared to prior years, the reduction in ACEP-WRE enrollments have been disproportionately larger than ACEP-ALE. ACEP-ALE has been allocated sufficient funds to enroll 60 percent of the historic average acres under FRPP/GRP, from 132,000 acres annually under FRPP/GRP to 80,000 acres under ACEP-ALE; while ACEP-WRE was allocated sufficient funds to enroll 28 percent of the historic average acres under WRP, from 177,000 acres per year under WRP to 50,000 acres per year under ACEP-WRE. Similarly, in both FY 2014 and FY 2015, ACEP-ALE received a larger relative proportion of funds than historically received under the predecessor programs. NRCS will continue to work to balance demand, resource needs, and maximizing the benefits of Federal funds invested.

#### *National Priorities and Initiatives*

*Comment:* NRCS received nine comments related to the topic of national priorities and initiatives. These comments included recommendations

for ALE to target GSS priority areas for waterfowl and migratory bird populations—such as the Prairie Pothole Region—for inclusion as National GSS priority areas, include OPAVs in the list of optional criteria for determining projects of special significance, emphasize projects that involve beginning farmers or ranchers as a project of special significance, and for WRE, to emphasize a watershed approach for WRE project selection, and determine WRE priority areas at the State level.

*NRCS Response:* Identifying and targeting enrollment to the most imperiled grassland, such as the Prairie Pothole and Great Plains Regions, is a procedural issue. Additionally, at § 1468.22(c)(4), the States may adopt as priority ranking criteria “(4) Geographic regions where the enrollment of particular lands may help achieve national, State, and regional conservation goals and objectives, or enhance existing government or private conservation projects.” Therefore, no changes are needed to the regulation to address the comment’s concern. NRCS has addressed recommendations about OPAVs earlier in this preamble related to identifying criteria for projects of special significance in general, and again emphasizes that factors related to projects of special significance are not based upon administrative matters within the control of the eligible entity but the attributes of the parcel itself. NRCS also addressed above the additional criteria NRCS has adopted for projects of special significance to encourage the involvement of beginning farmers or ranchers where such criteria do not have inadvertent impacts upon them. Most of the criteria for projects of special significance, including those for GSS, are focused upon environmental factors and priority resource concerns that can be addressed by encouraging enrollment. However, with this new criterion, NRCS is utilizing its authority under 16 U.S.C. 3844 to encourage enrollment of parcels that will assist historically underserved landowners who own and protect valuable agricultural lands that otherwise might not be enrolled due to unintended barriers to their participation under eligible entity programs. Under WRE, States determine WRE priority areas, including whether to emphasize a particular watershed within the State and then rank parcels within that watershed.

#### *Participation in Other USDA Programs*

*Comment:* NRCS received four comments recommending that landowners who have an ALE easement

encumbering their lands should receive priority for financial assistance through other NRCS conservation programs to implement practices identified in the ALE plan.

*NRCS Response:* The ACEP statute only authorizes financial assistance under ALE for the purchase of a conservation easement, and financial assistance for other purposes, such as closing costs or easement plan implementation, are not authorized. NRCS has received comments over the years that landowners who have demonstrated their land stewardship through encumbering the land with a conservation easement should receive priority for financial assistance funding under NRCS conservation program. Given the statutory requirement for lands encumbered by an ALE easement to be subject to an agricultural land easement plan, this recommendation has been made again by conservation organizations. NRCS is reviewing its financial assistance programs and will provide guidance, where appropriate, to its State offices about the practices identified in ALE plans and how such practices may address other program’s priority resource concerns.

#### *Planning*

*Comment:* NRCS received 136 comments related to planning, 50 of which related to ALE plan criteria. Of these ALE planning criteria comments, 12 comments expressed support for the current rule language or planning process; four comments encouraged flexibility for addressing short-term management needs or current planning efforts; 10 comments requested clarification of particular requirements; eight comments recommended that NRCS only require those plans mandated by statute; eight comments recommended that NRCS require RMS level of planning; and six comments recommended NRCS decouple ALE Plans from the minimum easement deed terms. NRCS also received two comments recommending that NRCS eliminate the requirement for an ALE plan.

Additional comments related to planning included 6 comments related to regulatory references; 29 comments related to the development of the ALE plan; 13 comments related to the voluntary nature of ALE plans; 33 comments related to the monitoring and enforcement of ALE plans; three comments related to the stringency of plans; one comment related to plans required by other programs; and one comment related to WRE wetland restoration plan of operations (WRPO).

*NRCS Response:* The ACEP Interim Rule identified the minimum requirements for an agricultural land easement plan and described the relationship between the agricultural land easement plan and the individual component plans that are required for certain land-use types. In particular, 7 CFR 1468.26 required that all ALE plans must, at a minimum:

- (1) Describe the activities that promote the long-term viability of the land to meet the purposes for which the easement was acquired;
- (2) Identify required and recommended conservation practices that address the purposes and resource concerns for which the parcel was selected;
- (3) Identify additional or specific criteria associated with permissible and prohibited activities consistent with the terms of the deed; and
- (4) If the agricultural land easement contains certain land use types, a component plan must be incorporated by reference into the agricultural land easement plan for grasslands, forest lands required by § 1468.20(d)(3) to have a forest management plan, and highly erodible land.

In the interim rule’s preamble, NRCS encouraged the development of a robust and comprehensive agricultural land easement plan, such as a plan at the NRCS Resource Management System (RMS) planning level, and identified that such a plan could include both required and recommended practices. NRCS recommended that NRCS’ planning procedures, conservation practices, and standards and specifications be used to develop the agricultural land easement plans.

An ALE plan identifies conservation practices or management standards necessary to meet statutory requirements and recommends conservation practices based on landowner goals and the purposes of the individual easement. Eligible entities may, at their option, address additional resource concerns in the ALE plan. NRCS will continue to conduct outreach about the relationship between deed terms and the plan, to clarify that the ALE plan is a living document that can be adjusted as landowner operations or objectives change and is intended to provide flexibility for management of the land within the purposes of the easement over the term of the easement. Additionally, NRCS has made available example plans as exhibits to the ACEP manual available on the NRCS Web site to help alleviate concern about the “unknown.”

The comments related to the development of the ALE plan focused

upon the costs for plan development, when the plan must be developed, who reviews and approves the plans, who enforces the plans, and whether a plan can be terminated if the landowner decides not to proceed with selling the easement. An eligible entity is responsible for ensuring that an ALE plan is developed prior to easement closing. NRCS or an NRCS-certified technical service provider (TSP) at NRCS cost may assist with the development of the plan if requested by the eligible entity. To ensure that there is sufficient technical assistance available, NRCS provides the eligible entity the opportunity to request NRCS assistance for plan development at the time that the parties enter into the ALE-agreement. NRCS requires that the eligible entity, the landowner, and NRCS must sign the plan prior to closing the easement. It is the responsibility of the eligible entity to enforce the plan. NRCS has responsibility to enforce a conservation plan on highly erodible land pursuant to 7 CFR part 12. NRCS affirms that the commenter is correct that a landowner is not required to implement an ALE plan unless the easement transaction closes.

### Ranking

*Comment:* NRCS received 135 comments on the topic of ACEP ranking. The breakdown of comments was as follows:

- General ranking recommendations (22 comments)
- Specific ALE National criteria (76 comments)
- Recommended new National criteria (13 comments)
- ALE State criteria (12 comments)
- Recommended new ALE State criteria (10 comments)
- WRE Ranking criteria (6 comments)

*General Ranking Recommendations:* The breakdown of the 22 general ranking recommendations, and the NRCS response to these comments, are as follows:

- Seven comments recommended that the national criteria should comprise no more than half of the total score. NRCS believes that the existing weighting provides ample opportunity for resource priorities within States to be addressed. In particular, State Conservationist have discretion to have State factors provide up to 50 percent of the weighting, and can also weight the national criteria in a manner that corresponds with the resource concerns in the State.

- One comment recommended that NRCS provide a clear and consistent

national framework for project selection, but also maintain the role of the State Technical Committee. NRCS agrees and believes the current balance between National and State criteria furthers this goal.

- One comment recommended that NRCS revise the ACEP manual to allow representatives of eligible entities that are seeking ALE funding to serve as State Technical Committee members and participate in State ranking criteria and weighting discussions, as long as they do not vote on recommendations. NRCS did not adopt this recommendation as an ethical matter. Even without voting on the recommendations, the influence upon the State ranking criteria and weighting factors could affect the selection of particular parcels the eligible entity is seeking funding for and represent an inherent conflict of interest.

- Three comments recommended that general ALE and grassland of special environmental significance should be ranked separately. NRCS would like to clarify that while these projects are ranked using the same form, the specific ranking questions applicable to the different types of enrollments have offsetting scores such that the applications are competitive within and between enrollment types. Furthermore, the State Conservationist has the ability to request separate allocations of ALE funds split into general ALE and GSS and thus not have the applications compete against each other for access to the same funds.

- One comment recommended consistent ranking scoring. NRCS agrees that consistent ranking scoring provides greater transparency and is one of the changes NRCS made from FRPP implementation to how it is implementing ALE. NRCS will also explore the implementation of using a consistent total ranking score across WRE as well.

- One comment expressed support for the use of thresholds in setting priority ranking and one comment expressed support for the ALE eligibility requirements that help ensure enrollment of priority acres that meet objectives of the program.

- One comment advised that project ranking should not be penalized for delays generated by NRCS and that some accommodation should be made if the delay is not the fault of the eligible entity. NRCS must maintain objectivity in the application of the criteria and whether to assess penalties for delays is at the State Conservationist's discretion who is most familiar with the situation.

- One comment recommended that NRCS prioritize easements with high

conservation values that include strong conservation plans. NRCS believes the current ranking criteria addresses this comment.

- One comment recommended that NRCS release a scoring tool to eligible entities to use to evaluate projects prior to submittal. NRCS State offices make available the ranking criteria at least 30 days prior to the application deadline.

- One comment recommended that NRCS revise the ranking criteria to ensure the application process does not negatively affect smaller acreage producers. There are many factors that NRCS balances in the development and implementation of its ranking factors and weightings. The State Conservationists have the flexibility to address the impact to smaller acreage producers through the weighting of the different ranking criteria.

