

## **Part 510 — General Information**

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## National Food Security Act Manual, Fourth Edition

### Part 510 - General Information

#### Subpart A – Introduction

##### 510.01 General Information

###### a Introduction

This section sets forth the purposes and objectives of the Highly Erodible Land Conservation (HELIC) and Wetland Conservation (WC) provisions.

###### b Legislated Authorities

Legislative authorities for the policy and procedures contained in this manual are—

- Public Law 99-198, Title XII, The Food Security Act of 1985.
- Public Law 101-624, Title XII, The Food, Agriculture, Conservation, and Trade Act of 1990.
- Public Law 104-127, Title III, The Federal Agriculture Improvement and Reform Act of 1996.
- Public Law 107-171, Title II, The Farm Security and Rural Investment Act of 2002.

These authorities are codified in 16 U.S.C. 3801 through 3824.

###### c Relationship among Statute, Regulation and Procedures

- Statute. NRCS derives its authority to administer the HELIC/WC programs first and foremost from the statute, Title XII of the Food Security Act of 1985 (the Act). This law is codified in the United States Code, at 16 U.S.C. 3801 et seq. (See 521.01)
- Regulations. As required by statute, NRCS (then SCS) promulgated a rule in the Code of Federal Regulation (CFR) at 7 CFR Part 12, to provide further information on how the law would be implemented. The rule, also called the regulation, went through the rulemaking procedures required by the Administrative Procedures Act (5 U.S.C. 500 et seq.), which required public comment. (See 521.02)
- Agency Policies and Procedures. Agency policies and procedures are set forth in the National Food Security Act Manual (NFSAM), as well as the General Manual. The NFSAM provides the in-depth technical procedures and policies by which NRCS implements its delegated responsibilities at the field level.

While the NFSAM is generally used by all NRCS employees at the field implementation level, during the USDA Administrative Appeals procedures or any legal proceedings, the agency will be judged as to whether implementation is in conformance with the regulations governing the provisions (in the case of an appeal) and the statute (in the case of federal litigation). Regulations are given deference as long as they do not conflict with the plain language of the statute. Other policies and procedures that provide internal agency guidance are given less weight in a dispute than the regulations. It is therefore crucial that all decisions be justified in terms of what the statute and regulations require.

###### d Contents of the Manual

This manual contains NRCS operating procedures for implementing the Federal Regulation 7 CFR Part 12 and 7 CFR 610, including—

7 CFR 12 Interim rules published—

- 51 FR 23496, June 27, 1986, effective date— June 24, 1986
- 61 FR 47019, September 6, 1996, effective date— September 6, 1996

7 CFR 12 Final rules published—

- 52 FR 35194, September 17, 1987, effective date— September 17, 1987
- 56 FR 18630, April 23, 1991, effective date— November 28, 1990, unless otherwise noted
- 56 FR 23735, May 23, 1991, effective date— November 28, 1990, unless otherwise noted.

7 CFR 610, Final rule published—

- 61 FR 27999, June 4, 1996, effective date June 4, 1996

**e Required Knowledge by NRCS Employees**

Personnel assigned HELC and WC responsibilities must have a working knowledge of this manual as well as of 7 CFR Part 12.

**f Decision making**

In making any decision, NRCS staff must address two essential questions—

- What is the authority for this action (statutory and regulatory)?
- Is the action sufficiently documented?

The importance of adequately documenting the basis for NRCS determinations in the administrative record cannot be overemphasized. NRCS must establish and document the following:

- The technical criteria for wetland, HEL, and other technical determinations.
- Whether an activity violates the conservation provisions of the Act.
- Whether the violation qualifies for an exemption from the provisions.

**g State Supplements to this Manual**

Draft copies of all State supplements to this manual will be sent for review and approval before issue to appropriate NHQ (National Headquarters) Division Director. The appropriate Division Director must approve all exceptions to this manual made by States.

The State Conservationist must provide a final copy of all amendments to this manual, State bulletins, technical notes, and guidelines relating to the provisions contained in this manual to NHQ. Further, in accordance with the agency's policy on edirectives, these must be posted to the [NRCS Electronic Directives web site](#).

**510.02 Objectives and Scope the Provisions**

**a Objectives of HELC and WC Provisions**

The objectives of the HELC and WC provisions are to—

- Remove certain incentives for persons who—
  - Produce agricultural commodities on highly erodible land without adequate conservation treatment.
  - Convert wetlands to make possible the production of agricultural commodities.
- Reduce nonpoint source pollution.
- Reduce soil loss from wind and water erosion.
- Protect the Nation's long-term capability to produce food and fiber.
- Reduce sedimentation and improve water quality.
- Assist in preserving the functions and values of the Nation's wetlands.

**b Program Benefits Covered by HELC and WC Provisions**

The following USDA benefits are subject to the HELC/WC provisions—

<b>Provisions subject to either HELC Compliance (16 U.S.C. § 3811 (a) or WC Compliance (16 U.S.C. § 3821)</b>	<b>Applicability to the provisions</b>
Contract payments received under production flexibility (or successor) contracts, marketing assistance loans, and any type of price support or payment made available under the Agricultural Market Transition Act, the CCC Charter Act (15 U.S.C. § 714 <i>et seq.</i> ), or any other Act.	HELIC – YES WC – YES
Farm storage facility loans made under § 4(h) of the CCC Charter Act (15 U.S.C. § 714b(h)).	HELIC –YES WC – NO
Disaster payments.  **Whether or not disaster payments are subject to the WC provisions is a matter of the specific disaster assistance legislation. The provisions as accorded by the statutory authority as passed in the 1996 Farm Bill does not condition receipt of USDA disaster relief benefits on compliance with the WC provisions.	HELIC – YES WC – **
Loans made, insured, or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. § 1921 <i>et seq.</i> ) or any other provision of law administered by the USDA Farm Service Agency (FSA), if it is determined that the proceeds of such loan will be used for a purpose that will contribute to excessive erosion of HEL; or if it is determined that the proceeds of such loan will be used for a purpose that will contribute to conversion of a wetland.	HELIC –YES WC – YES
Payments made under §§ 4 or 5 of the CCC Charter Act (15 U.S.C. §§ 714b or 714c) during such crop year for storage of an agricultural commodity acquired by the CCC.	HELIC – YES WC – NO

<b>Provisions subject to either HELC Compliance (16 U.S.C. § 3811 (a) or WC Compliance (16 U.S.C. § 3821)</b>	<b>Applicability to the provisions</b>
Any payment made pursuant to a contract entered into under Title XII, Subtitle D (16 U.S.C. § 3801 <i>et seq.</i> ). <ul style="list-style-type: none"> <li>• Conservation Reserve Program (CRP)</li> <li>• <a href="#">Conservation Security Program (CSP)</a></li> <li>• <a href="#">Environmental Quality Incentives Program (EQIP)</a></li> <li>• <a href="#">Farm &amp; Ranch Land Protection Program (FRPP)</a></li> <li>• Grassland Reserve Program (GRP)</li> <li>• <a href="#">Wetlands Reserve Program (WRP)</a></li> <li>• <a href="#">Wildlife Habitat Incentives Program (WHIP)</a></li> </ul>	HELC – YES WC – YES
Any payment made under §§ 401 or 402 of the Agricultural Credit Act of 1978 (16 U.S.C. § 2201 or 2202).	HELC – YES WC – YES
Payments, loans or other assistance made under §§ 3 and 8 of the Watershed Protection and Flood Prevention Act (16 U.S.C. § 1003 or 1006a).	HELC – YES WC – YES

### **c Appeal Rights**

The NRCS Appeals and Mediation Policy is set forth in NFSAM Part 519 and Conservation Programs Manual (440-V-CPM)[CPM, Part 510](#). Appeals of the HELC/WC provisions are authorized under 7 U.S.C. § 6991, *et seq.*

### **d Definition of a Field**

As defined by the statute at 16 U.S.C. 3801(a)(7), a field is—

- A part of a farm that is separated from the balance of the farm by permanent boundaries such as fences, roads, permanent waterways, or other similar features.
- At the option of the owner or operator of the farm, croplines may also be used to delineate a field if farming practices make it probable that the croplines are not subject to change.
- Any highly erodible land on which an agricultural commodity is produced after December 23, 1985, and that is not exempt under Section 1212, shall be considered as part of the field in which the land was included on December 23, 1985, unless the owner and Secretary agree to modification of the boundaries of the field to carry out this title.

### **e Scope of Provisions of 7 CFR Part 12**

The provisions apply to the following, as provided at 16 U.S.C. 3801(a)(16) is as follows:

- 50 States
- District of Columbia
- Commonwealth of Puerto Rico
- Guam
- Virgin Islands of the United States
- Commonwealth of Northern Mariana Islands
- Trust Territories of the Pacific Islands

Further, as defined in the rule at 7 CFR §12.2, persons subject to the HELC/WC provisions are as follows:

- Farm or ranch owners and operators
- Persons further defined as —
  - Individuals
  - Partnerships
  - Associations
  - Corporations
  - Cooperatives
  - Estates and trusts
  - Joint ventures
  - Other business or legal entities
  - State, political subdivision of a State, or any agency thereof
  - Other affiliates as further defined in 7 CFR 12.8

## 510.03 Requirements for Compliance with the HELC/WC Provisions

### a HELC Requirements

Persons requesting applicable USDA benefits must apply an approved conservation system when producing annually tilled agricultural commodity crops or sugarcane on fields determined to be highly erodible that meets the following definitions:

- A substantial reduction in soil erosion (has a pre-December 23, 1985 cropping history)
- No substantial increase in soil erosion (sodbuster from native vegetation after December 23, 1985).

### b WC Requirements

Persons who plant an agricultural commodity on wetlands that were converted between December 23, 1985 and November 28, 1990, will be ineligible for program benefits in any year an agricultural commodity is planted unless an exemption applies.

Persons who convert a wetland making production of an agricultural commodity possible after November 28, 1990 will be ineligible for program benefits until the functions and acreage of the wetland that was converted are restored or mitigated unless an exemption applies.

### c Participants' Responsibilities

It is the USDA program participant's responsibility to both know and to understand the requirements of the HELC and WC provisions and seek timely technical assistance for determinations needed in order to comply with the HELC/WC provisions (7 CFR §§ 12.4(h); 12.6(c); and 12.23(f)). Further, the participant must certify that he/she is in compliance with the provisions, and that he/she will not—

- Produce annually tilled agricultural commodity crops or sugarcane on land on which NRCS has not issued any determination of HEL.
- Convert a wetland or produce an agricultural commodity crop on a converted wetland.

A person may obtain a highly erodible land determination, a certified wetland determination, or a drainage scope-and-effect determination by completing and signing form AD-1026. The determination will be made in writing and a copy will be provided to the person.

Participants must request assistance or technical determinations in a timely manner to avoid delays in establishing program eligibility.

Persons who are adversely affected by a determination and believe that the requirements of the Act or the regulations were improperly applied may appeal any determination by NRCS under 7 CFR §12.12.

### d Access to the Farm or Ranch

The participant's signature on the Form AD-1026 grants legal access to the land by any USDA employees and/or their representatives (see 7 CFR 12.7(a)(5)), for the purpose of—

- Administration of the HELC/WC provisions.
- Review of the implementation of conservation systems.
- Review of the implementation of any practice associated with any conservation program subject to the HELC/WC provisions.

**e Failure to Provide Access**

Failure or refusal by a USDA participant to grant access in accordance with the rule at 7 CFR §12.7(a)(5) and the AD-1026 will result in immediate ineligibility for those USDA benefits subject to compliance with the HELC/WC provisions.

When an NRCS employee has been refused entry, document the exact time, date, and persons involved, including both the USDA participant and all NRCS or USDA employees involved. The technical determination shall be issued as a ***Final Technical Determination*** on the basis of this refusal. This is ***NOT*** an appealable issue as the regulation (7 CFR §12.7(a)(5)) requires the participant to provide NRCS access to the property in order to verify all compliance certifications. Both the final technical determination and the FSA-569 will be provided to the participant and FSA.

## Subpart B – Wetland Conservation Provisions

### 510.10 Definition of Conversion

For an activity to violate the WC provision, it must involve a conversion of wetlands that is not exempt. The Act, at 16 USC §3801(a)(6)(A), defines the terms as follows:

1. **Converted wetland** is wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible.
2. **Agricultural commodity** is any agricultural commodity planted and produced in a State by annual tilling of the soil, including tilling by one-trip planters; or sugarcane planted and produced in a State.

Accordingly, activities that affect wetlands, yet are not for the purpose and do not make production of an agricultural commodity possible or result in the production of an agricultural commodity, are not defined as “conversions” under the WC provisions of the Act. Therefore, these activities are not captured by the WC provisions.



## **510.11 WC Exemptions**

The Act exempts production of an agricultural commodity on or conversion of the following:

- Converted wetlands if the conversion was commenced before December 23, 1985;
- Artificial wetlands;
- Wetlands where the owner or operator uses normal cropping or ranching practices to produce an agricultural commodity in a manner that is consistent for the area, where the production is possible as a result of natural conditions, such as drought, and is without action by the producer that destroys a natural wetland characteristic;
- Under certain conditions, a converted wetland to which wetland characteristics returned.



## **510.12 NRCS WC Responsibilities**

NRCS' fundamental WC responsibilities are to—

- Determine, delineate and certify wetlands on lands subject to the WC provisions;
- Determine if an activity is a conversion under the Act;
- Determine if a conversion was commenced prior to December 23, 1985;
- Determine if a conversion is exempt under the Act.

In doing this, NRCS may also perform a variety of technical determinations, such as wetland delineations, functional assessments, scope and effect analyses, and development or approval of mitigation and monitoring plans. Procedures for these actions are provided in the NFSAM.



**510.13 Other Authorities Related to Wetlands**

Determinations, delineations, or exemptions made by NRCS may not meet the requirements of other local, state or federal wetland protection laws.

Furthermore, when providing technical or financial assistance that could result in the manipulation of a wetland, NRCS must inform the participant that the activity may require other local, state, or federal permits or approval and shall not be initiated until required permits are obtained.

NRCS' technical and financial assistance will be withdrawn if required permits are not obtained



## 510.14 Executive Order 11990

Executive Order 11990, signed by President Carter on May 24, 1977, requires that each federal agency take action to minimize impacts to wetlands when “providing federally undertaken, financed, or assisted construction and improvements”.

This order is separate from the WC provisions of the Act. It is broader in that it encompasses *all* NRCS technical and financial assistance activities affecting wetlands. Executive Order 11990 is discussed in NRCS’ wetland technical assistance policy, which is contained in the General Manual at [GM 190-410](#).

All NRCS programs must be conducted in compliance with this policy. A particular wetland that is not subject to the WC provisions, such as an artificial wetland or prior converted cropland, *may still be subject* to the Executive Order 11990 and NRCS’ wetland technical assistance policy.

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### Part 510 - General Information

#### Subpart C – USDA Responsibilities for HELC/WC

#### 510.20 NRCS Responsibilities

##### a General Responsibilities

In accordance with the rule at 7 CFR §12.6(c), an NRCS representative shall make the following determinations:

- Whether land is highly erodible or is a wetland or a converted wetland in accordance with the provisions of this part;
- Whether all technical information relating to the determination of a violation and severity of a violation has been provided to FSA for making payment-reduction determinations;
- Determinations related to HELC—
  - Whether highly erodible land is predominant on a particular field under §12.22;
  - Whether the conservation plan that a person is actively applying is based on the local NRCS Field Office Technical Guide and is approved by—
    - The Conservation District (CD) and NRCS; or
    - NRCS;
  - Whether the conservation system that a person is using has been approved by the CD under § 12.5(a)(2) or, in an area not within a CD, a conservation system approved by NRCS to be adequate for the production of an agricultural commodity on highly erodible land;
  - Whether an approved conservation plan or conservation system is being actively applied on highly erodible fields;
  - Whether failure to apply an approved plan or system is technical and minor in nature due to circumstances beyond the control of the person, and has only a minimal effect on the soil protection requirements of the conservation plan or conservation system; or whether a temporary variance from the requirements of the plan should be granted;
  - Whether or not an area meets the highly erodible land criteria as determined by the NRCS representative based upon existing records or other information and without the need for an onsite determination. This determination will be made by the NRCS representative as soon as possible following a request for such a determination.
- Determinations related to WC—
  - Whether the conversion of a wetland is for the purpose or has the effect of making the production of an agricultural commodity possible. An onsite determination will be made by the NRCS representative as soon as possible following a request for such a determination, but only when site conditions are favorable for the evaluation of soils, hydrology, and vegetation. If an area is continuously inundated or saturated for long periods of time during the growing season to such an extent that access by foot to make a determination of predominance of hydric soils or prevalence of hydrophytic vegetation is not feasible, the area will be determined to be a wetland.
  - Whether the actions of a person(s) with respect to the conversion of a wetland or production of an agricultural commodity on converted wetland did or will have only a minimal effect on the functions of wetlands in the area;
  - Whether a farmed wetland or farmed wetland pasture is abandoned;

- Whether the planting of an agricultural commodity on a wetland is possible under natural conditions;
- Whether maintenance of existing drainage of a wetland described in § 12.33 exceeds the scope and effect of the original drainage;
- Development or approval of a plan for the mitigation of a converted wetland and whether the mitigation of a converted wetland is accomplished according to the approved wetland mitigation plan.
- Other duties of NRCS—
  - Prepare, maintain, and make available to the public lists of—
    - Highly erodible soil map unit legends
    - Hydric soils
    - Hydrophytic plants
  - Provide other technical assistance for implementation of the provisions of this part as necessary.
  - Inform the CD that conservation systems conform with the FOTG so the CD may approve or disapprove the plans or systems.
  - Keep the CD informed on the status of application of conservation systems.
  - Coordinate technical assistance provided to CD's in the discharge of these responsibilities with the other Federal, State, and local agencies involved in implementation of HELC/WC.
  - Keep the CD informed about the status of HELC and WC determinations, reconsiderations, and appeals.
  - Provide technical assistance to identify suitable lands for FSA-Farm Credit, the U.S. Fish and Wildlife Service (FWS), and other interested agencies.
  - Conduct environmental evaluations, including cultural resource considerations, in compliance with the—
    - National Environmental Policy Act (NEPA).
    - National Historic Preservation Act (NHPA)
    - Endangered Species Act
  - Monitor and report progress regarding highly erodible land and wetland conservation implementation.
  - Comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-2000d-4, and other related authorities on Civil Rights including Executive Order 12898 on Environmental Justice which prohibits discrimination by the federal government based on race, color, national origin, religion, sex, age, handicap, or marital status.
  - Conduct HELC/WC determinations for Farm Credit Property.

**b HELC/WC Determinations**

NRCS will complete HELC/WC determinations on tracts for which FSA has forwarded a Form AD-1026 or FSA-569, according to the procedures in [Part 520.01](#).

**c Timeframes for Completion of HELC/WC Determinations**

For FSA loan applicants, NRCS will send a preliminary determination within 15 calendar days of the receipt of the AD-1026, per 1993 Memorandum of Understanding among the former Farmers Home Administration, Soil Conservation Service and Agricultural Stabilization and Conservation Service. All other determinations will be made as soon as possible, in accordance with 7 CFR §12.6.

## 510.21 Conservation District Responsibilities

Conservation Districts are responsible for—

- Providing information to NRCS and FSA during the appeal process that may help FSA or NRCS reach a decision.
- Participating in the field visit with the designated conservationist, if the CD wishes to participate.
- Approving conservation systems and revisions that meet CD program objectives.
- Considering the following when NRCS presents conservation systems for approval—
  - The degree of control the person has over the land for the period of the crop rotation, and other practices specified in the conservation system.
  - Other unusual situations regarding land use, treatment, or operations when approving the conservation system.
- Consulting with the FSA County Committee when appropriate.
- Actively participating in developing and reviewing the Field Office Technical Guide (FOTG), including the economic practicability, feasibility, and social acceptability of the conservation systems included in the FOTG.
- Integration of HELC/WC provisions with State and local conservation programs.
- Participating on [State Technical Committee](#) (optional).
- Participating in HELC/WC status review process.
- Providing FSA with information regarding good faith waivers.
- Providing input to NRCS in the development of wetland conservation plans and mitigation plans.
- Advising NRCS on minimal effect determinations.



## 510.22 FSA Responsibilities

FSA has the general responsibilities for administering the following HELC/WC provisions. Specific guidelines for these provisions are provided in FSA Handbook 6-CP.

FSA will—

- Establish field/tract boundaries, field numbers, and acreage on official FSA maps.
- Keep up-to-date data through the reconstitution process.
- Maintain official spatial records of HEL determinations, and wetland determinations on aerial photography.
- Determine whether a landlord qualifies for an exemption.
- Determine whether a tenant qualifies for the tenant exemption.
- Provide information on whether the conversion of a wetland commenced before December 23, 1985.
- Determine whether the conversion of a wetland was caused by a third party.
- Determine whether an agricultural commodity was planted on wetland that was converted after December 23, 1985.
- Determine whether persons are eligible for USDA benefits.
- Determine whether persons qualify for a good faith waiver.
- Determine persons who will be ineligible for USDA benefits as the result of production of an agricultural commodity on HEL or converted wetland.
- Determine whether land was converted from native vegetation, such as rangeland or woodland, to crop production after December 23, 1985.
- Advise new owners and operators of previous determinations on a tract and the status of conservation systems on the tract.
- Advise persons wishing to have their eligibility for benefits reinstated to request conservation system planning assistance from NRCS.
- Serve on the [State Technical Committee](#).
- Determine whether proceeds of a farm program loan made, insured, or guaranteed by FSA-Farm Credit will be used for a purpose that will contribute to excessive erosion on HEL or to the conversion of a wetland to make possible production of an agricultural commodity.
- Require borrowers to complete an AD-1026 and implement conservation systems on highly erodible land that is planted to an agricultural commodity.
- Ensure that highly erodible land, wetland, farmed wetland, prior converted cropland, farmed wetland pasture, and converted wetland are identified by NRCS on FSA-Farm Credit inventory farms.
- Hear appeals of technical determinations made for HELC and WC provisions as well as all conservation programs authorized under Title XII of the Food Security Act of 1985 as requested by a USDA program participant.
- Determine on request whether application of a conservation system causes a person undue economic hardship.



## **510.23 Cooperative Extension Service Responsibilities**

CES will—

- Assist with USDA information and education activities relating to the HELC/WC provisions
- Serve on the [State Technical Committee](#).

## **Part 511 — Highly Erodible Land Determinations**

### **Subpart A — Developing Soil Data for HEL Determinations**

- 511.01 HEL Soil Erodibility Index**
- 511.02 Highly Erodible Soil Map Unit List**
- 511.03 Developing HEL Soil Map Unit Lists Using an Existing Soil Survey**
- 511.04 Developing HEL Soil Map Unit Lists When a Completed Soil Survey Is Not Available**

### **Subpart B — Determining HEL Fields for HELC Administration**

- 511.10 Field Boundaries and Field Redefinition**
- 511.11 Determining Highly Erodible Fields**
- 511.12 Revising Highly Erodible Land Field Determinations**
- 511.13 Incorrect Determinations**

## Part 511 — Highly Erodible Land Determinations

### Subpart A — Developing Soil Data for HEL Determinations

#### 511.01 HEL Soil Erodibility Index

##### a Soil Erodibility Index

The soil erodibility index (EI) is the measure used to determine whether a soil map unit is highly erodible.

##### b Determining Potential Erodibility

The potential erodibility (PE) of a soil map unit is calculated as follows:

- Sheet and Rill Erosion (using USLE)—  $PE = R \times K \times LS$  where—
  - R = rainfall and runoff.
  - K = susceptibility of the soil to water erosion.
  - LS = the combined effects of slope length and steepness.
- Wind Erosion (using WEQ):  $PE = C \times I$ , where—
  - C = climatic characterization of wind speed and surface soil moisture expressed as a percentage.
  - I = the susceptibility of the soil to wind erosion.

Note— The factor values for the equations used in the soil loss equations are those in effect as of January 1, 1990.

##### c Calculating Erodibility Index

The erodibility index (EI) for a soil map unit is determined by dividing the potential erodibility for the soil map unit by the soil loss tolerance (T) value established for the soil in the FOTG as of January 1, 1990.

#### Erosion Equation

#### Calculation

Sheet and Rill Erosion (USLE)

$$\frac{R \times K \times LS}{T} = EI$$

Wind Erosion (WEQ)

$$\frac{C \times I}{T} = EI$$

**Note**— The Highly Erodible Map Unit List contained in the FOTG as of January 1, 1990, will be used for all EI calculations for HELC compliance, including sodbuster determinations and reviews of previous determinations.

**d Highly Erodible Soil Map Units**

A soil map unit with an EI of 8 or greater is considered to be highly erodible land as set forth in the regulation 7 CFR Part 610, Subpart B.

**511.02 Highly Erodible Soil Map Unit List**

**a Highly Erodible Soil List**

The Highly Erodible Soil Map Unit List is a list of all soil map units, names, and symbols in an area. These soil map units are specifically categorized as being—

- Highly Erodible due to wind erosion
- Highly Erodible or Potentially Highly Erodible (PHEL) due to sheet and rill erosion.

**Note—** When a field determination includes PHEL soil mapping units, the HEL determination shall be verified through a field review to determine the correct LS factor value for that specific field in order to finalize the field HEL determination. If necessary, a new determination shall be issued when the field verification changes the original office HEL determination label.

**b HEL Soil Map Unit List Area**

The Highly Erodible Soil Map Unit List developed as of January 1, 1990, will be used for all HEL determinations.

The Highly Erodible Soil Map Unit List shall be developed and maintained for any of the following:

- Each soil survey area
- Each FOTG area
- Other geographic areas as determined by State Conservationist

**c Highly Erodible Soil Map Units and Soil Map Unit Components**

The percentage of HEL soil map unit components that are required to achieve predominance of a soil map unit will be established by the State Conservationist. Determine whether a soil map unit is considered highly erodible according to the following table.

IF the soil map unit...	AND...	THEN...
Is named for either— <ul style="list-style-type: none"> <li>• A soil component or</li> <li>• A single miscellaneous area,</li> </ul>	Either the named— <ul style="list-style-type: none"> <li>• Component is identified as highly erodible, or</li> <li>• Miscellaneous area is identified as highly erodible,</li> </ul>	The entire soil map unit is considered highly erodible.
Is named for two or more— <ul style="list-style-type: none"> <li>• Soil components or</li> <li>• Miscellaneous areas,</li> </ul>	A predominance* of the named components are highly erodible, *Predominance is defined as ≥51%.	
		Less than a predominance of the named components are highly erodible,

IF the soil map unit...	AND...	THEN...
Contains highly erodible soils only as inclusions,		

**d Filing Highly Erodible Soil Map Unit Lists**

The Highly Erodible Soil Map Unit List shall be a part of Section II of the FOTG.

**e Tenure of HEL Soil Map Unit List**

The Highly Erodible Soil Map Unit List that was in effect January 1, 1990, will remain unchanged for HEL determinations.

**f Areas with More Than One “R” or “C” Value**

A separate HEL soil map legend will be developed for soil survey areas or counties having more than one “R” or “C” factor value.

A map showing the boundaries of each individual “R” or “C” factor value area will be placed in Section I of the FOTG.

**511.03 Developing HEL Soil Map Unit Lists Using an Existing Soil Survey**

**a List of Soil Map Units**

Soil map units may be available from—

- FOTG
- Published soil survey
- Soil Data Mart

**b Needs for Erodibility Calculations**

Provide EI calculations in each soil survey area for each soil map unit, including all components of a complex, association, or undifferentiated unit.

**c Procedure for Calculating Soil Map Unit EI**

When calculating the EI for soil map units, use the following table for guidance.

To DETERMINE...	USE...
The LS value required for a soil map unit to be highly erodible for areas subject to sheet and rill erosion.	The following equation: $\frac{8T}{RK} = LS$
L and S values onsite	The procedures in the <a href="#">National Agronomy Manual</a>
L and S values in the office	The data in the <a href="#">FOTG</a> , Section I and II
C and I <sub>l</sub> for WEQ	
T	

**d Determining Highly Erodible Soil Map Units**

A soil map unit is considered highly erodible when the following criteria apply:

- Sheet and rill erosion areas— The value of (RK(LS))/T equals or exceeds 8.
- Wind erosion areas— The value of (CI)/T equals or exceeds 8.

**e Determining Potentially Highly Erodible Soil Map Units**

In sheet and rill erosion areas, a soil map unit is considered potentially highly erodible (PHEL) if the following criteria apply:

- $RKLS/T \leq 8$  when calculating EI using the shortest length and flattest % slope.
- $RKLS/T \geq 8$  when calculating EI using the longest slope and steepest % slope.

All fields with a PHEL determination will be field verified to determine if the PHEL soil map units are HEL or non-highly erodible (NHEL), as shown in the following table:

<b>STEP</b>	<b>ACTION</b>
1	Use the National Agronomy Manual procedures for determining onsite L and S measurements in each field. Measure several representative slopes for each PHEL soil map unit delineation.
2	Determine whether a map unit is HEL by comparing the area of HEL portions to the total area of the map unit. If $\geq 51\%$ of the map unit area has an EI $\geq 8$ , the entire map unit for that particular field is HEL.
3	Determine the predominance of HEL for a map unit within a field by comparing the total area of the HEL map units to the total area of the map unit.
4	Document all decisions with supporting data placed in the case file.

**511.04 Developing HEL Soil Map Unit Lists When a Completed Soil Survey Is Not Available**

**a Soil Survey in Progress**

In accordance with the regulation at 7 CFR 610, Subpart B, §610.14, the guidance provided in the table shown below with regard to the soils factor values for computing HEL—

IF a Soil Survey...	THEN...
Was in progress as of January 1, 1990,	Use the factor values that were in force as of January 1, 1990.  Under no circumstances will the factor values be modified.
Was started since January 1, 1990,	
Has been completed since January 1, 1990,	
Is currently in progress or has been newly correlated,	Use the factor values for the new soils mapping that are the equivalent values to those in place as of January 1, 1990.

It may be necessary to develop a soil map unit correlation table to identify those map units from the January 1, 1990 list as compared to the map units of a newly correlated soil survey area.

**b Amending the HEL Soil Map Unit List**

If a map unit discussed in paragraph 511.04(a) is HEL, it shall be appended to the January 1, 1990 Highly Erodible Soil Map Unit List of the FOTG with appropriate documentation and explanation to support the addition.

Note that the **only** HEL map units that will be appended to the Highly Erodible Soil Map Unit List are those that have been correlated since January 1, 1990, where the correlation has been completed according to the procedures in the National Soil Survey Handbook.

**c Approvals**

Each HEL map unit appended to the Highly Erodible Map Unit List will be dated and approved by the State Soil Scientist.

**d Filing and Archiving HEL Soil Map Unit Lists**

The amended HEL Map Unit List will be filed in Section I, FOTG. All previous copies of the HEL Map Unit List shall be filed as per instructions set forth in [GM 120, Part 408](#). Mark the HEL Soil Map Unit List that has been replaced with the following: “Superseded by HEL Map Unit List dated [enter appropriate date]”.

**e No Changes to Previously Included Soil Map Units**

Under no circumstances will the soil map units previously included on the January 1, 1990 Highly Erodible Map Unit List have their classification changed.

Fields with previous HELC determinations will not be changed by any additions of soil map units to the Highly Erodible Soil Map Unit List.

**f HEL Computations for Conservation Programs Eligibility Determinations**

If a conservation program conditions eligibility on whether or not a field is Highly Erodible, the frozen soil map unit legend will be used in making those computations, unless otherwise specified in the specific regulation governing program implementation.

**Note—** Following the 2002 Farm Bill, the Conservation Reserve Program (CRP) has changed the computation and definition of what constitutes a highly erodible field for CRP purposes *only*. HEL computations made specifically for determining CRP eligibility must not be interchanged with HEL computations made for the purposes of complying with the HELC provisions.

## Part 511 — Highly Erodible Land Determinations

### Subpart B — Determining HEL Fields for HELC Administration

#### 511.10 Field Boundaries and Field Redefinition

##### a NRCS Responsibility in HELC Administration

NRCS will make determinations in response to the answers for Question 9 on the AD-1026.

- HEL determinations will be made for each field assigned a separate field number.

Note— Separate determinations *will not be made for subfields* designated alphabetically (A, B, C). Subfield determinations will be reflected in the determination for the total field (numeric designation).

- Determinations for fields containing conservation practices that appear to subdivide a field, such as field strips or terraces, shall be made for the entire field, not for the individual strip or terrace.
- Determinations for fields assigned multitract numbers shall be made for the field(s), not the tract.

**Example**— FSA sends an aerial photograph with a small field shown within a larger field boundary. NRCS will make a determination *only* for the larger field, and not for the smaller subfield(s). This is common in states where tobacco or other specialty crops are produced.

##### b Field Redefinitions

FSA and the USDA participant have the sole responsibility for field redefinition, including the following:

- Dividing a field into two or more fields when a tract is divided into two or more tracts.
- Combining two or more fields into one field.
- Making a field boundary redetermination at the request of the participant.
- Separating HEL from NHEL in a field, if—
  - HEL units are contiguous
  - HEL units are manageable as one unit
  - Separation is beneficial in the application of a conservation system.

Note— Fields may not be combined to avoid a determination of HEL. Transfer of field boundaries to new aerial photography including digitizing common land unit boundaries shall not be the trigger for a new HEL determination.

##### c Impacts of Changing Field Boundaries

When highly erodible and non-highly erodible fields are combined, the new field will first be analyzed to determine if the “33 1/3 percent or 50 acre” rule apply in determining HEL predominance—

- If the entirety of the new field contains at least 33 1/3 percent or 50 acres of HEL soil map units, then the entire field is HEL.
- If the new field does not contain at least 33 1/3 percent or 50 acres of HEL soil map units, then—

- The area of the original HEL field will remain labeled HEL.
- The area of the original NHEL field will remain labeled NHEL.

Note— This situation will allow both an NHEL and an HEL label in a single field. FSA shall maintain the field boundary line on the aerial photograph that existed before the participant combined the fields, connecting each with a bracket to indicate that the areas have been combined into one field.

**d Conservation Reserve Program (CRP) Acreage and Determination Labels**

When land from a CRP contract is returned to production and the acreage was previously part of a larger field with an existing HEL determination, the CRP area will carry the same determination label as the original, larger field. If the participant intends to adjust field boundaries, follow the procedures in Part 511.10 paragraphs [b](#) and [c](#).

If no determination was completed prior to entry of the acreage into CRP, an HEL determination must be made according to Part [511.12](#).

## 511.11 Determining Highly Erodible Fields

### a Basis for Determining Highly Erodible Fields

Determinations will be completed for all fields within a tract or multitract on which an annually tilled agricultural commodity crop is or will be produced.

The statutory provisions require that HEL determinations be based on the definition of a field within a farm, as follows:

Definition— A field is defined as a part of a farm that is separated from the balance of the farm by permanent boundaries such as fences, permanent waterways, woodlands, and croplines (in cases where farming practices make it probable that the cropline is not subject to change). (See Part [510.02d](#) for the full definition).

A field will be subject to the HELC provisions if it is determined to be highly erodible.

### b Preparing to Make HEL Determinations

When FSA refers the form [AD-1026](#) to NRCS, the following data will be used to make highly erodible land determinations—

- Information included on the AD-1026, aerial photocopies, and any attachments.
- The Highly Erodible Soil Map Unit List. The Highly Erodible Soil Map Unit List and associated FOTG data that were prepared as of January 1, 1990 will be used for all HEL determinations.
- Soil survey maps.
- Previous HEL determinations completed on the tract.

### c Determine HEL by Field

This table gives the conditions under which fields will be determined HEL or NHEL

<b>IF the highly erodible soil map units in a field...</b>	<b>THEN the field is...</b>
Constitute 33.33 percent or more of the acreage in the field,	HEL
Total 50 or more acres HEL soil mapping units,	
Do not constitute 33.33 percent,	NHEL

### d HEL Determination Labels

The following HEL identification labels shall be recorded on the aerial photocopies, including the official aerial photography maintained by FSA—

- HEL — The field is composed of predominantly highly erodible soil map units and is subject to the HELC compliance provisions.
- NHEL — The field is not composed of predominantly highly erodible soil map units and is not subject to the HELC compliance provisions.

### **e Determination Considerations**

Portions of the soil map unit area outside of the field boundary will not be considered in the erodibility index determination,

**Exception**— The boundary of the entire soil map unit will be used to determine the slope percent and length as indicated in the [National Agronomy Manual](#).

Fields initially determined as being PHEL will be reviewed in the field to determine if the field is HEL or NHEL (see [511.03\(e\)](#)).

Document the findings from the onsite investigation in the administrative record to support the HEL technical determination, including the measurements used to support the LS factor value generated and the place where the measurements were made in the field or soil map unit.

Field observation data used to make erodibility determinations will supersede any calculations and standard values for LS or I factors used in making office determinations of HEL.

### **f Multitract Determinations**

Determinations for fields assigned multitract numbers shall be made as follows:

- Use field boundaries for making HEL determinations on land for which there was no prior HEL determination, including fields defined as multitracts.
- Redetermine HEL using the criteria for highly erodible fields found in Part [511.11](#) if both of the following apply:
  - The original HEL determination was made using tract subdivisions of a field rather than field boundaries within a farm.
  - The producer has requested the redetermination in writing.

### **g Providing HEL Determination Notification**

Notify all participant signatories on the form AD-1026, including all primary owners and tenants, as well as FSA, of the HEL determination. The notification shall be in writing, and will be issued not later than 10 days after completing the determination. Examples of letters of notification are included in the Exhibits as specified in the Conservation Programs Manual, [Part 510, Subpart G](#). Notification shall include the following information:

- The type of determination.
- The regulatory basis for the determination (i.e., 7 CFR 12.22 and 7 CFR 610.14)
- The basis for making the determination (i.e., analysis of the soil mapping unit information, including any field review findings).
- Appeal and Mediation information.
- A copy of the determination on the NRCS-CPA-026.
- Any other material or documentation needed to support the technical determination (e.g., soils mapping, soils map unit descriptions, aerial photographs).

### **h HEL Field Records to Provide**

For all HEL determinations, provide the following records to the persons listed in paragraph 511.11(g) above—

- A copy of the official HEL determination.
- A copy of the completed FSA aerial photocopy with HEL/NHEL designations.
- The technical determination notification letter.

**i Case File Records Required**

The following documents will be maintained as specified in [GM 120, Part 408](#), in the appropriate case file:

- Forms AD-1026 and AD-1026A
- NRCS-CPA-026 or the NRCS-CPA-026E
- FSA aerial photocopy with HEL/NHEL designations
- HEL calculations including field documentation of PHEL soil map units
- Resource inventory data
- Any other material used for making the required determinations.

**511.12 Revising Highly Erodible Land Field Determinations**

**a Revising Determinations**

The following table provides NRCS policy on revising HEL determinations:

**IF NRCS receives an AD-1026... AND... THEN...**

With a statement in the remarks section that the original field boundaries for the tract are incorrect,	An aerial photocopy is provided with correct boundaries,	Complete a new HEL determination using the “33 1/3 % or 50 acre” rule.
With an aerial photocopy showing new field boundaries resulting from dividing or combining one or more existing fields,	A previously determined HEL field is combined with NHEL or a previously undetermined area,	Complete a new HEL determination for the new field using the “33 1/3 % or 50 acre” rule. If the new field is—  HEL, then label the entire field HEL.  NHEL, then the area of the original HEL field will continue to be designated HEL; the new NHEL area will be designated NHEL.
	An NHEL field is split, or NHEL fields are combined,	Complete a new HEL determination.
	A previous HEL field is split,	Any field with remaining HEL soil map units remains as HEL. Fields with no HEL soil map units are NHEL.
With a request by a participant that HEL be separated from NHEL in the field,	The participant establishes a permanent boundary to separate HEL from NHEL that meets FSA requirements for HEL delineations,	Complete the new HEL determinations using the new field boundaries.
When fields are split and redefined for CRP eligibility purposes,		Make a new determination for the land remaining in the former field.
When a field that was previously in CRP is brought back into production of an annually tilled agricultural commodity		The field will revert back to the HEL determination carried prior to entry into the CRP. If the field from CRP is combined with another field, use the

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**IF NRCS receives an AD-1026... AND... THEN...**

		<p>guidance provided for field combinations.</p> <p>Under no circumstances will the determination made for CRP eligibility purposes be used for compliance with the HELC provisions.</p>
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**Note— FSA will enter the circumstances regarding the redefinition in the remarks section of the AD-1026.b Notification of Changes**

A new NRCS-CPA-026e is to be prepared and distributed when a field redefinition meets the following criteria:

<b>IF the field redefinition results from...</b>	<b>AND the resulting determination is...</b>	<b>THEN NRCS will...</b>
Splitting a field or combining two or more fields,	An NHEL field(s),	<p>Not need to issue a new NRCS-CPA-026e.</p> <p>NRCS will make remarks on the AD-1026 that the new field is NHEL. Sign, date and return the AD-1026 to FSA.</p>
	An HEL field(s),	Notify FSA and the participant via a new NRCS-CPA-026e.

## **511.13 Incorrect Determinations**

### **a Technical Errors**

When a technical or other error is found, NRCS shall immediately take appropriate action to correct the error(s) and provide notification to all signatories on the form AD-1026.

### **b Correcting HEL Determinations**

Incorrect HEL determinations will not result in the ineligibility of benefits for any prior years or in the year that the incorrect determination is found.

When an incorrect HEL determination is found, NRCS will—

- Correct the determination.
- Notify all signatories on the form AD-1026 and FSA.
- Assist the participant with developing or revising a conservation plan or conservation system that will meet the HELC requirements, if needed.
- Provide appeal and mediation rights. (See CPM, Part [510](#).)

## **Part 512 — Conservation Systems and Plans**

### **Subpart A — Conservation Systems**

- 512.01 Conservation System Requirements**
- 512.02 Developing Acceptable Conservation Systems**
- 512.03 Determining Systems Based on RUSLE Technology**

### **Subpart B — Documenting Conservation Plans and HEL Conservation Systems**

- 512.10 Requirements of an HEL Conservation Plan**
- 512.11 Developing and Approving HEL Conservation Plans**
- 512.12 Retaining and Filing HEL Conservation Plans**
- 512.13 Conservation Plan Operation and Maintenance**
- 512.14 Updating HELC Records**
- 512.15 Actions to Take in the Event of a Natural Disaster**

## Part 512 — Conservation Systems and Plans

### Subpart A — Conservation Systems

#### 512.01 Conservation System Requirements

##### a The Relationship Between a Conservation Plan and a Conservation System

The conservation plan provides a means of documenting the application of a conservation system that meets the HELC requirements. These provisions *do not require* that a person have a conservation plan in order to be in compliance with the provisions, unless a conservation plan is a specific requirement for approval of an exemption or variance as shown below. (Also, see [Part 513](#)). All conservation plans will meet the requirements of this manual, [GM-180, Part 409](#), and the National Planning Procedures Handbook ([NPPH](#)).

A conservation system designed to meet the HELC requirements is a combination of one or more conservation measures or management practices. When applied to the land, the conservation system must bring about either—

- A substantial reduction in soil erosion
- In the case of land converted from native vegetation, allow for no substantial increase in soil erosion.

An *approved* HEL conservation plan is a document that describes the application and maintenance of an approved conservation system. Conservation plans are desired, but are not required except in the following three situations:

- Reinstatement for eligibility for USDA benefits.
- Approval of a good faith waiver of ineligibility, but before benefits have been restored.
- Granting a a Technical Assistance (TA) variance.

##### b Standards for a Conservation System

Conservation systems must be—

- Based on the local resource conditions
- Based on the available conservation system technology
- Economically feasibility.
- In accordance with the standards and guidelines contained in the local FOTG

A conservation system that is being used when planting agricultural commodities on HEL must meet one of the following definitions:

- Provide for a substantial reduction in soil erosion when producing agricultural commodities on HEL where a prior cropping history has been established.
- Permit no substantial increase in soil erosion when agricultural commodities are produced on HEL converted from native vegetation after December 23, 1985.

*And* provide for the control of the following—

- Sheet and rill erosion
- Wind erosion
- Ephemeral gully erosion

**c Conservation Requirement on HEL and Compliance Certification Statement**

Participants will not be ineligible to receive USDA benefits if a conservation system that meets the HEL soil protection requirements in accordance with 7 CFR 12.23(b) and 7 CFR 12.23(h), as well as the FOTG is used when producing annual agricultural commodities on HEL.

Participants must certify compliance with the HELC provisions as follows on forms AD-1026 or AD-1026U, as appropriate, when USDA benefits are requested—

*“By signing Form AD-1026, Item 13, the producer certifies receipt of this form, and unless an exemption has been granted by USDA, agrees to the following on any farms in which such person has an interest (and will) not plant or produce an agricultural commodity on highly erodible fields unless actively applying an approved conservation plan or maintaining a fully applied conservation system.”*

**d What is Substantial Reduction?**

Conservation systems approved *prior to* July 3, 1996 as included in the FOTG have been determined as meeting the requirements of Parts [512.01\(b\)](#) and [512.01\(c\)](#) provided that the participant continues to actively apply and maintain the conservation system.

The Conservation District shall have a full opportunity to participate in the development, review, and approval of all conservation systems prepared by NRCS for use by a participant for the purposes of compliance with the HELC provisions.

When comparing the annual level of erosion before conservation system application to the expected annual level of erosion after conservation system application, it is necessary to compare the same portion of the field(s) to determine if the conservation system application meets the HEL requirements. The level of substantial reduction in erosion a participant must obtain is shown in the following table:

<b>IF the field...</b>	<b>THEN a substantial reduction...</b>
Was used to produce crops prior to December 23, 1985, and the conservation system or plan has been approved, applied, and maintained prior to July 3, 1996,	Has already been met, provided the plan or system continues to be applied and maintained, and—  The same person continues to use the original conservation system or revises the system to provide an equal or greater level of erosion protection.
	The new owner and/or operator accepts the approved conservation system or plan and continues to apply and maintain the conservation system or an equivalent conservation system.
Was used to produce crops prior to December 23, 1985 and has a conservation system or plan that has been approved after July 3, 1996,	Is a 75 percent reduction of the potential erodibility, not to exceed two (2) times the soil loss tolerance level for the predominant highly erodible soil map unit in the highly erodible field.
Has no history of crop production prior to July 3,1996,	Does not apply. Furthermore, in no case will the soil erosion level for the conservation system being applied on

	land broken out of native vegetation exceed the soil loss tolerance for the major HEL soil map unit in the HEL field. (See Part <a href="#">512.01(f)</a> .)
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**e Substantial Increase Defined**

When developing a conservation system for land converted to cropland from *native* vegetation, a substantial increase in soil erosion is defined as any level of soil erosion that is greater than the sustainable level (soil loss tolerance – [T]) of the predominant HEL soil mapping unit in the HEL field. To determine substantial increase, the LS factor must be determined in the field.

**f Conservation Field Trials**

NRCS may provide opportunities, in appropriate circumstances, for persons to try new techniques or new conservation systems such as conservation field trials. NRCS shall be confident that the proposed technique or conservation system has reasonable likelihood of success before approving the field trial.

The following is the procedure for approving and evaluating a conservation field trial.

Step	Action
1	Acquire approval for the field trial from the State Conservationist, following advice provided by the State Technical Committee.
2	Document the use of the field trial in the person’s conservation plan and specify within the plan the time period during which the field trial is in effect.
3	Evaluate the field trial results to determine if the new technique or conservation system should be included in the FOTG.

## 512.02 Developing Acceptable Conservation Systems

### a Conservation System Approval Levels

At the request of the owner or operator, NRCS must provide technical assistance for developing or revising a conservation system that may or may not be included in a conservation plan. Priorities for revising conservation plans will be determined locally with oversight provided by the second-level supervisor or as provided by state guidance provided by the STC.

Conservation systems must be developed to meet a participant's specific needs as well as meeting the HELC requirements. Since the stated goals of the HELC provisions are to reduce or prevent excessive soil erosion, NRCS has established approval levels when conservation systems not currently in the FOTG are developed for use on HEL cropland. The approval levels for conservation system development are as follows:

- The responsible field office employee may approve the HEL conservation system if the predicted erosion rate for the system to be applied does not exceed 2T (two times the tolerable erosion rate).
- State Conservationists may approve HEL conservation systems that have a predicted erosion rate in excess of 2T but where the predicted rate does not exceed 4T (four times the tolerable erosion rate).

**Note**— Conservation systems developed and approved for predicted erosion rates in excess of 2T must be supported by appropriate documentation to confirm the rationale for accepting erosion rates in excess of 2T, such as documentation that supports economic hardship or where either local resources prohibit or economic feasibility cannot be obtained through a conservation system with a lesser soil loss.

- The Director, Conservation Planning and Technical Assistance Division (CPTAD), shall approve all conservation systems developed in excess of 4T.

### b Conservation Systems for HEL Cropland on Expired CRP Contracts

Land being released from CRP will not be held to a higher conservation standard than any other HEL cropland within the FOTG area. CRP acreage carries the official cropland designation. As such, land coming out of CRP will not be considered as being either sodbuster land.

All land released from a CRP contract is officially considered as cropland with a previously established cropping history. Therefore, the conservation system requirements are those where a conservation system has been developed since July 3, 1996. (See Part [512.01\(e\)](#).)

If structural practices are needed, and must be applied in a specific sequence, the person will have up to two years following the CRP contract expiration date to complete the conservation system. In extenuating circumstances only.

### c Planning Conservation Systems Fields with both HEL and NHEL Designations

Fields having both HEL and NHEL designations due to combinations or splitting of fields, will be planned to the required protection level for each portion unless the person agrees to a greater level of protection for the NHEL portion. (See Part [511.10](#).)

FSA will maintain the field boundary line on the aerial photograph that existed before the producer combined the two fields. The two fields will be connected by a bracket to indicate that the areas have been combined into one field.

Conservation systems will meet the resource protection needs for the NHEL portion of the field and the HELC needs and requirements for the HEL portion as provided in the FOTG.

A system revision cannot occur during a compliance status review of an HEL determination. However, if an approved conservation system other than the one documented in the plan is found during a compliance status review and it is the basis for a "Using an Approved System" (UA) designation, it must be documented in a conservation plan.

A conservation system revision may include provisions for other conservation programs and for the consolidation of all conservation planning decisions into one document thereby reducing the planning burden on USDA participants.

#### **d Conservation Systems Not Included in the FOTG**

A participant may develop and use a conservation system that is not currently included in the local FOTG. In those cases, it is the participant's responsibility to demonstrate that the conservation system being used will meet HELC soil protection requirements and FOTG criteria. (See Part [512.01](#).)

During a compliance status review, NRCS will document the conservation system being used by a USDA participant in order to determine if the soil protection requirements have been met.

#### **e Revision Signatures**

Conservation plans or conservation plan revisions will be maintained in the USDA participant's case file, which will include the approval and signature of the participant, the NRCS employee and the Conservation district.

#### **f Revised Systems for a New Operator**

When revising an existing conservation system for a new operator all of the following items are required—

- The minimum level of protection for the new conservation system must be the level of protection provided by the previously applied conservation system if one exists, or 75% of PE not to exceed 2T.
- All previously established conservation practices including treatment for ephemeral gully erosion must be maintained by the new operator.
- The previous level of soil protection constitutes the "before treatment" soil loss levels.
- The present conservation treatment system must be evaluated using the current version of the appropriate erosion prediction equations.

#### **g Revising HEL Conservation Systems Due to an NRCS Technical Error**

When an NRCS technical error has been found, the participant will remain eligible for USDA benefits for that program participation year. However, to maintain USDA program benefit eligibility, the participant must develop and begin to implement a revised conservation system before the next crop year.

If an NRCS technical error is found resulting in application of an incorrect conservation system—

- Contact the participant(s) immediately.
- The participant must revise the conservation system being used in order to fully comply with the soil protection requirements of the HELC provisions.

- The new conservation system must be substantially implemented not later than one year following the plan revision approval date.

#### **h Documenting Conservation Systems**

As a minimum, planning documentation must include the following:

- Description of the conservation system being applied.
- “Before and after” soil loss calculations, including all the factor values used to determine the soil loss.
- Conservation practices necessary to meet the minimum system requirements of the FOTG.

## 512.03 Using the Most Current Soil Protection Technology

### a Previously Approved Conservation Systems

NRCS will re-evaluate the allowable soil loss levels for conservation systems with the most current version of the applicable soil prediction technology available whenever technical assistance is provided to a USDA program participant as documented in the FOTG for HELC. If the current conservation system being used was developed using an older version of the applicable soil prediction equation, NRCS must recalculate that conservation system using the most current version of the applicable equation (either RUSLE or WEQ) to establish the new soil loss value for the conservation system.

The factor values for one version of an equation must not be interchanged or used in the newer version of the soil prediction equations (i.e., USLE factor values cannot be used in the RUSLE or RUSLEII erosion prediction equations). Additionally, soil losses predicted using one version of an equation may not be compared to the soil loss predictions arrived at using another version of the applicable equation (i.e., USLE soil loss estimates cannot be compared with RUSLE estimates.) Soil loss estimates calculated using the appropriate technology must be used to make comparisons with actual soil losses determined during a conservation system review or a Compliance Status Review. (See Part [518](#).)

Example— Where a State has established a maximum CP value (Cropping factor value multiplied by the Practice factor value) to develop an acceptable conservation system, a corresponding maximum value must be established for the most current soil prediction technology in use in that State.

All new conservation systems will be developed using the most current version of the applicable soil prediction technology for the prevalent type of erosion. Likewise, all conservation systems must be evaluated using the most current version of the applicable soil prediction technology.

No conservation system revisions will be required as a result of NRCS implementing new erosion prediction technology. For optional revisions, see Part [512.04](#). Further, implementation of the newest applicable soil prediction technology will not lessen the HELC compliance standards.

Conservation systems must be developed or revised using site-specific factor values rather than any default values used in establishing the system.

In no case will a USDA participant be required to use a conservation system that mandates a soil protection level of T or below unless the field is a sodbuster from native vegetation.

### b Recalculations for Determining Compliance of Conservation Systems

Soil loss levels for systems developed using prior technology and documented in the FOTG for conservation compliance purposes will be recalculated using the current version of the applicable soil prediction technology to establish the new allowable soil loss value for the conservation system.

NRCS will evaluate the soil protection effectiveness of the conservation system actually being applied by the USDA participant using the applicable soil prediction technology and the most current standards in the local FOTG.

### c HELC Compliance Status Reviews and Soil Prediction Technology

The current version of the applicable soil prediction technology must be used to calculate soil erosion for all compliance status reviews. No USDA participant will be found to be “not actively applying” (NA) unless the correct version of the applicable soil prediction technology has been

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used to evaluate the conservation system soil loss. Current technology will be used to determine if the system being applied meet the soil protection requirements and the FOTG criteria.

**d Residue Measurements and Soil Prediction Technology**

Crop residue measurements will be completed in accordance to either the [National Agronomy Manual \(NAM\)](#) or the [National Range and Pasture Handbook \(NRPH\)](#).

**e Effects of Technology Changes**

HEL determinations and conservation systems have been developed using the USLE and WEQ, published in 7 CFR Part 610, Subpart B and adopted and incorporated as of January 1, 1990 into the FOTG.

As new technology such as RUSLE is developed and incorporated into the FOTG, policy will be established for specific use of the new technology.

NRCS will continue to use the HEL soil map unit lists that were developed using USLE, WEQ, and the factors in the FOTG as of January 1, 1990 when making HEL determinations.

Implementation of new technology will not result in increased requirements for HELC. The original conservation treatment identified in the conservation system will be honored as technology is implemented.

Any new or revised systems will be based on new data and technology as they become available and incorporated into the FOTG.

**f Which Soil Loss Equation to Use?**

The following table provides policy for the proper use of the USLE and RUSLE soil loss prediction equations.

<b>IF the Soil Loss Prediction Equation is to be used to...</b>	<b>THEN use...</b>
<ul style="list-style-type: none"> <li>• Make or revise an HEL determination</li> <li>• Determine the soil Erodibility Index (EI)</li> <li>• Develop HEL soil mapping units</li> </ul>	USLE
<ul style="list-style-type: none"> <li>• Develop an approved conservation system</li> <li>• Recalculate the soil loss for applied conservation systems</li> <li>• Evaluate substantial reduction or no substantial increase in soil erosion</li> <li>• Determine “before and after” soil loss for status reviews</li> <li>• Evaluate applied conservation systems</li> </ul>	RUSLE

**g RUSLE Implementation Guidelines**

The current version of RUSLE will be implemented for conservation compliance purposes when—

- RUSLE databases have been fully developed.
- All HEL conservation systems listed in the FOTG are evaluated to ensure that the most current version of RUSLE has been used to establish the standards which determine if the applied conservation systems meet the soil loss reduction requirements.
- All applicable documents are incorporated into the FOTG.

- Changes to soil loss equations have met notice and comment requirements in a manner consistent with federal rulemaking procedures (5 U.S.C. Part 553).
- Soil loss levels for conservation systems developed using other technologies must be recalculated using the current version of RUSLE to establish the new soil loss value for the conservation system, as described in Part 510.04(b).

## Part 512 — Conservation Systems and Plans

### Subpart B — Documenting Conservation Plans and HEL Conservation Systems

#### 512.10 Requirements of an HEL Conservation Plan

##### a Definition of a Conservation Plan

A conservation plan contains a participant's decisions about the conservation system being used. Conservation systems developed for HELC compliance will be documented in a conservation plan when the participant requests a plan or as required at paragraph [512.01\(a\)](#). Otherwise, the minimum documentation required in the case file for HELC compliance is provided in paragraph [512.02\(h\)](#) when producing agricultural commodity crops on highly erodible land. A conservation plan is a document that—

- Describes the conservation system to be applied.
- Documents the status of system application.
- Describes the decisions of the person with respect to location, land use, tillage systems, and conservation treatment measures and schedules.
- Is approved by the local CD.

Use an existing conservation plan or system to the extent possible when providing technical assistance to develop an HEL conservation plan.

##### b Conservation Plan Goals

All participants will be encouraged to develop a conservation plan to document the decisions made about and the application of a conservation system. When requested by the participant, NRCS must provide technical assistance within a reasonable period of time to develop a conservation plan documenting the decisions about an HEL conservation system. Available workload priorities and staffing limitations shall be considered; however, NRCS must provide the requested planning assistance in a timely manner to ensure that the participant is able to comply with the HELC provisions.

##### c Requirements of a Conservation Plan

Conservation plans meeting the HELC provisions will be developed according to the policy and procedures in the following NRCS policy documents:

- GM-180, Part 409 Conservation Planning Policy.
- National Planning Procedures Handbook (NPPH)
- GM-450, Part 401
- NFSAM, Part 512, Subpart B

Conservation plans will meet the appropriate soil protection requirements of the FOTG.

##### d Working with the Landowner and Operator

Whenever possible, the conservation plan or system should be developed with both the owner and the operator. This will ensure continuity of the plan as tenants or operators change.

##### e Contents of the Conservation Plan

The HEL conservation plan document will contain as a minimum the following:

- The participant's decisions.
- Documentation of conservation treatment that will result in substantial reduction in soil erosion.
- Maps and other information to meet the requirements of the NPPH and NFSAM.
- Identification of each highly erodible cropland field by number.
- Field numbers, tract number, field acres, HEL and wetland symbols if applicable, and location of structural practices.
- Scheduled Application of Practices.
- Purpose of the Practice.
- Conservation practice standard name and code number, specifications for proper implementation and the criteria NRCS will use to determine when the practice is satisfactorily implemented.

## 512.11 Developing and Approving HEL Conservation Plans

### a Newly Acquired Land

When a participant acquires land previously covered by an existing HEL conservation plan or conservation system, the level of soil erosion control established through implementation of that conservation system sets the maximum allowable soil loss for any new or revised HEL conservation plan or conservation system.

In order to maintain compliance with the HELC requirements, a producer must—

- Use an HEL conservation system that meets both FOTG criteria and the soil loss reduction criteria previously established. (See paragraph [512.01\(d\)](#).)
- Formally adopt, apply, and maintain the existing HEL conservation system included in the conservation plan for the newly acquired land.
- Meet the requirements of the FOTG in use at the time the system was developed for systems documented in an approved conservation plan.

### b Farm Loan Program Inventory Farms

The Act requires that NRCS provide HEL determinations for all farms held in inventory. After determinations are completed, farm loan program officials will request NRCS assistance in developing either a conservation plan for the inventory farm, or preparing a set of recommendations that, as a minimum, will meet the soil protection requirements for the highly erodible cropland fields.

NRCS will include the following requirements in the recommendations—

- Where highly erodible cropland fields are currently in permanent protective vegetation, maintaining the vegetation will be a part of the lease or a condition of the sale.
- Where highly erodible cropland fields are currently being cropped, the fields will be seeded to permanent vegetation and the cover maintained to provide protection from erosion.
- Where it is necessary to produce crops on highly erodible cropland fields, the land will be cropped according to an approved HEL conservation system.

After determinations are made and if there is not sufficient time to develop a conservation plan for the HEL cropland, NRCS will provide information to the Farm Loan Program County Supervisor that indicates whether the implementation of the anticipated conservation plan relative to other conservation plans in the county will be—

- Low in cost
- Moderate in cost
- High in cost

Note— Conservation plans will become part of the terms of Farm Loan Program long-term loans.

This table provides information on providing planning assistance for Farm Loan Program Inventory properties—

<b>IF the land...</b>	<b>THEN the decisionmaker is...</b>
Will not be sold or leased in the current year,	The farm loan program official.

Is or will be leased,	The farm loan program official and lessee jointly.
Is sold,	The new owner.

**c Acceptance of the HEL Conservation Plan**

A conservation plan developed at the request of the participant and used to document decisions pertaining to an HEL conservation system will be signed as accepted by the USDA participant and the NRCS representative and approved by the local CD.

If there is no CD, a statement to indicate that NRCS is providing the approval in the absence of the CD will be included.

**d Conservation District Approval Process**

CD officials shall review and recommend conservation systems for inclusion in the local FOTG. In addition, a CD representative shall have an opportunity to review and approve or disapprove new and revised HEL conservation plans.

Exception— In areas where there is no CD, NRCS will approve the conservation plans. If the CD—

- Takes no action to approve or disapprove HEL conservation plans submitted within 45 days, then NRCS shall approve the plan if all HEL and FOTG requirements have been met.
- Approves the HEL conservation plan, upon signature of the CD official, the HEL conservation plan is final.
- Disapproves the HEL conservation plan, the USDA participant may either—
  - Prepare an amended plan and resubmit that plan for approval.
  - Request reconsideration of the original conservation plan by the CD.
- Does not approve a specific category or group of HEL conservation plans after NRCS has determined that all HELC and FOTG requirements have been met, NRCS will approve the plans without requiring the participant to use the informal administrative appeals process.

**g Conservation District Cooperator**

There is no requirement for persons requesting HELC assistance to become Conservation District Cooperators by signing a the District cooperative agreement. However, when working with USDA participants, NRCS may encourage participation in the conservation district.

**h FSA Notification of Conservation Plan Implementation**

FSA does not require notification that the participant has completed the application of all practices in an HEL conservation system or conservation plan, unless specifically required for any of the following reasons:

- Reinstatement following a “not actively applying” determination.
- As a condition of a good faith waiver.
- As a condition of a TA variance.

FSA will consider the participant as being compliant with the HELC provisions through the participant’s self-certification on the AD-1026 unless NRCS informs FSA of a violation by requesting and submitting form FSA-569.

## **512.12 Retaining and Filing HEL Conservation Plans**

### **a Establishing a Case File**

A case file is used to maintain records of conservation activities including HEL determinations for each tract. It may also include records of other activities such as CRP, CSP, EQIP, WRP WHIP, and other conservation programs applicable to the tract.

Field offices shall establish and maintain case files for all tracts for which HELC determinations and HEL conservation system planning, application, or other related materials have been developed. Case files shall be established and maintained as set forth in [GM-120, Part 408](#).

### **b Documents To Include in the Case File**

A case file provides the location of all information and documentation related to NRCS assistance on the tract. The case file should include the following:

- HEL determinations made for each tract.
- The conservation system for the tract.
- The status of application of the conservation system and whether the system meets the HELC requirements.

### **c Disposition of Obsolete Plans**

NRCS should archive case files for obsolete plans. The HEL determinations made are permanent and remain with the land. Other information collected about the tract may be useful in the future.

### **d Reinstatements**

A participant found to be in violation of the HELC provisions can be reinstated for program eligibility provided the participant complies with the HELC requirements of a conservation plan developed by NRCS. Procedures for reinstatement are provided at Part 513.XX.

## 512.13 Conservation Plan Operation and Maintenance

### a Introduction

Once a conservation system is applied, the HELC provisions require maintenance so that the system controls erosion as originally intended. The functional life of a conservation system starts with implementation and ends when the system is revised, no longer required, or no longer provides the benefits it was designed to provide.