- One comment recommended that if "other criteria" are to be determined, that such criteria should be subject to public comment. Ranking criteria are a topic of discussion at State Technical Committee meetings, and these meetings are publicized by NRCS at the State level and open to the public. Additionally, NRCS at the State level posts the criteria it will use for ranking at least 30 days prior to the end of an application period.

- One comment recommended that NRCS segment the core of the parcel from incidental land in the ranking form. NRCS did not adopt this recommendation because NRCS is cost-sharing on the entirety of the parcel and therefore the entirety of the parcel must be evaluated in the ranking.

- One comment recommended that NRCS provide a Web site that outlines State and local program priorities and priority geographies for applicant to evaluate eligibility under those categories. Each NRCS State office has its own Web page and NRCS will provide this greater detail on these NRCS State Web pages.

*Specific ALE National Criteria:* (76): Section 1468.22(b) of the interim rule identified the following as national ranking criteria:

- *Criterion One—Percent of prime, unique, and other important farmland in the parcel to be protected:* Five comments made recommendations about Criterion One. Four of the comments recommended adding grassland of special environmental significance and one comment recommended adding "or ranchland" to the ranking criterion. NRCS will address this comment by replacing the word farmland with soils, which is inclusive of these other uses.

○ *Criterion Two—Percent of cropland, rangeland, grassland, historic grassland, pastureland, or non-industrial private forest land in the parcel to be protected:* NRCS did not receive any comments about Criterion Two.

○ *Criterion Three—Ratio of the total acres of land in the parcel to be protected to average farm size in the county according to the most recent USDA Census of Agriculture:* Eighteen comments made recommendations about Criterion Three. Ten of these comments recommended eliminating the factor; one comment recommended amending the factor to encourage the priority of small farms; three comments recommended that when analyzing the comparison of farm size to average farm size in the county that farmland and rangeland are distinguished so that properties in the county with similar land uses are compared to each other; one comment recommended NRCS use a more frequently updated metric, such as Important Farmland data in States where it is available, instead of the Census of Agriculture reports; two comments recommended NRCS exclude impervious surface areas from the calculation of total project acres; and one comment recommended using the term “mean” instead of “average.” NRCS believes that the State criteria can address the recommendations made by the comments, depending upon the availability of information within the State. For example, States can adopt criteria that place less weight on land that has significant acreage in impervious surfaces. NRCS uses the nationally-available data for the National criteria to provide consistent, objective ranking criteria that is equally available across the country. However, States can include in the State ranking criteria more localized or more frequently updated data sources. NRCS did not adopt the recommendation about replacing terms as the term “average” in this case is synonymous with “mean.”

○ *Criterion Four—Decrease in the percentage of acreage of farm and ranch land in the county in which the parcel is located between the last two USDA Censuses of Agriculture.* NRCS received 15 comments about Criterion Four. Twelve of the comments recommended eliminating this criterion; two comments recommended allowing consideration for regional goals and objectives; and one comment requested that NRCS clarify how “development pressure” to a non-agricultural use will be determined. NRCS will keep this National criterion as prioritizing land that is most at risk of conversion is at

the heart of the program and this factor is fundamental to how that risk of conversion can be objectively and consistently evaluated.

○ *Criterion Five—Percent population growth in the county as documented by the United States Census.* NRCS received one comment about Criterion Five recommending NRCS eliminate the criterion. NRCS did not adopt this recommendation as population growth is another objective indicator of development pressure that increases the risk of conversion of agricultural lands to non-agricultural uses or threatens grazing uses and related conservation values.

○ *Criterion Six—Population density (population per square mile) as documented by the most recent United States Census.* NRCS received two comments on Criterion Six, one recommending NRCS eliminate the criterion and one comment requesting clarification on how the criterion will be applied. NRCS did not adopt this recommendation because this criterion similarly reflects whether a parcel is subject to a high risk of conversion. NRCS applies this criterion by providing higher priority to parcels in areas that have population that is denser than the average density for the State.

○ *Criterion Seven—Existence of a farm or ranch succession plan or similar plan established to address farm viability for future generations.* NRCS received 24 comments about Criterion Seven. One comment supported the use of the criterion, eight comments recommended that NRCS allow an Option to Purchase at Agricultural Value (OPAV) to score points as a “succession plan”, four comments recommended allowing scoring for an affirmative requirement to maintain land in productive agriculture, two comments recommended moving this criterion from the national criteria to the State criteria, seven comments recommended eliminating the criterion, and two comments recommended replacing the succession plan ranking criterion with one that provides priority for land that is being sold to a new farmer or other priority historically underserved landowner. This criterion existed under FRPP as part of the State ranking criteria, but was elevated to a national ranking criterion due to the change in the statutory purposes of ALE to include future viability. An OPAV or other affirmative requirement to maintain land in productive agriculture can be considered a form of succession planning. As is already allowed under the ACEP interim rule, the State Conservationist can include in the State ranking criteria the multifunctional

benefits of an ALE, including deed provisions that provide for the future sale of a parcel to a historically underserved landowner. The final easement deed must include provisions that address the items for which the parcel receives ranking points, such as the presence of a succession plan or multifunctional easement benefits.

○ *Criterion Eight—Proximity of the parcel to other protected land, such as military installations; land owned in fee title by the United States or an Indian Tribe, State or local government, or by a nongovernmental organization whose purpose is to protect agricultural use and related conservation values; or land that is already subject to an easement or deed restriction that limits the conversion of the land to non-agricultural use.* NRCS did not receive any comments about Criterion Eight, but is expanding the last sentence to include the phrase ‘or protects the grazing uses and related conservation values’ to address the statutory purposes of ALE.

○ *Criterion Nine—Proximity of the parcel to other agricultural operations and agricultural infrastructure.* NRCS did not receive any comments about Criterion Nine.

○ *Criterion Ten—Maximizing the protection of contiguous acres devoted to agricultural use.* NRCS received nine comments about Criterion Ten. Five of these comments recommended that NRCS modify the criterion to give priority to “blocks” of farmland that are in proximity to each other; three comments recommended to eliminate the criterion; and one comment recommended NRCS modify the criterion for small States. NRCS adopted the recommendation to modify the criterion to reflect priority for farmland or ranchland that are contiguous or in proximity to each other.

○ *Criterion Eleven—Whether the land is currently enrolled in CRP in a contract that is set to expire within one year and is grassland that would benefit from protection under a long-term easement.* NRCS received two comments about criterion eleven. One of the comments expressed support for the criterion and the other comment recommended that NRCS retain the flexibility at the State level to determine relative priority assigned to expiring CRP acres versus other grasslands. NRCS did not adopt the recommendation as it has determined to exercise the discretion provided by statute to prioritize CRP acres.

○ *Criterion Twelve—Other additional criteria as determined by NRCS.* NRCS did not receive any comments related to criterion twelve. Due to the addition of

a new National criterion, described below, this criterion will be the thirteenth criterion to appear in the regulation under National criteria.

○ *Criterion Thirteen*—In response to comments received regarding the need for national criteria that reflect that ALE purposes include the protection of grazing uses and related conservation values from conversion to non-grassland uses, NRCS is adding a new National criteria. In particular, NRCS has added to the regulation the following criterion in order to assist in balancing the respective purposes of the program. The new criterion reads as follows: *Decrease in the percentage of acreage of permanent grassland, pasture and rangeland, other than cropland and woodland pasture in the county in which the parcel is located between the last two USDA Censuses of Agriculture.*

*Recommended New National Criteria:* NRCS received 13 comments recommending new national criteria, including:

- One comment recommending adding a national ranking criterion to score parcels that include a “buy-protect-sell” approach. NRCS did not adopt this recommendation because this type of transaction can present statutory authority issues, and while flexibility exists for certain types of these transactions, NRCS does not believe it is appropriate to prioritize such approaches.

- Five comments recommended adding a national ranking criteria for grassland easements where enrollment of land will contribute to achieving the goals and objectives of national, regional and State fish and wildlife conservation plans and initiatives. NRCS affirms that the existing State Criterion Four, as provided in the current ACEP interim regulation § 1468.22(c)(4), is intended to allow State Conservationists to account for the priorities identified in these types of plans in their State ranking criteria.

- One comment recommended adding a national ranking criteria for lands in areas of high conversion pressure from grasslands to cropland. NRCS believes that this criterion is appropriate given the grassland conservation purposes of ALE, and as described above, has added it to the National criteria.

- One comment recommended adding a national ranking criteria to give special consideration to applications that serve metropolitan and metropolitan statistical areas that have high risk of farm conversion. NRCS believes that the national factor related to population growth factors addresses

the priority that would be provided by a metropolitan ranking factor.

- One comment recommended that “effective agricultural zoning” should be considered within the national ranking criteria for eligible ALE parcels. NRCS did not adopt this recommendation because such determination would be too subjective.

- One comment recommended adding State ranking criteria to the list of national ranking questions to address areas of national importance. NRCS did not adopt this recommendation.

- Two comments recommended consolidating national ranking criteria three through six because the commenter believed that such factors weigh against enrollment of remote, intact parcels of significant ecological value. NRCS did not adopt this recommendation because the statutory criteria for the program is to maximize the benefit of the Federal investment with an emphasis on protecting agricultural uses and related conservation values and maximizing the protection of areas devoted to agricultural use. In NRCS’ experience in administering conservation easement programs NRCS has determined that if two parcels of similar agricultural and related conservation values are offered for the program, but one is subject to threat of development or conversion, the benefit of the Federal investment is maximized by prioritizing the protection of the agricultural uses on the parcel subject to the most immediate threat of conversion to non-agricultural or non-grassland uses. Ranking criteria three through six are intended to evaluate this risk and provide an objective, transparent, and nationally-available data sources upon which to base this evaluation.

- One comment recommended adding a national ranking criterion to consider the number of development rights to be extinguished. NRCS did not adopt this recommendation because this information is not consistently available nationwide or at the time of ranking. If an individual State has a consistently available data source or mechanism by which to evaluate at the time of ranking the risk of development or conversion, the State Conservationist has the discretion to include such a consideration in the State ranking criteria as provided in § 1468.22(c)(7).

*ALE State Criteria (12):* NRCS received twelve comments making recommendations about the seven State criteria. Section 1468.22(c) of the interim rule identified the following as State ranking criteria:

- *State Criterion One—The location of a parcel in an area zoned for agricultural use.* NRCS did not receive

any comments about State Criterion One.