Between the times the system is developed and implemented and when a revision is required, the system will not always operate at 100 percent of the design requirement and will periodically require maintenance. This is especially true for those conservation systems where structural conservation practices have been included as a part of the conservation system. At some point the maintenance need is so great that the system must be rebuilt to FOTG standards and specifications. The amount and type of maintenance required depends on a number of factors, including the condition and age of the system, storm events, and so forth.

The FOTG lists the following:

- Expected maintenance problems.
- Likely maintenance needs for most practices.
- Specific methods for proper operation and maintenance of some practices.

### b NRCS Policy

Operation and maintenance (O&M)—

- Is required for all conservation practices included in a conservation plan or used in a conservation system regardless of its complexity.
- Is discussed and agreed upon? with the producer during the planning process.
- Job sheets or maintenance sheets may be included as part of the plan or system to explain maintenance requirements.

O&M requirements shall be included in the HEL conservation plan. It is recommended that practices with complex O&M requirements be referenced to maintenance job sheets and/or practice-specific required O&M plans.

### c Typical O&M Requirements

Typical O&M requirements include the following:

- An annual O&M inspection. NRCS may have an appropriate check list available at the state or local level.
- Repair of any significant damage to structures and/or vegetation.
- Replacement of any failed practice components.
- Replacement of any settled or eroded fill areas.
- Removal of any accumulated sediment from waterways.
- Re-seeding of acreage as needed.

### d Procedure for Notifying the Person of O&M Needs

If conditions are found that indicate the system needs maintenance, is not functioning as intended, or the application does not meet the specifications in the FOTG, application deficiencies and maintenance needs shall be identified. The deficiencies should quantify amounts such as percent of waterway and terrace washouts, row grade of the planned and applied contour system, etc.

NRCS will—

- Document the conservation practice repairs and any other corrective actions needed.
- Within 10 working days, notify the participant in writing that—
  - Required corrective action must be completed in order to meet the HELC requirements.
  - NRCS assistance is available if needed.
  - The tract/field will be placed on the following year's HELC status review list to ensure that the O&M item(s) has been completed.

## 512.14 Updating HELC Records

### a Responsibilities

Establishing, maintaining, and updating HELC records is the responsibility of the participant and FSA. NRCS is not required to take action to update NRCS records until the participant requests changes to his/her HEL conservation plan or system. When this occurs, NRCS will provide technical assistance as requested to develop and/or revise the plan or system as workload permits.

### b Reconstitution

FSA reconstitutes a farm when there is a change in any of the following:

- Ownership of a tract or part of a tract.
- Addition of land to the farm.
- Sale of a part of the tract or farm.
- Combination of all land ownership.

### c FSA Notification of Person

FSA has agreed to notify new tract owners and operators of—

- Existing HEL determinations made for the tract.
- The current status of any conservation plan for the tract.
- Their responsibility to contact NRCS regarding conservation plan adoption or revision.

### d Information from FSA on Reconstituted Farms

FSA will report changes resulting from a reconstitution to NRCS by—

- Data share, when available
- Form FSA-156EZ
- Aerial photocopies with previous tract and reconstituted tract information.

### e Updating HEL Case Files due to Reconstitutions

By signing an AD-1026, the USDA participant —

- Accepts the existing conservation plan or system.
- Accepts the treatment level designated in the plan.
- Agrees to apply a conservation system for the tract.

The existing conservation plan or system stays in effect until the new owner or operator requests NRCS conservation assistance. If the USDA participant does not request assistance, he or she will be responsible for ensuring that the conservation being used will comply with the soil protection requirements.

### f When To Update HELC Records

Update the case file to reflect changes in conservation plans or systems requested by the producer or, if needed, changes resulting from a farm reconstitution.

## **512.15 Actions to Take in the Event of a Natural Disaster**

### **a General**

In situations where a significant area is affected by a natural disaster that has severe adverse effects upon the ability of persons to apply, use, or maintain conservation systems, the State Conservationist shall—

- Provide general guidance to the potentially affected persons relative to HELC.
- In consultation with the State Technical Committee, develop guidance specific to the type of disaster including, but not limited to, the following:
  - Standards and specifications for alternative conservation systems to apply in lieu of the current systems (e.g., haying and grazing plans on CRP acreage).
  - Specific guidance relative to granting widespread variance for a weather-related disaster.
  - O&M guidance.
  - Identification of the conditions resulting from the natural disaster and the expected effect on existing or new conservation systems;
  - Specific actions expected to be taken with regard to conservation practice repair, use, and maintenance to ensure that continued eligibility for USDA program benefits will be maintained.
  - Practices for which variances will be granted where appropriate. (See [Part 518](#) or [Part 513](#).)
  - Specific actions that NRCS will take when conducting reviews and providing assistance.

### **b Public Information**

NRCS shall provide guidance to the public and to participants in a manner that will make it available to all persons who may have been affected by the natural disaster.

## **Part 513 — HELC Technical Assistance, Exemptions and Variances**

### **Subpart A — Technical Assistance in HELC Implementation**

**513.01 Requirements for Making Crop Residue Measurement**

**518.02 Requirements for Self-Certification**

**513.03 Reinstatement Guidelines**

### **Subpart B —HEL Exemptions and Variances**

**513.10 Introduction**

**513.11 HEL Compliance Deficiencies Found While Providing Technical Assistance (TA)**

**513.12 HELC “Good Faith” Waivers**

**513.13 Variance for Special Problems, Including Weather, Pests, or Disease**

**513.14 Variance for a Failure of a Technical and Minor Nature**

**513.15 Variance for Personal Hardship**

**513.16 Variance for Undue Economic Hardship**

**513.17 Tenant (Other Producer) Exemption**

**513.18 Other Exemptions**

## Part 513 — HELC Technical Assistance, Exemptions and Variances

### Subpart A — Technical Assistance in HELC Implementation

#### 513.01 Requirements for Making Crop Residue Measurements

##### a Introduction

The Act allows a participant to make crop residue measurements (including those provided by a technical service provider (TSP)). These measurements must be completed in accordance with paragraph (c) below in order to be considered by NRCS in determining compliance with the HELC provisions for purposes of a compliance status review.

##### b Measurement

Measurement of crop residue in the field using the appropriate methodology is important in determining the performance of conservation systems with regard to erosion management.

Measurements made by TSP's and used by a producer will be the producer's official measurements as long as the measurements were made in accordance with the provisions of paragraphs (c) and (d) below.

##### c Measurement Techniques

Crop residue measurements must be completed according to the procedures set forth the National Agronomy Manual (NAM Part [503.43](#) for the "Line-Transect Method" and the National Range and Pasture Handbook (NRPH), Chapter 4, Inventorying and Monitoring Grazing Land Resources for the "Clip-and-Weigh Method."

The measurement techniques are to be used as follows:

- When measuring actual residues from the previous crop following planting of the current year's crop, the Line-Transect Method must be used.
- When measuring the expected amount of protection from a live crop, the Clip and Weigh method must be used.

##### d Crop Residue Measurements Made by Technical Service Providers (TSP's)

As provided for in the Act, a participant may utilize the services of a TSP to make crop residue measurements. All measurements provided by a TSP shall be completed according to the procedures in paragraph (c) above.

## 513.02 Requirements for Self-Certification

### a Self-Certification

A participant may provide self-certification of—

- Compliance with the HELC provisions (on the AD-1026).
- Application of the required HEL conservation plan or HEL conservation system practices.
- Crop residue measurements, in accordance with section [513.01](#).

### b Certification of Planning and Application

USDA participants are responsible for making all decisions and for applying all conservation practices required and as scheduled in the conservation system or the conservation plan. Non-application of a specific conservation practice may result in soil losses in excess of the allowable level for compliance purposes.

When the practices in a conservation system are not applied as scheduled and the lack of application results in soil erosion in excess of the requirements defined in Part 512.01(d) or (e), that field and tract will be in noncompliance unless there is sufficient justification for the lack of conservation practice application. (See [Part 513, Subpart B](#) for the variances that can be granted).

If the system being applied is not documented in a conservation plan, the participant that has planted the annually tilled agricultural commodity crop, as well as all signatories to the AD-1026, are responsible for demonstrating that the conservation system being used to produce an annually tilled agricultural commodity crop is in accordance with the soil protection provisions of the regulation at 7 CFR 12.23 paragraphs (b)n and (h). The participant must provide any or all records needed to complete the evaluation of the effectiveness of the conservation system actually being applied in comparison with the criteria contained in the FOTG.

### c Requirements for Technical Service Providers

Any person having the appropriate credentials that wants to provide or is providing technical assistance to a participant regarding certification of compliance with the HELC provisions must meet the requirements set forth in the Interim-Final Regulation, [7 CFR 652](#), Technical Service Provider Assistance and have applied for and received certification in accordance with the [Technical Service Provider Registry \(TechReg\)](#) web application.

### d Records of Plan/System Application

Evaluating the application of a conservation system is best done over the cycle of one or more crop rotations rather than in any given year. In order to do this, it is necessary to establish and annually review cropping system historical records.

Participants are encouraged to keep records of crop rotations, tillage operations, and maintenance work done on structural practices, including drainage systems, to support their certification of compliance made on the AD-1026.

## **e Information to Document**

Historical records may be used in conducting compliance status reviews. Historical records will **not**, however, be sufficient on their own to establish whether or not a conservation system is being applied that meets the soil protection requirements of the regulation at 7 CFR Part 12.23(b). Annual documentation needed for each field can include—

- Management records
  - Maintenance records
  - Residue level after planting
  - Crops grown and rotations used
  - Use of any cover crops
  - Agrichemical use records
  - Tillage operations used
  - Custom harvesting records
  - Other treatments or practices used
  - Acreage reported for crop insurance policy or loss adjustment

Note: This is not an all-inclusive list of historical records that may be useful in documenting the status of compliance on a field or tract.

Developing and maintaining the historical record is the participant's responsibility. This information may be kept by the producer, agrichemical industry representatives, certified crop advisors, or consultants. Any information relied upon by the participant to prove compliance with the HELC provisions must be made available to NRCS for use in conducting compliance status reviews.

If a participant's compliance records prove the use of an acceptable HEL conservation system over a period of years, a deficiency occurring in a field in a single year *will not be the sole basis* for a noncompliance decision.

## **513.03 Reinstatement Guidelines**

### **a Reinstatement**

A USDA participant may have his/her eligibility for those USDA program benefits subject to HELC compliance reinstated in any crop year following the crop year in which the participant was determined by FSA to be ineligible for those benefits.

Ineligibility for USDA benefits is the result of an NRCS determination of “not applying” an appropriate conservation system that will sufficiently protect the soil resources.

### **b Responsibilities of Participant**

The participant must request technical assistance for reinstatement purposes from NRCS to develop a conservation plan sufficient for compliance with the HELC provisions and—

- Agree to complete an approved conservation system by the end of the crop year; or agree to install all identified uncompleted practices before the end of the crop year in which benefits have been requested. The conservation system must be substantially implemented if this is a multi-year rotation.
- Sign the revised, approved conservation plan.
- Continue to apply and maintain all scheduled practices in the approved plan or system.

### **c NRCS Response to Reinstatement Request**

NRCS will, no later than 45 days after receiving a request from the participant desiring reinstatement, —

- Provide technical assistance to revise the plan or plan an approved system.
- Certify that the plan or approved conservation system meets FOTG requirements.
- Obtain approval of the revised plan from the CD.
- Schedule and conduct a status review within the crop year of reinstatement.

### **d Notification of Approval for Reinstatement**

After the revised conservation plan has been approved by all parties, NRCS will provide FSA with form NRCS-CPA-027 signifying that a revised conservation plan has been developed for the purposes of eligibility reinstatement. Attach a copy of the participant’s request for reinstatement to this form. NRCS will provide the participant with a copy of the NRCS-CPA-027 as well as a notification that includes the following information —

- The effective crop year of the new conservation plan .
- The applicable tract(s) and field(s) where the conservation plan must be implemented.
- The requirement that the conservation system be applied and maintained in order to retain eligibility for USDA program benefits.
- The requirement that the allowable soil loss established through the conservation system must not be exceeded if the conservation system is revised in later years.
- The requirement that NRCS must certify the participant’s implementation and compliance with the new conservation system prior to the end of the crop year of reinstatement.

- Notification to the participant that the tract(s) to be reinstated will be subject to a compliance status review prior to the end of the crop year in which reinstatement of USDA program benefits has been requested.

## Part 513 — Technical Assistance, Exemptions, Variances, and Investigations

### Subpart B —HELC Exemptions and Variances

#### 513.10 Introduction

##### a Deficiencies and Violations

**Deficiency** – a deficiency or potential deficiency is a lack, shortage, shortfall, failure, or insufficiency in a USDA participant’s implementation of a conservation system that would adversely impact his/her compliance with the HELC/WC provisions.

**Violation** – a violation or potential violation is an infraction, breach of the statute or regulation, contravention of a duty, or a failure to comply with the terms and conditions of the HELC/WC provisions resulting from a deficiency or potential deficiency in the USDA participant’s performance.

##### b Exemptions

An exemption may be granted that will provide the participant with temporary relief from compliance with the HELC requirements due to certain circumstances. (Also refer to Part 518, Subpart B for additional guidance).

The following exemptions from the HELC provisions are provided—

- Relief for undue economic hardship granted by the State FSA Committee (see 7 CFR. §12.23(i) and FSA Handbook 6-CP, [Part 5, Section 1, paragraph 503](#)); NFSAM Part 513.11(a).
- Tenant exemption procedures granted by the FSA County Committee (see 16 U.S.C. §3812(e) and FSA Handbook 6-CP, Part 7, Section 1, Paragraph 202; NFSAM Part 513.11(b)).
- 2-Acre Non-Commercial Cropland Exemption granted by the FSA County Committee (see 16 U.S.C. 3812(h) and 7 CFR Part 12.5(a)(4)); FSA Handbook 6-CP, Part 5, Section 1, Paragraph 505A; NFSAM Part 513.11(c)).
- Good faith exemption granted by the FSA County Committee (see 16 U.S.C. §3812(f)(1-3) and FSA Handbook 6-CP, Part 7, [Section 2, Paragraph 721](#)); NFSAM Part 513.12.
- Small area exemptions (see 7 CFR Part 12.22(d) and NFSAM Part [513.12\(a\)](#)).
- Sodbuster-Interseeding exemption (NFSAM Part 513.13(b)).
- Land for which there is no soils mapping or published soil survey available (see 16 U.S.C. §3812(a); §3813; and NFSAM Part [513.13\(c\)](#)).
- Cropland from expired CRP contracts (see 16 U.S.C. §3812(a)(3) and NFSAM Parts [513.12\(d\)](#) and [512.02\(d\)](#)).

##### c Variances

A variance may provide the participant with an approved deviation from the HELC requirements. (Also refer to Part 518, Subpart B [\[link\]](#) for additional guidance).The following variances from the HELC provisions are provided—

- Variance for a deficiency found while providing technical assistance (see 16 U.S.C. §3814 and NFSAM Part 513.14 [link]).
- Variance for special environmental conditions including weather, pests, or disease (see 16 U.S.C. §3812(f)(4)(C), §3812(f)(5) and NFSAM Part 513.15 [link])
- Variance for a minor technical violation that creates only a minimal effect on the effectiveness of the HELC conservation system (see 16 U.S.C. §3812(f)(4)(A) and NFSAM Part 513.16 [link]).
- Variance for extreme personal hardship (see 16 U.S.C. §3812(f)(4)(B) and NFSAM Part 513.17 [link]).

**d Authority for Granting Exemptions and Variances**

Sections 1213, 1214, and 1215 (16 U.S.C. §3812, 16 U.S.C. §3813 and 16 U.S.C. §3814, as specified in paragraphs b and c above) of the Act provide the authority and criteria under which USDA agencies (FSA and NRCS) may grant variances or exemptions from the HELC provisions.

**e Criteria for Granting Exemptions and Variances**

The State Conservationist may delegate authority for granting variances to other NRCS conservationists if the following procedures have been established:

- State criteria have been established for granting variances, including requirements for documentation, and these criteria have been incorporated in a State supplement to the NFSAM.
- Training on all variance criteria has been provided to the NRCS employees given the delegated authority.

**f Review and Follow-up After Granting Exemptions and Variances**

A compliance status review must be completed for every tract where a variance or an exemption from the HELC provisions has been granted in the previous year (see Part 518.20(c)) to determine the following information:

- If the conditions that provided the basis for the variance have been alleviated.
- Whether the producer is using an acceptable conservation system.

A compliance status review of the entire tract does not need to be done unless the District Conservationist finds that there is a need to do so, or the tract is again randomly selected for a compliance review.

## 513.11 Exemptions Provided by FSA

### a Exemption for Undue Economic Hardship

- **Description** – An exemption may be granted for failure to apply a conservation system if the system would impose an undue economic hardship on the person (see 16 U.S.C. 3812(a)(3) and 7 CFR Part 12.23(j)) as determined by the State FSA Committee.
- **NRCS Action** – NRCS will complete the AD-1026D, Part C, Item 11, including any comments from the CD that could assist in making the exemption determination. Upon notification by FSA that the exemption has been granted to the person, NRCS will work with the person to—
  - Develop a system that meets the FOTG standards, the local resource conditions, available conservation technology and the economic capabilities of the person.
  - Provide a revised implementation schedule, not to exceed one year.
  - Inform the person(s) that he/she will need to certify completion of the system to NRCS and that the tract will be on the following year’s compliance review list.

### b Tenant Exemption Procedures

- **Description** – A tenant may not be subject to loss of all benefits on other tracts for which he/she has a financial interest if the tenant makes a good faith effort to apply a conservation system on a given tract but the landlord for that tract –
  - Will not document an approved conservation system in a conservation plan
  - Will not allow the tenant to install conservation measures or management practices.
  - Imposes terms and conditions that prevent the implementation of a conservation system.
- **NRCS Action** – FSA will refer tenant exemption requests to NRCS on AD-1026B. Upon receipt, NRCS will complete the items in AD-1026B, Part B, and return to FSA. The FSA COC will use the information to make a person (tenant or renter) exemption determination. NRCS will complete the AD-1026B, Part C, Item 11, including any comments from the CD that could assist in making the exemption determination. Upon notification by FSA that the exemption has been granted to the person, NRCS will work with the person to—
  - Provide the person, within 45 days of establishing that a conservation system is not being applied, information regarding actions needed to comply with the HELC provisions.
  - Help the tenant apply conservation measures and management practices in the conservation plans or systems covering highly erodible tracts.
  - Follow appeal procedures in CPM, Part [510](#).
  - Complete form FSA-569. Flag the tract in question on the FSA-569 as "not actively applying" the conservation system.
- Below are the items to be completed by NRCS on form AD-1026B—

Item	Requested Entry on AD-1026B
11	If the landlord has a conservation plan, or if the person had a plan in a timely manner but was not allowed by the landlord to install all of a practice, mark “Yes” and complete questions 12 and 13 based on the landlord’s decisions.

12	List structural measures required by the plan that have not been applied.
13	List planting practices that are required by the plan.
14	Signature by District Conservationist and date.

When AD-1026B, Part B is completed, NRCS will return the form to FSA to make the exemption determination.

**c Two-acre Noncommercial Cropland Exemption**

- **Description** – Areas of two acres or less are exempt from the HELC provisions if used for the non-commercial production of an agricultural commodity and FSA determines that this production is not intended to circumvent the HELC provisions otherwise applicable. An example of this is a home garden. (See 16 U.S.C. 3812(h) and 7 CFR Part 12.5(a)(4); FSA Handbook 6-CP, Part 5, Section 1, Paragraph 505A).
- **NRCS Action** – The FSA COC will make all decisions with regard to this exemption.

**513.12 HELC “Good Faith Waiver” Exemptions — (AG)**

**a Good-Faith Waiver**

Section 3812(f)(1-3) of 16 U.S.C. and 7 CFR Part 12.5(a)(5) provide that a participant who violates the HELC requirements may regain eligibility for USDA program benefits as shown in the following table:

<b>IF FSA determines...</b>	<b>AND the person(s)</b>	<b>THEN NRCS will...</b>
That the person acted in good faith without intent to violate,	Agrees, within 45 days, to implement the needed practices or system within an agreed-upon period, not to exceed 1 year,	Provide information to FSA on the AD-1068, Part B, (and Part C if the violation is sodbuster).  A compliance review of the tract will be required in the year following the granting of the good faith waiver.
	Agrees, within 45 days, to implement the needed practices or system, but does not implement the approved plan or system within one year,	Report the failure to comply with the HELC provisions on the FSA-569 and return the form to FSA for further action.
	Does not agree to implement the needed conservation practices or HEL conservation plan or system,	Report the failure to comply with the HELC provisions on the FSA-569 and return the form to FSA for further action.

**b Payment Reduction Rules for Good Faith Waivers**

The following table provides the payment reduction requirements when the violation is determined to be in good faith without the intent to violate, and the required practices or systems will be installed within the required time frames. The FSA Handbook 6-CP, Section 2, Good Faith Relief Provisions [link], provides additional guidance. This exemption is granted by FSA.

<b>IF good faith requirements are met, and the violation is on...</b>	<b>Then...</b>
Land that was converted from native vegetation to crop production after December 23, 1985 (sodbusted),	The person will be given a graduated payment reduction of \$500 to \$5,000 based on the acres and Erodibility Index of the sodbusted land involved.
Land that was planted to an agricultural commodity prior to December 23, 1985,	No payment reduction applies.

**c NRCS and CD Role in Good Faith Waivers**

NRCS, in consultation with the CD, will provide the following information to the FSA County Committee on form AD-1068:

- Any facts about the case that may affect the COC determination.
  - Copies of documents related to the case that provide facts and details that may affect the COC’s good faith decision, such as NRCS notification to the producer regarding the determination.
  - Whether the producer has obtained or has attempted to obtain a conservation plan for the farm in a timely manner.
  - Whether there was any face-to-face discussion with the producer concerning the HELC violation.
  - Whether the landlord attempted to work with NRCS in developing a conservation plan that could be actively applied by the producer.
  - Information concerning the field(s) in violation and the Erodibility Index of each sobdusted field in violation.

FSA will reinstate benefits to the participant when FSA receives the AD-1068 indicating that the conservation plan has been signed or an approved conservation system has been applied.

**d Completing Form AD-1068**

Instructions for completing the AD-1068 are shown in the table below:

<b>Part</b>	<b>Item</b>	<b>Required NRCS Entry</b>
B	9	Description of pertinent facts by NRCS or the CD.
	10	Signature of NRCS employee and date.
C	11	Field number(s).
	12	Erodibility index.
E	21	Date conservation plan/system agreed upon.
	22	Signature of NRCS employee and date.

## 513.13 Other Exemptions

### a Small Area Exemptions

The small area exemption applies to small, non-cropland areas such as abandoned farmsteads, areas around filled or capped wells, rock piles, trees or brush, etc. within or adjacent to existing fields that are converted to cropland. (See 7 CFR Part 12.22(d)).

These areas must be included in a plan or system for adjacent HEL fields and must meet the level of treatment required for such fields. [how then is this an exemption?]

NRCS makes this exemption determination on a case-by-case basis.

### b Sodbuster-Interseeding Exemption

The interseeding of close grown crops into existing sod for grazing, haying, or silage shall not be considered planting an agricultural commodity.

NRCS will make the exemption determination.

### c Soils Maps Not Available

When a participant begins producing annually tilled agricultural commodity crops on land on which there are either no available soil survey maps or the maps are not of sufficient quality for making an HEL determination, NRCS must provide adequate soil survey maps no later than two years from the date that the land is put into crop production. (See 16 U.S.C. §3812(a); §3813, and 7 CFR §12.5(a)(1)). All soils maps must be provided in accordance with the provisions in Part 511.

Further, the participant must apply a conservation system that will provide sufficient protection to the soils resources in accordance with information developed by the local USDA office until an official HEL determination can be made. Until such time as an official HEL determination can be made, the participant will not be ineligible for USDA program benefits.

### d Expired Land from CRP Contracts

When land from an expired or terminated CRP contract is returned to production of annually tilled agricultural commodity crops, (see 16 U.S.C. §3812(a)(3), 7 CFR Part 12.23(d) and NFSAM Part 512.02(d)), the participant shall be required to apply a conservation system that provides the following level of soil erosion protection:

- The equivalent level of erosion as the conservation system being used prior to enrollment in the CRP; or
- A level of protection that is 75% of the PE not to exceed 2T in accordance with Part [512.02\(d\)](#).

Further, if the conservation plan or conservation system that the participant will be using requires the construction of any structural conservation practices (e.g., terraces, grassed waterways, grade control structures) he or she will be provided up to two years from the date that the CRP contract expired to install these practices. This period may be extended for an additional period of one year provided that there is acceptable written justification submitted by the participant why he/she was unable to implement the required structural practices within the 2-year period.

## 513.14 HEL Compliance Deficiencies Found While Providing Technical Assistance — (TA)

### a Notice and Investigation of Potential HELC Deficiencies

The provisions set forth at 16 U.S.C. § 3814 and 7 CFR Part 12.5(a)(5)(ii) provide the availability of a variance from the HELC provisions if the following criteria are met:

- A possible compliance deficiency or potential violation of the HELC provisions has been observed by a USDA employee while providing routine technical assistance.
- The technical assistance being provided to the participant when the violation is observed does not involve an official compliance status review of HELC or a whistleblower investigation.

### b The 45-Day, One-Year Rule

If a participant is found to be in violation of the HELC provisions, the NRCS employee that has observed the HELC deficiency shall—

- Provide notification of the nature of the violation as well as technical assistance in the form of conservation treatments needed to be in compliance with the provisions *within 45 days of the violation having been found*.
- Provide sufficient time in which to apply the needed treatments of the HEL conservation system, *not to exceed one year from the date the HEL conservation plan developed by NRCS and the participant is signed* by all applicable parties.
- Inform the participant that the tract(s) found in violation of the HELC provisions will be reviewed the following year to ensure that the HEL conservation system is being fully implemented.

### c Situations Not Considered as Routine NRCS Technical Assistance

The following situations do not qualify as “providing onsite technical assistance” for the purposes of this variance:

- Conservation compliance reviews.
- Whistleblower complaint investigations.
- Requests for HEL determinations by FSA because the producer certified compliance on form AD-1026 and FSA has reason to believe the person did not meet HELC requirements.
- Requests from other Federal agencies that necessitate site investigations?

### d NRCS Action Required After Confirming a Compliance Deficiency

NRCS will, within 45 days after confirming an HEL compliance deficiency:

- Provide the participant with information as to the actions or practices needed to be in compliance with the HELC provisions.
- Request a form FSA-569 if the participant refuses to agree to an HEL conservation plan or fails to apply the required HEL conservation system within the required time frames.

The following guidance table is provided for granting this variance from the HELC provisions—

<b>IF the person...</b>	<b>AND the deficiency...</b>	<b>THEN...</b>
Agrees to correct the deficiency within the time schedule, and signs the plan within 45 days,	Is corrected or the system is fully implemented within 1 year of the violation notification,	FSA will not be informed of the violation unless a form FSA-569 has been referred due to a prior-year violation on the tract(s).
Note: NRCS will not request a form FSA-569 unless the agreement requirements are not met,	Is not corrected or the system is not fully implemented within 1 year of the violation notification,	Request an FSA-569 from FSA and mark Part C “does not meet” the requirements of the HELC provisions.
Does not agree to correct the deficiency,		Immediately request form FSA-569 and mark Part C “does not meet” the requirements of the HELC provisions.

**e Limitations for the Use of This Variance**

This variance may not be used during the course of a compliance status review or a whistleblower investigation.

## 513.15 Temporary Variance for Weather, Pests, or Disease — (AC)

### a Description of the Temporary Variance

NRCS may grant a temporary variance from conservation practices in the person's HEL conservation system to address weather, pest, or disease problems, in accordance with the provisions at 16 U.S.C. 3812(f)(4)(C) and 7 CFR Part 12.5(a)(6)(C). (Also see NFSAM Part 512).

### b Requirements for the Variance

Requests for this variance will be supported by documentation of the extent and effect of the special unfavorable conditions related to:

- Weather
- Pests
- Diseases

These special conditions will usually involve more than one tract in a county, several counties in a State; or one or more States in the area or region.

### c NRCS Response to the Request for a Temporary Variance

- The NRCS representative must respond in writing within 30 days of receipt of the request for the variance with approval or disapproval of the request.
- If NRCS fails to respond within the 30-day period to a request for a variance, the variance is automatically granted.

### d Considerations for Granting the Variance

NRCS, in consultation with the CD at the local level, will review requests for variances considering the following known local conditions and factors:

- Incidence of crop diseases in the area.
- Percent of stand damaged or destroyed.
- Percent of expected crop production compared to normal production.
- Documentation of weed or insect infestations.
- Comparison of weather events to historical records.
- Documentation of severe weather conditions.
- Other special circumstances that prevented the implementation of conservation practices or systems.

### e Steps for Granting the Temporary Variance

The following table provides procedures to be followed when a person requests this variance.

Step	Action
1	DC receives written and dated request for a variance at the field office.  Field office will date stamp the request upon receipt.

Step	Action
2	DC will notify the State Conservationist and CD of request. Where NRCS area offices exist, notification to the State Conservationist should be through the appropriate area office.
3	DC will assemble producer's documentation on need for the variance.
4	<p>If it is determined that sufficient documentation was not presented to support the request for the variance, the DC will send a letter stating that more time will be needed to grant the request.</p> <p>For example, if a participant makes a request for a weather-related variance on the basis of excessive rain and the general county rainfall records for the period cited in the request show less than normal rainfall, then more information <i>may</i> be needed to substantiate the difference for that portion of the county.</p>
5	Grant the variance request if the criteria developed by the local review group, and as reviewed by the State Conservationist and the State Technical Committee, have been met in accordance with Part 512.10.
6	The State Conservationist will determine if the need for the variance is regional in scope, and if so, will coordinate the use of the variance with the adjacent States.
7	All variances granted for this specific purpose will be fully documented. All tracts granted this variance will be placed on the following year's compliance review list.

**f Limitations for the Use of this Variance**

The use of this variance is limited as follows:

- May be used only when application of the conservation system is prevented due to severe weather, crop pest infestations, or crop diseases.
- May not be used when there has been NRCS error or untimely provision of technical assistance.
- May only be used if the following documentation exists:
  - The information included in paragraph (e) above must be included in the case file when granting this variance.
  - When the variance is approved on an area-wide, county-wide, or state-wide basis, a disaster must have been a declared either by USDA, the Governor of the State, or the President.

**513.16 Variance for a Failure of a Technical and Minor Nature -- HELC Minimal Effect — (AM)**

**a Technical and Minor Deficiencies**

A compliance deficiency is considered technical and minor in nature if it has only a *minimal effect* on the effectiveness of the conservation plan or system in accordance with 16 U.S.C. 3812(f)(4)(A) and 7 CFR Part 12.5(a)(6)(A).

Deficiencies having only a minimal effect on the soil protection functions of the conservation system being used are categorized as one of the following:

- Failure to apply one or more practices according to NRCS standards and specifications as stated in the FOTG.
- Failure to maintain one or more previously applied practices.

**b Documenting an NRCS Minimal Effect Variance**

This table provides instructions for processing variance requests for deficiencies considered technical and minor in nature.

<b>Step</b>	<b>Action</b>
1	Document which practices do not meet criteria in the FOTG.
2	Determine and document the impact of the failure to apply the practice/system.
3	Document in the case file any previously applied practices needing maintenance but that are still serving the intended purpose.
4	Work with the person to revise the plan/system to include more suitable practices or to perform the needed maintenance.
5	Notify the person that he/she will need to certify correction of the deficiencies within one year and that the tract will be placed on the following year's compliance review list.

This variance is granted by the NRCS District Conservationist.

**c Limitations for the Use of This Variance**

The use of this variance is limited as follows:

- May only be used when the deficiency is minor and has only a minimal effect on the soil protection functions of the conservation system. (See Part 518.14(b)).
- May not be used when there has been NRCS error or untimely provision of technical assistance.
- May not be used when a producer voluntarily changes a conservation system that is in place.

## 513.17 Variance for Personal Hardship or NRCS Error — (AH)

### a Description

In accordance with the provisions set forth at 16 U.S.C. 3812(f)(4)(B) and 7 CFR Part 12.5(a)(6)(B) and 7 CFR 12.5(a)(3) a variance may be granted when a conservation system was not applied due to a technical error or incorrect plan, extreme personal hardship, or other unusual occurrence. (See Part 518.14(b)) [link].