- *State Criterion Two—The eligible entity’s performance in managing and enforcing easements.* One comment recommended that performance be measured by the efficiency by which easement transactions are completed or percentage of parcels that have been monitored and the percentage of monitoring results that have been reported. The eligible entity’s performance in managing and enforcing easements is outlined in the ALE-agreement with NRCS, which includes the requirement that the eligible entity must provide a complete monitoring report based on an at-least-annual monitoring of the easement.

- *State Criterion Three—Multifunctional benefits of farm and ranch land protection including social, economic, historical and archaeological, environmental benefits, species protection, or climate change resiliency.* NRCS received five comments about State Criterion Three, including one comment that supported the inclusion of “climate change resiliency”; one comment recommended NRCS consider social values when prioritizing projects; and three comments recommended that NRCS encourage State Conservationists to prioritize easements that establish and maintain perennial cover and other practices to sequester carbon, limit greenhouse gas emissions, and improve soil health. On May 12, 2016, USDA Secretary Vilsack released a roadmap for the USDA Building Blocks for Climate Smart Agriculture and Forestry, the Department’s framework for helping farmers, ranchers, and forestland owners respond to climate change. The effort relies on voluntary, incentive-based conservation, forestry, and energy programs to reduce greenhouse gas emissions, increase carbon sequestration, and expand renewable energy production in the agricultural and forestry sectors. In response to the commenters and to support USDA’s climate initiative, NRCS has revised State Criterion Three to identify more clearly that State ranking criteria may prioritize projects that enhance carbon sequestration potential and further climate resiliency efforts. NRCS determined that at the State level, NRCS can better tailor the ranking factor to prioritize the actual types of projects within a State or region that can best deliver climate resiliency/carbon sequestration benefits to the types of operations within their State and give them proportionately greater weight as determined appropriate. NRCS believes that State Criterion Three, with this adjustment, includes the flexibility for

the State Conservationist to address the commenters' recommended factors and meet statutory objectives for protecting other conservation values.

- *State Criterion Four—Geographic regions where the enrollment of particular lands may help achieve national, State, and regional conservation goals and objectives, or enhance existing government or private conservation projects.* NRCS received one comment about State Criterion Four that recommended NRCS allow consideration for National, State, and regional agricultural goals and objectives. NRCS agrees and added the words "agricultural or" to State Criterion Four.

- *State Criterion Five—Diversity of natural resources to be protected.* NRCS received five comments about State Criterion Five. Four of the comments recommended NRCS modify the criteria to emphasize natural resources protection and "improvement" and the remaining comment recommended NRCS support the flexibility provided at the State level to fund projects based on resource needs. NRCS agrees with the comments and added the words "or improved" to State Criterion Five. NRCS cautions that while points could be added for projects where there will be an improvement to resource conditions as a result of enrolling the land in ALE, protection efforts alone should also score in priority.

- *State Criterion Six—Score in the land evaluation and site assessment system or equivalent measure for grassland enrollments. This score serves as a measure of agricultural viability (access to markets and infrastructure).* NRCS did not receive any comments about State Criterion Six.

- *State Criterion Seven—Other criteria determined by NRCS that will allow for the selection of parcels that will achieve ACEP-ALE purposes.* NRCS did not receive any comments about State Criterion Seven.

*Recommended new ALE State Criteria:* NRCS received 10 comments that recommended new ALE State criteria, including one comment that recommended NRCS provide more information on the development of State ranking criteria, ALE plan components and stewardship; five comments recommended adding pollinator habitat conservation, two comments recommended NRCS address the likelihood that the easement will lead directly to a farming or ranching opportunity for a beginning farmer or rancher; one comment recommended NRCS give State Conservationists the flexibility to meet local unique resource needs, and one comment recommended

including a requirement for National office approval before a State overrides ranking criteria. Pollinator habitat conservation, access to land by new and beginning farmers, and local unique resource needs are the type of criteria that a State has the flexibility to adopt under the category of natural resources benefits social and economic benefits, and regional conservation goals. The recommendation about social benefits fits better with State Criterion Three. State Conservationists do have the flexibility to provide greater detail and weighting to the factors in a manner that addresses local unique resource needs. However, in response to the comment recommending National office review prior to a State overriding ranking criteria, NRCS would like to clarify that a State cannot override or eliminate criteria as the criteria are required by regulation.

- *WRE Ranking criteria:* NRCS received six comments about WRE ranking criteria. Three of the comments expressed support for the provision that authorizes the leveraging of Federal funding, of which two comments recommended a slight re-write the section about leveraging at § 1468.32(a)(3); one comment recommended allowing State Conservationists to prioritize partnerships that target multiple benefits; one comment recommended NRCS should only fund permanent easements; and one comment recommended opposing efforts to shorten easement duration. NRCS adopted the recommendation about adding language to § 1468.32(a)(3) to include contribution of funds from a person or "other entity." State Conservationists currently have the necessary flexibility to prioritize partnerships that prioritize projects with multiple benefits. NRCS offers enrollment for permanent easements, 30-year easements, easements for the maximum duration under State law, and 30-year contracts. NRCS prioritizes longer-term easements over shorter-term easements in the ranking criteria.

#### *Regional Conservation Partnership Program (RCPP)*

*Comment:* NRCS received eight comments on the topic of RCPP. Five of the comments addressed waivers of non-statutory provisions, including three comments that expressed support of the waiver; one comment recommended a waiver for forestry; and one comment recommended waiver for adjusted gross income limitation. Three of the RCPP comments recommended NRCS allow acquisition and

implementation costs to be recognized as in-kind RCPP match.

*NRCS Response:* NRCS addresses waiver recommendations on a project-specific basis. NRCS will recognize entity acquisition and implementation costs as contributions of resources required under RCPP.

#### *Restoration*

*Comment:* NRCS received seven comments on the topic of restoration under the WRE component of ACEP. Two comments expressed support for the priority for migratory bird habitat restoration; three comments recommended modifying wetland restoration to include flexibility for other than pre-disturbance hydrology and vegetation; one comment recommended that NRCS address delays in easement restoration completion; and one comment encouraged agreements with partners to accelerate restoration.

*NRCS Response:* Wetland restoration is a primary purpose of ACEP-WRE. NRCS based the ACEP-WRE definition upon the definition from the predecessor Wetlands Reserve Program in place since 1995, and there is only difference between the former Wetlands Reserve Program definition and the ACEP-WRE definition. In particular, NRCS introduced slight flexibility in the ACEP-WRE definition by allowing 30 percent of the easement area to be in a different hydrologic regime or vegetative community while the former Wetlands Reserve Program definition only allowed 30 percent of the wetland restoration area to be in a different hydrologic regime or vegetative community.

In many parts of the country, especially the southeast and the Midwest, the original vegetative wetland community was bottomland hardwood forest or forested wetland. However, emergent marsh habitat is very popular amongst landowners and various waterfowl organizations given the utilization of such habitat by migratory birds.

NRCS has interpreted the restoration requirements broadly and NRCS believes that the restoration objectives of ACEP-WRE are best met with adhering to the existing parameters. Achieving full restoration of the wetland functions and values on each acre enrolled in WRE to maximize the environmental benefits for Federal funds expended continues to be a high priority activity for NRCS.

#### *State Technical Committees*

*Comment:* NRCS received 17 comments on the topic of State Technical Committees. Three comments

recommended NRCS allow more opportunity for State Technical Committee input on grasslands of special environmental significance, six comments recommended that NRCS require State Technical Committee input on the identification of lands of statewide importance and related technical matters; two comments expressed support for an expanded role for State Technical Committees; five comments recommended NRCS allow State Technical Committee members that represent eligible entities be able to participate in the discussion of State criteria and weighting, so long as they do not vote on recommendations; and one comment recommended NRCS encourage State Technical Committee input on all ALE matters.

*NRCS Response:* NRCS appreciates the significant contribution of expertise that State Technical Committees contribute to the technical excellence of the implementation of NRCS programs. State Conservationists hold regular State Technical Committee meetings to ensure that broad input is obtained for all aspects of ACEP implementation, including input for the ALE component of the program. NRCS, while obtaining this input, must ensure that the ethical integrity of its program implementation efforts is maintained, and thus as mentioned above NRCS will continue to place parameters upon who is able to participate in discussions about ranking criteria.

#### *Subordination, Modification, Exchange, and Termination*

*Comment:* NRCS received 33 comments on the topic of subordination, modification, exchange, and termination, collectively known as easement administration actions. The breakdown of these comments was as follows:

- General (5 comments);
- Compelling public interest/not practical alternative standards (2 comments)
- 10 percent of easement area affected (3 comments)
- 8-Digit watershed (1 comment)
- Partner issues (7 comments)
- Easement modification (3 comments)
- Easement termination (3 comments)
- Application of Treasury regulations (9 comments)

*NRCS Response:* The easement administration authority provides NRCS with greater flexibility to address the long-term management of its easement portfolio than existed under the predecessor program authorities. Unlike prior circumstances where congressional action was needed to address conflicts between equally

important public values, NRCS can now ensure that its easements will continue to meet program purposes in coordination with other compelling public needs in proximity to NRCS easement interests. In particular, NRCS may subordinate, modify, exchange, or terminate its interests in an easement if NRCS determines that the easement administration action: Is in the Federal government's interest; addresses a public compelling need or furthers the practical administration of the easement; has no practicable alternative that would avoid the easement area; results in equivalent or greater economic value and conservation function and value at no cost to the Government; affects no more than 10 percent of the existing easement area unless special circumstances apply; and is agreed to by the landowner, and if applicable, the eligible entity.

Of the five general comments, three comments supported the provisions; one comment recommended that the easement administration action terms be incorporated directly into the conservation easement deed; and one comment recommended prohibiting any easement administration actions for natural gas and oil exploration and extraction. NRCS identifies in the WRE warranty easement deed the statutory reference to the easement administration action authorities, and the ALE regulatory deed requirements identify that NRCS approval is required for any easement administration actions that may arise on ALE easements. NRCS evaluates all easement administration action requests on a case-by-case basis and determines whether the required criteria have been met.

Of the two comments related to compelling public need, one comment recommended that NRCS eliminate the criteria and the other comment recommended that NRCS clarify that a compelling public need is not limited to Federal agency priorities. NRCS will not eliminate the criterion as it is required by statute and provides a high bar for the requirements that must be met before NRCS will alter the physical boundaries or the terms of an existing ACEP easement on which a significant investment of Federal funds has been made to secure the long-term protection of agricultural and wetland resources for future generations. A compelling public need is not limited to Federal priorities, and may be based upon circumstances that are being addressed by State or local governmental entities.

Of the three comments related to the criterion of limiting the impact of the easement administration action to 10 percent of easement area, two comments

recommended eliminating the limitation and one comment recommended adopting a limit of 5 percent of the easement area. NRCS did not adopt either recommendation as 10 percent provides sufficient flexibility, with most easement administration actions affecting much less of the easement area.

The comment received about the limitation that replacement acreage in an easement exchange be within the same 8-digit watershed as the original easement recommended that NRCS allow a waiver for replacement land to go beyond the 8-digit watershed. NRCS did not adopt the recommendation because the nature of the easement values are best served by ensuring that replacement lands are within the same watershed and the criteria serves as an objective and transparent requirement that can be equitably applied.

Of the seven comments about partner issues associated with easement administration actions, one comment recommended that NRCS be required to include the eligible entity in its discussions with the Department of Justice related to condemnation actions; two comments recommended adding language to recognize the role of other funding partners in the approval of changes to easement terms; one comment recommended NRCS consult with the Land Trust Alliance, two comments recommended that in the case of ALE easements, NRCS should notify the eligible entity immediately upon receiving notice of any "infrastructure project request", and one comment recommended that for condemnation or termination, the eligible entity should reimburse NRCS proportionally to NRCS' initial investment in the easement, provided that the condemnation of the property provides adequate compensation to the eligible entity. The Department of Justice represents the United States and NRCS is a client agency, and it is not appropriate to adopt a requirement to include third parties in its discussions with its own legal representatives. NRCS does not believe it is appropriate for it to include language in the regulation regarding the relationship between the eligible entity and a third-party funding partner of the eligible entity. It is the responsibility of the eligible entity to ensure that it is meeting the requirements of all of its funding partners. NRCS welcomes input from any partner organization. NRCS will notify an eligible entity if it receives an easement administration action or infrastructure project proposal that may affect an ALE easement. NRCS identifies in the minimum deed terms of

the respective shares that NRCS and an eligible entity may receive if a parcel is condemned.

Three comments about easement modification recommended that modification actions should be subject to a less stringent standard of review than termination actions, and that these two types of actions should not be addressed in the same provision. NRCS agrees termination actions are more significant than modification actions; however, NRCS did not adopt this recommendation as the statute specified the primary criteria by which all of the easement administration actions should be evaluated, and there are separate definitions and further limitations on easement termination actions than exist for easement modification actions even though they stem from the same section of the ACEP interim regulation.

The three comments specific to easement termination actions included one recommendation that NRCS ensure that easement extinguishment is not incentivized when property value increases; one recommendation that the notice to Congress for termination actions should be replaced with written notice to the State Conservationist by the entity; and a third recommendation that recovery of costs should be limited to the NRCS proportionate value. NRCS policies promote the full and long-term protection of the resources and Federal investments made through its conservation easement programs and does not promote or incentivize the termination of easements. Besides meeting the criteria regarding the nature of the easement administration action, NRCS specifies that NRCS applies requirements of avoidance and minimization prior to considerations of mitigation. NRCS, by statute, must notify Congress and therefore did not adopt the recommendation about replacing such requirement. There are other costs associated with an easement administration action and thus it would not protect the Federal investment to limit recovery to the proportionate NRCS investment in the easement.

The issues raised by the nine comments on the topic of the applicability of the IRS regulations were discussed above under the topic of ALE deed terms. In particular, easement administration actions may impact the availability of a tax deduction for charitable donations of easement value, and therefore NRCS advises that eligible entities and landowners consult with their tax advisor about all aspects of a conservation easement transaction. As mentioned earlier, NRCS will consider requests from eligible entities about how to address in the easement deed

valuation concerns associated with easement administration actions.

#### *Wetland Reserve Enhancement Partnerships (WREP)*

*Comment:* NRCS received seven comments about the topic of WREP, including two comments that support the continued implementation of WREP; three comments recommended that NRCS limit partners' required contribution under WREP to only a portion of the restoration costs and not include a percentage of the easement cost; and two comments that recommended NRCS offer new WREP opportunities over the life of the 2014 Agricultural Act and to continue supporting existing WREP projects.

*NRCS Response:* NRCS published solicitations for new WREP proposals at the State level beginning in FY 2015 and anticipates soliciting proposals for each remaining fiscal year under the 2014 Agricultural Act. The specific match requirements are published with each specific proposal solicitation, but in general partners submitting a WREP proposal for financial assistance funds must provide a combination of in-kind and cash contributions of at least 25 percent of the restoration or management costs. Partners submitting a WREP proposal for technical assistance funds must provide a combination of in-kind and cash contributions of at least 50 percent of the total costs.

#### *WRE Reservation of Grazing Rights*

*Comment:* NRCS received two comments on the topic of the WRE reservation of grazing rights enrollment opportunity. One comment advised that haying should not be included in the reserved grazing rights, and the other comment recommended that the reserved grazing rights option provide only minimal restrictions under the easement.

*NRCS Response:* NRCS affirms that haying is not part of the reserved grazing rights. Any haying activity that a landowner may wish to conduct on the easement area must first be approved by NRCS under the compatible use authorization process. NRCS did not adopt the recommendation for a minimally restrictive easement option for the grazing rights enrollment option because WRE is a wetland restoration program and reservation of grazing rights is only appropriate where grazing is part of restoration, management, and maintenance of the wetland functions and values. Further, NRCS offers easement compensation commensurate with rights to be obtained.

#### *WRE—miscellaneous*

*Comment:* NRCS received seven comments that expressed general support for various provisions of the WRE component of ACEP, including support for the exemption from the county cropland limitation for subclass w soils in the land capability classes IV–VIII, and support for the lower WRE ownership requirement and waiver criteria.

*NRCS Response:* NRCS will continue to implement ACEP in accordance with the requirements established by the 2014 Act.

#### **Regulatory Certifications**

##### *Executive Order 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, reducing costs, harmonizing rules, and promoting flexibility. Upon implementation of this rule the Natural Resources Conservation Service intends to conduct a retrospective review of this rule with the purpose of improving program performance, and better understanding the longevity of conservation implementation.

The Office of Management and Budget (OMB) designated this final rule a significant regulatory action. The administrative record is available for public inspection at the Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue SW., Room 5831 South Building, Washington, DC. In accordance with Executive Order 12866, NRCS conducted an economic analysis of the potential impacts associated with this program. A summary of the economic analysis can be found at the end of this preamble, and a copy of the analysis is available upon request from Kim Berns, Director, Easement Programs Division, U.S. Department of Agriculture, Natural Resources Conservation Service, Post Office Box 2890, Washington, DC 20013–2890; or at: <http://www.nrcs.usda.gov/programs/acep/> under *ACEP Rules and Notices with Supporting Documents*.

### Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute. NRCS did not prepare a regulatory flexibility analysis for this rule because NRCS is not required by 5 U.S.C. 553, or any other provision of law, to publish a notice of proposed rulemaking with respect to the subject matter of this rule. Even so, NRCS has determined that this action, while mostly affecting small entities, will not have a significant economic impact on a substantial number of these small entities. NRCS made this determination based on the fact that this regulation only impacts those who choose to participate in the program. Small entity applicants will not be affected to a greater extent than large entity applicants.

### Congressional Review Act

Section 1246(c) of the Food Security Act of 1985 (the 1985 Act), as amended by Section 2608 of the Agricultural Act of 2014, requires that the Secretary of Agriculture use the authority in section 808(2) of title 5, United States Code, which allows an agency to forego the usual 60-day Congressional Review delay of the effective date of a major regulation if the agency finds that there is a good cause to do so. NRCS hereby determines that it has good cause to do so in order to meet the congressional intent to have the conservation programs, authorized or amended under Title XII of the 1985 Act, in effect as soon as possible. NRCS also determined it has good cause to forgo delaying the effective date given the critical need to let agricultural producers know what programmatic changes are being made so that they can make financial plans accordingly. For these reasons, this rule is effective upon [the latter of October 1, 2016, or publication in the **Federal Register**].

### Environmental Analysis

A programmatic Environmental Assessment (EA) was prepared that resulted in a Finding of No Significance (FONSI) for the ACEP interim final rule. No comments were received on that analysis. Minor modifications to the previous EA were made to support this rulemaking but the analysis remains the same. As a result, the EA again resulted in a FONSI and therefore an Environmental Impact Statement (EIS) is not required to be prepared (40 CFR

part 1508.13). The EA and FONSI are available for review and comment for 30 days from the date of publication of this final rule in the **Federal Register**. NRCS will consider this input and determine whether there is any new information provided that is relevant to environmental concerns and bearing on the proposed action or its impacts that warrant supplementing or revising the current available draft of the ACEP EA and FONSI.

A copy of the EA and FONSI may be obtained from the following Web site: <http://www.nrcs.usda.gov/ea>. A hard copy may also be requested in one of the following ways: (1) Email: [andree.duvarney@wdc.usda.gov](mailto:andree.duvarney@wdc.usda.gov) with “Request for EA” in the subject line; or (2) written request: National Environmental Coordinator, Natural Resources Conservation Service, Ecological Sciences Division, Post Office Box 2890, Washington, DC 20013–2890. Comments should be specific and indicate they are being provided on the EA and FONSI. Public comment on the environmental analysis only may be submitted by any of the following means: (1) Email comments to [andree.duvarney@wdc.usda.gov](mailto:andree.duvarney@wdc.usda.gov), (2) go to <http://www.regulations.gov> and follow the instructions for submitting comments for Docket No. NRCS–2014–0011, or (3) mail written comments to: National Environmental Coordinator, Natural Resources Conservation Service, Ecological Sciences Division, Room 6159–S, P.O. Box 2890, Washington, DC 20013–2890.