- Granting of this variance is based on identification of a significant hardship specific to that person, such as—
  - Impaired physical condition.
  - Death of the farm operator or a family member that prevented application of scheduled practices.
  - Destruction of a building or equipment by fire or similar adverse event.
- This variance may also be granted if NRCS error prevents the person from applying the conservation system (7 CFR Part 12.5(a)(3)).

### b Documenting a Personal Hardship Variance

The following table describes procedures to follow when a person requests a personal hardship variance.

Step	Action
1	DC will obtain person's supporting data and request the variance from the State Conservationist. Instructions provided at Part 518.20(b) must be followed to grant this variance. If the State Conservationist has amended the NFSAM in accordance with Part 518.20(b) [link], the variance may be granted on a limited basis at the field office level.
2	All decisions for this variance will be made on a case-by-case basis. There are no provisions for any blanket authorizations of this variance.
3	Document decision in the case file.
4	If granted, inform the person that he/she will be required to implement the conservation system within a year, and that the tract will be added to the following year's compliance review list.

This variance is granted by the NRCS District Conservationist

### c Limitations for the Use of This Variance

The use of this variance is limited as follows:

- If this variance is to be granted based on identification of a significant hardship specific to the person, there must be sufficient documentation in the case file supporting the hardship determination.

- If this variance is to be granted as a result of an NRCS error or untimely provision of technical assistance, there must be sufficient information in the case file to support the need for this variance as follows:
  - The producer applied for technical assistance in sufficient time for NRCS to provide the assistance.
  - The producer does not have sufficient knowledge of types or kinds of conservation practices or of the conservation system requirements needed to be in compliance with the HELC provisions.
  - Previous variances have not been granted to the person for the same reasons.

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**Part 514 — Wetland Determinations and Labels**

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- 514.60 Certification of Wetland Determinations**

**Subpart G – Labels-- Authorized Use, Maintenance and Improvements**

- 514.70 Authorized Use, Maintenance and Improvements**

## Subpart A — Wetland Determination and Delineation

### 514.01 Background and Definitions

The Act requires NRCS to determine, delineate, and certify all wetlands located on land subject to the wetland conservation provisions (hereafter referred to as “subject land”) on a farm or ranch. NRCS makes wetland determinations in order to establish a producer’s eligibility for certain USDA program benefits. (See 16 U.S.C. §3822; 7 CFR §12.30).

To identify and label wetlands subject to the WC provisions, NRCS will use offsite procedures such as those contained in state mapping conventions and the 1987 Corps of Engineers Wetland Delineation Manual or regionalized version of the manual (1987 Manual), and the onsite delineation methods provided in the 1987 Manual or regionalized version of the 1987 Manual. For land that has been in constant agricultural use since before December 23, 1985, use of mapping conventions, along with field verification of hydric soil using the *Field Indicators of Hydric Soils in the United States* (published by the National Technical Committee for Hydric Soils) and hydrology indicators in accordance with the 1987 Manual may be sufficient to make a wetland determination.

#### (a) Wetlands

Wetlands are defined<sup>1</sup> as lands that—

- Have a predominance of hydric soils.
- Are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.
- Under normal circumstances *do* support a prevalence of hydrophytic vegetation.

#### (b) Normal Circumstances

“Normal circumstances” refers to the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed. The premise for the concept of normal circumstances is that for many wetlands where the vegetation has been removed, the soil and hydrological characteristics remain to the extent that hydrophytic vegetation could return if vegetation management ceased. The *Atypical Situations* subsection of the 1987 Manual and/or state mapping conventions are to be used when positive indicators of hydrophytic vegetation cannot be found due to the effects of human activities.

**Exception:** Lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soil shall not be considered wetland for purposes of the Act. Such areas may be considered wetlands for purposes of the Clean Water Act (CWA) and other laws.

#### (c) Wetland Determination

Wetland determination means a technical decision regarding whether or not an area is a wetland, including identification of appropriate wetland labels and acres of each label, as discussed in Part 514, Subpart B. Wetland determinations are recorded on NRCS-CPA-026e.

[\[Link to Form template and instructions.\]](#)

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<sup>1</sup> 16 U.S.C. §3801 and 7 CFR §12.2

**(d) Wetland Delineation**

Wetland delineation means outlining the boundaries of a wetland determination on aerial photography, digital imagery, or other graphic representation; or on the land.

**514.02 Wetland Criteria**

**(a) Three Criteria of a Wetland**

Wetlands are identified through the confirmation of three wetland criteria—

- Hydric soil
- Wetland hydrology
- Hydrophytic vegetation

**(b) Relationship of the Criteria to a Determination**

All three criteria must be met for an area to be identified as a wetland. Each criterion must be independently assessed and substantiated by collecting, analyzing and documenting data to support the determination or delineation.

**514.03 Hydric Soils**

**(a) Introduction**

Several terms are frequently used to describe hydric soil delineation methodology. These are—

- Hydric Soil Definition
- Hydric Soil Criteria
- Hydric Soil Lists
- Hydric Soil Indicators.

According to the deliberations of the National Technical Committee for Hydric Soils (NTCHS), each of these terms has a specific meaning and use. All hydric soils must satisfy requirements of the Hydric Soil Definition. Hydric Soil Criteria are used to generate Hydric Soil Lists **and are not for field use**. Hydric Soil Lists contain soil map units that have a probability of being hydric. Hydric Soil Criteria and Hydric Soil Lists are used as offsite assessment tools in conjunction with local soil survey maps and information. Hydric Soil Indicators are primarily morphological indicators used for field identification of hydric soils. A hydric soil is a soil that meets the Hydric Soil Definition.

**(b) Hydric Soil Definition**

NTCHS defines a hydric soil as—

A soil that formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part (Federal Register, July 13, 1994).

Nearly all hydric soils exhibit characteristic morphologies that result from repeated periods of saturation or inundation for more than a few days.

Saturation or inundation, when combined with microbial activity in the soil, causes the depletion of oxygen. This anaerobiosis promotes certain biogeochemical processes, such as the accumulation of organic matter and the reduction, translocation, or accumulation of iron and other soluble elements. These processes result in characteristic morphologies that persist in the soil during both wet and dry periods, making them particularly useful for identifying hydric soils in the field.

**(c) Hydric Soil Lists**

Lists of hydric soils are compiled from the hydric soil criteria and are published in the National List of Hydric Soils, as well as in local lists of hydric soil mapping units developed by NRCS. Hydric soils lists are used in conjunction with NRCS soil surveys to estimate the location and properties of hydric soils in a given county or similar area.

In addition, an official list of local hydric soils is maintained in the Soil Data Mart (<http://soildatamart.nrcs.usda.gov/> ) and includes all map unit components identified as probable hydric soils based on the hydric soils criteria . The National Hydric Soils list is an aggregation of the local hydric soils lists produced from Soil Data Mart data.

**(d) Hydric Soil Field Indicators**

Indicators are used for field identification of hydric soils. The presence of one more indicators is evidence that the definition of a hydric soil has been met.

The publication *Field Indicators of Hydric Soils in the United States* (USDA, NRCS) will be applied to identify and delineate hydric soils in the field. In addition, the 1987 Manual contains a list of indicators. Although these indicators may provide similar results, they do not supersede the published NRCS indicators but may be used as supplementary information. Copies of *Field Indicators of Hydric Soils in the United States* can be obtained online at [ftp://ftp-fc.sc.egov.usda.gov/NSSC/Hydric\\_Soils/FieldIndicators\\_v5\\_9.pdf](ftp://ftp-fc.sc.egov.usda.gov/NSSC/Hydric_Soils/FieldIndicators_v5_9.pdf), or from—

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Field indicators are not intended to replace or relieve the requirements contained in the definition of a hydric soil, and some hydric soils do not have any of the currently used indicators. The absence of an indicator does not preclude the soil from being hydric. Guidance for identifying hydric soils that lack indicators can be found in Part 514.07 [\[link\]](#), in the 1987 Manual or regional supplements to the 1987 Manual.

Information contained in *Field Indicators of Hydric Soils in the United States* and additional information concerning hydric soils are maintained online at: [http://soils.usda.gov/soil\\_use/hydric/main.htm](http://soils.usda.gov/soil_use/hydric/main.htm).

## 514.04 Hydrophytic Vegetation

### (a) Definition

Hydrophytic vegetation consists of plants growing in water or in a substrate that is at least periodically deficient in oxygen during the growing season as a result of excessive water content.

### (b) Hydrophytic Vegetation Criterion

Land shall be determined to meet the hydrophytic vegetation criterion if—

- One or more of the indicators of hydrophytic vegetation is present, in accordance with the 1987 Manual, Part III, or
- Where the natural vegetation has been altered or removed, NRCS determines that under normal circumstances such land supports a prevalence of hydrophytic vegetation. When vegetation has been altered or removed, NRCS will use the Atypical Situations procedures in the 1987 Manual. In addition, NRCS might determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered conditions.

### (c) Hydrophytic Plant Lists

A plant shall be considered hydrophytic if the species is listed in the appropriate region of the most current edition of the *National List of Plant Species that Occur in Wetlands*, or a regional plant list approved by NRCS. The publication may be obtained upon request from the U.S. Fish and Wildlife Service, National Wetland Inventory, Monroe Bldg. Suite 101, 9720 Executive Center Drive, St. Petersburg, Florida 33702 or online at: <http://www.nwi.fws.gov/bha/list88.html>

## 514.05 Wetland Hydrology

### (a) Definition

Wetland hydrology is defined in the Act as:

*Inundation or saturation by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.*

### (b) Wetland Hydrology Indicators

Wetland hydrology indicators are used in combination with indicators of hydric soil and hydrophytic vegetation to determine whether an area is a wetland. Soils and vegetation generally reflect a site's long-term to medium-term wetness history. The function of wetland hydrology indicators is to provide evidence that the site has a *continuing* wetland hydrologic regime and that hydric soils and hydrophytic vegetation are not relics of a past hydrologic regime.

Hydrology indicators are the most ephemeral of wetland indicators. Those involving direct observation of surface water or saturated soils are usually present only during the normal wet portion of the growing season and may be absent during the dry season or during drier-than-normal years. Therefore, lack of an indicator is not evidence for the absence of wetland hydrology. On the other hand, some indicators could be present on a nonwetland site immediately after a heavy rain or during a period of unusually high precipitation, river stages,

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runoff, or snowmelt. Therefore, it is important to take weather conditions prior to the site visit into account to minimize both false-positive and false-negative decisions regarding wetland hydrology. An understanding of normal seasonal and annual variations in rainfall, temperature, and other climatic conditions is essential in interpreting hydrology indicators.

When wetland hydrology indicators are absent from an area that has indicators of hydric soil and hydrophytic vegetation, further information may be needed to evaluate wetland hydrology. If possible, one or more site visits should be scheduled to coincide with the normal wet portion of the growing season, the period of the year when the presence or absence of wetland hydrology indicators is most likely to reflect the true wetland/nonwetland status of the site. In addition, analytical techniques involving aerial photography or other remote sensing data, gauge data, runoff estimates, scope-and-effect equations for ditches and subsurface drain lines, or groundwater modeling may also be useful. On highly disturbed or problem sites, direct hydrologic monitoring may be needed to determine whether wetland hydrology is present. The COE technical report *Technical Standard for Water-Table Monitoring of Potential Wetland Sites* (ERDC TN-WRAP-05-02, U.S. Army Research and Development Center, Vicksburg, MS) provides information for monitoring hydrology on a potential wetland site (<http://el.ercd.usace.army.mil/elpubs/pdf/tnwrap05-2.pdf>).

### (c) Definition of Growing Season

The growing season is defined as—

The part of the year when soil temperatures at 20 inches (50 cm) below the soil surface are higher than biologic zero (41° F). As this quantitative determination requires in-ground instrumentation, growing season may be estimated by approximating the number of frost free days.

The growing season can be approximated as the period of time between the average date of the last killing frost to the average date of the first killing frost, as represented by a temperature threshold of 28° F or lower at a frequency of 5 years in 10. Growing season data can be obtained from the NRCS National Water and Climate Center (NWCC), at Portland, Oregon. This information is available online at: <http://www.wcc.nrcs.usda.gov/climate/wetlands.html>. Additional data may be obtained from agricultural experiment stations, the USDA Agricultural Research Service (ARS) or other facilities.

The growing season may be defined differently or the concept eliminated altogether in some regions. In certain parts of the country, local methods of determining the actual growing season may be more accurate than that described above. Such methods may be used when accompanied by the technical rationale. Use the procedures for determining hydrology or growing season in the current regionalized version of the 1987 Manual, if available.

## 514.06 Offsite Procedures and Mapping Tools

### (a) When to Use Offsite Procedures and Mapping Tools

Offsite data gathering and assessment are generally used to gather background information and identify areas warranting a closer look in the field. They are also used to document whether altered sites formerly met wetland criteria.

The principal mapping tools to assist in making wetland assessments include recent and historic aerial photography, NRCS Soil Survey maps, and FWS National Wetlands Inventory (NWI) maps.

When these tools are not in agreement with conditions observed onsite, the discrepancies and conclusions must be documented in the wetland determination case file via data forms and/or other relevant information. Discrepancies between wetland signatures and onsite conditions may be caused by a number of factors, including canopy cover masking signatures in wooded areas, or emergent hydrophytic vegetation being indistinguishable from upland herbaceous vegetation on aerial photography.

Use of wetland mapping tools should take into consideration periods of above and below normal precipitation, e.g., an aerial photograph may have been taken soon after a major rain event, or an NWI map may reflect conditions as they were during a drought year.

If mapping tools are not in agreement, it may be necessary to consult local long term climatological data and apply Hydrology Tools to confirm that wetland signatures are reflective of long term wetland hydrology for the site. See the 1987 Manual, Parts III and IV and NRCS Engineering Field Handbook, Chapter 19, “Hydrology Tools for Wetland Determination,” for guidance.

### **(b) Offsite Mapping Tools**

Obtain the following information, when available and applicable:

- *USGS quadrangle maps.* USGS quadrangle maps often provide general delineation of wet areas and show drainage patterns.
- *NWI maps.* NWI maps show water regime modifiers, which describe the flooding or soil saturation characteristics. Wetlands classified in the NWI maps as having a temporarily flooded or intermittently flooded water regime should be viewed with particular caution since this designation is indicative of plant communities that are transitional and may not meet the wetland criteria in the Act. These are among the most difficult plant communities to map accurately from aerial photography.  
*CAUTION*– Due to the scale of aerial photography used and other factors, all NWI map boundaries are approximate.

NWI maps identify permanent water bodies such as lakes and rivers in addition to wetlands as they are defined by the Act (see Part 514) and the Clean Water Act. In addition, NWI maps may not identify farmed wetlands, which are not mapped in many parts of the country because they lack natural vegetation. The U.S. Fish & Wildlife Service publication “Classification of Wetlands and Deepwater Habitats of the United States” (1979, FWS/ OBS-79/31) describes the NWI map classification method. Methods used to prepare NWI maps vary from region to region. Understanding the local variation in how they were developed and knowing the years of photography on which the interpretations were based is helpful in determining their reliability.

The optimum use of NWI maps is in planning for a site visit (i.e., size, diversity and hydrologic regime of an area) and to assist during the site visit, particularly by showing the approximate areal extent of a wetland and its association with other communities.

- *Soil survey map, map unit descriptions and local hydric soils list.* Soil surveys include hydrology data for components of soil map units or soil series, such as depth to water table and duration of ponding or flooding.
- *Aerial photography or FSA slides.* If used to document hydrology, a minimum of five years of aerial photography/slides which indicate normal precipitation should be

used. An equal number of wetter and drier years may be used when an insufficient number of normal years' slides and photographs are available.

Depending on quality and location, wetland signatures that may be observed on aerial photography or slides include—

- Hydrophytic vegetation
- Surface water
- Saturated conditions
- Flooded or drowned-out crops
- Crop stress due to wetness
- Differences in vegetation due to different planting dates
- Unharvested crops
- Isolated areas that are not farmed with the rest of the field
- Patches of greener vegetation

Color infrared (CIR) aerial photography can be especially useful for identifying surface water and saturated conditions. Water and soil moisture generally absorb both visible light and near-infrared radiation. This reduces the reflectance of these wavelengths and causes water and moist soil to appear darker than drier areas. Therefore, when wetland areas are captured on CIR photographs they can appear darker than the surrounding landscape, particularly when the photographs were taken with leaves off and during moist conditions.

The dark tones are particularly noticeable when there is water at or near the surface, the leaf litter is thin, and there are areas of standing water or blackened leaves. Whether the dark toned signature is visible is dependent on a variety of factors such as—

- Canopy cover
- Density of the shrub layer
- Presence of excessive leaf litter
- Dead persistent emergent vegetation
- Size of the wetland and antecedent weather conditions

Wetlands that have dense emergent vegetation, including persistent dead vegetation, that obscures the ground surface will not exhibit dark tones as strongly, if at all. Also, wetlands on the drier end of the spectrum, where soil saturation does not express itself on the soil surface as water or blackened leaves, will not show strong dark tones, especially if there is dense emergent vegetation or deep dry leaf litter or pine needles.

- Floodplain maps or inventories.

### **(c) Offsite Procedures:**

Use the following information, when available and applicable:

- *Stream and tidal gage data, if applicable.* These documents provide records of tidal and stream flow events. They are available from the USGS, some state agencies, or Corps of Engineers District office.
- NRCS Engineering Field Handbook, Chapter 19, “Hydrology Tools for Wetland Determination”
- *Documents and maps from state, county, or local governments.* Regional maps that characterize certain areas (e.g., potholes, coastal areas, vernal pools, or basins) may be helpful because they indicate the type and character of wetlands.
- Previous wetland determinations or prior knowledge of the area.
- FSA cropping history records.

- Climatic data.
- Engineering surveys of site on file.
- Information obtained from the landowner or producer.

**(d) Synthesis of Offsite Data**

Use the above sources of information to complete the following steps:

<b>STEP</b>	<b>ACTION</b>
1	Identify the subject land(s) on a map. Use the latest official USDA photography and the Geographic Information System (GIS) portion of the Customer Service Toolkit (CST) if available.
2	Prepare a base map. Mark the tract, field, and subject land (if different from fields) boundaries on the map.
3	Determine size of the subject lands. Use field acreages from the Common Land Unit feature of the CST if available, or measure the field and tract boundaries and calculate the size of the area.
4	Summarize available information on soils. Create a soils map layer using GIS, if possible, or outline the tract, field, and subject lands on a hard copy of the soils map. Identify which components of map units are on the local hydric soils list. Read map unit descriptions and interpretive tables, looking for information on any wetness characteristics. These may include drainage class; frequency, duration, and timing of inundation (if any); seasonal water table depths and soil permeability.
5	<p>Summarize available information on vegetation and hydrology. Use GIS to create layers for the USGS quadrangle and/or NWI maps, if possible, or outline the tract, field, and subject lands on hard copies of these maps. Consider indications of hydrophytic vegetation and hydrology such as—</p> <ul style="list-style-type: none"> <li>• Is the area shown as a marsh or swamp on USGS quadrangle maps? (CAUTION: Do not use this as the sole basis for determining that hydrophytic vegetation is or is not present). Is there a significant, well-defined drainage through the area? Is the area within a major floodplain or tidal area? What range of elevation occurs in the area, especially in relation to the elevation of the nearest watercourse?</li> <li>• Does the NWI map show the area as a wetland or deepwater aquatic habitat? If shown as a wetland (e.g., “Palustrine”), identify the vegetation type(s) labeled on the map. What is the water regime modifier?</li> </ul>
6	Compare historic aerial photography, including at least one photo taken prior to December 23, 1985 if available, to the most recent photo. Note any changes in wetland and cropping signatures.
7	Identify points where you plan to gather onsite data for the three wetland criteria.

## 514.07 Onsite Procedures

### (a) Introduction

NRCS policy is that all certified wetland determinations require a site visit. This may delay the determination until field conditions are suitable for assessing all three wetland criteria. Routine determination procedures are summarized in the diagram below. In general, onsite determinations are conducted in accordance with the 1987 Manual. However, as the table below shows, NRCS will use updated procedures that differ from those described in the 1987 Manual in some cases. The comprehensive determination procedures described in the 1987 Manual may be required for complex sites or when rigorous documentation is needed. The user must be trained in the use of the 1987 Manual and should refer to it for complete procedures.

### (b) Equipment and materials

The following equipment and materials will be needed to make onsite determinations and delineations:

- Base map and data from offsite procedures,
- Copies of the 1987 Manual *Routine Wetland Determination Data Form* or regionalized version of data form or other state-approved data form (one for each community type plus additional copies for boundary determinations),
- National List of Plant Species that Occur in Wetlands,
- Spade,
- Measuring tape,
- Munsell Color Charts (Munsell Color 1975) or Earth Colors (Color Communications, Inc. 1997),
- GPS unit,
- 1 N Hydrochloric acid, if needed,
- alpha, alpha dipyridyl dye, if needed,
- Field Indicators of Hydric Soils,

### (c) Onsite Determination Procedures

The following procedures generally apply when making onsite determinations. These procedures differ somewhat from those found in the 1987 Manual due to advances in wetland science and delineation methods since the 1987 Manual was last updated. In addition, information not found in the 1987 Manual has been added here to help NRCS make accurate determinations and delineations.

STEP	ACTION
1	<b>Locate the determination area.</b> Determine the spatial boundaries of the subject lands using information from the base map, aerial photography, USGS quadrangle map or other graphic representation.
2	<b>Record “Community ID.”</b> Traverse the area and determine the locations of plant community types or, if the naturally-occurring vegetation has been removed, are hydric soil components present? Sketch the location of each on the base map, and give each a name (e.g., PF01A, map unit name). Record the name of each on the “Community ID” line for each sheet.

STEP	ACTION
3	<p><b>Record “Plot ID.”</b> Select a representative observation point in each community type or map unit that contains hydric soils, whichever is greater. A representative observation point is one in which the apparent characteristics (determined visually) best represent characteristics of the entire community or map unit. Use GPS coordinates or mark on the base map the approximate location of the observation point(s). For each community ID, number the point(s) and place corresponding numbers on the Field Data Sheets “Plot ID” line.</p>
4	<p><b>Determine whether an atypical situation exists.</b> Examine the area and determine whether there is evidence of sufficient natural or human-induced alteration to significantly alter the area’s vegetation, soils, and/or hydrology. Consider possible offsite modifications that may affect the area’s hydrology. [<i>Record “Yes” or “No” on Field Data Sheet</i>]</p> <p>If one or more criteria have been significantly altered, PROCEED TO Part 514.08 (Atypical Situations) and determine whether hydrophytic vegetation, hydric soils, and/or wetland hydrology were present prior to this alteration.</p>
5	<p><b>Determine whether the area is a potential Problem Area</b> by considering the following:</p> <ol style="list-style-type: none"> <li>a. Is the area presently lacking hydrophytic vegetation or hydrologic indicators that may be due to annual or seasonal fluctuations in precipitation or ground-water levels?</li> <li>b. Are hydrophytic vegetation indicators lacking due to seasonal fluctuations in temperature?</li> </ol> <p><i>Record “Yes” or “No” on Field Data Sheet for “Do Normal Circumstances exist on the Site?” and “Is the area a potential Problem Area?”.</i></p> <p>If the answer to <b>either</b> of these questions is YES, PROCEED TO <i>Problem Areas</i>, Part 514.09.</p>
6	<p><b>Visually determine the dominant plant species in each vegetation stratum</b> of the community type (or sample plot) and record them on data sheets.</p> <p>In general, dominant plant species are the most abundant species in the community; they contribute more to the character of the community than do the other species present. The “50/20 rule”, as outlined below, is a repeatable and objective procedure for selecting dominant plant species and is recommended when the naturally-occurring vegetation has not been removed. Dominant species are chosen independently from each stratum<sup>2</sup> of the community. Using the 50/20 Rule, dominants are the most abundant species that individually or collectively account for more than 50% of the relative coverage of vegetation in the stratum plus any additional species that comprise 20% or more of the total cover. Absolute percent cover<sup>3</sup> is the recommended measure for determining dominance in each vegetational stratum. Steps in selecting dominant species by the 50/20 rule are as follows:</p>

<sup>2</sup> A stratum is defined as a vegetative layer within a specific height range and size class with at least 5% aerial cover

<sup>3</sup> Absolute percent cover is the percentage of the area of ground covered by the foliage of a vegetative strata. It is (180-V-NFSAM, Fifth Edition August 2005)

STEP	ACTION
	<p>a. Estimate the absolute percent cover of each species in the first stratum. Rank all species in the stratum from most to least abundant.</p> <p>b. Calculate the absolute percent cover of all species in the stratum (i.e., sum their individual percent cover values). Can be &lt; or &gt; 100%.</p> <p>c. From absolute percent cover calculate the relative cover of each species in the stratum. Sum the relative cover values for all species in a stratum. Divide the cover values for each species by the sum of the total cover. Multiply that value by 100.</p> <p>d. Select plant species from the ranked list, in decreasing order of relative coverage, until the cumulative coverage of selected species exceeds 50% of the relative cover for the stratum. If two or more species are of equal in cover (i.e., they are tied in rank), they should be selected together as a group. The selected plant species are all considered to be dominants. All dominants must be identified to the species level.</p> <p>e. In addition, select any additional species that, by itself, is at least 20% of the relative percent cover in the stratum. Any such species is also considered to be a dominant and must be accurately identified.</p> <p>f. Repeat steps a-e for any other stratum present. Combine the lists of dominant species across all strata. A species may be dominant in more than one stratum (e.g., a woody species may be dominant in the tree, understory, shrub or herb stratum). An example showing use of the 50/20 Rule is Part 520.12 <a href="#">[LINK]</a>.</p>
7	<p><b>Record the indicator status of each dominant species</b> at that Plot ID location according to the <i>National List of Vascular Plant Species that Occur in Wetlands</i> for the appropriate region or an approved regional list of hydrophytic vegetation.</p>
8	<p><b>Determine whether hydrophytic vegetation is present.</b> Examine each data sheet. When <b>more than</b> 50 percent of the dominant species in a community type have an indicator status of OBL, FACW, and/or FAC, hydrophytic vegetation is present. Complete the vegetation section of each data sheet.</p>
9	<p><b>Determine whether wetland hydrology is present.</b> Examine the hydrologic information on the data sheet. Any portion of the area having one primary or two secondary positive wetland hydrology indicator(s) has wetland hydrology. Complete the hydrology portion of each data sheet. If hydrology indicators are absent, yet the site has hydric soils and hydrophytic vegetation, determine whether the site visit is taking place during the dry season or a drought period. If so, use the Problem Area procedures to evaluate hydrology.</p>
10	<p><b>Document hydric soil indicators.</b> The common temptation is to excavate a small hole in the soil, note the presence of any indicators, make a decision, and leave. Before any decision can be made, however, the overall site morphology must be understood and documented.</p>

possible for the absolute percent cover in a community to exceed 100%, as the plant community may consist of two or more vegetative strata with overlapping foliage, or the foliage within a single strata may overlap.

(180-V-NFSAM, Fifth Edition August 2005)

STEP	ACTION
	<p>At each site, examine and describe on the data form the site features listed below before looking for hydric soil indicators. Use all of the evidence that is available. If one or more of the regional NTCHS Hydric Soil Field Indicators is present, the soil is hydric. If no hydric soil indicators are present, analyze the site features below to determine if the soil is indeed non-hydric or if it represents a ‘problem’ hydric soil.</p> <ul style="list-style-type: none"> <li>• Review the hydrology data recorded on the data sheet.</li> <li>• Slope gradient–Is the site level or nearly level so that surface water does not run off readily, or is it steeper where surface water would run off from the soil?</li> <li>• Slope shape–Is the surface concave, where water would tend to collect and possibly pond on the soil surface? Is the surface or slope shape convex, causing water to run off or disperse? On hillsides, are there convergent slopes, where surface or groundwater may be directed toward a central stream or swale?</li> <li>• Landform–Is the soil on a low terrace or floodplain that may be subject to seasonal high water tables or flooding? Is it at the toe of a slope where runoff may tend to collect or groundwater emerge at or near the surface? Has the microtopography been altered by cultivation?</li> <li>• Soil materials–Is there a restrictive layer in the soil that would slow or prevent the infiltration of water? This could include consolidated bedrock, cemented layers such as duripans and petrocalcic horizons, layers of silt or substantial clay content, or strongly contrasting soil textures. Or is there relatively loose soil material (sand, gravel, or rocks) or fractured bedrock that would allow the water to flow laterally down slope?</li> <li>• Vegetation–Does the vegetation at the site indicate wetter conditions (e.g., different species assemblages, morphological adaptations) than at nearby sites, or is it similar to what is found at adjacent sites?</li> </ul> <p>Always look at the features of the immediate site and compare them to the surrounding areas. Contrast the features of wet and dry sites that are in close proximity. Look first at the area immediately around the sampling point. For example, a nearly level bench or a depression at the sampling point may be more important to site wetness than the overall landform on which it occurs. By understanding how water moves across the site, the reasons for the presence or absence of hydric soil indicators should be clear.</p>
<p>11</p>	<p><b>Determine whether hydric soil is present.</b> Hydric soil is present if one or more field indicators, as described in the <i>Field Indicators of Hydric Soils in the United States</i>, are present and the soil meets the requirements contained in the definition of a hydric soil. To document a hydric soil, first remove any loose leaves, needles, or bark from the soil surface. Do not remove the organic surface layers of the soil, which usually consist of plant remains in varying stages of decomposition. Dig a hole and describe the soil profile. It is recommended that the hole is dug to a depth of at least 20 inches (50 cm) from the soil surface. Circumscribe a 1 ft. diameter area, preferably with a tile spade (sharpshooter). Extend the blade vertically downward, cutting all roots to the depth of the blade around the circumscribed area. Lift the soil from the hole. This should provide approximately 16 inches of the soil profile for examination. If a soil auger or probe is used, remove successive cores and place them in the same sequence as they were removed from the hole. Digging may be difficult in some areas due to</p>

STEP	ACTION
	<p>rocks and hardpans.</p> <p>If necessary to document a field indicator, continue excavating soil to a greater depth. For example, depth of excavation will often need to be greater than 20 inches in soils with thick dark surface horizons because the upper horizons of these soils, due to the masking effect of organic material, often contain no easily visible redoximorphic features. At many sites, it is necessary to make exploratory observations to 40 inches (100 cm) or more. These observations should be made with the intent of documenting and understanding the variability in soil properties and hydrologic relationships on the site. After a sufficient number of exploratory excavations have been made to understand the soil-hydrologic relationships at the site, subsequent excavations can be limited to the depth needed to identify hydric soil indicators.</p> <p>Whenever possible, excavate the soil deep enough to determine if there are layers or materials present that might restrict soil drainage. This will help to understand why the soil may or may not be hydric.</p> <p>Particular attention should be paid to changes in microtopography over short distances. Small changes in elevation may result in repetitive sequences of hydric/non-hydric soils, making the delineation of individual areas of hydric and non-hydric soils difficult. Often the dominant condition (hydric or non-hydric) is the most justifiable interpretation.</p> <p>Record on the Data sheets the color of the soil matrix, presence of an organic layer, presence of redoximorphic features, presence of iron and manganese concretions and presence of field indicators of hydric soil. The soil must be moist when colors are determined. If any of the field indicators of hydric soil are found, hydric soil is present.</p> <p>If no hydric soil indicator is present, the soil may still be hydric. Some hydric soils do not have any of the currently listed indicators. These are referred to as “problem soils.” In particular, soils formed in red parent materials, soils with a high pH or low organic matter content, and disturbed soils may not exhibit hydric soil indicators. Look at landscape, vegetation and observable hydrology. Assistance of an experienced soil or wetland scientist may be needed to determine whether the soil is hydric in these circumstances. If it is determined that the soil is hydric, document that hydric soil indicators are not present and why the soil is hydric anyway.</p> <p>Examine each data sheet and determine whether a positive hydric soil indicator was found. If so, that location has hydric soil. Complete the soil section of each data sheet.</p>
12	<p><b>Make wetland determination.</b> Examine the data sheet. If the entire area presently or normally has wetland indicators of all three criteria, the entire area is a wetland. If the entire area presently or normally lacks wetland indicators of one or more criteria, the entire area is a nonwetland.</p> <p>If only a portion of the area presently or normally has wetland indicators for all three criteria, PROCEED TO STEP 13.</p>
13	<p><b>Determine wetland-nonwetland boundary.</b> Combine all wetland plant communities or map units and all nonwetland plant communities or map units. GPS the boundaries in the field, if possible, or sketch the boundaries on the base map. It will usually be necessary to complete additional data sheets in non-hydric soil map units to document</p>

<b>STEP</b>	<b>ACTION</b>
	the location of the boundaries. Wetland boundaries may also be delineated on the land if needed for activities planned by the landowner.