### Civil Rights Impact Analysis

USDA has determined through a Civil Rights Impact Analysis that this final rule discloses no disproportionately adverse impacts for minorities, women, or persons with disabilities. The data presented in the Civil Rights Impact Analysis indicate producers who are members of the protected groups have participated in NRCS conservation programs at parity with other producers. Extrapolating from historical participation data, it is reasonable to conclude that ACEP will be administered in a non-discriminatory manner as the predecessor programs have been. Outreach and communication strategies are in place to ensure all producers will be provided the same information to allow them to make informed compliance decisions regarding the use of their lands that will affect their participation in U.S. Department of Agriculture (USDA) programs. NRCS conservation programs apply to all persons equally regardless of their race, color, national origin, gender, sex, or disability status.

Therefore, this final rule portends no adverse civil rights implications for women, minorities, and persons with disabilities. Copies of the Civil Rights Impact Analysis are available, and may be obtained from Kim Berns, Director, Easement Programs Division, U.S. Department of Agriculture, Natural Resources Conservation Service, Post Office Box 2890, Washington, DC 20013–2890, or electronically at: <http://www.nrcs.usda.gov/programs/ACEP>.

### Paperwork Reduction Act

Section 1246 of the Food Security Act of 1985 (the 1985 Act) as amended by the Agricultural Act of 2014 (the 2014 Act) requires that the implementation of this provision be carried out without regard to the Paperwork Reduction Act, chapter 35 of Title 44, U.S.C. Therefore, NRCS is not reporting recordkeeping or estimated paperwork burden associated with this interim rule.

### Government Paperwork Elimination Act

NRCS is committed to compliance with the Government Paperwork Elimination Act and the Freedom to E-File Act, which require government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

### Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994

Pursuant to section 304 of the Federal Crop Insurance Reform Act of 1994, (Pub. L. 103–354), USDA classified this rule as non-major. Therefore, a risk analysis was not conducted.

### Unfunded Mandates Reform Act of 1995

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, USDA assessed the effects of this final rule on State, local, and Tribal governments, and the public. This rule does not compel the expenditure of \$100 million or more by any State, local, or Tribal governments or anyone in the private sector; therefore, a statement under section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

### Executive Order 13132

This final rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. NRCS has determined that this final rule conforms with the Federalism principles set forth in the Executive Order; would not impose any

compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities on the various levels of government. Therefore, NRCS concludes that this final rule does not have Federalism implications.

**Executive Order 13175**

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. Executive Order 13175 required 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 been substantial direct effects on (1) one or more Indian Tribes, (2) the relationship between the Federal Government and Indian Tribes, or (3) the distribution of power and responsibilities between the Federal Government and Indian Tribes. NRCS has assessed the impact of this interim rule on Indian Tribes and determined that this rule does not, to NRCS' knowledge, have Tribal implication that requires Tribal consultation under E.O. 13175. The Agency has developed an outreach/collaboration plan that it is implementing as it administers the Farm Bill. If a Tribe requests consultation, NRCS will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress. Among other activities, in April 2015, USDA held a series of tribally-focused webinars on this rule, and in December 2016, USDA held an informational discussion of the rule at the Intertribal Agriculture Council Annual Membership Meeting. On February 23, 2016, at the request of the

Swinomish Indian Tribal Community (Swinomish Tribe), USDA consulted with the Swinomish Tribe on ACEP as well as other programs operated by USDA.

**Regulatory Impact Analysis—Executive Summary**

Title II of the Agricultural Act of 2014 (the 2014 Act) amended Title XII of the Food Security Act of 1985 to establish the Agricultural Conservation Easement Program (ACEP) in a new Subtitle H. Title II of the 2014 Act repeals the previously authorized programs, Wetlands Reserve Program (WRP), Farm and Ranch Lands Protection Program (FRPP), and Grassland Reserve Program (GRP), but maintains the purposes of these programs in ACEP. Pursuant to Executive Order 12866, Regulatory Planning and Review, NRCS has conducted a Regulatory Impact Analysis and Initial Regulatory Flexibility Analysis (RIA) of ACEP using historical data and information, including information from WRP, FRPP, and GRP. This RIA describes both the potential impact of the ACEP regulation on benefits and costs and the regulatory flexibility in the rule implementation. Implementation of this regulation is required to complete the Congressional Action.

In considering alternatives for implementing ACEP, the agency followed the legislative intent to establish an open participatory process, optimize environmental/conservation benefits, and address natural resource concerns. Because ACEP is a voluntary program, the program will not impose any obligation or burden upon agricultural landowners who choose not to participate.

The 2014 Act requires establishment of ACEP to retain the provisions in the current easement programs by establishing two types of easements: Wetland reserve easements (WRE) that protect and restore wetlands as previously available under WRP, and

agricultural land easements (ALE) that limit non-agricultural uses on productive farm or grassland as previously available under FRPP and the easement component of GRP. The WRE component provides technical and financial assistance to landowners to restore and protect wetlands and associated habitats through conservation easements. ACEP–WRE addresses wetlands, wildlife habitat, soil, water, and related natural resource concerns on private lands. The ALE component protects the natural resources and agricultural value of agricultural cropland, pasture and other working land, promotes agricultural viability for future generations, preserves open space, provides scenic amenities, and protects grazing uses and related conservation values by restoring and conserving eligible land and limiting non-agricultural uses.

The 2014 Act also identified ACEP as a covered program for implementation of the Regional Conservation Partnership Program (RCPP), authorized by Subtitle I of Title XII of the Food Security Act of 1985, as amended (16 U.S.C. 3871 *et seq.*) RCPP is funded, in part, by a reservation of 7 percent of funds that have been allocated to implement covered programs, including 7 percent of funds allocated for ACEP implementation.

*Impacts of ACEP*

Most of the ACEP rule's impacts consist of transfer payments from the Federal Government to farmers, landowners, and producers. Although these transfers create incentives that very likely cause changes in the way society uses its resources, we lack data with which to quantify the resulting social costs or benefits. Under the 2014 Act, ALE and WRE enrollments are limited by funding. As set forth in the 2014 Act, total proposed ACEP funding and associated transfer payments by fiscal year is presented in Table ES–1.

TABLE ES–1—PROPOSED CONSERVATION TRANSFER PAYMENTS FACILITATED BY ACEP FUNDING, INCLUDING THE POTENTIAL RCPP ALLOCATION, FY 2014–2018

FY	Nominal-dollar Farm-Bill authorization (million \$)	Real-dollar <sup>1</sup> authorization 2.1% GDP deflator (million \$)	Real-dollar <sup>1</sup> authorization discounted at 3% (million \$)	Real-dollar <sup>1</sup> authorization discounted at 7% (million \$)
FY 2014 .....	\$400.0	\$400.0	\$400.0	\$400.0
FY 2015 .....	425.0	416.3	404.1	389.0
FY 2016 .....	450.0	431.7	406.9	377.0
FY 2017 .....	500.0	469.8	429.9	383.5
FY 2018 .....	250.0	230.1	204.4	175.5
Total <sup>2</sup> .....	2,025.0	1,947.8	1,845.4	1,725.1

<sup>1</sup> 2013 dollars.

<sup>2</sup> Net present value of discounted funding levels.

### *Conservation Impacts of the Program*

Land enrolled in ACEP–WRE easements will produce onsite and offsite environmental impacts. Those include: Restoration and protection of high value wetlands; control of sheet and rill erosion as lands are restored from cropland to wetlands and associated habitats; restoration, enhancement, and protection of habitat for fish and wildlife, including threatened and endangered species and migratory birds; improving water quality by filtering sediments 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. Many of those conservation impacts are difficult to quantify at a national scale, but have been described by studies at an individual project, watershed, or flyway scale.

For land enrolled in ACEP–ALE, the suite of conservation effects on protected grasslands are different than those on protected farmland. ACEP–ALE easements on grasslands limit agricultural activities to predominately grazing and haying, 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 non-grassland uses. The net conservation effects through time from farmland protection include direct access benefits (pick-your-own, agritourism, and nature-based activities like hunting) indirect access benefits (open spaces and scenic views) and non-use benefits (wildlife habitat and existence values). Grassland protection conservation effects include the direct, indirect, and non-use benefits, but also include on-farm production gains and carbon sequestration.

### *Expected Costs of the Program*

The main program costs are the purchase of easements and associated restoration expenses under the ACEP–WRE component. Agricultural production ceases on lands enrolled in ACEP–WRE. At the same time, disaster

payments, crop loss payments, and other commodity payments are eliminated.

Through ACEP–ALE, landowners voluntarily restrict the land to agricultural uses by the sale of conservation easements to eligible entities. Local cooperating entities are key drivers in farmland<sup>1</sup> conservation because they benefit from the indirect services (offsite and non-use benefits) provided by agricultural land, and in the case of ACEP–ALE and its predecessors, also share in the costs of purchasing conservation easements. The local nature of the supply of and demand for conservation easements, and the site-specific nature of the potential benefits complicate the description of conservation effects conducted in this analysis.

The public and private costs of ACEP–ALE are: (1) The actual cost of purchasing the easement; (2) a reduced tax base that includes the opportunity cost of lower local economic activity, which for this analysis we assume is offset by a reduction in needed public infrastructure and associated taxes to support that infrastructure; and (3) the forgone economic activity fostered by new development. These costs are not social costs and we do not estimate them in this analysis.

### *Allocation Process and Comparison to Legacy Programs*

NRCS allocates ACEP funding based upon State-generated assessments of priority natural resource needs and associated work necessary to address identified resource concerns. These State-developed assessments, following national guidance to assure accuracy and consistency, are submitted to agency leadership for review. At the national level, NRCS analyzes in a systematic manner these State-reported resource needs and requests along with factors including NRCS landscape initiatives or other nationally established conservation priorities; regional factors such as development pressure, migratory bird flyways, multi-state watersheds with water quality resource concerns; existing State capacity, workload, and performance; and other factors. This approach provides flexibility to address nationally and locally important natural resource concerns. Once funds are allocated to the States, individual project selection occurs at the State level based on the

prioritization of the eligible applications using the NRCS ranking criteria.

Over the course of the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill), the three easement programs (WRP, GRP, and FRPP) received an average of \$691 million annually, which was comprised of \$513 million in WRP, \$138 million in FRPP, and \$39 million in GRP. All three easement programs were combined under ACEP and the purposes of FRPP and GRP were combined under the ACEP–ALE component. The average annual funding available under the new ACEP program will be approximately \$368 million annually, about 53 percent of the amount previously available under the repealed programs.

### *Conclusions*

Executive Summary Table ES–2 provides an overview of the potential benefits from both sub-program areas of ACEP. For the private landowner, the end products of the ACEP–WRE include assurances of the restoration of the property and associated recreational use, the potential to engage in compatible uses on the property, and the elimination of negative impacts to agricultural operations on the property. Outcomes from the private landowner view of the ACEP–ALE include the long-term protection of the agricultural nature of the land and potential increases in productivity (from implementing the ALE plan) and sustainability of the local agricultural market (from local production). In addition, the private landowner, along with the general public, will reap the benefits of recreational waterfowl harvest, upland species harvest, and agritourism. Also in many cases easements that protect farmsteads under ACEP–ALE will provide the general public with an opportunity to engage with and obtain food products from a local farm producer.

Both ACEP–WRE and ACEP–ALE may provide benefits that are achieved for society as a whole, within the limitations of a voluntary program. These include: Improved water quality and water quantity; carbon sequestration; restoration of habitat for endangered or threatened wildlife species; flood prevention and protection; and improvements to scenic quality and rural characteristics. We note that agricultural lands and wetlands sequester carbon at higher rates than lands converted to development.

Participation in ACEP is voluntary and landowners participate in the program for many reasons, such as estate planning, income diversity,

<sup>1</sup> Farmland refers to agricultural land used in crop production and livestock production, *i.e.*, cropland and pasture. For the purposes of this document, farmland does not include grasslands.

expanded recreational opportunity, improving agricultural efficiency, and their personal natural resource ethic. Landowners may also participate in part to meet requirements they face in managing their operations. For example, a landowner may decide to enroll acres in ACEP in order to protect highly productive grasslands from conversion to crop production and thus limit soil and chemical runoff into a nearby stream. Such actions may help demonstrate compliance with other State or Federal requirements, such as State plans to meet Federal TMDL requirements. ACEP may help landowners meet any compliance responsibilities that they may have under the Endangered Species Act. Also, ACEP-WRE implementation provides new habitat through the restoration of degraded wetlands that benefit wildlife. Even in the absence of a United States Fish and Wildlife Service (FWS) critical habitat listing, as is generally the case, land enrolled in ACEP could benefit at-risk species.

NRCS has a long-term responsibility to ensure ACEP program objectives are achieved and statutory requirements are met on these lands. Monitoring policy for these lands is in place to guide NRCS in meeting these responsibilities and to maintain working relationships with landowners. In addition, the Statement of Federal Financial Accounting Standards 29 (SFFAS 29) considers easements held by the United States as Stewardship Lands that must be accounted for as part of the agency's annual financial accountability

reporting. The SFFAS 29 requires that the "Condition" of all Stewardship Lands be reported regularly. Therefore, NRCS incorporates this additional financial accounting responsibility to report on the condition of Stewardship Lands into its monitoring requirements by assessing compliance with the terms of the easement and whether the easement is meeting program objectives. NRCS added functionality to its easement database to aid its State Offices in tracking monitoring events and observations.

NRCS requires an annual monitoring review of all ACEP easements to ensure compliance with easement terms and that program purposes are being met. For ACEP-ALE easements, NRCS requires the eligible entity to submit annual monitoring reports to NRCS for all ALE easements it holds, while NRCS conducts the annual monitoring of all ACEP-WRE easements. For ACEP-WRE, the monitoring conducted by NRCS provides a qualitative assessment of the outcomes of the restoration and management practices implemented on the easements. Additionally, data and information obtained through the Conservation Effects Assessment Project (CEAP) will continue to be used to provide qualitative assessments of the various benefits provided by NRCS easements and the outcomes being achieved in the study areas. Over the next two years as funding allows, NRCS will encourage its State offices to develop and utilize rapid wetland assessment tools or other methodologies that will provide greater ecological

information about the condition of its wetland easements over time.

Data, however, currently do not exist that would allow for parsing, or attributing, different potential benefits to the suite of motivations that might result in a producer participating in this program. What can be said, is that the ACEP easement payment compensates the landowner for the rights they are encumbering as a result of participating in ACEP. In addition, those transfer payments from the Federal Government to farmers, landowners, and producers may also create incentives that cause changes in the way society uses its resources. As mentioned, we lack data with which to estimate and attribute the overall social costs or benefits. The agency will continue to utilize tools such as producer surveys, case studies, and conservation innovation grants to gain knowledge of producer motivations for programs participation.

NRCS is committed to the continual improvement of its collection and analysis of administrative and programmatic data (such as the impact and natural resource outcome of program funding) to ensure that program benefits are being achieved through adoption and implementation of targeted resource-based policies and procedures. Given the agency's lack of outcome-based program data, NRCS will implement other measures to quantify the incremental benefits obtained from this program.

**BILLING CODE 3410-16-P**

**Table ES-2 Potential benefits from the Agricultural Conservation Easements Program described in the 2014 Farm Bill by recipient**

Ecosystem Function	Ecosystem Service	Wetlands Reserve Easements	Agricultural Lands Easements
<b>Benefits likely to accrue to private landowner</b>			
Tree growth medium	Commercial timber harvest	√	
Fish habitat	Commercial fish harvest	√	
Grassland preservation	Forage production	√	√
<b>Benefits that potentially accrue to both private landowner and public</b>			
Wildlife habitat	Recreational waterfowl harvest	√	
Wildlife habitat	Recreational upland species harvest	√	√
Land for food production	Local food production		√
Recreation opportunities	Agri-tourism	√	√

Potential Social Benefits			
Flood retention	Reduced flood flows/peaks	√	√
Water filtration	Water quality	√	√
Endangered and Threatened wildlife habitat	Biodiversity	√	√
Open space	Scenic quality and rural characteristics	√	√
Carbon sequestration	Carbon storage	√	√
Groundwater recharge	Water quantity	√	√

**BILLING CODE 3410-16-C**

**List of Subjects in 7 CFR Part 1468**

Agricultural operations, Conservation practices, Conservation payments, Conservation easements, Farmland protection, Grasslands, Natural resources, Soil conservation, Wetlands, and Wildlife.

Accordingly, the interim rule revising 7 CFR part 1468, which was published at 80 FR 11032 on February 27, 2015, is adopted as a final rule 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**

■ 2. Amend § 1468.1 by revising paragraph (a) to read as follows:

**§ 1468.1 Applicability.**

(a) The regulations in this part set forth requirements, policies, and procedures for implementation of the Agricultural Conservation Easement Program (ACEP) administered by the

Natural Resources Conservation Service (NRCS). ACEP purposes include:

(1) Combining the purposes and coordinate the functions of the wetlands reserve program established under section 1237, the grassland reserve program established under section 1238N, and the farmland protection program established under section 1238I, as such sections were in effect on the day before the date of enactment of the Agricultural Act of 2014;

(2) Restoring, protecting, and enhancing wetlands on eligible land;

(3) Protecting the agricultural use and future viability, and related conservation values, of eligible land by limiting non-agricultural uses of that land; and

(4) Protecting grazing uses and related conservation values by restoring and conserving eligible land.

\* \* \* \* \*

■ 3. Amend § 1468.3 by:

■ a. Revising the definitions of “agreement” and “agricultural land easement plan”;

■ b. Adding definitions for “ALE agreements” and “at-risk species”;

■ c. Removing the definition of “cooperative agreement”;

■ d. Revising the definitions of “dedicated fund”, “easement payment”, “easement restoration agreement”, “eligible activity”, and “eligible entity”;

■ e. Adding definitions for “future viability” and “grassland”; and  
 ■ f. Revising the definitions of “grassland of special environmental significance”, “grasslands management plan”, “nongovernmental organization”, “other productive soils”, “participant”, and “pending offer”.

The additions and revisions read as follows:

**§ 1468.3 Definitions.**

\* \* \* \* \*

*Agreement* means the document that specifies the obligations and rights of NRCS and any person, legal entity, or eligible entity who is participating in the program or any document that authorizes the transfer of assistance between NRCS and a third party for provision of authorized goods and services associated with program implementation. Agreements may include but are not limited to an agreement to purchase, an ALE-agreement, a wetland reserve easement restoration agreement, a cooperative agreement, a partnership agreement, or an interagency agreement.

\* \* \* \* \*

*Agricultural land easement plan* means the document developed by NRCS or provided by the eligible entity and approved by NRCS, in consultation with the eligible entity and landowner,

that describes the activities that promote the long-term viability of the land to meet the purposes for which the easement was acquired. The agricultural land easement plan includes a description of the farm or ranch management system, conservation practices that address applicable resource concerns for which the easement was enrolled, and any required component plans such as a grasslands management plan, forest management plan, or conservation plan as defined in this part. Where appropriate, the agricultural land easement plan will include conversion of highly erodible cropland to less intensive uses.

*ALE-agreement* means the financial assistance document that specifies the obligations and rights of NRCS and eligible entities participating in the program under subpart B, including a cooperative agreement or grant agreement.

*At-risk species* means any plant or animal species listed as threatened or endangered; proposed or candidate for listing under the Endangered Species Act; a species listed as threatened or endangered under State law or Tribal law; State or Tribal land species of conservation concern; or other plant or animal species or community, as determined by the State Conservationist, with advice from the State Technical Committee or Tribal Conservation Advisory Council, that has undergone, or is likely to undergo, population decline and may become imperiled without direct intervention.

\* \* \* \* \*

*Dedicated fund* means an account held by a certified nongovernmental organization that is sufficiently capitalized for the purpose of covering expenses associated with the management, monitoring, and enforcement of agricultural land easements and where such account cannot be used for other purposes.

\* \* \* \* \*

*Easement payment* means the consideration paid to a participant or their assignee for an easement conveyed to the United States under the ACEP-WRE, or the consideration paid to an Indian Tribe or Tribal members for entering into 30-year contracts under ACEP-WRE.

*Easement restoration agreement* means the agreement or contract NRCS enters into with the landowner or a third party to implement the WRPO on a wetland reserve easement or 30-year contract.

\* \* \* \* \*

*Eligible activity* means an action other than a conservation practice that is included in the Wetland Reserve Plan of Operations (WRPO), as applicable, and that has the effect of alleviating problems or improving the condition of the resources, including ensuring proper management or maintenance of the wetland functions and values restored, protected, or enhanced through a ACEP-WRE easement or 30-year contract.