The following flowchart summarizes the onsite wetland determination procedures.

**INSERT FLOWCHART HERE**

**514.08 Atypical Situations**

**(a) When to Use this Section**

Methods described in this section should only be used when a determination has been started (using the Onsite Determination Procedures, Part 514.07(c)), and positive indicators of hydrophytic vegetation, hydric soils, and/or wetland hydrology cannot be found due to effects of human activities or natural events. Examples include, but are not limited to—

- Alteration or removal of vegetation
- Placement of dredged or fill material over hydric soils
- Construction of levees, drainage systems, or dams that significantly alter the area hydrology
- Fire, flood, or other natural event that affects wetland indicators

When atypical situations occur, apply procedures described in one of the following Subsections, as appropriate, to determine whether positive indicators of hydrophytic vegetation, hydric soils, and/or wetland hydrology existed prior to alteration of the area. Once these procedures have been employed, RETURN TO Part 514.07(c), Onsite Determination Procedures to make the wetland determination.

**(b) Subsection 1 – Vegetation**

Use the following steps to determine whether hydrophytic vegetation previously occurred:

STEP	ACTION
1	Examine the area and describe the type of alteration that occurred. Look for evidence of selective harvesting, clear cutting, bulldozing, conversion to agriculture, or other activities (e.g., burning, discing, etc.). Record observations on the Field Data Sheets,
2	Describe effects on vegetation. Record on the Field Data Sheets a general description of how the activities affected the plant communities. Consider the following: <ul style="list-style-type: none"> <li>• Has all or a portion of the area been cleared of vegetation?</li> <li>• Has only one layer of the plant community (e.g., trees) been removed?</li> <li>• Has selective harvesting resulted in removal of some species?</li> <li>• Has all vegetation been covered by soil?</li> </ul>
3	Determine the type of vegetation that occurred before the alteration of the site. Obtain all possible evidence of the type of plant communities that occurred in the area prior to alteration. Potential sources of such evidence include— <ul style="list-style-type: none"> <li>• Aerial photography. Aerial photography can often be used to document the type of vegetation that was previously present on the site. The general type of plant communities previously present can usually be determined, and species identification is sometimes possible.</li> <li>• Onsite inspection. Many types of activities result in only partial removal of the previous plant communities, and remaining species may be indicative of hydrophytic vegetation. In other cases, plant fragments (e.g., stumps, roots) may be used to reconstruct the plant community types that occurred prior to site alteration. Sometimes this can be determined by examining piles of debris</li> </ul>

STEP	ACTION
	<p>resulting from land-clearing operations or excavation to uncover identifiable remains of the previous plant community.</p> <ul style="list-style-type: none"> <li>• Previous site inspections. Documented evidence from previous inspections of the area may describe the previous plant communities.</li> <li>• Adjacent vegetation. Circumstantial evidence of the type of plant communities that previously occurred can sometimes be obtained by examining the vegetation in adjacent areas or reference sites. If adjacent areas or reference sites have the same topographic position, soils, and hydrology as the altered area, the plant community types on the altered area were probably similar to those of the adjacent areas or reference sites.</li> <li>• Soil surveys sometimes include a description of the plant community types associated with each soil type. If the soil type on the altered area can be determined, it may be possible to determine the general type of plant communities that previously occurred.</li> <li>• Landowner. In some cases, the landowner may provide important information about the type of plant communities that occurred prior to alteration.</li> <li>• Public. Individuals familiar with the area may provide a good general description of the previously occurring plant communities.</li> <li>• NWI wetland maps. The NWI map labels may be useful in determining the type of plant communities that occurred prior to alteration.</li> </ul> <p>To make the most accurate determination, all of the above sources should be considered. Record the plant community types that occurred prior to alteration on the data sheets. Record the basis used for the determination in the Remarks section.</p>
4	<p>Determine whether the plant community types that previously occurred were hydrophytic. Develop a list of dominant species that previously occurred on the site and record on the data sheets. PROCEED TO Subsection 2 or 3 if the soil or hydrology of the area has been significantly altered, or return to Part 514.07(c), STEP 5 and characterize the remaining criteria that are not significantly influenced by human activities.</p>

**(c) Subsection 2 – Hydric Soils**

Employ the following steps to determine whether hydric soils previously occurred:

STEP	ACTION
1	<p>Examine the area and describe the type of soil alteration that occurred. Look for evidence of—</p> <ul style="list-style-type: none"> <li>• Deposition of dredged or fill material or natural sedimentation. In many cases the presence of fill material will be obvious. If so, it will be necessary to dig a hole to reach the original soil (sometimes several feet deep). Fill material will usually be a different color or texture than the original soil (except when fill material has been obtained from similar areas onsite). Look for decomposing vegetation between soil layers and the presence of buried organic or hydric soil layers. In accreting or recently formed sandbars in riverine situations, the soils</li> </ul>

	<p>may support hydrophytic vegetation but lack hydric soil characteristics.</p> <ul style="list-style-type: none"> <li>• Presence of nonwoody debris at the surface. This can only be applied in areas where the original soils do not contain rocks. Non-woody debris includes items such as rocks, bricks, and concrete fragments.</li> <li>• Subsurface plowing. Has the area recently been plowed below the A-horizon?</li> <li>• Removal of surface layers. Has the surface soil layer been removed by scraping or natural landslides? Look for bare soil surfaces with exposed plant roots or scrape scars on the surface.</li> </ul> <p>Determine and record on the Field Data Sheets the approximate date the alteration occurred. This may require checking aerial photography.</p>
<p><b>2</b></p>	<p>Describe effects on soils. Record on the Field Data Sheets a general description of how activities identified in STEP 1 have affected the soils.</p> <p>Consider the following:</p> <ul style="list-style-type: none"> <li>• Has the soil been buried? If so, record the depth of fill and determine whether the original soil is intact.</li> <li>• Has the soil been mixed at a depth below the A-horizon? If so, it will be necessary to examine soil at a depth immediately below the plowed zone. Record supporting evidence.</li> <li>• Has the soil been sufficiently altered to change the soil phase? Describe these changes.</li> </ul>
<p><b>3</b></p>	<p>Characterize soils that previously occurred. Consider the following potential sources of information:</p> <ul style="list-style-type: none"> <li>• Soil surveys. Determine the soil map units or soil series that were mapped for the area, and compare them with the list of hydric soils.</li> <li>• Characterization of buried soils. When fill material has been placed over the original soil without physically disturbing the soil, examine and characterize the buried soils. To accomplish this, dig a hole through the fill material until the original soil is encountered. Determine the depth at which the original soil material begins. Look for indicators of hydric soil. Record on the Field Data Sheets the color of the soil matrix, presence of an organic layer, presence of redoximorphic features, presence of iron and manganese concretions, and presence of field indicators of hydric soil. The soil must be moist when colors are determined. (NOTE: When the fill material is a thick layer, it may be necessary to use a backhoe or posthole digger to excavate the soil pit.)</li> <li>• Characterization of plowed soils. Determine the depth to which the soil has been disturbed by plowing. Look for hydric soil indicators immediately below this depth. Record findings on the data sheets.</li> <li>• Removal of surface layers. Dig a soil pit and determine whether the entire surface layer (A-horizon) has been removed. If so, examine the soil immediately below the top of the subsurface layer (B-horizon) for hydric soil characteristics. As an alternative, examine an undisturbed soil of the same soil series occurring in the same topographic position in an immediately adjacent area that has not been altered. Determine if hydric soil indicators exist and record findings on the Field Data Sheets.</li> </ul>

<b>4</b>	<p>Examine the available data and determine whether indicators of hydric soils were formerly present. If indicators of hydric soils are found, record the appropriate indicators on the data sheets. If no hydric soil indicator is present, the soil may still be hydric. Some hydric soils do not have any of the currently listed indicators. In particular, soils formed in red parent materials, soils with a high pH or low organic matter content, and disturbed soils may not exhibit hydric soil indicators. Assistance of an experienced soil or wetland scientist may be needed to determine whether the soil is hydric in these circumstances. If no indicators of hydric soils were found, yet it is determined that the soil is hydric, document that hydric soil indicators are not present and why the soil is hydric anyway.</p> <p>PROCEED TO Subsection 1 or 3 if the vegetation or hydrology of the area has been significantly altered, or return to Part 514.07(c), STEP 5 and characterize the remaining criteria that are not significantly influenced by human activities.</p>
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**(d) Subsection 3 – Hydrology**

Apply the following steps to determine whether wetland hydrology previously occurred.

STEP	ACTION
<b>1</b>	<p>Examine the area and describe the type of hydrologic alteration that occurred. Look for evidence of—</p> <ul style="list-style-type: none"> <li>• Dams. Has recent construction of a dam or some recent natural event (e.g., beaver activity or landslide) caused the area to become increasingly wetter or drier? NOTE – This activity could have occurred a considerable distance away from the site in question.</li> <li>• Levees, dikes, and similar structures. Have levees or dikes recently been constructed that prevent the area from becoming periodically inundated by overbank flooding?</li> <li>• Ditching. Have ditches been constructed recently that lower the water table or cause the area to drain more rapidly?</li> <li>• Filling of channels or depressions (land-leveling). Have natural channels or depressions been recently filled?</li> <li>• Subsurface drain tiles. Has drainage tile recently removed surface and/or subsurface water?</li> <li>• Diversion of water. Has an upstream drainage pattern recently been altered that results in water being diverted from the area?</li> <li>• Ground-water extraction. Has prolonged and intensive pumping of ground water for irrigation or other purposes significantly lowered the water table and/or altered drainage patterns?</li> <li>• Channelization. Have nearby streams recently been channelized sufficiently to alter the frequency and/or duration of inundation or saturation?</li> </ul> <p>Determine and record on the Field Data Sheets the approximate date the alteration occurred. This may require checking aerial photography.</p>
	<p>Describe effects of alteration on area hydrology. Record on the data sheets a general description of how the observed alteration has affected the area. Consider the following:</p>

STEP	ACTION
2	<ul style="list-style-type: none"> <li>• Is the area more frequently or less frequently inundated than prior to alteration? To what degree and why?</li> <li>• Is the duration of inundation and soil saturation different than prior to alteration? How much different and why?</li> </ul>
3	<p>Characterize the hydrology that previously existed in the area. Potential sources of information include—</p> <ul style="list-style-type: none"> <li>• Stream or tidal gage data. If a stream or tidal gaging station is located near the area, it may be possible to calculate elevations representing the upper limit of wetland hydrology based on duration of inundation. If fill material has not been placed on the area, survey this elevation from the nearest USGS benchmark. Record elevations representing zone boundaries on the data sheets. If fill material has been placed on the area, compare the calculated elevation with elevations shown on a USGS quadrangle or any other survey map that pre-dated site alteration.</li> <li>• Field hydrologic indicators. Certain field indicators of wetland hydrology may still be present. Look for watermarks on trees or structures, drift lines, and debris deposits. Record on Field Data Sheets. If nearby undisturbed or reference areas are in the same topographic position and are similarly influenced by the same source(s) of hydrology (e.g. overbank flooding, high water table), look for wetland indicators in these areas.</li> <li>• Aerial photography. Examine any available aerial photography and determine whether the area was inundated at the time of the photograph. Consider the time of the year and the antecedent precipitation conditions that occurred when the aerial photograph was taken. Use only photographs taken during the growing season and prior to site alteration.</li> <li>• Historical records. Examine any available historical records for evidence that the area has been periodically inundated or saturated. Obtain copies of any such information and record findings on the Field Data Sheets.</li> <li>• Floodplain management maps. Determine the previous frequency of inundation of the area from floodplain management maps (if available). Record flood frequency on the Field Data Sheets.</li> <li>• Public or local government officials. Contact individuals who might have knowledge of the previous hydrology of the area.</li> </ul>
4	<p>Determine whether wetland hydrology previously occurred. Examine the available data and determine whether wetland hydrology was present prior to site alteration. If no indicators of wetland hydrology were found, the original hydrology of the area was not wetland hydrology. If indicators of wetland hydrology were found, record the appropriate indicators on the data sheets and PROCEED TO Subsection 1 or 2 if the vegetation or soil of the area has been significantly altered, or return to Part 514.07(c), STEP 5 and characterize the remaining criteria that are not significantly influenced by human activities.</p>

## 514.09 Problem Areas

### (a) When to Use this Section

Certain wetland types and/or conditions may make application of indicators for one or more criteria difficult, at least at certain times of the year. These are *not considered to be atypical* situations. Instead, they are wetland types in which wetland indicators for one or more criteria may be periodically lacking *due to normal seasonal or annual variations in environmental conditions* that result from causes other than human activities or catastrophic natural events. If possible, delay the wetland determination until field conditions are suitable to evaluate all three wetland criteria. **Use of problem area procedures is appropriate only when a decision has been made that wetland indicators of one or more criteria are lacking, probably due to normal seasonal or annual variations in environmental conditions, and the determination cannot be delayed until field conditions are suitable for evaluating all criteria.**

Representative examples of potential problem areas, their seasonal or annual variability, and its effects on wetland indicators are described below. Similar situations may occur in other wetland types.

Problem Area	Description
<i>Slope wetlands</i>	Occur in areas where thin soils cover relatively impermeable layers. Such areas are seldom, if ever, inundated, but downslope groundwater movement keeps the soils saturated for a sufficient portion of the growing season to produce anaerobic and reducing soil conditions. This fosters development of hydric soil characteristics and selects for hydrophytic vegetation. Indicators of wetland hydrology may be lacking during the drier portion of the growing season.
<i>Seasonal wetlands</i>	In many regions, wetlands occur that have indicators of all three criteria during the wetter portion of the growing season, but normally lack wetland indicators of hydrology and/or vegetation during the drier portion of the growing season. Obligate and facultative wetland plant species normally are dominant during the wetter portion of the growing season, while upland species (annuals) may be dominant during the drier portion of the growing season. Evidence of the persistence of an area's wetness can be obtained from its vegetation, soil, drainage characteristics, the uses to which it has been subjected, and weather or hydrologic records.
<i>Prairie potholes</i>	Prairie potholes normally occur as shallow depressions in glaciated portions of the north-central United States. Many are isolated, while others have a drainage outlet to streams or other potholes. Most have standing water for much of the growing season in years of normal or above normal precipitation, but are neither inundated nor have saturated soils during most of the growing season in years of below normal precipitation. During dry years, potholes often become incorporated into farming plans, and are either planted to annual crops (e.g., row crops or small grains) or are mowed as part of a haying operation. When this occurs, wetland indicators of one or more criteria may be lacking. For example, tillage may eliminate onsite hydrologic indicators, and make detection of soil and vegetation indicators much more difficult.

<b>Problem Area</b>	<b>Description</b>
<i>Vegetated flats</i>	In both coastal and interior areas of the U.S., vegetated flats are often dominated by annual species that are categorized as obligate wetland plants. Application of delineation procedures during the growing season will result in a positive wetland determination. However, these areas will appear to be unvegetated mudflats during the nongrowing season, and would not meet the hydrophytic vegetation criteria during that time.

**(b) Steps for Making Wetland Determinations in Problem Areas**

Steps for making wetland determinations in problem areas are presented below. Specific procedures will vary according to the environmental conditions present at the time of the determination. A determination must be based on the best evidence available to the field inspector, including—

- Field data resulting from an onsite inspection.
- The inspector’s knowledge of the ecology of the wetland type.

<b>STEP</b>	<b>ACTION</b>
<b>1</b>	Examine the Field Data Sheets and identify which of the three criteria must be given additional consideration.
<b>2</b>	Document the environmental condition(s) or man-induced activities that have affected the expression of the criteria. Describe how the criteria are affected in the Remarks section of the Field Data Sheets. Consider personal ecological knowledge of the range of normal environmental conditions of the area. Local experts may provide additional information.
<b>3</b>	Using the information from STEP 2, determine whether wetland indicators are normally present on this site for the required duration of the growing season. Record on the Field Data Sheets the indicators normally present during this time and return to the appropriate STEP in Part 514.07(c) to evaluate unaffected criteria and complete the wetland determination.

## 514.10 Relationship of Labels to Wetland Determinations and Delineations

The determination of whether or not land is a wetland is based on technical criteria, as described in Subpart A, and is independent of wetland labels. Labels are only used to identify land subject to exemptions or restrictions under the Act. Such land may or may not have positive indicators for wetland criteria and/or meet the definition of wetland. Subparts B – D contain instructions for identifying and labeling wetlands to determine whether restrictions or exemptions apply to the land per the WC provisions of the Act, and what activities are permitted on such land.

Areas identified will be outlined and labeled on the official FSA photomap and on an appropriate NRCS field office base map using wetland labels specified in this Part. The preferred base map is orthorectified photography that will enable digitization of certified wetland determinations and provide a basis for future updating. **Documentation supporting the chosen labels must be included in the participant's file.**

If available, aerial slides and photographs that reflect conditions as of December 23, 1985 will be used to determine if wetlands were converted to agricultural use prior to December 23, 1985 and may therefore be exempt. The Act protects wetlands as they existed on the date of its enactment. Therefore, for the purpose of determining eligibility and exemptions under the Act, December 23, 1985 is the effective date, and the condition of the land on that date dictates the appropriate label. Even if land had been drained and cropped prior to December 23, 1985, if on December 23, 1985, wetland characteristics had returned, those wetland conditions are used to determine whether the land is considered prior converted wetland, farmed wetland or farmed wetland pasture.

## **Subpart B —Labels: Wetlands Manipulated for Agricultural Use Before December 23, 1985**

### **514.20 Prior Converted Cropland (PC)**

#### **(a) Definition**

Prior converted cropland is a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:

- If the area is not a pothole, playa or pocosin<sup>4</sup>, inundation is less than 15 consecutive days during the growing season or 10% of the growing season, whichever is less, in most years (50% chance or more).
- If the area is a pothole, playa or pocosin, inundation is less than 7 consecutive days and saturation is less than 14 consecutive days during the growing season in most years (50% chance or more).

#### **(b) Supporting Documentation**

Use NRCS Engineering Field Handbook, Chapter 19, “Hydrology Tools for Wetland Determination” and the 1987 Manual to determine if the area is inundated for the requisite time. Aerial photographs or slides taken during the growing season and maps from flood frequency studies should also be used when available. Since the hydrology requirement must have a  $\geq 50\%$  probability of being present any given year, two-year frequency interval maps must be used. Site conditions must be thoroughly documented, using information such as—

- Aerial photographs and FSA slides
- Analytical processes to evaluate length of ponding or flooding from a single event
- Interviews with the person and other knowledgeable residents of the area
- Field indicators of surface water such as water marks, drift lines, and drowned or stressed crops
- Stream gage data.

FSA records may be used to determine current or prior cropping history. In the absence of FSA records, any documentation of cropping history should be based on aerial photography, crop expense or receipt records, grain elevator records specific to tract and field, or other suitable documentation that can be tied to the specific field and/or tract under review.

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<sup>4</sup> Playa: shallow depression recharge wetlands. The presence and extent of playa wetlands in each state will be determined by the State Conservationist.

Pocosin: a swamp, often containing organic soil, and partly or completely enclosed by a sandy rim. Pocosins are found on the southeastern coastal plain. These areas have long hydroperiods, temporary surface water, are adapted to periodic fires, and have soils of sandy humus, muck, or peat. The presence and extent of pocosins in each state will be determined by the State Conservationist.

Pothole: glacially formed depressions. The hydroperiod varies from temporary to semi-permanent. The presence and extent of pothole wetlands in each state will be determined by the State Conservationist.

**(c) Restrictions**

Drainage systems or other hydrologic manipulations on PC’s may be maintained or improved after December 23, 1985 without loss of USDA program benefits. However, improvements that cause conversion of adjacent or nearby wetlands (W, FW, FWP, WX), are subject to the WC provisions. The producer should complete Form AD-1026 before conducting any manipulation that may affect other wetlands.

PC land will not be considered abandoned under the Act. However, for Clean Water Act purposes, if the area is not managed for five consecutive years such that wetland conditions return, the COE may consider the area abandoned and it may be subject to CWA permit requirements. The PC label is only valid as long as the land is in *agricultural use*, and does not apply to land in non-agricultural use. If the land changes to a non-agricultural use, the PC determination is no longer applicable.

**(d) Agricultural Use**

As defined in “NRCS-COE Joint Guidance for Conducting Wetland Determinations for the Food Security Act of 1985 and Section 404 of the Clean Water Act, “agricultural use” refers to open land planted to an agricultural crop, used for the production of food or fiber, used for haying or grazing, left idle per USDA program requirements, or diverted from crop production to an approved cultural practice that prevents erosion or other degradation. It does not include barns, silos, chicken houses, other buildings or structures used on a farm or for agricultural purposes.

**(e) Procedures for Identifying Prior Converted Cropland (PC)**

The following procedures will be followed in making PC determinations:

STEP	ACTION
1	Consult aerial photographs, crop records and other resources to determine if the area was converted for production of an agricultural commodity prior to December 23, 1985, and whether it potentially meets the hydrologic criterion of Farmed Wetland or Farmed Wetland Pasture (see Part 514.21 and 514.22).[link]
2	A site visit must be conducted using appropriate wetland delineation tools to verify site conditions and determine if the conditions observed on aerial photographs are consistent with the landscape of the site. If not, additional field work or review of aerial photographs or other resources might be required to determine the agricultural use and the hydrology of the site on December 23, 1985.  If necessary, use Hydrology Tools to assess the effects of drainage and/or to determine if aerial photographs reflect “normal” precipitation conditions (see Part 514.06(b)).[link]

**514.21 Farmed Wetlands (FW)****(a) Definition**

Farmed wetlands are wetlands that were drained, dredged, filled, leveled or otherwise manipulated before December 23, 1985, for the production of an agricultural commodity, and that meet all of the following criteria:

- If the area is not a pothole, playa or pocosin, it is inundated for at least 15 consecutive days during the growing season or 10% of the growing season, whichever is less, in most years (50% chance or more).
- If the area is a pothole, playa or pocosin, it is inundated for at least 7 consecutive days or saturated for at least 14 consecutive days during the growing season in most years (50% chance or more).
- Production was made possible or enhanced by the manipulation
- The area has not been abandoned (refer to definition of abandonment found in Part 514.16). [\[link\]](#)

**(b) Supporting Documentation**

Use NRCS Engineering Field Handbook, Chapter 19, “Hydrology Tools for Wetland Determination” and the 1987 Manual, Parts III and IV to determine if the area is inundated for the requisite time. Aerial photographs or slides taken during the growing season and maps from flood frequency studies should also be used when available. Since the hydrology requirement must have a  $\geq 50\%$  probability of being present any given year, two-year frequency interval maps must be used. Site conditions must be thoroughly documented, using information such as—

- Aerial photographs and FSA slides
- Analytical processes to evaluate length of ponding or flooding from a single event
- Interviews with the person and other knowledgeable residents of the area
- Field indicators of surface water such as water marks, drift lines, and drowned or stressed crops
- Stream gage data.

FSA records may be used to determine current or prior cropping history. In the absence of FSA records, any documentation of cropping history should be based on aerial photography, crop expense or receipt records, grain elevator records specific to tract and field, or other suitable documentation that can be tied to the specific field and/or tract under review.

**(c) Restrictions**

Farmed wetlands may be maintained and used to produce agricultural commodities or other crops without a loss of eligibility for USDA program benefits. However, any additional hydrologic manipulation after December 23, 1985 that does not meet the definition of maintenance may result in a violation of the WC provisions. A producer who wants to maintain the previous drainage capacity must submit Form AD-1026 before conducting any manipulation. NRCS must evaluate the scope and effect of any such manipulation using the procedures provided in Part 516, Subpart B to evaluate whether it meets the definition of maintenance.

If a producer wants to restore wetland characteristics to FW areas and at the same time prevent the areas from being considered abandoned, he or she must document hydrologic and vegetative baseline conditions with NRCS prior to restoring wetland characteristics.

**(d) Procedures for Identifying Farmed Wetlands:**

The following procedures shall be used to identify farmed wetlands (FW):

STEP	ACTION
1	<p>Consult aerial photographs, crop records and other resources to determine if the area was manipulated prior to December 23, 1985 for production of an agricultural commodity, whether it potentially meets the hydrologic criterion of Farmed Wetland, and whether it has been abandoned.</p> <p>Determine if the site has been abandoned, without the abandonment being part of an approved plan (documentation of baseline conditions). If the area meets abandonment criteria, it should be labeled W (unless other manipulation has occurred to the extent that it is a converted wetland – see Part 514.15) [link]. If the site has been manipulated since 12/23/85 beyond the scope and effect of any prior manipulation, it might meet the Converted Wetland criteria.</p>
2	<p>A site visit must be conducted using appropriate wetland delineation tools to verify site conditions and determine if the conditions observed on aerial photographs are consistent with the landscape of the site. If not, additional field work or review of aerial photographs or other resources might be required to determine the agricultural use and the hydrology of the site on December 23, 1985.</p> <p>If necessary, use Hydrology Tools to assess the effects of drainage and/or to determine if aerial photographs reflect “normal” precipitation conditions (see Part 514.06(b). [link])</p>

**514.22 Farmed Wetland Pasture or Hayland (FWP)**

**(a) Definition**

A farmed wetland pasture or hayland is a wetland that was drained, dredged, filled, leveled or otherwise manipulated and used for pasture or hayland (includes native pasture or hayland) as of December 23, 1985, and meets both of the following criteria:

- The area is inundated for at least 7 consecutive days during the growing season or saturated for at least 14 consecutive days during the growing season in most years (50% chance or more).
- The area has not been abandoned. (Refer to definition of abandonment found in Part 514.16). [link]

**(b) Supporting Documentation**

Use NRCS Engineering Field Handbook, Chapter 19, “Hydrology Tools for Wetland Determination” and the 1987 Manual, Parts III and IV to determine if the area is inundated for the requisite time. Aerial photographs or slides taken during the growing season and maps from flood frequency studies should also be used when available. Since the hydrology requirement must have a  $\geq 50\%$  probability of being present any given year, two-year frequency interval maps must be used. Site conditions must be thoroughly documented, using information such as—

- Aerial photographs and FSA slides
- Analytical processes to evaluate length of ponding or flooding from a single event
- Interviews with the person and other knowledgeable residents of the area
- Field indicators of surface water such as water marks, drift lines, and drowned or stressed crops
- Stream gage data.

**(c) Restrictions**

Farmed wetland pasture or hayland can be maintained and used to produce forage crops or other crops without loss of eligibility for USDA benefits. However, additional hydrologic manipulation after December 23, 1985 that does not meet the definition of maintenance may violate the WC provisions. The person must complete Form AD-1026 before conducting the manipulation. NRCS will use the scope and effect procedures in Part 516, Subpart B to evaluate whether hydrologic manipulation meets the definition of maintenance.

If a producer wants to restore wetland characteristics to FWP areas and at the same time prevent the areas from being considered abandoned, he or she must document hydrologic and vegetative baseline conditions with NRCS prior to restoring wetland characteristics.

**(d) Procedures for Identifying Farmed Wetland Pasture or Hayland**

The following procedures shall be used to identify farmed wetland pasture or hayland (FWP):

STEP	ACTION
1	<p>Consult aerial photographs, crop records and other resources to determine if the area was manipulated prior to December 23, 1985 for use as pasture or hayland, whether it meets the hydrologic criterion of Farmed Wetland Pasture, and whether it has been abandoned.</p> <p>Determine if the site has been abandoned without the abandonment being part of an approved plan (documentation of baseline conditions). If the area meets abandonment criteria, it should be labeled W (unless other manipulation has occurred to the extent that it is a converted wetland – see Part 514.15) [link]. If the site has been manipulated since 12/23/85 beyond the scope and effect of any prior manipulation, it may meet the Converted Wetland criteria.</p>
2	<p>A site visit must be conducted using appropriate wetland delineation tools, to verify site conditions and determine if the conditions observed on aerial photographs are consistent with the landscape of the site. If not, additional field work or review of aerial photographs or other resources may be required to determine the agricultural use and the hydrology of the site on December 23, 1985.</p> <p>If necessary, use Hydrology Tools to assess the effects of drainage and/or to determine if aerial photographs reflect “normal” precipitation conditions (see Part 514.06(b). [link]</p>

## 514.23 Abandonment

### (a) Description

Abandonment is the cessation of **active** crop or forage production on areas labeled Farmed Wetland (FW) or Farmed Wetland Pasture and Hayland (FWP) for five consecutive years. FW and FWP areas that are determined to be abandoned will be labeled Wetland (W). An area will **not** be considered abandoned when either of the following occurs:

- It is enrolled in a conservation set-aside program or a state or federal wetland restoration program, other than USDA perpetual easements such as the Wetland Reserve Program (WRP) or the Emergency Watershed Protection Program (EWPP). Hydrologic and vegetative baseline conditions and restoration activities must be documented before the site is enrolled. Restoration is defined in Part 515.10.
- NRCS documented hydrologic and vegetative baseline conditions and restoration activities **before** active crop or forage production ceases. A certified wetland determination conducted by NRCS can be used to verify baseline conditions. Documentation of baseline conditions should include a scope and effect determination of drainage systems to help ensure that the landowner returns the wetland to the water regime that existed prior to the wetland restoration. See Part 516 for more information.

Note— Areas labeled CW, CW+year, and PC are **NOT** subject to abandonment. Restored CW and CW+year areas will revert to the label that applied before the conversion.

This definition of abandonment is applicable only for compliance with the Act. Regulations governing the Clean Water Act may provide different or additional criteria for abandonment, particularly with regard to PC areas. Producers who are planning to abandon PC areas should be advised to discuss their plans with the COE prior to proceeding.

### (b) Determination of Abandonment for FW and FWP

- Areas labeled FW – In order to demonstrate that the area has not been abandoned, the producer must be able to document that an agricultural commodity crop has been produced on the area at least once every five years during the growing season and that drainage structures have been maintained to function at or near their as-built capacity (see Scope and Effect procedures in Part 516).
- Areas labeled FWP – In order to demonstrate that the area has not been abandoned, all drainage structures must have been maintained to function at or near their as-built capacity, and the producer must have controlled woody vegetation.

When making a determination of abandonment, an NRCS employee must review the following types of records and document all findings:

- Commodity crop production records to determine if a commodity crop has been produced at least once every five years, for FW
- Aerial photographs, including color slides and color infrared photography to determine the status of hydrology manipulations and cropping
- Drainage district or other drainage records to assess maintenance of drainage structures

**(c) Manipulation on Land Considered Abandoned**

Drainage systems may not be reinstalled or maintained if the land has been abandoned and wetland criteria are met. Such land will be identified as wetland (W) and any maintenance or manipulation of existing systems that results in conversion will cause the area to be labeled converted wetland (CW or CW+year).

Maintenance of drainage outlets for upstream PC, FW, or FWP through the area considered abandoned is allowed, as described in Part 516, Subpart B.

## Subpart C —Labels: Natural and Artificial Wetlands

### 514.30 Wetlands (W)

#### (a) Definition and Criteria

Wetlands that are labeled (W) are those areas that meet the three wetland criteria and have typically not been manipulated by altering hydrology and/or removing woody vegetation. Wetland includes areas that have been abandoned, as described in Part 514.23. Wetland criteria are described in Part 514.03. [link]

Wetlands may be planted to produce an agricultural commodity after December 23, 1985, as long as **all** of the following requirements are met:

- Production is possible as a result of a natural condition, such as drought or normal seasonal hydrologic conditions (see Part 515.30)
- Water regimes are not manipulated
- Woody vegetation with stumps is not removed
- Normal tillage does not fill, level, or otherwise cause conversion of the wetland

**NOTE:** Removal of herbaceous vegetation is not considered manipulation, provided it is conducted by mowing or normal tilling. Grading, landleveling or landclearing is considered manipulation. See Part 515, Subpart D for procedures to determine whether the wetland can produce an agricultural commodity under natural conditions.

#### (b) The Wetland Label

The wetland delineation tools described in Part 514, Subpart A, are used to assess wetland criteria. These tools include the onsite procedures described in Part 514.07 and the 1987 Manual. If a site currently meets all three of the wetland criteria, or would meet all three wetland criteria under normal circumstances, that site is further evaluated to determine if the land use ***as of December 23, 1985*** qualifies it to be any of the following:

- Prior-converted cropland
- Farmed wetland
- Farmed wetland pasture
- Artificial wetland
- Manipulated wetland
- Converted wetland

These wetlands or former wetlands are labeled and described in Parts 514.20 through 514.40. If the site ***does not*** meet the requirements for any of the labels listed above, apply the **WETLAND (W)** label to the land.