*Eligible entity* means an Indian Tribe, State government, local government, or a nongovernmental organization that has a farmland or grassland protection program that purchases agricultural land easements for the purposes of protecting:

- (1) The agricultural use and future viability, and related conservation values, of eligible land by limiting non-agricultural uses of that land; or
- (2) Grazing uses and related conservation values by restoring and conserving eligible land.

\* \* \* \* \*

*Future viability* means the legal, physical, and financial conditions under which the land itself will remain capable and available for continued sustained productive agricultural or grassland uses while protecting related conservation values.

*Grassland* means land on which the vegetation is dominated by grasses, grass-like plants, shrubs, or forbs, including shrubland, land that contains forbs, pastureland, and rangeland, and improved pastureland and rangeland.

*Grassland of special environmental significance* means grasslands that contain little or no noxious or invasive species, as designated or defined by State or Federal law; are subject to the threat of conversion to non-grassland uses or fragmentation; and the land is:

- (1)(i) Rangeland, pastureland, shrubland, or wet meadows on which the vegetation is dominated by native grasses, grass-like plants, shrubs, or forbs, or
- (ii) Improved, naturalized pastureland, rangeland, and wet meadows; and
- (2)(i) Provides, or could provide, habitat for threatened or endangered species or at-risk species,
- (ii) Protects sensitive or declining native prairie or grassland types or grasslands buffering wetlands, or
- (iii) Provides protection of highly sensitive natural resources as identified by NRCS, in consultation with the State Technical Committee.

*Grasslands management plan* means the site-specific plan developed or approved by NRCS that describes the

management system and practices to conserve, protect, and enhance the viability of the grassland. The grasslands management plan will include a description of the grassland management system consistent with NRCS practices contained in the Field Office Technical Guide, including the prescribed grazing standard for easements that will be managed using grazing; the management of the grassland for grassland-dependent birds, animals, or other resource concerns for which the easement was enrolled; the permissible and prohibited activities, including the use of haying as a management tool; and any associated restoration plan or conservation plan. The grasslands management plan is a component of either an agricultural land easement plan or wetland reserve plan of operations.

\* \* \* \* \*

*Nongovernmental organization* means any organization that for purposes of qualifying as an eligible entity under subpart B:

- (1) Is organized for, and at all times since the formation of the organization, has been operated principally for one or more of the conservation purposes specified in clause (i), (ii), (iii), or (iv) of section 170(h)(4)(A) of the Internal Revenue Code of 1986;
- (2) Is an organization described in section 501(c)(3) of that Code that is exempt from taxation under 501(a) of that Code; and
- (3) Is described in—
  - (i) Section 509(a)(1) and (2) of that Code, or
  - (ii) Section 509(a)(3) of that Code and is controlled by an organization described in section 509(a)(2) of that Code.

\* \* \* \* \*

*Other productive soils* means farm and ranch land soils, in addition to prime farmland soils, that include unique farmland or farm and ranch land of statewide and local importance.

\* \* \* \* \*

*Participant* means a person, legal entity, Indian Tribe, native corporation, or eligible entity who has been accepted into the program and who is receiving payment or who is responsible for implementing the terms and conditions of an agreement to purchase or agreement to enter a 30-year contract, or the ALE-agreement for agricultural land easements.

*Pending offer* means a written bid, contract, or option extended to a landowner by an eligible entity to acquire an agricultural conservation easement before the legal title to these

rights has been conveyed for the purposes of protecting:

(1) The agricultural use and future viability, and related conservation values, of eligible land by limiting non-agricultural uses of that land; or

(2) Grazing uses and related conservation values by restoring and conserving eligible land.

\* \* \* \* \*

■ 4. Amend § 1468.4 by revising paragraph (c) to read as follows:

§ 1468.4 Appeals.

\* \* \* \* \*

(c) Easement administration determinations under ACEP after easement closing. NRCS determinations that are made pursuant to its rights in an ACEP-funded easement after closing may be appealed to the State Conservationist as specified in the notice provided to the landowner when NRCS exercises its rights under the easement. Such determinations are not subject to appeal under 7 CFR part 11 or part 614.

■ 5. Amend § 1468.5 by revising paragraph (a) to read as follows:

§ 1468.5 Scheme or device.

(a) In addition to other penalties, sanctions, or remedies that may apply, if it is determined by NRCS that anyone has employed a scheme or device to defeat the purposes of this part, any part of any program payment otherwise due or paid during the applicable period may be withheld or be required to be refunded with interest, thereon, as determined appropriate by NRCS.

\* \* \* \* \*

■ 6. Amend § 1468.6 by revising paragraphs (b)(4)(ii), (b)(6), (d), (f), (g), and (i) to read as follows:

§ 1468.6 Subordination, exchange, modification, and termination.

\* \* \* \* \*

(b) \* \* \*

(4) \* \* \*

(ii) If there is no practicable alternative that exists other than impact to the conservation value of the easement area, such adverse impacts have been minimized to the greatest extent practicable, and any remaining adverse impacts mitigated by enrollment of other lands that provide equal or greater conservation functions and values, as determined by NRCS, at no cost to the government;

\* \* \* \* \*

(6) The subordination, exchange, modification, or termination action will result in comparable conservation functions and value and equivalent or greater economic value to the United

States as determined pursuant to paragraph (d) of this section.

\* \* \* \* \*

(d) A determination of equal or greater economic value to the United States under paragraph (b) of this section will be made in accordance with an approved easement valuation methodology for ALE easements under subpart B or for WRE easements under subpart C. In addition to the value of the easement itself, NRCS may consider other financial investments it has made in the acquisition, restoration, and management of the original easement to ensure that the easement administration action results in equal or greater economic value to the United States.

\* \* \* \* \*

(f) When reviewing a proposed action under this section, the preferred alternative is to avoid the easement area. If the easement area cannot be avoided entirely, then the preferred alternative must minimize impacts to the original easement area and its conservation functions and values.

(g) Easement modifications, including subordinations, are preferred to easement exchanges that may involve lands that are not physically adjacent to the original easement area. Easement exchanges are limited to circumstances where there are no available lands adjacent to the original easement area that will result in equal or greater conservation and economic values to the United States.

\* \* \* \* \*

(i) Where NRCS determines that recordation of a new deed is necessary to effect an easement administration action under this section, NRCS may use the most recent version of the ACEP deed document or deed terms approved by NRCS.

\* \* \* \* \*

■ 7. Amend § 1468.10 by adding paragraph (c) to read as follows:

§ 1468.10 Environmental markets.

\* \* \* \* \*

(c) ACEP funds may not be used to enter agreements to implement conservation practices that the landowner is required to establish as a result of a court order or to satisfy any mitigation requirement for which the ACEP landowner is otherwise responsible.

Subpart B to Part 1468 [Amended]

■ 8. Amend subpart B to part 1468 by revising all references to “Cooperative Agreement”, “cooperative agreement”, or “Cooperative agreement” to read “ALE-agreement” wherever they occur.

■ 9. Amend § 1468.20 by revising paragraphs (a)(1) and (2), (d)(1)(ii), and (d)(3) to read as follows:

§ 1468.20 Program requirements.

(a) \* \* \*

(1) Under ACEP–ALE, NRCS will facilitate and provide cost-share assistance for the purchase by eligible entities of agricultural land easements or other interests in eligible private or Tribal land that is subject to a written pending offer from an eligible entity.

(2) To participate in ACEP–ALE, eligible entities as identified in (b) below must submit applications to NRCS State offices to partner with NRCS to acquire conservation easements on eligible land. Eligible entities with applications selected for funding must enter into an ALE-agreement with NRCS and use the NRCS required minimum deed terms specified therein, the effect of which is to protect natural resources and the agricultural nature of the land and permit the landowner the right to continue agricultural production and related uses subject to an agricultural land easement plan as approved by NRCS, the landowner, and the Grantee.

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(ii)(A) Contains at least 50 percent prime or unique farmland, or designated farm and ranch land of State or local importance unless otherwise determined by NRCS,

(B) Contains historical or archaeological resources,

(C) The enrollment of which would protect grazing uses and related conservation values by restoring and conserving land, or

(D) Furthers a State or local policy consistent with the purposes of the ACEP–ALE.

\* \* \* \* \*

(3) Eligible land, including eligible incidental land, may not include forest land of greater than two-thirds of the easement area unless waived by NRCS with respect to lands identified by NRCS as sugar bush that contributes to the economic viability of the parcel. Land with contiguous forest that exceeds the greater of 40 acres or 20 percent of the easement area will have a forest management plan before the easement is purchased and compensation paid to the landowner.

\* \* \* \* \*

■ 10. Amend § 1468.21 by revising paragraph (c) to read as follows:

§ 1468.21 Application procedures.

\* \* \* \* \*

(c) NRCS will determine the entity, land, and landowner eligibility for the fiscal year of enrollment based on the application materials provided by the eligible entity, onsite assessments, and the criteria set forth in § 1468.20.

\* \* \* \* \*

■ 11. Amend § 1468.22 by revising paragraphs (b)(1), (8), (10), (12), and (13) and (c)(3) through (5) to read as follows:

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

\* \* \* \* \*

(b) \* \* \*

(1) Percent of prime, unique, and other important soils in the parcel to be protected;

\* \* \* \* \*

(8) Proximity of the parcel to other protected land, such as military installations; land owned in fee title by the United States or an Indian Tribe, State or local government, or by a nongovernmental organization whose purpose is to protect agricultural use and related conservation values; or land that is already subject to an easement or deed restriction that limits the conversion of the land to non-agricultural use or protects grazing uses and related conservation values;

\* \* \* \* \*

(10) Maximizing the protection of contiguous or proximal acres devoted to agricultural use;

\* \* \* \* \*

(12) Decrease in the percentage of acreage of permanent grassland, pasture, and rangeland, other than cropland and woodland pasture, in the county in which the parcel is located between the last two USDA Censuses of Agriculture; and

(13) Other additional criteria as determined by NRCS.