#### (c) Restrictions

Any manipulation to wetlands that results in a conversion (an activity that is for the purpose or makes possible production of an agricultural commodity –see Part 510.04 link) may result in a violation of the WC provisions. Activities that do not constitute conversion may still be regulated by the COE under Section 404 of the Clean Water Act, or be subject to state or local laws. Drainage structures that were constructed through a wetland (W) prior to

December 23, 1985, which have been maintained by the producer, and which serve as an outlet for drainage systems of upstream PC, FW, and FWP may be maintained to the scope and effect of the drainage as it existed on December 23, 1985 but may not be improved. These include structures operated and maintained as drainage outlets. See Part 516, Subpart B for policy and procedures to use in calculating the scope and effect of the original drainage.

Producers should be advised to avoid impacts to wetlands during drainage maintenance activities. If drainage maintenance converts a wetland in violation of the WC provisions, the producer may need to restore the wetland or mitigate the loss of wetland functions in order to remain eligible for USDA program benefits (see Part 515 Subpart B). NRCS should also provide information to producers regarding the need to contact the appropriate state and federal agencies to ascertain permitting requirements for drainage maintenance activities.

To prevent loss of eligibility associated with conversion of wetlands via drainage, the producer should provide documentation on the drainage system prior to conducting the maintenance. Documentation should include the following:

- Any existing wetland easements
- Survey of the drainage system as it currently exists, with sufficient detail to evaluate factors affecting drainage of upstream PC, FW, or FWP
- Documentation of the scope and effect of the drainage system that existed on December 23, 1985
- Proposed drainage system maintenance activities, including structures and designs
- Proposed dates of implementation and completion

Cropping and mechanical harvest of hay within the wetlands affected by maintenance will be allowed to the extent that it was possible for those activities prior to the maintenance of drainage capacity. Placement of excavated material associated with the maintenance activities may constitute a conversion under the Act. In addition, if the wetland is jurisdictional for CWA purposes, the participant should contact the COE if spoil is to be placed in the wetland.

Wetlands manipulated during any maintenance activities will be labeled WX (see Part 514.31). All other pre-existing wetland labels will remain as previously determined.

## **514.31 Manipulated Wetlands (WX)**

### **(a) Definition**

Wetlands that have been manipulated as defined in Part 516 Subpart B, will be labeled as Manipulated Wetlands (WX) under the following conditions:

- The manipulation was not for the purpose of producing an agricultural commodity
- The manipulation did not make production of an agricultural commodity possible

Manipulated wetlands may or may not meet wetland criteria depending on type and degree of manipulation. If production is later made possible or a commodity crop is ever produced on the manipulated wetland, it will become a converted wetland (CW+Year). Open water areas, if they have been excavated in wetlands, are typically labeled WX. Wetlands manipulated for orchard, grove, vineyard, cranberry or other crops that are not annually tilled are typically labeled WX.

**(b) Examples of WX**

Activities that result in manipulated wetlands (WX) include, but are not limited to, the following (these activities may be regulated under the CWA or state and local laws):

- An open ditch constructed through a forested wetland removes the hydrology, but the trees are not removed and the manipulation does not make production possible
- Trees cut with stumps left in place and there is no manipulation of hydrology. Manipulation of the area does not make production possible
- Piles of trees, stumps and soil covering an area, but the area cannot be cropped without additional land clearing activities
- Rocks piled in wetlands
- Construction of roads, buildings, or other activities that do not make production possible
- Construction of stock watering or irrigation ponds
- Installation of orchards, groves or vineyards.

**(c) Supporting Documentation**

Use the procedures in Part 514.07 and 514.08 for identifying WX areas. These procedures are to be supplemented by appropriate Mapping Tools as described in Part 514.

**(d) Restrictions**

Manipulated wetlands can be maintained, but not for the purpose of or making possible production of an agricultural commodity. To ensure compliance, a producer must complete Form AD-1026 before conducting any hydrologic manipulation to ensure that the proposed manipulation is not for the purpose of and does not make production of an agricultural commodity possible on the WX or any other wetland. Activities that manipulate wetlands may be subject to the Clean Water Act or other wetland laws and regulations.

**(e) Procedures for Identifying Manipulated Wetlands (WX)**

The following procedures shall be used to identify Manipulated Wetlands (WX):

STEP	ACTION
1	Use appropriate wetland delineation tools as described in Part 514, Subpart A to assess site conditions. These tools include Hydrology Tools and the onsite procedures described in Part 514.07 and the 1987 Manual. Be aware that wetland criteria may be altered or removed as a result of manipulation.
2	Review aerial photos or FSA slides to check for land use changes that may indicate wetland manipulation or conversion.

**514.32 Artificial Wetland (AW)**

**(a) Definition**

An artificial wetland is land that was formerly non-wetland under natural conditions, but now exhibits wetland characteristics because of the influence of human activities. These areas are

exempt from the WC Provisions of the Act and thus can be drained, removed or otherwise manipulated without causing ineligibility for USDA program benefits.

Examples of Artificial Wetlands include:

- A wetland created incidentally by an irrigation delivery system or other adjacent human activity on an area that was formerly upland.
- Ponds constructed in uplands. These may be labeled as AW even if all or part of these areas may be too deep to allow wetland vegetation to grow (i.e., they do not meet the hydrophytic vegetation criteria). These areas may be jurisdictional under the Clean Water Act. If a pond was constructed wholly or partially in wetlands, the portion of the pond that was constructed in wetlands is **not** AW. These areas should be labeled WX if agricultural production is not possible.
- Wetlands created by beaver activity, unless they occurred on natural wetland areas and are supported by a hydric soil.

**(b) Cautions**

The following cautions regarding AWs are provided:

- Increasing the hydrology on an existing wetland does not make the wetland an AW. Such an area would remain wetland unless the hydroperiod is increased to the point where wetland vegetation cannot survive, in which case it would be labeled WX.
- If a manmade pond or pit is created entirely within uplands it will usually not be considered jurisdictional by the COE. An exception may occur when the pond or pit has "naturalized" with the establishment of wetland vegetation. For NRCS purposes, the entire area should be marked as AW, but the person will be notified in writing to contact the COE prior to altering these areas.
- The COE or State wetland policy may require permitting of activity.

**(c) Procedure**

Use appropriate wetland delineation tools, as described in Part 514, Subpart A to assess wetland criteria. These tools include Hydrology Tools and the onsite procedures described in Part 514.07 and the 1987 Manual.

**Subpart D —Labels: Wetlands Converted After December 23, 1985**

**514.40 Converted Wetlands (CW or CW+Year)**

**(a) Definition**

A converted wetland is an area that was formerly wetland (e.g., W, FW, FWP, WX) and meets both of the following criteria:

- After December 23, 1985, has been drained, dredged, filled, leveled, or otherwise manipulated, including the removal of woody vegetation (including stumps), and any activity that results in impairing or reducing the flow, circulation, or reach of water
- The purpose or effect of the activity was to make production of an agricultural commodity possible or to increase production, such as—
  - Making an area farmable in more years or during different times of the year than it previously was; or
  - Increasing yield because of reduced crop stress.

For the purpose of the Act, the term “conversion” constitutes those activities that have the purpose or effect of making production of an agricultural commodity possible or to increase production. Wetlands that have been manipulated but that do not meet this requirement would be labeled WX.

If woody stumps are not removed, or if they are cleared from an area of land so small that the use of normal farming equipment is not possible (such as clearing a fence row), the manipulation is not considered conversion for purposes of the Act. **However, be aware of and track potential “piecemealing”, the incremental removal of woody vegetation that eventually affects a large enough area to make production possible.**

**(b) Examples of Manipulation that Convert Wetlands**

This table provides examples of manipulations that are considered conversion, if conducted for the purpose of making, or that make agricultural commodity production possible.

Type	Actions that may cause conversion of wetlands
New Construction; grading, land leveling	Construction of open ditches or subsurface drains into, or outlets through wetlands
	New construction of a diversion that decreases flow of water to a wetland
	Construction of dugouts, or other ponds, dikes, etc. in wetlands resulting in fill being placed in a wetland, or that impact wetland hydrology.
Woody Vegetation	Stems, stumps, and brush removed after December 23, 1985, if for the

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Type	Actions that may cause conversion of wetlands
Removal	purpose of, or made production of agricultural commodity or mechanical harvest of forage possible.
Placement of Fill	Placing earth (including spoil from drainage system maintenance), woodchips, manure, or any other solid material in a wetland
Hydrologic Manipulation	Any manipulation of the hydrology by means of onsite or offsite activities that exceed the original scope and effect of hydrologic manipulations that occurred prior to December 23, 1985.

**NOTE**— The examples of manipulation described in the above table may also be subject to the Clean Water Act. If within the course of administering their responsibilities NRCS personnel observe such manipulations, they should inform the participant that the activity may be subject to the Clean Water Act, and, at the discretion of the State Conservationist, they may notify the local COE Regulatory Office of the nature and location of observed activity.

**(c) Examples of Manipulation That is Not Considered Conversion**

This table contains examples of actions not considered manipulation and manipulation that is not considered conversion—

Type	Action not considered manipulation	Manipulation not considered conversion
Woody Vegetation Removal	Removal of woody vegetation <b>without removal of stumps</b> , such that the area cannot be cropped or established for mechanical harvests of hay or pasture.	<ul style="list-style-type: none"> <li>• Removal of woody vegetation, including stumps, from an area so small that production on the area is not possible, such as clearing a fence line in a manner that will not permit the use of normal farming equipment on the cleared area.</li> <li>• Removal of seedlings or young trees by mowing or normal plowing.</li> </ul>
Herbaceous Vegetation Removal	Removal of herbaceous vegetation is not considered manipulation, provided it is conducted by mowing or normal tilling.	
Tillage	Normal tillage practices and operations with tillage equipment accepted as normal in the local area. (Tilling does not include redistribution of surface material in a manner that converts wetland areas to upland, mechanized landclearing, or deep ripping in wetland areas.)	

Type	Action not considered manipulation	Manipulation not considered conversion

**(d) Date of Conversion**

When the Act was signed in 1985, it stated that persons shall be ineligible for USDA benefits if an agricultural commodity is planted on wetland that was converted after December 23, 1985. Revisions to the Act in 1990 stated that persons shall be ineligible if they convert wetlands after November 28, 1990 to the extent that production of an agricultural commodity is possible. For this reason, NRCS must determine whether a wetland was converted before or after November 28, 1990. Conversions made after 12/23/85 but prior to 11/28/90 will be labeled CW. Conversions made after 11/28/90 will be labeled CW+year (this is the year the conversion occurred), with the following exception:

Conversions by a county water drainage board or similar entity (even if the wetland was converted after 11/28/90), will be labeled CW (see Part 515.50(d)).

Wetland conversion activities will be assessed to determine if any exemptions to the Act apply to the conversion.

**(e) Supporting Documentation**

Use procedures in Part 514.07 for identifying wetlands (use atypical situations where wetland criteria have been altered or removed). These procedures are to be supplemented by appropriate Mapping Tools and the 1987 Manual as described previously in this Part.

**(f) Restrictions on Converted Wetlands (CW)**

Manipulation that was performed between December 23, 1985, and November 28, 1990, that caused an area to become a converted wetland (CW), may be maintained to the scope and effect of the original manipulation. Subsequent manipulation that exceeds the original scope and effect will cause the area to become a converted wetland (CW+year) under the Act and the person will be ineligible for USDA benefits unless an exemption applies. Production of an agricultural commodity on the CW will also result in ineligibility for USDA program benefits for that crop year. The area will be labeled CW if the manipulation is the result of activity by a state, county, drainage district, or similar entity (see Part 515.50(d)) [link]. An area will also be labeled CW if it was converted such that production of an agricultural commodity might be possible, but the conversion is for a non-agricultural use (e.g., an area manipulated for construction of a septic drain field). The person will be ineligible for USDA benefits if an agriculture commodity is planted or forage is harvested by mechanical means on CW areas.

**(g) Labeling Converted Wetlands that are restored**

If a converted wetland is restored by a participant, in accordance with a restoration plan approved by NRCS, the area will revert to the label that applied before the conversion.

**(h) Exemptions**

Converting wetlands will not cause a person to be in violation of the WC provisions if the conversion is determined to be exempt. For conversions that qualify for the mitigation exemption, minimal effect exemption, third party exemption, or other exemptions, label the

site “CW” with the applicable exemption (e.g., CW-ME, CW-MIW or CW-TP). See Part 515 for information and criteria for exemptions.

**(i) Procedures for Identifying Converted Wetlands**

The following table shall be used to identify converted wetlands (CW or CW+Year):

<b>STEP</b>	<b>ACTION</b>
<b>1</b>	Use appropriate wetland delineation tools as described in Part 514, Subpart A to assess wetland criteria. These tools include Hydrology Tools and the onsite procedures described in the Part 514.07 and the 1987 Manual.
<b>2</b>	Review 1985, 1990, and/or other appropriate year aerial photos or FSA slides to confirm date of potential wetland conversion. FSA receipts or other records may also be used to help determine the date. For wetlands converted between 12/23/85 and 11/28/90, it is generally not essential to know the exact crop year of conversion. For wetlands converted after 11/28/90, the crop year must be determined using the best available data. This information is provided to FSA to determine the years the person may be ineligible for USDA program benefits.

## **Subpart E — Labels: Not Inventoried and Nonwetland Labels**

### **514.50 Use of the Not Inventoried (NI) Label**

#### **(a) Definition**

Not Inventoried (NI) lands are areas within a tract or subject area where a wetland determination has not been made. Landowners should be instructed to notify NRCS before conducting any activities that may impact potential wetlands in these areas, to protect their eligibility for USDA benefits.

NI areas may or may not contain wetlands, and are not a certified part of the wetland determination. As the description indicates, presence of the three wetland criteria has not been determined. Therefore, any areas labeled NI are subject to change when site conditions are evaluated.

#### **(b) Supporting Documentation**

Since areas labeled NI are not evaluated, no documentation is required in support of this label.

#### **(c) Restrictions**

Producers will be advised in writing via the certified wetland determination, that he or she is responsible for notifying NRCS before conducting activities that may impact wetlands in areas labeled NI, and that failure to do so may result in noncompliance with the WC Provisions.

### **514.51 Nonwetlands (NW)**

#### **(a) Definition**

Nonwetland is land that did not meet wetland criteria on 12/23/85 and does not meet wetland criteria at the time of the determination, excluding PC and CW.

Deepwater habitat may be labeled NW, if it is necessary to make a determination of eligibility for these areas.

NW will be used for land that was converted prior to 12/23/85 and did not meet wetland criteria on 12/23/85, but an agricultural commodity was not produced and the area was not managed for pasture or hay.

#### **(b) Supporting Documentation**

Using appropriate mapping tools as described previously in Part 514, Subpart A and onsite determination procedures as described in Part 514.07, document the presence or absence of the three wetland criteria.

**(c) Procedure for Identifying Nonwetlands**

Use appropriate wetland delineation tools, as described in Part 514 Subpart A, to assess wetland criteria. These tools include the onsite procedures described in Part 514.07 and the 1987 Manual.

**Other Waters**

Other waters include streams, lakes, ponds, rivers, and ditches, that are not wetlands as defined in the Act.

Other waters are not subject to the WC provisions; however, they may be regulated under the Clean Water Act. If manipulation will occur in other waters, advise the person to contact the COE for an onsite inspection of the area. Other waters are not labeled as such on certified wetland determinations. They may be labeled NW or NI.

Caution: A vegetated wetland fringe often occurs along natural ponds, lakes, streams, rivers and ditches. These wetlands are subject to the Act and to Clean Water Act Section 404, and are delineated in accordance with procedures in Part 514.07 when necessary to distinguish them from the adjacent other water (i.e., for purposes of compliance with the WC provisions).

## Subpart F — Certification

### 514.60 Certification of Wetland Determinations

#### (a) Regulatory Language (7 CFR §12.30(c))

Certification of a wetland determination means that the wetland determination is of *sufficient quality to make a determination of ineligibility for USDA program benefits* (16 U.S.C. §3822(a)(3)). All certified wetland determinations must be completed in accordance with the determination procedures outlined in Part 514, Subparts B and C.

#### (b) Job Approval Authority Requirements

Certified wetland determinations must be completed by a qualified NRCS employee, as determined by the State Conservationist. Qualified employees must meet the following criteria:

- Have completed all the required training, including update courses.
- Has the appropriate job approval authority and classification.
- Has demonstrated proficiency in making certified wetland determinations.

#### (c) Effective Date of Certifications

All wetland determinations made after *November 28, 1990* and provided to the landowner with appeal rights are considered certified wetland determinations (PL101-624 – Nov. 28, 1990).

In accordance with the Act at 16 U.S.C. §3822(a)(4), “A final certification...shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary.”

Accordingly, NRCS will review a previously certified wetland determination *if requested* by any affected person. All requests for review of a wetland determination must be made on form AD-1026.

#### (d) Detrimental Reliance on a Certified Wetland Determination

A person will not be ineligible for program benefits as a result of taking an action in reliance on a certified wetland determination that did not correctly identify the area as wetlands subject to the Act (including farmed wetland, farmed wetland pasture or manipulated wetland).

#### (e) Appeals of Certified Wetland Determinations

Prior to finalizing a certified wetland determination, NRCS will notify the person affected by the certification and provide an opportunity to appeal it. NRCS will certify the wetland determination as final 30 days after providing the person notice of certification or, if an appeal is filed with USDA, after the administrative appeal procedures are exhausted (See Part 521 and the Conservation Programs Manual, Part 510 for NRCS policy and procedure regarding appeals). NRCS appeal procedures are contained in 7 CFR Part 614.

In the case of an appeal, NRCS must review and certify the accuracy of the determination for all lands subject to the appeal to ensure that it is accurate. Prior to a decision being rendered

on the appeal, NRCS will conduct an onsite investigation (known as a reconsideration) of the subject land.

**(f) Preparing the Certified Wetland Determination**

NRCS will delineate all wetlands subject to the WC provisions by outlining the boundaries of the wetland on aerial photography, digital imagery, or other graphic representation. If possible, NRCS will use GPS to digitally map the wetland boundary in the field and to import that data onto digital orthophotoquadrangle maps (DOQ's) or other GIS digital photo imagery. Refer to Part 514, Subpart B to determine the appropriate labels to apply to the delineated wetlands.

The complete boundaries and acreage of all areas within the tract that were delineated and identified must be shown on the map, including areas identified as NW. All other parts of the tract, outside of the delineated areas, will be labeled NI. This must be clearly depicted on the certified wetland determination map. Use the label and acreage information from the map to prepare the CPA-026e [[Link to Form and Instructions](#)]. Provide a copy of the CPA-026e, along with the supporting documentation, to the producer and FSA.

**(g) Communicating with the Landowner**

Prior to conducting a site visit, NRCS employees should contact the producer and landowner and provide them the opportunity to be present during the site visit. This will allow NRCS to explain the procedures and requirements of the Act and to acquire background information on the site from the producer and landowner. Good communication with the producer and landowner has been shown to improve their understanding of the conservation compliance provisions and reduce the numbers of appeals.

## Subpart G — Labels-- Authorized Use, Maintenance, and Improvements

### 514.70 Authorized Use, Maintenance and Improvements

The following table provides a summary of the wetland types, labels, criteria, authorized uses and authorized maintenance activities for compliance with the WC provisions of the Act. Persons planning maintenance activities are to be advised in writing to contact the COE for Clean Water Act permit requirements.

Many old wetland determinations used labels that are not included in this part. When a certified wetland determination is conducted on a site, either because the existing determination is not certified or the participant requested a review of a certified determination, NRCS will apply the criteria provided in this part and label the area accordingly. This will in effect update the old label. Labels on areas for which a certified determination is not required do not need to be updated. Updating the labels will not affect a participant's eligibility under the Act, as the criteria for identifying wetlands and exemptions have not changed.

Areas that were labeled "Commenced Conversion" (commenced conversion determinations must have been requested from FSA by September 19, 1988 and the manipulation or conversion must have been completed by January 1, 1995) will be labeled PC or FW, as applicable.

**NOTE:** Use the paragraph reference to locate additional information on the wetlands identified in this table.

Name and Label	Criteria For Determination	Authorized Activities	Authorized Maintenance	Paragraph Reference
(AW) Artificial Wetland	Man-made wetlands on areas previously nonwetland.	No restrictions.	No restrictions.	Part 514.23 [link these references]
(CW-CME) Categorical Minimal Effect Exemption	Converted wetland is exempt because the activity is conducted per the approved list of Categorical Minimal Effect exemptions identified in 7 CFR Part 12.	Per conditions of the approved list.	Per conditions of the approved list.	Part 515.01
(CW-CPM) COE Permit w/ Mitigation	Converted wetland is exempt because the activity is authorized by a COE permit and satisfies the mitigation requirements of the Act	Per COE permit conditions.	Per COE permit conditions.	Part 515.20
(CW)	Converted after 12/23/85 and	Additional	Maintenance	Part 514.14

Name and Label	Criteria For Determination	Authorized Activities	Authorized Maintenance	Paragraph Reference
Converted wetland	before 11/28/90	manipulation, or production of agricultural commodities or forage for mechanical harvest will cause ineligibility.	allowed to original scope and effect of drainage system.	
(CW) Wetland Converted by state, county, drainage district, or similar entity	Converted after 12/23/85 and beyond a person's direct control, but not considered third party (TP).  Includes converted W, FW, and FWP.	Production of agricultural commodities or forage for mechanical harvest, or additional manipulation, will cause ineligibility.	Maintenance allowed to original scope and effect of system prior to conversion.	Part 514.14; Part 515.50
(CW+year) Converted wetland	Converted after 11/28/90	Conversion causes ineligibility, regardless of whether production of agricultural commodity occurred.	Not applicable.	Part 514.14
(FW) Farmed Wetland	Manipulated and cropped before 12/23/85.  Includes potholes, playas, and pocosins, that are seasonally inundated for at least 7 consecutive days or saturated for 14 days during the growing season.  If the area is not potholes, playas, or pocosins, it must be seasonally flooded or ponded for 15 consecutive days during the growing season.  Not abandoned.	May be farmed as it was as of 12/23/85.	May be maintained to the extent that existed before 12/23/85.	Part 514.12
(FWP) Farmed Wetland Pasture and Hayland	Utilized for pasture or hay but not planted to an agricultural commodity prior to 12/23/85.  Is inundated for at least 7 consecutive days or saturated for	May be farmed as it was as of 12/23/85 without the removal of woody vegetation.	May be maintained to the extent that existed before 12/23/85	Part 514.13

Name and Label	Criteria For Determination	Authorized Activities	Authorized Maintenance	Paragraph Reference
	14 days during the growing season. Not abandoned.			
(CW-MIW) Mitigation Exemption	Converted wetland is exempt because mitigation has occurred according to an approved plan.	As stipulated in the mitigation agreement.	As stipulated in the mitigation agreement.	Part 515.10
(CW-ME) Minimal Effect Exemption	Converted wetland is exempt because conversion is determined to have a minimal effect, both individually and cumulatively, on the wetland functions in the watershed.	As stipulated in the minimal effect agreement, if applicable.	Only those activities stipulated in the minimal effect agreement, if applicable.	Part 515.01
Mitigation Site (MIW)	Site of wetland restoration, enhancement, or creation serving as mitigation for CW-MIW site	As stipulated in Mitigation Plan/Agreement	As stipulated in Mitigation Plan/Agreement	Part 515.10
(NI) Not Inventoried	Areas within subject land where no wetland determination was completed.	None until a certified determination is completed for the area labeled NI.	None until a certified determination is completed for the area labeled NI.	Part 514.15
(NW) Nonwetland	Did not meet wetland criteria on 12/23/85 and does not currently meet wetland criteria.	No restrictions.	No restrictions unless manipulation would convert adjacent wetlands.	Part 514.20
(PC) Prior Converted Cropland	Wetland converted to cropland or improved pasture before 12/23/85 and as of 12/23/85 did not meet farmed wetland, farmed wetland pasture or wetland hydrology criteria.	No restrictions.	No restrictions unless manipulation would convert adjacent wetlands.	Part 514.21
(CW-TP) Third Party Exemption	Converted wetland is exempt because the area was converted after 12/23/85 by a third party who is not associated with the producer, and without the producer's collusion, fraud, scheme or device.	May not be used to produce an agricultural commodity unless otherwise exempt.	Only the third party can maintain.	Part 515.50

Name and Label	Criteria For Determination	Authorized Activities	Authorized Maintenance	Paragraph Reference
	A third party does not include drainage districts or other local government entities.			
(W) Wetland	Meets wetland criteria. Not converted after 12/23/85. Also, includes areas previously identified as FW or FWP, which have been abandoned.	May be farmed under natural conditions without removal of woody vegetation.	At level needed to maintain original system on FW, FWP, and PC. Must not convert additional wetlands or exceed original scope and effect of drainage system.	Part 514.11
(WX) Wetlands that have been manipulated	Wetlands that have been manipulated but not for the purpose of or making possible production of an agricultural commodity.	Would cause ineligibility if production was later made possible.	No restrictions as long as production not made possible including on an adjacent wetland.	Part 514.22

## **Part 515 — Wetland Conservation Exemptions and Good Faith Waivers**

### **Subpart A — Minimal Effects Exemption**

- 515.01 Minimal Effect Exemption**
- 515.02 Minimal Effect Evaluation and Determination**
- 515.03 Minimal Effect Notification and Agreements**
- 515.04 Monitoring and Recording Minimal Effect Exemptions**

### **Subpart B — Mitigation Exemption**

- 515.10 Background (16 U.S.C. §3822(f))**
- 515.11 Wetland Mitigation Plans and/or Agreements**
- 515.12 Mitigation Plan Development**

### **Subpart C — CWA Section 404 Permit with Mitigation**

- 515.20 Background (16 U.S.C. §3822 (f(4)))**

### **Subpart D — Wetlands Farmed Under Natural Conditions**

- 515.30 General Information**

### **Subpart E – WC Good faith Waivers**

- 515.40 Good Faith Waivers of Ineligibility by FSA**

### **Subpart F – Third Party Exemption**

- 515.50 Third Party Exemption**

## Subpart A — Minimal Effect Exemption (ME)

### 515.01 Minimal Effect Exemption (16 U.S.C. §3822(f))

#### (a) Background

NRCS may grant a producer an exemption when he or she converts a wetland through an action that has a **minimal effect** on the individual and cumulative wetland functions in an area.

NRCS will label converted wetlands that qualify for these exemptions CW-ME.

#### (b) CWA Permit Requirements

A producer is not exempted from Clean Water Act Section 404 permit requirements on the basis of being granted a minimal effect exemption. Therefore, all persons granted a minimal effect exemption will also be provided with the appropriate contact information for the COE in order to seek evaluation of an activity under Section 404 of the Clean Water Act.

#### (c) Types of Minimal Effect Exemptions

Minimal Effect exemptions may or may not require special conditions, as described below—

Class	Description
Minimal Effect without Conditions (ME)	Actions which, upon evaluation with an approved functional assessment procedure, are determined to have a minimal impact on wetland functions. (See Part 516 for functional assessment procedures).
Minimal Effect with Conditions (ME)	Actions which, upon evaluation with an approved functional assessment procedure, are found to have a minimal effect on wetland functions <i>if special conditions are applied</i> .

#### (d) State Conservationist Responsibilities for Developing Minimal Effect Procedures

The State Conservationist, in consultation with the State Technical Committee, will develop and issue minimal effect procedures for assessing wetland functions, making determinations, and approving exemptions.

### 515.02 Minimal Effect Evaluation and Determination

#### (a) Components of the Minimal Effect Determination

The minimal effect evaluation is the technical basis for the minimal effect determination and will include—

- Application of an approved wetland functional assessment methodology (see Part 516) to estimate the amount of wetland function that will be or was lost as a result of wetland conversion

- Analysis of the secondary<sup>1</sup> and cumulative<sup>2</sup> effects of the loss of wetland functions to the watershed.
- Identification of preemptive “red flag” or cautionary “yellow flag” conditions that could preclude a given conversion activity from qualifying for a minimal effect exemption. Examples include: threatened or endangered species habitat, existence of rare plant communities, location within an easement, etc.
- Threshold(s) for the functional assessment output data, i.e., a quantitative value at which a converted wetland would be eligible for the exemption.

**(b) Minimal Effect Evaluations Before Conversion Has Occurred**

The minimal effect evaluation includes an assessment of the existing functions of the wetland and the reduction in function anticipated as a result of the conversion activities. A functional assessment will be conducted when a producer requests a Minimal Effect Exemption. The functional assessment will be based on site conditions and must be documented using approved functional assessment worksheets.

The producer must provide NRCS with the following information prior to the required site visit—

- Description of the proposed activity.
- Location of the proposed activity.
- Any existing restrictions on the property in question, such as easements or permit conditions.

**(c) Minimal Effect Evaluations After Conversion Has Occurred**

If a wetland conversion has already occurred, NRCS will use the best available information to complete the functional assessment. The following information sources (not all inclusive) should be considered—

- Current and previous site visits and documentation
- Prior wetland determinations and/or delineation
- State wetland mapping conventions
- Interviews with the landowner
- Reference sites of the same hydrogeomorphic (HGM) subclass nearby in the watershed

**(d) Minimal Effect Determination**

Following completion of the minimal effect evaluation, NRCS must determine whether the conversion activities will have or have had a minimal effect on the existing wetland functions in the watershed. If NRCS determines that the effect is or will be minimal, the NRCS representative will approve a minimal effect exemption.

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1 **Secondary effects** are those that are "caused by an action and are later in time or farther removed in distance but are still reasonably foreseeable" (40 CFR §1508.8). Generally, these impacts are induced by the initial action. They comprise a wide variety of secondary effects such as changes in land use, water quality, economic vitality and population density.

2 **Cumulative effects** are impacts which result from the incremental consequences of an action when added to other past and reasonably foreseeable future-actions (40 CFR §1508.7). These impacts are less defined than secondary effects. The cumulative effects of an action may be undetectable when viewed in the individual context of direct and even secondary impacts, but nonetheless can add to other disturbances and eventually lead to a measurable environmental change.

## **515.03 Recording Minimal Effect Exemptions**

### **(a) Documentation of Minimal Effect Exemptions**

NRCS will prepare and keep a copy of the following in the participant's case file—

- Notification to the participant of the determination
- Revised NRCS-CPA-026e and certified wetland determination map
- Minimal Effect Agreement if specific conditions are required to ensure that the effect remains minimal. See Part 515.04.

### **(b) Notification to Participant**

NRCS will notify the person of the determination in writing. This letter will specify that the ME exemption applies only for Food Security Act purposes. The letter will also state that any wetland manipulations or activities remain subject to Federal, State, or local restrictions, existing easements of record, or permit restrictions on the property and activity in question.

The NRCS representative shall issue a revised NRCS-CPA-026E and certified wetland determination map to the person indicating the area is ME. Label the area on the FSA and NRCS aerial base maps CW-ME.

### **(c) FSA Notification**

Provide FSA a copy of any revised NRCS-CPA-026E with FSA aerial photocopy.

## **515.04 Minimal Effect Agreements**

### **(a) Agreement Requirements**

A minimal effect agreement is required if specific conditions are required to meet and/or maintain the minimal effect exemption.

Agreements must specify that the exemption applies only for Food Security Act purposes and that the activity remains subject to Federal, State, or local restrictions, existing easements of record, or permit restrictions on the property and for the activity in question. An agreement must be signed by the person prior to granting the exemption and finalizing the CPA-026e.

If an agreement is necessary, it will stipulate the terms and conditions with which the person conducting the activity must comply in order to meet the requirements of the exemption. Items that should be specifically addressed include—

- Any existing easement or permit restrictions
- Location of the wetland subject to the minimal effect determination
- Limitations and conditions, if any, on the extent of the activities
- Operation and maintenance of any structures
- Signature of the participant and NRCS
- Date of signature

If there are no additional or special conditions attached to the ME determination, *an agreement is not necessary*.

## **515.05 Monitoring Minimal Effect Exemptions**

### **(a) Agreement Conditions**

Conditions in the Minimal Effect Agreement may require monitoring by NRCS to ensure that the person meets or maintains the requirements of the exemption. Any monitoring requirements will be included in the Agreement.