(c) \* \* \*

(3) Multifunctional conservation values of farm and ranch land protection including:

(i) Social, economic, historical, and archaeological benefits;

(ii) Enhancing carbon sequestration;

(iii) Improving climate change resiliency;

(iv) At-risk species protection; or  
(v) Other related conservation benefits;

(4) Geographic regions where the enrollment of particular lands may help achieve national, State, and regional agricultural or conservation goals and objectives, or enhance existing government or private conservation projects;

(5) Diversity of natural resources to be protected or improved;

\* \* \* \* \*

■ 12. Amend § 1468.23 by revising paragraph (a)(1) to read as follows:

**§ 1468.23 ALE-agreements.**

(a) \* \* \*

(1) The interests in land to be acquired, including the United States' right of enforcement, the deed requirements specified in this part, as well as the other terms and conditions of the easement deed;

\* \* \* \* \*

■ 13. Amend § 1468.24 by revising paragraph (b)(4)(vi)(G) and adding paragraphs (b)(4)(ii)(H) through (K) to read as follows:

**§ 1468.24 Compensation and funding for agricultural land easements.**

\* \* \* \* \*

(b) \* \* \*

(4) \* \* \*

(vi) \* \* \*

(G) One of several parcels within a special project area being offered for enrollment in that fiscal year that are being protected pursuant to a comprehensive plan approved by the State Conservationist, with input from the State Technical Committee, for the permanent protection of a large block of farm or ranch land;

(H) Part of a comprehensive plan to facilitate transfers to new and beginning farmers approved by the State Conservationist, with input from the State Technical Committee, for the permanent protection of a block of farm or ranch land that, if implemented, will facilitate the transfer of farmland to a next generation farmer;

(I) Subject of a conservation buyer transaction where a member of an underserved community, veteran, beginning farmer or rancher, or a disabled farmer or rancher has a valid purchase and sale agreement to acquire the property subject to an agricultural land easement;

(J) Parcel has an existing NRCS Resource Management System (RMS) level plan with NRCS conservation practices applied or under contract to be applied in accordance with NRCS standards and specifications, and the landowner has agreed that the ALE plan will be developed at the RMS level in accordance with the purposes for which the ALE easement is being acquired; or

(K) Meets the definition of grassland of special environmental significance.

\* \* \* \* \*

■ 14. Revise § 1468.25 to read as follows:

**§ 1468.25 Agricultural land easement deeds.**

(a) Under ACEP-ALE, a landowner grants an easement to an eligible entity

with which NRCS has entered into an ALE-agreement. The easement deed will require that the easement area be maintained in accordance with ACEP-ALE goals and objectives for the term of the easement.

(b) Written pending offers by an eligible entity must be for acquiring an easement in perpetuity, except where State law prohibits a permanent easement. In such cases where State law limits the term of a conservation easement, the easement term will be for the maximum duration allowed under State law.

(c) The eligible entity may use its own terms and conditions in the agricultural land easement deed, but the agricultural land easement deed must address the deed requirements as specified by this part and by NRCS in the ALE-agreement.

(d) All deeds, as further specified in the ALE-agreement, must address the following regulatory deed requirements:

(1) Include a right of enforcement clause for NRCS. NRCS will specify the terms for the right of enforcement clause, including that such interest in the agricultural land easement remains in effect for the duration of the easement and any changes that affect NRCS' interest in the agricultural land easement must be reviewed and approved by NRCS under § 1468.6 of this part.

(2) Ensure compliance with an agricultural land easement plan that is provided by the eligible entity in consultation with the landowner, approved by NRCS, and implemented according to NRCS requirements. NRCS may provide technical assistance for the development or implementation of the agricultural land easement plan. If the parcel contains highly erodible land, the conservation plan component of the agricultural land easement plan will be developed and managed in accordance with the Food Security Act of 1985, as amended, and its associated regulations. The access must be sufficient to provide the United States ingress and egress to the easement area to ensure compliance pursuant to its right of enforcement.

(3) Specify that impervious surfaces will not exceed 2 percent of the ACEP-ALE easement area, excluding NRCS-approved conservation practices unless NRCS grants a waiver as follows:

(i) The eligible entity may request a waiver of the 2 percent impervious surface limitation at the time that a parcel is approved for funding,

(ii) NRCS may waive the 2 percent impervious surface limitation on an individual easement basis, provided that no more than 10 percent of the

easement area is covered by impervious surfaces,

(iii) Before waiving the 2 percent limitation, NRCS will consider, at a minimum, population density; the ratio of open, prime, and other important farmland versus impervious surfaces on the easement area; the impact to water quality concerns in the area; the type of agricultural operation; parcel size; and the purposes for which the easement was acquired,

(iv) Eligible entities may submit an impervious surface limitation waiver process to NRCS for review and consideration. The eligible entities must apply any approved impervious surface limitation waiver processes on an individual easement basis, and

(v) NRCS will not approve blanket waivers or entity blanket waiver processes of the impervious surface limitation. All ACEP-ALE easements must include language limiting the amount of impervious surfaces within the easement area.

(4) Include an indemnification clause requiring the landowner to indemnify and hold harmless the United States from any liability arising from or related to the property enrolled in ACEP-ALE.

(5) Include an amendment clause requiring that any changes to the easement deed after its recordation must be consistent with the purposes of the agricultural land easement and this part. Any substantive amendment, including any subordination of the terms of the easement or modifications, exchanges, or terminations of the easement area, must be approved by NRCS prior to recordation or else the action is null and void.

(6) Prohibit commercial and industrial activities except those activities that NRCS has determined are consistent with the agricultural use of the land.

(7) Limit the subdivision of the property subject to the agricultural land easement, except where State or local regulations explicitly require subdivision to construct residences for employees working on the property or where otherwise authorized by NRCS.

(8) Include specific protections related to the purposes for which the agricultural land easement is being purchased, including provisions to protect historical or archaeological resources or grasslands of special environmental significance.

(9) Other minimum deed terms specified by NRCS to ensure that ACEP-ALE purposes are met.

(e) NRCS reserves the right to require additional specific language or require removal of language in the agricultural land easement deed to ensure the enforceability of the easement deed,

protect the interests of the United States, or to otherwise ensure ALE purposes will be met.

(f) For eligible entities that have not been certified, the deed document must be reviewed and approved by NRCS in advance of use as provided herein:

(1) NRCS will make available for an eligible entity's use a standard set of minimum deed terms that could be wholly incorporated along with the eligible entity's own deed terms into the agricultural land easement deed, or as an addendum that is attached and incorporated by reference into the deed. The standard minimum deed terms addendum will specify that if such terms conflict with other terms of the deed, the NRCS terms prevail.

(2) If an eligible entity agrees to use the standard set of minimum deed terms as published by NRCS, NRCS and the eligible entity will identify in the ALE-agreement the use of the standard minimum deed terms as a requirement and the National Office review of individual deeds may not be required. NRCS may place priority on applications where an eligible entity agrees to use the standard set of minimum deed terms as published.

(3) The eligible entity must submit all individual agricultural land easement deeds to NRCS at least 90 days before the planned easement purchase date and be approved by NRCS in advance of use.

(4) Eligible entities with multiple eligible parcels in an ALE-agreement may submit an agricultural land easement deed template for review and approval. The deed templates must be reviewed and approved by NRCS in advance of use.

(5) NRCS may conduct an additional review of the agricultural land easement deeds for individual parcels prior to the execution of the easement deed by the landowner and the eligible entity to ensure that they contain the same language as approved by the National Office and that the appropriate site-specific information has been included.

(g) The eligible entity will acquire, hold, manage, monitor, and enforce the easement. The eligible entity may have the option to enter into an agreement with governmental or private organizations that have no property rights or interests in the easement area to carry out easement monitoring, management and enforcement responsibilities.

(h) All agricultural land easement deeds acquired with ACEP-ALE funds must be recorded. The eligible entity will provide proof of recordation to NRCS within the timeframe specified in the ALE-agreement.

■ 15. Amend § 1468.27 by revising paragraphs (a)(1) and (b)(3) introductory text to read as follows:

**§ 1468.27 Eligible entity certification.**

(a) \* \* \*

(1) An explanation of how the entity meets the requirements identified in § 1468.20(b) of this section;

\* \* \* \* \*

(b) \* \* \*

(3) The terms of the ALE-agreement will include the regulatory deed requirements specified in § 1468.25 of this part that must be addressed in the deed to ensure that ACEP-ALE purposes will be met by the certified entity without requiring NRCS to pre-approve each easement transaction prior to closing.

\* \* \* \* \*

■ 16. Amend § 1468.28 by revising paragraph (f) to read as follows:

**§ 1468.28 Violations and remedies.**

\* \* \* \* \*

(f) If NRCS exercises its rights identified under an agricultural land easement NRCS will provide written notice to the eligible entity at the eligible entity's last-known address. The notice will set forth the nature of the non-compliance by the eligible entity and provide a 180-day period to cure. If the eligible entity fails to cure within the 180-day period, NRCS will take the action specified under the notice. NRCS reserves the right to decline to provide a period to cure if NRCS determines that imminent harm may result to the conservation values or other interest in land that it seeks to protect.

**Subpart C—Wetland Reserve Easements**

■ 17. Amend § 1468.32 by revising paragraph (a)(3) to read as follows:

**§ 1468.32 Establishing priorities, ranking consideration and project selection.**

(a) \* \* \*

(3) Whether the landowner or another person or entity is offering to contribute financially to the cost of the easement or other interest in the land to leverage Federal funds;

\* \* \* \* \*

■ 18. Amend § 1468.33 by revising paragraphs (d)(3) and (4) to read as follows:

**§ 1468.33 Enrollment process.**

\* \* \* \* \*

(d) \* \* \*

(3) The terms of the easement identified in paragraph (d)(2)(i) of this section includes the landowner's agreement to the implementation of a

WRPO identified in paragraph (d)(2)(ii) of this section. In particular, the easement deed identifies that NRCS has the right to enter the easement area to undertake on its own or through an agreement with the landowner or other third party, any activities to restore, protect, enhance, manage, maintain, and

monitor the wetland and other natural values of the easement area.

(4) At the time NRCS enters into an agreement to purchase, NRCS agrees, subject to paragraph (e) of this section, to acquire and provide for restoration of the land enrolled into the program.

\* \* \* \* \*

Dated: October 4, 2016.

**Jason A. Weller,**  
*Vice-President, Commodity Credit Corporation and Chief, Natural Resources Conservation Service.*

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