### **(b) Wetland Label to Use if a Violation Occurs**

If a violation of the minimal effect agreement occurs—

- NRCS will request FSA-569 from FSA (see Part 517)
- The minimal effect exemption will be invalidated and the converted wetlands for which it applied will be relabeled CW+year (the year of the original conversion).

## Subpart B — Mitigation Exemption

### 515.10 Background

#### (a) General Information

According to the Act, no person shall be determined to be ineligible for USDA benefits for converting a wetland or producing an agricultural commodity on a converted wetland, if NRCS determines that the person has adequately mitigated for the lost wetland **acreage** and **functions** through the restoration of a converted wetland, the enhancement of a degraded wetland, or the creation of a new wetland (16 U.S.C. §3822(f, h)). NRCS will label the converted wetland CW-MIW. NRCS will label the wetland mitigation site MIW.

#### (b) Exceptions

The State Conservationist, in consultation with the State Technical Committee, may identify certain wetland types or classes that are not eligible for the mitigation exemption. These wetland types or classes are those for which NRCS determines that equivalent functional replacement within a reasonable period of time is not possible, or mitigation is not feasible for other reasons identified by the State Conservationist. Any type or class of wetland that a State Conservationist identifies as not eligible for this exemption will be published in the Federal Register.

#### (c) Mitigation Requirements

In order to be eligible for USDA benefits, a person who converts a wetland or produces an agricultural commodity on a converted wetland that is subject to the WC provisions must mitigate the loss of the **functions** and **acreage** of the converted wetland, unless another exemption applies. The person seeking a mitigation exemption must implement a mitigation plan and/or agreement as follows:

- NRCS and/or the producer must develop an approved wetland mitigation plan and/or agreement that replaces the wetland functions and acres lost as a result of the wetland conversion.
- The mitigation shall be completed in advance of or concurrent with the wetland conversion and/or the production of an agricultural commodity, as applicable.
- Mitigation may not be funded at the expense of the Federal government for either the direct or indirect costs for any of the following:
  - Wetland restoration, creation or enhancement to mitigate a converted wetland.
  - Acquisition of a site for use in mitigating a conversion.
  - Securing an easement (except if conducted under a mitigation banking pilot program established by USDA).
- Mitigation must occur on lands in the same 8-digit Hydrologic Unit Code (HUC) as the converted wetland (including regional mitigation banks), unless NRCS determines that it is ecologically preferable to conduct the mitigation outside of the 8-digit HUC. This decision and the rationale for it must be thoroughly documented in the administrative record.
- Mitigation (other than restoration of the converted wetland itself) must be completed on land where the owner has granted an easement to USDA.

#### (d) Granting a Mitigation Exemption

If all of the above conditions are met, NRCS may grant a mitigation exemption that will allow—

- Production of agricultural commodities on the wetland area granted an exemption.

- Eligibility to participate in those USDA programs that are subject to the WC provisions.

**(e) Ineligible Sites**

The following land is not eligible for use as a wetland mitigation site:

- Land enrolled in the following USDA financially assisted conservation programs –
  - Wetlands Reserve Program (WRP) wetland restoration easement for the length of the easement period.
  - Watershed Protection Program Floodplain Easement for the length of the easement period.
  - Conservation Reserve Program (CRP), enrolled either through the general signup, the continuous signup, or through the Conservation Reserve Enhancement Program (CREP) for the duration of the contract or easement period.
- Other Federal lands owned in fee title or easement, except for enhancement, if the fee/title easement holder agrees to such.
- Lands on which Federal funds were used to acquire an easement.
- Mitigation wetlands on which Federal funds are directly responsible for any of the following:
  - Creation
  - Restoration or enhancement
  - Acquisition
- Lands on which a lien is attached, unless the lien holder agrees to subordinate their interests.

**(f) Easement Requirement**

The person must provide an easement to USDA for the mitigation wetland in all cases except for restoration of the converted site or when the mitigation is provided as part of the Clean Water Act Section 404 permit exemption (16 U.S.C. §3822(f)(4)), in accordance with all of the following:

- Duration of Easement – The easement will be in effect for the length of time that the converted wetland is in agricultural use or is not restored to its previous wetland condition, whichever comes first.
- Easement Language – The easement must state that alterations to the mitigation wetland that will lower its functions are prohibited.
- Administration – Easements will be administered by the Commodity Credit Corporation (CCC).
- Recording the easement –
  - Easements on public lands must be recorded in the public land records.
  - The landowner must pay recording fees and survey costs, if required.
  - The landowner must certify that there is no lien on the land.
  - If the land is mortgaged, the mortgage holder must agree to subordinate his/her interest to the CCC easement.

For a copy of a standard wetland easement, see Conservation Programs Manual, (CPM) Part [514.63](#).

**(g) Three Types of Mitigation Authorized by the Act**

Three types of mitigation are authorized in the Act (16 U.S.C. §3822 (f)), and are defined as follows:

***Restoration of a wetland*** is manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural and/or historic functions to a former or degraded wetland.

For the purpose of tracking net gains in wetland acres, restoration is divided into the following categories:

- **Re-establishment** – The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former wetland. Re-establishment results in rebuilding a former wetland and results in a gain in wetland acres.
- **Rehabilitation** – The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions of a degraded wetland. Rehabilitation results in a gain in wetland function but does not result in a gain in wetland acres.

**Enhancement of a wetland** is manipulation of the physical, chemical, or biological characteristics on either an undisturbed or a degraded wetland site that will heighten, intensify, and/or improve specific wetland functions or change the growth stage or composition of the vegetation present, and is undertaken for specified purposes such as water quality improvement, flood water retention, or wildlife habitat improvement, enhancement may –

- Result in a change in wetland function(s) and can lead to a decline in other wetland functions, but does not result in a gain in wetland acres.
- This term includes activities commonly associated with enhancement, management, manipulation, and directed alteration.
- Due to the potential loss of other functions, enhancement may not be adequate to mitigate for lost wetland functions.

**Creation of a wetland**, or “establishment”, means the manipulation of physical, chemical, or biological characteristics to develop a wetland on an upland or deepwater site, where a wetland did not previously exist. Establishment results in a gain in wetland acres.

**Preservation of a wetland is not an authorized form of mitigation under the FSA, although it may be acceptable under the Clean Water Act or local wetland regulatory requirements.**

#### **(h) Role of Wetland Enhancement and Rehabilitation in Mitigation**

Enhancement and Rehabilitation result in a gain of wetland functions, but not a gain of wetland acreage. In situations where the mitigation consists of wetland creation or reestablishment that replaces the acres, but does not adequately replace all of the functions of the converted wetland, additional mitigation in the form of enhancement or rehabilitation on a degraded wetland can be used to mitigate for those specific wetland functions. However, enhancement, if it increases a specific function or functions beyond what existed naturally, will generally result in the loss of other wetland functions. Enhancement that results in reduction of existing wetland functions should not be used for mitigation.

**Example 1:** A wetland conversion will result in a loss of 2.5 acres of forested wetlands. The mitigation plan provides 2.5 acres of wetland reestablishment, achieved by blocking ditches to restore hydrology and planting trees to reestablish hydrophytic vegetation on a prior converted area that is currently being farmed. The functional assessment indicates that the restoration activity will replace the functions of the converted wetlands. However there will be a temporal loss of wetland functions associated with the time it takes for the mitigation site to become a fully functional forested wetland. Therefore, additional mitigation is needed in the form of rehabilitating 2 acres of an existing forested wetland to compensate for temporal loss of wetland functions.

**Example 2:** A wetland conversion will result in a loss of 2 acres of herbaceous, prairie pothole wetland. The proposed mitigation will create 2 acres of herbaceous wetland by excavating a

shallow basin in uplands. The functional assessment indicates the creation will not adequately replace faunal habitat functions and nutrient cycling functions, as the created wetland will not immediately develop a native hydrophytic plant community and the soil will have low organic matter content. Therefore, additional mitigation is provided for these functions, by rehabilitating a 0.5-acre cropped, degraded prairie pothole with similar hydrology as the impacted wetland. The rehabilitation consists of removing sediment from the wetland, establishing a buffer around the wetland and eliminating annual cropping of the wetland.

## **515.11 Wetland Mitigation Plans and Agreements**

### **(a) General Requirements**

A wetland mitigation plan must fully document the actions that are required to adequately restore and/or compensate for all wetland acres and functions that were or will be lost from converting a wetland. The mitigation plan may be a component of a larger conservation plan.

A wetland mitigation agreement can be synonymous with the mitigation plan or can be a separate document that contains a short description of the conversion and the actions in the mitigation plan that will be completed in order for the producer to regain eligibility for USDA benefits. The latter type of agreement must reference the plan and its requirements as a condition of its fulfillment. A separate mitigation agreement may be desired when a party other than NRCS develops the mitigation plan. Both the participant and NRCS must sign the agreement/plan.

### **(b) Goals and Objectives**

Mitigation plans and agreements should discuss the environmental goals and objectives of the mitigation. The plan/agreement should include a discussion of the wetland types (e.g., HGM regional wetland subclass (see Part 516.01), Cowardin<sup>3</sup> classification), and functions and acres that will be impacted by the conversion. It should also discuss the existing wetland type(s) and functions, if any, at the compensatory mitigation site(s).

### **(c) Objective Statement**

The objective statement must describe, by wetland type, the amount (e.g., acres, linear feet, functions) of wetlands that the activity will convert and the amount of compensatory mitigation needed to offset the conversion.

## **515.12 Mitigation Plan Development, Approval, Monitoring and Compliance**

### **(a) Who Can Develop the Mitigation Plan?**

The person requesting an exemption that requires a wetland mitigation plan may—

- Develop the plan.
- Employ another party to develop the plan.
- Request assistance from NRCS to develop the plan. NRCS may provide assistance, as workload allows.

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<sup>3</sup> Cowardin classification refers to the publication: Cowardin, L.M., Carter, V., Golet, F.C., and LaRoe, E.T. (1979). "Classification of Wetlands and Deepwater Habitats of the United States," FWS/OBS-79/31, U.S. Fish and Wildlife Service, Office of Biological Services, Washington, D.C.

**(b) Use of Success Criteria**

Mitigation plans should be specific, measurable, and “outcome-based”, or tied to success criteria rather than elements of the design. An example of an outcome-based agreement is as follows:

- “Greater than 80% aerial cover by at least 5 different species of native, hydrophytic vegetation by end of 3<sup>rd</sup> growing season”

and

- “[H]ave saturated soils within 12 inches of the surface for a minimum duration of 14 days...”.

When success of the mitigation project is tied to adequate performance measures and criteria, then failure to achieve those criteria will result in failure of the mitigation site. NRCS can then require further actions to achieve compliance and mitigate for the wetland functions lost as a result of the conversion.

Success criteria must be detailed, specific and measurable.

Success criteria may be linked to achievement of the functional levels documented on the converted wetland prior to conversion, particularly for wetland types that will be quickly established (e.g., emergent marshes).

For wetlands that require a longer period of time to become fully functional, such as forested wetlands, success criteria must ensure that the site is on the right trajectory of functional increase as it goes through the successional stages necessary to become fully functional. For example, during the monitoring period, woody vegetation should survive and thrive, achieving an “X” percent cover and an “X” height (or dbh) by Year 5.

**(c) Technical Requirements for Mitigation Plans**

At a minimum, the mitigation plan should include the following technical requirements:

<b>Technical Requirement</b>	<b>How to Accomplish the Technical Requirement</b>
Acres	Describe the acres of HGM (or other) class of wetlands to be restored or created.
Aerial Images	Maps and aerial images showing the location of the converted wetland and mitigation site location prior to conversion and mitigation.
Functional Assessment	Include the completed wetland functional assessment sheets, if applicable.
Hydrology Specifications	Document the following for each proposed hydrologic zone in the mitigation area: <ul style="list-style-type: none"><li>• Depth, duration and timing (hydroperiod) of proposed inundation/saturation;</li><li>• Structures required to create proposed hydrology and whether the hydrology is supported by groundwater or surface water, or both;</li><li>• Data substantiating adequate hydrology source.</li></ul>

<b>Technical Requirement</b>	<b>How to Accomplish the Technical Requirement</b>
Soil Specifications	Include the following: <ul style="list-style-type: none"> <li>• Soil characteristics of the mitigation site;</li> <li>• Details on topsoiling or soil amendments, if applicable (i.e., source, composition and depth).</li> </ul>
Grading Plan	If land grading will occur, provide the following: <ul style="list-style-type: none"> <li>• Existing and proposed contours of mitigation site;</li> <li>• Typical cross-sections depicting existing and proposed grades;</li> <li>• Equipment to be used to grade the site.</li> </ul>
Planting Plan	Document the following in the plan: <ul style="list-style-type: none"> <li>• Species of plants and planting location;</li> <li>• Quantity of each species;</li> <li>• Planting schedule;</li> <li>• Seeding and planting rates;</li> <li>• Minimal acceptable management level;</li> <li>• Minimal acceptable survival rate;</li> <li>• Invasive species control strategy.</li> </ul> (If planting will not be done because there is a suitable seed source in the soil, provide details of seed source).
Erosion Controls	Describe measures that will be used to control erosion and sedimentation on the site during construction.
Time Limits/ construction schedule	Include dates and sequence of mitigation activities. All mitigation practices must be completed within 12 months of the date the plan/agreement is signed. A time extension may be granted if NRCS and FSA agree.
Permits	Person is responsible for all necessary Federal, State and local permits. Copies of all permits will be contained in the plan.
Compatible Uses	If applicable, specify what uses are allowed of the mitigation area and the converted area
Monitoring	Provide specifications, frequency and duration of monitoring.
Success Criteria	Specify measurable results that will demonstrate success of mitigation, e.g., percent cover of desired species, hydroperiod specifications.
Maintenance	Specify what maintenance activities are required by the person, how often they need to be accomplished and their purpose and goals.
Signatures	The wetland mitigation plan (and agreement if applicable) must be signed by the person requesting the exemption, NRCS and any applicable third

Technical Requirement	How to Accomplish the Technical Requirement
	parties (e.g., property owners, easement holders).

**(d) Plan Approvals**

NRCS shall determine whether a wetland mitigation plan is technically sufficient to restore and/or replace the lost wetland acreage and functions. To assist in this determination, NRCS must use the following guidelines:

- Location of the mitigation site — The mitigation site should be located as close to the converted wetland as possible, unless the risk of failure is high or a location further away provides more ecological benefit. First priority should be given to on-farm sites; The mitigation site should be located within the same watershed (8-digit HUC).
- Success Criteria — The following criteria shall be evaluated when approving mitigation plans:
  - A wetland functional assessment (see Part 516, Subpart A) will generally be used to document that the mitigation wetland fully compensates for the wetland functions of the converted wetland. This is especially important for offsite mitigation, including mitigation banks.
  - Performance measures for vegetation/soils/hydrology per examples in 515.11(d)
  - Monitoring specifications for periodic NRCS inspection to ensure that the mitigation measures are successful;
- Mitigation Ratios — A ratio of one acre mitigated for one acre converted is the minimum replacement ratio required by the Act. NRCS may determine through a wetland functional assessment that more acreage is needed to provide equivalent functions. Functional assessments should consider temporal loss of wetland functions, the expected time lag before the mitigation wetlands performs the same level of function as the converted wetland, and the risk of failure, in determining the appropriate ratio. A person may appeal a ratio that exceeds 1:1 acreage.

If an off-farm mitigation site is owned by a third party, the third party must sign the mitigation plan/agreement and easement, and agree to maintain the subject lands according to conditions outlined (if they do not, the participant is out of compliance). If mitigation sites located outside the State are used, prior approval must be granted by the Deputy Chief of Programs.

**(e) Monitoring**

NRCS will conduct follow-up inspections of the mitigation site until all practices are successfully established. Inspections shall consist of the following actions:

- Ensure that the success criteria in the Plan are met. This may include:
  - Successful establishment of vegetation.
  - Restoration of the hydrological features and planned landscape features.
  - A time schedule for installation and maintenance of all restoration measures.
- Determine if a violation of the plan has occurred

- Ensure the mitigation site continues to progress after being established and meeting success criteria by conducting follow up inspections at a prescribed interval, in accordance with the state-approved monitoring protocol.

**(f) Compliance with the Mitigation Plan/Agreement**

If terms of the wetland mitigation plan/agreement are violated, NRCS will request a FSA-569 form from FSA. The mitigation exemption will be invalidated and the converted wetlands for which it applied will be relabeled CW+year (the year of the original conversion).

If the mitigation site does not meet the success criteria in the plan/agreement, the producer will be provided the opportunity to conduct remedial actions to ensure that it does meet success criteria. Any remedial actions must be accomplished within a reasonable period of time that is specified in a revised mitigation agreement, signed by the producer. If the mitigation area ultimately does not meet success criteria, the mitigation exemption will be invalidated and the converted wetlands will be relabeled CW+year.

**515.13 Regaining Eligibility After A Violation Through Mitigation Or Restoration.**

The Act at 16 U.S.C. 3822 (i) states that a person who is determined to be ineligible for benefits because of a violation of the WC provision during a crop year shall not be ineligible for any subsequent crop year if, prior to the start of such subsequent crop year, the person has fully restored the converted wetland or has mitigated for the loss of wetland functions, as determined by NRCS. In these cases, the participant will regain eligibility when the restoration of the converted wetland or the mitigation achieved by restoring, creating or enhancing another wetland is fully completed and in compliance with the success criteria agreed upon in the Mitigation or Restoration Plan/Agreement.

## **Subpart C — CWA Section 404 Permit Requirements and Mitigation**

### **515.20 COE Permit with Mitigation Exemption (CPM)**

#### **(a) Background**

In accordance with 16 USC §3822(f)(4), no person will be ineligible for program loans or USDA payments if the wetland conversion subject to the WC provisions was authorized by a permit issued under Section 404 of the Clean Water Act (33 U.S.C. §1344) and the acreage and functions of the converted wetland have been adequately mitigated. The converted wetland is labeled CW-CPM.

#### **(b) Corps of Engineers (COE) Permits**

If COE authorizes a project that converts wetlands under an individual or general permit with mitigation, and the permit covers all wetlands that are subject to the WC provisions, the permitted area is exempt from the WC provisions provided NRCS has determined that the mitigation is adequate to meet WC requirements. The participant is responsible for obtaining review by NRCS of a proposed conversion to ensure that all wetlands subject to the WC provisions are covered by the permit application. For past conversions where a permit has been received by the participant, the mitigation plan must be submitted to NRCS for approval.

NRCS must determine if the mitigation plan adequately compensates for impacts of the proposed actions on those wetlands subject to the WC provisions. NRCS will coordinate with the COE to the maximum extent possible to ensure that the mitigation plan is acceptable to both agencies. If the mitigation plan is acceptable for the WC provisions, NRCS will document that the conversion activity is exempt. If the mitigation plan is not acceptable, NRCS may require alternative or additional mitigation to offset the conversion.

#### **(c) No Easement Requirement**

In cases where mitigation of a converted wetland is accomplished according to the terms of a COE permit, no easement is required to meet the mitigation requirements of the Food Security Act. However, if the COE permit does not cover all wetlands on the site that are subject to the WC provisions, impacts to areas not covered under the COE permit must be evaluated in accordance with Part 515 and must be adequately mitigated in order for the producer to maintain eligibility for USDA benefits.

## Subpart D — Wetlands Farmed Under Natural Conditions (W)

### 515.30 General Information

#### (a) Background

In accordance with 16 U.S.C. §3822(b)(1)(D) and the governing regulation at 7 CFR §12.5(b)(3), a wetland will not be considered to be converted if production of an agricultural commodity on the wetland is possible as a result of a natural condition, such as drought, and the actions of the person producing an agricultural commodity do not permanently alter or destroy natural wetland characteristics as determined by NRCS.

Destruction of herbaceous hydrophytic vegetation resulting from the production of an agricultural commodity is not considered altering or destroying a natural wetland characteristic if –

- Such vegetation is able to return following cessation of the condition that made production of the agricultural commodity crop possible, and
- The destruction was the result of crop production activities that are common in the area.

Removal of woody vegetation is *not considered farming under natural conditions*, even if this practice is temporarily enhanced by drought or other natural conditions, since such removal would destroy natural wetland characteristics for an extended period of time.

Review of aerial photographs and anecdotal evidence may help determine if the area has a history of being farmed under natural conditions. If the manipulation is not clearly discernible and NRCS must determine whether the wetland is farmed under natural conditions, consider the hydrologic characteristics and land use capabilities of the soil type, as well as precipitation conditions, growing season and normal cropping practices in the area. If the soil on a reference site cannot produce an agricultural commodity under natural conditions, the subject wetland will be considered to be converted wetland. (See 7 CFR §12.32(a)(1)).

#### (b) How to Determine If a Wetland is Farmed Under Natural Conditions

IF AN AREA IS...	AND ...	THEN NRCS MUST...
Supports a hydric soil and has been previously used for production of an agricultural commodity,	Drainage or other manipulation is not clearly discernible (ascertain through onsite inspection and offsite mapping tools).	Compare the site with other sites that have the same hydric soils in a natural condition to determine if the soil is able to be used to produce an agricultural commodity crop under natural conditions.

#### (c) Seasonal Hydrology

Many wetlands that have a high water table during the winter and early spring and are dry the rest of the growing season will support a crop after the water table falls below the root zone. Soil Surveys provide soil and water features of the soil map units or soil series, which describe

frequency, duration, and timing of inundation and/or soil saturation. Soil permeability coefficients may also be available.

To determine whether farming can occur during the dry season complete the following analysis:

<b>STEP</b>	<b>ACTION</b>
<b>1</b>	Determine the commodity crops to be planted.
<b>2</b>	Determine the typical planting time for the crops identified in Step 1.
<b>3</b>	Determine whether the hydrology in the wetland typically draws down by the time identified in Step 2.

When evaluating the hydrology of a site, it is important to put the conditions in the context of the antecedent and current precipitation conditions. Hydrology Tools can be used to assess whether existing site conditions are drier or wetter than “normal” based on the 30-year average rainfall. If possible, it may be helpful to conduct site visits to nearby “reference wetlands”, which have the same soils, landscape position and hydroperiod, to verify when the water table typically draws down to the extent that these areas could be tilled and cropped.

## Subpart E — Good Faith Waivers

### 515.40 Good Faith Waivers of Ineligibility Made by FSA

#### (a) Statutory and Regulatory Authority for Good Faith Waivers

USDA may grant a waiver for a violation of the WC provisions when a producer has acted in good faith without intent to violate the provisions (16 U.S.C. §3822(h), 7 CFR §12.5(b)(5)(1)). Participants who receive a good faith waiver may regain eligibility for USDA benefits by developing and implementing an approved a wetland mitigation plan within one year.

#### (b) Approval Process

A person who is determined to be ineligible for benefits as the result of having already converted a wetland or produced an agricultural commodity on a converted wetland, may regain eligibility for USDA benefits if—

1. FSA determines the person acted in good faith and without the intent to violate the wetland provisions in accordance with FSA Handbook 6-CP.
2. NRCS and the producer develop and/or approve an appropriate plan or agreement to either restore the converted wetland or mitigate for the wetland acres and functions by restoring, creating or enhancing another wetland.
3. The producer implements the terms of the plan and/or agreement in a sufficient period of time, not to exceed one year from the date that the plan and/or agreement was signed by all parties.

Each step must be considered independently, although **all three steps must be completed before the producer is eligible for USDA payments and benefits.**

The FSA COC is responsible for determining whether the participant acted in good faith without intent to violate. This requires the COC to assess why and how the conversion was done, and to determine what the participant knew before taking the action. Even if the participant agrees to implement an approved restoration or mitigation plan, this does not necessarily mean that he or she acted in good faith when converting the wetland. Likewise, a participant may have acted in good faith, but fails to implement an approved restoration or mitigation plan in accordance with the established schedule. The participant must meet both requirements (good faith determination and meeting the success criteria of the required plan), to regain eligibility.

The Regulations at 7 CFR §12.5(b)(5) state that, in determining whether a person acted in good faith, the COC shall consider such factors as whether—

- The characteristics of the site were such that the person should have been aware that a wetland existed on the subject land;
- NRCS had informed the person about the existence of a wetland on the subject land;
- The person planted an agricultural commodity on converted wetland when he or she should have known that a wetland previously existed on the subject land;
- The person has a record of violating the WC provisions or other Federal, State, or local wetland regulations; or
- There is other information that demonstrates that the person acted with the intent to violate the WC provisions.

**(c) FSA Consultation with NRCS**

Prior to making a WC good faith determination, FSA must, according to the procedures in Handbook 6-CP, consult with NRCS. NRCS must submit on Form AD-1069 facts about the case, copies of documents, any evidence that the participant had knowledge of the WC provisions or whether there had been any previous violations, as well as other pertinent information. A previous violation will generally indicate that the participant was aware of the requirements of the WC provisions, but even without a previous violation, the participant may have been informed and aware of those requirements. Specific information regarding AD-1069 is provided in Part 519.

**(d) WC Good Faith Documentation Furnished by NRCS**

NRCS should furnish all relevant information to the COC to use in making the good faith determination, and should specifically address the following five items on the AD-1069—

- The extent of knowledge the participant had about the wetlands on which the violation occurred;
- Whether the participant had been provided a certified wetland determination on Form NRCS-CPA-026E;
- Whether NRCS or any USDA employee had any face-to-face discussions with the participant concerning the wetlands before the violation occurred.
- If the participant had been involved in previous violations of the WC provisions or other wetland laws, either on the current tract or any other tracts that he or she farms.
- Characteristics of the site before the conversion occurred, in accordance with 7 CFR §12.5(b)(7).

**(e) Monitoring Requirements**

If a good faith waiver is granted by the COC, NRCS will monitor the implementation of the restoration or mitigation plan, in accordance with the requirements in Part 515.12(f).

In many cases, such as restoring forested wetlands, fully mitigating for the converted wetland will take more than one year. However, the participants must actively meet success criteria according to the time schedule of the mitigation plan.

**(f) Compliance with the Mitigation Plan/Agreement**

If terms of the restoration or mitigation plan/agreement are violated, NRCS will request a FSA-569 form from FSA. The good faith waiver will be invalidated and the converted wetland for which it applied will be relabeled CW+year (the year of the original conversion).

If NRCS determines that the producer is not fully applying the required plan, or if conditions that must be met after the first year are not met (e.g., hardwood survival or control of woody or exotic vegetation), NRCS will use form FSA-569 to indicate that the producer is not in compliance with the provisions of his or her good faith waiver. The waiver will be invalidated, and the converted wetland for which it was applied will revert to the previous CW+year label.

## Subpart E — Third Party Exemption

### 515.50 Third Party Exemption (TP) (7 CFR §12.5(b)(vii)(D))

#### (a) Background

A person shall not be determined to be ineligible for program benefits for production of an agricultural commodity on wetland converted after December 23, 1985 if—

- The wetland is converted by actions of persons unassociated or unaffiliated with the USDA program participant, or any of the person's predecessor in interest.
- The wetland conversion is an indirect effect of an action occurring off the tract whose purpose is other than to convert the wetland, such as drainage on an adjacent property.
- Such conversion was not the result of a scheme or device to avoid compliance with the WC provisions.

FSA, in consultation with NRCS, makes the determination as to whether a third party is responsible for converting a wetland. FSA will notify NRCS when a third party exemption is approved, and NRCS will label the converted wetland CW-TP.

#### (b) Requirements for the Exemption

This exemption relies on four main conditions:

- The conversion was not the result of a “scheme or device”
- It was not done by a previous landowner or a predecessor in interest.
- It was not done by a drainage district or similar entity.
- The purpose of the action that caused the conversion was not to convert the wetland

#### (c) Use of Wetlands Converted by Third Party and Eligibility of TP

Wetlands, WX, FW or FWP determined to have been converted by actions of a third party:

- May not be maintained or improved by the participant, without loss of eligibility, unless the conversion is otherwise exempt.
- Will make the third party ineligible to receive USDA benefits unless the wetland functions are restored or mitigated.

#### (d) Conversions by Drainage Districts or Similar Entities

The regulations (7 CFR. §12.5(b)(1)(vii)(D)) specify that activities of an entity of local government, such as a water resource district, drainage district, or, in some cases, local road authorities, will be attributed to all persons within the jurisdiction of the district or other entity who are assessed for the activities of the district or entity. Accordingly, where a person's wetland is converted due to the actions of the district or entity, the person shall be considered to have caused or permitted the drainage. However, the activities of a drainage district or other entity will not be attributed to a person to the extent that the activities of the district or entity were beyond the control of the person and the wetland converted is not used by the person for the production of an agricultural

commodity or a forage crop for harvest by mechanical means. Wetlands converted by a drainage district or similar entity will be labeled CW

(e) Example

If a third party, such as a highway department, caused the conversion, the current landowner and any subsequent landowners would be eligible for the third party exemption. However, if the current landowner colluded with the highway department to arrange the conversion, he/she would be involved in a scheme or device, and would be ineligible. Furthermore, because the current landowner is ineligible because of his/her scheme or device, subsequent landowners are also ineligible because the conversion was “caused” by a previous landowner or predecessor in interest.

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### **Part 516 — Wetland Conservation Technical Determinations**

#### **Subpart A — Wetland Functional Assessments**

**516.01 Wetland Functional Assessments**

**516.02 Uses of Functional Assessments**

#### **Subpart B — Scope and Effect Determinations**

**516.10 Definitions**

**516.11 Making Scope and Effect Determinations**

**518.12 Allowable Maintenance Actions**

#### **Subpart A — Wetland Functional Assessments**

**516.01 Wetland Functional Assessments**

**(a) Background**

NRCS must use a functional assessment procedure adopted by the State Conservationist, in consultation with the State Technical Committee, to assess wetland functions for minimal effect determinations, mitigation evaluation, and violations. Due to their general scientific rigor, the use of any Hydrogeomorphic (HGM) functional assessment procedure developed for the specific geographic region is encouraged.

The HGM approach classifies wetlands by regional wetland subclasses based on hydrogeomorphic factors and identifies the physical, chemical and biological functions that wetlands in those subclasses are most likely to perform. Assessment models are developed that define the relationship between attributes of the wetland ecosystem and surrounding landscape and a wetland's capacity to perform a given function. The result of these assessment models is a functional index, that estimates the wetland's capacity to perform a function relative to other wetlands within the regional subclass of the reference domain.

In the absence of HGM models or other acceptable functional assessment procedures, NRCS may develop localized assessment procedures using the HGM functional assessment templates from Part 521. These procedures require development of reference standards through one of the following two methods:

- Field evaluation of reference wetlands.

- Development of an “idealized” wetland as recommended by the State Technical Committee and adopted by the State Conservationist.

Regardless of the tool being used for functional assessments, it must quantify wetland functions in order to provide for valid assessment of impacts to wetland functions.

**(b) Use of Functional Assessments**

NRCS uses functional assessments in making the following determinations:

- Whether a proposed conversion will have a minimal effect on the wetland functions (see Part 515, Subpart A).
- If a completed conversion had a minimal effect on the wetland functions (see Part 515, Subpart A).
- If cumulative or secondary impacts of the conversion had a minimal effect on the functions of other wetlands in the watershed.
- How much mitigation will adequately replace wetland functions of a converted wetland (see Part 515, Subpart B).
- Planning mitigation (replacement) wetlands.
- Evaluating the success of mitigation wetlands.

**(c) Developing Wetland Functional Assessment Methods**

Use the following steps when developing functional assessment procedures. Place all functional assessment procedures applicable to the State or specific geographic location in the local eFOTG.

<b>STEP</b>	<b>ACTION</b>
<b>1</b>	The State Conservationist, in consultation with the State Technical committee will: <ul style="list-style-type: none"> <li>• Determine wetland subclasses applicable to the state.</li> <li>• Determine which wetland functional assessment models apply to the identified wetland subclasses.</li> <li>• Identify the functions of various wetland subclasses in the State.</li> </ul>
<b>2</b>	The State Conservationist will officially adopt those models determined applicable to the State.
<b>3</b>	Where there are no available adoptable models for wetland subclasses , the State Conservationist, in consultation with the State Technical Committee, will develop a procedure that will adequately address specific wetland functions for those subclasses.

## 516.02 Uses of Functional Assessments

### (a) Functional Assessment Requirements for Minimal Effect Determinations

NRCS must use wetland functional assessments to evaluate the individual wetland hydrological and biological functions within a subclass when making a minimal effect determination request. Use the following guidance for this purpose.

STEP	ACTION
1	The State Conservationist, in consultation with the State Technical Committee and local wetland experts will: <ul style="list-style-type: none"> <li>• Develop a decision matrix to use in evaluating the output of a functional assessment model as it applies to a minimal effect determination.</li> <li>• Establish threshold levels from the output data that cannot be exceeded in order for a producer to receive a minimal effect determination.</li> </ul>
2	The State Conservationist will develop a minimal effect evaluation worksheet to document the output of the functional assessment.
3	The minimal effect worksheet will be used for all conversions (CW or CW+yr) to determine if the conversion had or will have a minimal effect to all wetland functions in the watershed.
4	Functional assessments will not be completed without a site visit.

### (b) Functional Assessment Requirements for Mitigation

In situations where a minimal effect determination cannot be granted and where wetland functions must be mitigated, a functional assessment will be used to determine the amount of mitigation required, in accordance with the following procedures:

STEP	ACTION
1	Use the functional assessment to determine the amount of equivalent functions that will be required to compensate for functions lost as a result of the wetland conversion.
2	Each function adversely affected must be adequately mitigated.
3	NRCS must include consideration of the time it takes to fully establish lost functions (temporal loss) in a functional assessment when determining mitigation ratios.

### (c) Evaluating Converted Wetlands

When evaluating wetland conversions, it may be necessary to select an undisturbed reference wetland. If a reference wetland is used, it must be within the same subclass

and conditions to ensure that the assessment returns results that will provide a valid assessment of what the converted wetland *would have shown, had it not been converted*.

- All remnant site conditions and information will be documented on the actual converted wetland. Use aerial photographs, previous site visit documents, property owner statements, etc., as well as any of the following: The reasons for the use of the reference site.
- Why the reference wetland was selected.
- How the reference site compares to the converted wetland.

## Subpart B — Scope and Effect Determinations

### 516.10 Definitions

#### (a) Scope and Effect

*Scope and effect* refers to the documentation of wetland hydrologic manipulation that occurred prior to December 23, 1985, or planned or existing hydrologic manipulation on these previously manipulated wetlands. Make a scope and effect evaluation to help determine if an action can be considered maintenance, or if it is improvement of an existing drainage or water control system.

If a manipulation that occurs after December 23, 1985 exceeds the scope and effect of the original hydrologic manipulation, the action may be considered conversion, unless the manipulation qualifies for an exemption. Scope and effect documentation will require a field visit. **A scope and effect evaluation is not a substitute for determining if a site has wetland hydrology.** Use the procedures in Part 514 to evaluate hydrology for making wetland determinations.

#### (b) Maintenance of Hydrologic Manipulations

Maintenance of hydrologic manipulations refers to the repair, rehabilitation, or replacement of the capacity of existing systems to allow for the continued use of wetlands currently in agricultural production and the continued management of other areas as they were used before December 23, 1985. This allows a person to reconstruct or maintain the capacity of the original system or install a more permanent or lower maintenance/cost system.

#### (c) Hydrologic Manipulation

Hydrologic manipulations are alterations that remove water, divert water, or otherwise affect hydrology on wetlands. Manipulations may include any of the following:

- Dams
- Dikes
- Ditches
- Diversions
- Subsurface drains (tile)
- Pumps
- Terraces
- Dredge and fill

- Excavation
- Deep ripping of a restrictive layer

## 516.11 Making Scope and Effect Determinations

### (a) When to Make Scope and Effect Determinations

Scope and effect determinations may be required when—

- Conducting an initial determination for FW and FWP labels.
- An AD-1026 is referred from FSA that indicates that a participant has or will conduct maintenance of an existing drainage system or installation of a new drainage system.
- Evaluating an FSA-569 regarding hydrologic manipulation on a tract.

### (b) How to Calculate Scope and Effect of Drainage Features on a Site

A scope and effect analysis compares “before and after” hydrologic conditions or drainage system capacity. This comparison can be based on any of the following:

- Ditch or tile system records
- Observed site conditions (e.g., original ditch profile obtained from soil inspection)
- Application of drainage equations, such as the ellipse equation or DRAINMOD.

### (c) Determination of the Original Drainage Scope and Effect

In most cases, determining the original capacity of a drainage system before proposed maintenance is done will ensure that the maintenance does not exceed the original capacity. The best way to do this is to measure the ditch or drain tile directly and determine the original depth and capacity.

### (d) Ditches

To determine the original “as-built” profiles of drainage ditches, the following procedures may be used:

STEP	ACTION
1	Collect ditch records, surveys and soils information. Elevations of the “as-built” ditch profiles can be used as a reference point for comparison with current findings.
2	The original profile is usually covered by several inches or feet of sediment from offsite sources and sloughing from the ditch banks. Typically, the undisturbed parent material will have a lighter color (due to lower percentage of organic matter); a higher bulk density (i.e., a more firm and compact texture) and it will be more uniform than the silt deposits.
3	Do a soil boring on at least one side of the ditch (beyond but near the top of the ditch bank) to a depth of at least one foot below the original profile (estimate the depth if the original profile depth is not known). Boring both sides of the ditch is not necessary if the soil profile is similar. At least three borings should be done in the ditch channel. More borings may be needed if the original channel has been covered by sloughing sediment from the bank,

STEP	ACTION
	and the existing channel represents a more recent flow path.
4	Note soil texture, color and thickness of soil horizons. By comparing soil material in the channel with soil material outside the ditch bank, the boundary between sediment and natural soil material can be determined.
5	Take elevations of the borings at the original ditch bottom. (When sediment in the ditch bottom has been penetrated to reach original soil material, take the elevation at the top of the soil-sampling device and subtract the length of the soil-sampling device to determine the elevation of the original ditch bottom).
6	Do soil boring cross sections approximately every 100 feet. This distance may be increased, if, based on elevations, the grade is uniform, or decreased if the grade is more variable.

This procedure works well where ditches traverse mineral soils, but determining the original profile is more difficult for ditches dug through organic soils. It may be possible to estimate the profile through a peat area by determining the profile of the ditch in mineral soils where the ditch enters and exits the peat area. Accurate use of soil borings to reveal the history of a ditch requires field experience and knowledge of local soil morphology.

If ditch maintenance has already been done, it may be difficult to determine the original profile. In these cases, it may be possible to find undisturbed sections of ditch above or below the maintained area, which can be used to estimate the original profile, grade and depth, or to find culverts that indicate the original size and depth. Ditches are usually not measurably deeper than the invert elevations of downstream culverts. Additional information on culverts may be available from highway departments.

**(e) When the Original Drainage Profile Cannot Be Determined**

If determining the original drainage profile is not possible using soil borings and culverts, or if additional information or corroboration is needed, the locations and profiles of ditches or drain tiles can sometimes be interpolated. Determine the apparent zone of influence of the ditch or drain tile from aerial photography or site conditions and, using drainage equations, estimate the size and location of drainage features that would produce that drainage effect. Drainage equations should be based on actual soil information (e.g., permeability), not mid-values of the mapped soil series. [\[LINK TO PAUL RODRIGUE'S DRAINAGE EQUATION TRAINING MODULE\]](#)

Aerial photographs may show vigor or stress responses resulting from wetland conditions, such as crop stress in wet areas or increase in abundance or plant vigor. Compare size, vigor or stress features of the affected species between wetland areas and adjacent uplands. Aerial photographs may also show evidence of ponding or saturation (see Part 514.06 on aerial photography interpretation for wetland delineation). In addition, aerial photographs may show spoil piles consisting of subsoil material, which can be used to document that maintenance exceeded the original scope and effect.

## **(f) Documenting Scope and Effect Determinations**

Scope and effect determinations must be documented in the administrative record for each site (reference to the administrative record as applied here is not a reference to a record for appeals purposes). The following information may be useful in analyzing and documenting scope and effect:

- Wetland determinations
- Depth and duration of ponding or flooding
- Depth to water table
- Drainage area
- Location of drainage system within the basin
- Lateral distance effected by the drainage system
- Field surveys or tile plans
- Type and description of existing and/or original manipulation; when the manipulation was installed; size, depth, grade, and outlet conditions
- Soil borings to define original construction limits
- Surface inlets
- Condition of present system
- Soil type and related drainage information
- Status of woody vegetation, if appropriate
- Aerial photos to verify location and effectiveness of hydrologic manipulation
- Conservation assistance notes in the case file
- Data provided by landowners and contractors
- Existing easements

Information on existing drainage systems may be available from the drainage district, county records, consultants, contractors, local library, field investigations and NRCS files.

## **516.12 Allowable Maintenance Actions**

### **(a) Allowable Maintenance**

Maintenance of existing systems that does not exceed the original scope and effect is allowable under the Act, provided it does not violate any existing wetland or flowage easements. Maintenance or improvement of drainage systems is allowable on all prior converted cropland as long as adjacent wetlands are not adversely affected.

### **(b) Increase in Water Regime**

The Act allows a landowner to maintain the hydrology of farmed wetlands and farmed wetland pastures that existed when the Act was passed, through appropriate maintenance to the drainage systems. In most cases, reestablishing the original depth and profile of drainage ditches or tile will achieve this. However, there may be situations where a change in the watershed area upstream of the subject land will result in an increased hydroperiod. In these cases, a participant is allowed to adjust the existing drainage system to accommodate the increased water regime under the regulations at 7 CFR §12.33(a). The participant must furnish NRCS with all appropriate documentation regarding the increased water regime, its causes and the planned adjustments to the drainage system.

In cases where an increased water regime is documented, NRCS will consult aerial photography and crop history records to determine the farming use and the scope and

effect of the drainage system in the area as of December 23, 1985. Further, NRCS will authorize maintenance that will achieve that water regime and farming or ranching use as of 12/23/1985. A landowner may improve drainage sufficiently to achieve the water regime and farming use that existed on December 23, 1985, which reflects the operation and maintenance of the site prior to that date. However, he/she is not authorized to improve the drainage or manipulation so that wetland characteristics on areas identified as wetland, farmed wetland or farmed wetland pasture are further degraded.

**(b) Requests for Approval of Maintenance**

Any participant who intends to maintain drainage systems or hydrologic manipulations that existed before December 23, 1985 must complete an AD-1026 in the FSA office.

Areas requiring a scope and effect determination prior to drainage maintenance include PC areas with adjacent FW, FWP, WX, or W that may be converted by the activity, and FW or FWP areas on which wetland functions have been restored in accordance with a restoration plan. In these cases, the restoration plan should include the hydrologic and vegetative baseline conditions existing at the time of restoration. FSA will refer the AD-1026 and an aerial photocopy to NRCS that provides the location of the intended maintenance.

If a certified wetland determination has been completed, proceed with a scope and effect evaluation if the proposed actions are considered manipulation and the manipulation is considered a conversion.

If a certified wetland determination has not previously been completed, NRCS must complete a certified determination prior to completing the scope and effect evaluation

NOTE: USDA employees should encourage persons who intend to perform maintenance on WX, FW, FWP, or CW to notify NRCS of their intent before taking any action. To do this, the person needs to file a revised AD-1026 with FSA. NRCS will notify the person in writing to contact appropriate state and federal agencies for necessary permits.

**(c) Flowchart of Scope and Effect Actions**

[The following hyperlinked flowchart](#) provides a visual description of scope and effect methodology:

## **Part 517 — HELC/WC Violations, Appeals, and Equitable Relief**

### **Subpart A — Violation Complaints**

- 517.01 Whistleblower Complaints**
- 517.02 Procedures for Determining HELC/WC Violations**
- 517.03 Site Visit Procedures for WC Violation Determinations**
- 517.04 Agency HELC or WC Administrative Record Requirements**

### **Subpart B — HELC/WC Appeals and Equitable Relief Provisions**

- 517.10 General Information**
- 517.11 Preliminary Technical Determinations**
- 517.12 Final Technical Determinations**
- 517.13 Equitable Relief**

## Part 517 — HELC/WC Violations, Appeals, and Equitable Relief

### Subpart A — Violation Complaints

#### 517.01 Whistleblower Complaints

##### (a) Whistleblower Complaints

Whistleblower complaints may be received either verbally or in writing, and may come from any source. All complainants are to remain anonymous, unless the complainant indicates otherwise.

##### (b) Timing of the Investigation

Unless there are extenuating circumstances, as discussed below, whistleblower complaints and/or requests for a compliance review referred to NRCS on form FSA-569 should be completed within the following time frames:

- Within 30 days in a field office.
- Within 45 days in an area or State office.

If the status of HELC/WC compliance cannot be verified due to weather, time of the year, inability to assess the conservation system that was used to plant the agricultural commodity, inability to validate the vegetation, inability to measure crop residues correctly, or other extenuating circumstances, NRCS shall notify FSA in writing that a potential violation has been reported. The notification shall include all known information regarding the potential violation as well as the reasons that the NRCS cannot complete the violation investigation at the time of the notification.

##### (c) Report of Possible Noncompliance Register

Each office shall establish a "Report of Possible Noncompliance" register that shall include the following information:

- Type of complaint (HELC or WC)
- Tract number
- Tract owner and/or operator name
- Name of complainant
- Date received
- Date report completed
- Details of the potential violation

This file is confidential and is to be maintained by NRCS employees only.

##### (d) Confidentiality of the Whistleblower

The name of a confidential source shall not be entered in the case file but should be maintained in the "Report of Possible Noncompliance" register. Assume that the person who provided the report expects confidentiality unless he or she specifically states otherwise, and this is documented in the case file. The following noncompliance report records are not available to the public.

- Register of Reports of Possible Noncompliance.
- Report of possible noncompliance provided to NRCS by a confidential source.

(180-V-NFSAM, Fifth Edition August 2005)

These records are protected under the Freedom of Information Act (FOIA) exemption 7(D).

**(e) Final Report of Possible Noncompliance**

A final report of the finding of the investigation and all documentation to support the finding will be placed in the case file that contains the tract(s) that was investigated. The name of the confidential source must not appear in the final report nor shall the name appear as a reference in the case file. The final report is available under FOIA.

**(f) Reports Affecting Other Agencies**

There may be situations where the noncompliance report involves items where NRCS does not have program responsibility. Possible noncompliance reports involving items that are not an NRCS responsibility will be forwarded to the State Conservationist, who will forward the details of the report to the appropriate agency and inform the person who filed the complaint, if known, what actions have been taken.

**(g) Monitoring of the Register**

In an effort to monitor the process, Area and State Office personnel will review the "Report of Possible Noncompliance" register and reports during quality assurance reviews. The State Conservationist will inform the appropriate NHQ Division Director of major concerns. Failure to implement the whistleblower process as outlined will be viewed as fraud as outlined in Part 518.53 [link].

**517.02 Procedures for Determining HELC/WC Violations**

**(a) Potential Violations**

Potential compliance violations include any of the following:

- Producer is not actively applying a conservation plan or conservation system.
- Producer is not using an approved conservation system.
- Producer denies access to the farm or tract to a USDA employee on official business.
- Producer violates the WC provisions (e.g., converts a wetland after November 28, 1990; plants a commodity crop on a wetland converted after December 23, 1985; fails to comply with a wetland mitigation agreement or conditions of a minimal effect agreement).

**(b) Notification of Potential Violations**

NRCS may become aware of a potential HELC or WC compliance violation by any of the following means:

- Random compliance status review.
- Whistleblower complaint to FSA or NRCS.
- Discovery of a potential compliance deficiency by FSA or NRCS staff while providing technical or programmatic assistance.
- Eligibility determination for Title XII financial assistance conservation programs.
- The producer checks yes to question #9 or #10 on the AD-1026, indicating that an activity has or will take place that might constitute a violation.

- Discovery by NRCS via monitoring of failure to follow a mitigation or minimal effect exemption agreement.

**(c) Administrative Procedure to Follow in the Event of a Potential Violation**

Regardless of how the potential violation arose, the administrative process is as follows:

STEP	ACTION
1	<p>FSA issues, with or without a written request from NRCS, an FSA-569, <u>NRCS Report of HELC and WC Compliance for Review Purposes</u> to NRCS.</p> <p>An FSA-569 is <i>always</i> issued when there is a potential violation as listed in paragraph 517.02(a) above. This is the method used in communicating findings with regard to any potential violation between FSA and NRCS regardless of origination of the original complaint. This form, if a violation is indicated in part C, must be accompanied by a complete final technical determination that is completed in accordance with Part 517.12.</p> <p>NRCS will inform any person or organization that reported a potential violation that their complaint is being investigated.</p>
2	<p>NRCS will determine if there is a current AD-1026* on file and if the producer is a USDA program participant for the current year. <b><i>For HELC</i></b>, NRCS cannot investigate any alleged violation that took place in a prior year or when a producer is not a current year USDA participant, as verified by a current AD-1026A or FSA156EZ.</p> <p>*Since May 4, 1996, farmers and ranchers no longer are required to certify compliance with the HELC/WC provisions annually using form AD-1026. Therefore, a certification dated for any prior year may be the most current certification filed by the USDA participant.</p> <p>If the AD-1026 that is on file does not reflect the activities currently taking place on the farm, tract, or field, the program participant will need to complete a new AD-1026 providing certification regarding his or her intent to comply with the provisions.</p> <p>In addition, the AD-1026, whether current or executed to update the participant’s certification of compliance, provides the authority for NRCS to enter the property, in accordance with the regulation at 7 CFR §12.7(a)(5). (See Step 4 below.)</p>
3	<p>NRCS must contact all persons having a financial interest in the farm or tract to provide notice of the receipt of an FSA-569. The purpose for notification is two-fold—</p> <ul style="list-style-type: none"> <li>• It notifies the participant that a potential violation of the provisions has been reported.</li> <li>• To request access to the land in question, and to provide an opportunity to those persons having an interest in the tract to participate in the review.</li> </ul>
4	<p>The regulations at 7 CFR §12.7(a)(5) provide—</p>

STEP	ACTION
	<p>“The person applying for the benefits must authorize and provide representatives of USDA access to all land in which such person has an interest for the purpose of verifying any such certification”.</p> <p>If the participant prohibits access to the land in question to any USDA employee in accordance with the regulation or fails to agree to the site visit, that person shall immediately be notified in writing that he or she is in violation of the HELC or WC provisions, as applicable. NRCS will place a check at the top of Part C, sign and date the form, and return the FSA-569 to FSA.</p>
5	<p>If the producer agrees to the site visit —</p> <p><u>For HELC compliance determinations</u> — NRCS must conduct the field review within a reasonable period of time, not to exceed 30 days, in accordance with the regulations at 7 CFR 12.6(c)(2)(vii) and 7 CFR 12.23(h).</p> <p><u>For WC compliance determinations</u>—the site visit will be conducted “as soon as possible, following a request for such a determination, but only when site conditions are favorable for the evaluation of soils, hydrology, and vegetation.” [7 CFR §12.6(c)(7)].</p>
6	<p>For both HELC and WC potential violations, the information gathered during the field investigation <b><u>must be entered into the web-based FSA compliance status review application.</u></b></p> <p>If the potential violation is on HEL, complete a compliance review according to the policy set forth in the NFSAM, Parts 511, 512 and 518. Compliance determinations for HELC must be evaluated in accordance with the regulatory provisions at 7 CFR 12.23(h), as follows, “<i>Application of a conservation plan or system. A person is considered to be applying a conservation plan for purposes of §12.5(a) if the conservation system or plan being applied achieves or exceeds the substantial reduction [or no substantial increase] in soil erosion described in paragraph (b) which the conservation system or plan was designed to achieve....</i>”</p> <p>If the potential violation is on a wetland, complete an investigation of the potential converted wetland(s) according to the procedures in part 517.03. For potential wetland violations, 7 CFR §12.30(c) states that “<i>Certification of a wetland determination means that the wetland determination is of sufficient quality to make a determination of ineligibility for program benefits</i>”; thus, <b><u>the results of all compliance determinations shall be based on a certified wetland determination.</u></b></p> <p>This may require NRCS to conduct a new certified determination on a previously uncertified (“NI”) area.</p> <p>The Act (see 16 U.S.C. §3822(c)), states that “<b><u>No program loans, payments, or benefits shall be withheld from a person under this subtitle unless the Secretary has conducted an onsite visit of the subject land.</u></b>” thus, an onsite visit must be made as a result of receipt of a FSA-569.</p>

STEP	ACTION
	<p>Furthermore, the Act states that a person may request that NRCS complete a review of a certified wetland determination at any time. If requested, NRCS will provide additional levels of review of the certified wetland determination as well as review the determination of noncompliance.</p>
7	<p><u>Findings for HELC</u>—If the findings of the field investigation indicate that the USDA participant is in violation of the HEL provisions, NRCS must issue a “Preliminary Technical Determination” in accordance with the appeals regulation at 7 CFR 614.101, NFSAM section 517.11 and CPM Part 510, Subpart B. The FSA-569 will <b><i>NOT</i></b> be returned to FSA until the determination becomes a final USDA technical determination on which FSA can make decisions regarding denial of benefits and/or good faith.</p> <p><u>Findings for WC</u>—If the findings indicate that the area in question does not meet either CW or CW+year criteria, then the appropriate blocks in Part C of the FSA-569 will be checked, and the NRCS employee signs Part C. Return the form to FSA with a copy to the producer with appropriate documentation of the certified wetland determination included (See NFSAM Part 521 and CPM Part 510 regarding decision-making, technical determination notification requirements, and, if applicable, appeal rights).</p> <p>If the results are such that an area <b><i>does meet</i></b> the criteria for CW or CW+year, then the results of the site visit will be provided to the participant (i.e., NRCS-CPA-026e, wetland determination map with appropriate labels, letter of transmittal to include the rationale for the decision as well as the findings of fact, and the appropriate analysis of the findings) with all applicable appeal rights.</p> <p>This information will be sent via <b><i>certified mail, return receipt requested</i></b> . As part of this information, NRCS shall specify that exemptions provided for in 7 CFR §12.5 do not apply (if appropriate), and the activity does not meet any of the requirements for an exemption as provided in 7 CFR §12.11.</p> <p>(See NFSAM Part 518 and CPM Part 510 regarding decision-making, technical determination notification requirements, and appeal rights).</p>
8	<p>There are no certification requirements for technical determinations related to HELC. However, all determinations issued with regard to the HEL provisions must be supported by the actual field conditions as fully documented during the field investigation. Further, the technical determination for HEL violations will be of sufficient quality that both NRCS and FSA can make any further decisions, whether it involves FSA programs, other compliance decisions, or NRCS decisions regarding whether or not a participant is eligible to participate in or continue to receive benefits from Title XII financial assistance conservation program contracts.</p> <p>The regulations provide that “<i>The wetland determination and wetland delineation shall be certified as final by the NRCS official 30 days after providing the person notice of certification or, if an appeal is filed with USDA, after the administrative appeal procedures are exhausted [7 CFR</i></p>

STEP	ACTION
	<p data-bbox="461 264 651 296"><i>§12.30(c) (2)J</i>”.</p> <p data-bbox="461 310 1357 380">Therefore, the FSA-569 <b><i>will not</i></b> be returned to FSA <b><i>until the determination has become a “Final USDA Decision”</i></b> as defined in the regulations above.</p>
9	<p data-bbox="461 415 1357 478">Once the determination is final (appeals process has been exhausted), NRCS will sign and complete Part C and return the FSA-569 to FSA.</p>

**(d) Determinations of Non-Compliance Must Be Made by NRCS**

Section 2002(a)(2) (Conservation Compliance) of the Farm Security and Rural Trade Investment Act of 2002, Public Law 107-171, 116 Stat. 233 states—

“...The Secretary shall have, and shall not delegate to any private person or entity, authority to determine whether a person has complied with this subtitle.”

This provision affects determinations of non-compliance for both HELC (16 U.S.C. §3811(b) and WC (16 U.S.C. §3821(e)). Therefore, no person other than an NRCS employee may provide notification to FSA of a potential violation of the HELC/WC provisions for any reason. (See Parts [518.21](#) and [518.22](#)). A Technical Service Provider (TSP), or other representative of NRCS may conduct a wetland delineation or other evaluation that provides technical support for a finding of noncompliance, but the technical information must be reviewed and verified by NRCS. **NRCS must make the determination of compliance, and must conduct a site visit on the subject land before determining that a producer is out of compliance.**

**(e) Forfeiture of Benefits for WC Non-Compliance**

For WC violations, **all benefits obtained by the participant are forfeited from the year that a wetland violation occurred until NRCS certifies that a restoration or mitigation plan is fully applied** (unless a good faith waiver is issued by FSA. See Part 515.40). For a mitigation plan to be “fully applied”, the work must be in accordance with a plan approved by NRCS. In many cases, fully compensating for lost wetland functions will take more than one year. However, if the participant is meeting the success criteria according to the time schedule of the mitigation plan, NRCS will notify FSA that the person has regained compliance. NRCS will continue to monitor the site as specified in the mitigation plan until the site is determined to be self-sustaining by NRCS.

**(f) Forfeiture of Benefits for HELC Non-Compliance**

A USDA participant’s eligibility for receipt of USDA benefits may be revoked for the year of the violation and any subsequent years until eligibility is reinstated. (See NFSAM Part 513.03).

## **517.03 Site Visit Procedures for WC Violation Determinations**

### **(a) Onsite Visit Objectives**

The objective of the site visit is to verify, as required by regulation [7 CFR §12.6(c)(2)] the following items:

- Whether land is wetland or converted wetland.
- Whether the conversion of a wetland is for the purpose of or has the effect of making the production of an agricultural commodity possible.
- Whether the actions of a person(s) with respect to the conversion of a wetland or production of an agricultural commodity on converted wetland would have only a minimal effect on the functions and values of wetlands in the watershed.
- Whether a farmed wetland or farmed wetland pasture is abandoned.
- Whether the planting of an agricultural commodity on a wetland is possible under natural conditions.
- Whether maintenance of existing drainage of a wetland exceeds the scope and effect of the original drainage.
- Whether a plan for the mitigation of a converted wetland will be approved and whether the mitigation of a converted wetland is accomplished according to the approved mitigation plan.
- Whether conditions of a Minimal Effect Agreement are met.

### **(b) Where Applicable, Document the Following:**

- Measured dimensions and size of conversion action (fill, ditches, land clearing, etc.)
- Type of manipulation
- Vegetative communities
- Sample plots, in accordance with wetland delineation procedures as described in Part 514 and the 1987 Manual
- Wetland boundaries
- Adjacent habitats
- Conditions existing prior to disturbance
- GPS locations or distances to fixed reference points (roads, buildings, shorelines, large trees)
- Evidence of wetland hydrology--frequency, duration, volume, timing of flow, etc., and any surface hydrologic connection with downstream navigable waters
- Locations of soil pits or auger samples
- Ongoing activities
- Other?—fauna, water quality/evidence of turbidity, erosion, pollution, evidence of recent flooding or inundation of site
- Functional assessment of wetlands for the purpose of a minimal effect or mitigation determination

A sufficient number of Field Data Sheets, or other relevant documentation, should be completed to thoroughly document site conditions in accordance with Part 514.07 [link], or Part 515, Subpart A or B, as appropriate.

## 517.04 Agency HELC or WC Administrative Record Requirements

### (a) Administrative Record —File Management

Any filing of a request for review under the Administrative Procedures Act (APA) will cause a federal District Court to complete either a record review of an agency's action or to hold an actual hearing in order to determine if the NRCS decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. §706(2)(A)).

In making this determination, the court will evaluate the agency's entire administrative record. The administrative record is the paper trail that provides the appropriate documentation of the agency's decision-making process as well as the basis for the agency's decision. This consists of all documents, including the regulatory and statutory authorities, agency policy, and materials directly or indirectly considered by the agency decision-maker in making the decision. The administrative record must be compiled during the decision-making process (i.e., during the process of gathering the data, applying the appropriate procedures, and issuing the determination) as documents and materials are generated or received.

### (b) Guidelines for Compiling the Administrative Record

The following are guidelines for compiling the administrative record:

- Include documents and materials that were available or considered by the decision-making official at the time the decision was made, whether they support the final agency decision or not.
- Do not include personal notes, including notes taken by an individual at a meeting, or journals maintained by an individual, unless they are included in an agency file which is under the control, possession and maintenance of the agency.
- Include policies, guidelines, directives, manuals, articles, books, factual information or data, communications received from other agencies and from the public, and any responses to those communications. If manuals or books cannot be reproduced and included in the record, document the source with title, author, edition, publication date and page numbers.
- As a general rule, do not include internal "working" drafts of documents that were or were not superseded by a more complete, edited version of the same document. Generally, include all draft documents that were circulated for comment either outside the agency or outside the author's immediate office, if changes in these documents reflect significant input into the decision making process.
- The file should include technical information, sampling results, survey information, and engineering reports or studies. Also include the decision documents, minutes or transcripts of meetings, and memorialization of telephone conversations and meetings, such as memoranda or handwritten notes, unless they are personal notes.

### (c) Flowchart of Actions in a Potential WC Violation

The [following hyperlinked flowchart](#) provides a "roadmap" of actions to be taken when NRCS investigates a potential wetland violation.

**(d) Flowchart of Actions in a Potential HELC Violation**

The [following hyperlinked flowchart](#) provides a “roadmap” of actions to be taken when NRCS investigates a potential HEL violation.

## Part 517 — HELC/WC Violations, Appeals, and Equitable Relief

### Subpart B — Appeals and Equitable Relief

#### 517.10 General Information

##### (a) Appeals and Mediation Process

All HELC/WC appeals will be processed in accordance with NRCS policy in the Conservation Programs Manual, (CPM) [Part 510](#), Appeals and Mediation, and, where applicable, FSA Handbook [1-APP](#). In addition, all appeals to the National Appeals Division (NAD) will be held in accordance with the [NAD Hearing Officer's Guide](#).

Generally, appeals and mediation rights for HELC/WC preliminary technical determinations are as follows:

- Appeal to the County FSA Committee in the county where the determination was made, *or* appeal to the NRCS STC in the State where the determination was made, *but not both*. (*See Note*)
- Mediation or ADR.
- Appeal to NAD.

Note: Appeal to the County FSA Committee is, in the opinion of General Counsel, no longer considered to be mandatory. Additionally, the statute provides that the agency shall use the informal appeals process that was in place prior to passage of Public Law 103-354, which in the case of NRCS was to the STC. Therefore, NRCS is offering the option of an informal appeal to either the County FSA Committee or to the NRCS STC, but not both, as the informal, first line of appeal.

##### (b) General Conditions of Appealability

Any technical determination made regarding implementation of HELC/WC that is adverse to the participant on an individual basis is appealable. The following are examples of appealable determinations:

- The specific application of the statute, regulation, or agency policy to an individual participant.
- A miscalculation or error in correctly applying formulas and criteria used in the formulas, including the using the incorrect formula.
- The potential for denial of program benefits based on a determination of violation of either the HELC or WC provisions.
- The potential for denial of participation in Title XII conservation programs where compliance with the HELC/WC provisions is a condition of eligibility and/or participation.

##### (c) Actions Not Appealable

In accordance with the provisions of the Department of Agriculture Reorganization Act of 1994, Public Law 103-354 (7 U.S.C. 6991 et.seq.) and as articulated in the NAD Rules of Procedure, 7 CFR 11, §11.6(a)(2),

*“The Director shall determine[d] whether the decision is adverse to the individual participant, and thus appealable, or is a matter of general applicability, and thus not subject to appeal....”*

Actions and determinations that are generally applicable to all USDA program participants in the nation, State, or Tribes and thus, not considered to be appealable are as follows:

- NRCS conservation practice standards.
- Procedural decisions relating to program administration, such as:
  - Timeframes for action on a specific request.
  - Workload prioritization.
- Science-based formulas and criteria used in those formulas.
- The “Frozen” HELC Soils List.
- Correlated soil surveys.
- Other matters that are generally applicable to all program participants, such as:
  - Criteria used by NRCS in a State, county, or region to determine eligibility for certain variances.
  - Addition of a tract to the compliance status review tract list by NRCS or other entity (whistleblower) or as follow-up to a previous year variance or exemption.
  - The process used by NRCS to select compliance status review tracts.
- Matters of regulation and statute.

## 517.11 Preliminary Technical Determinations

### (a) Making Preliminary Technical Determinations

NRCS must make a preliminary technical determination for all determinations supplied to program participants regarding implementation of the HELC/WC provisions.

This includes, but is not limited to, the following types of technical determinations:

- HEL determinations
- Wetland determinations and/or delineations
- Any violation of the HELC/WC provisions
- Mitigation and/or restoration determinations
- All variances that NRCS has authority to grant except for *expedited variances* for weather, disease, or pests upon the USDA participant's request due to the mandatory 30 calendar day timeframe required when this variance is requested.

### (b) Required Content

All preliminary technical determinations must include the following items:

- The issue or reason for the preliminary technical determination.
- The statutory and/or regulatory basis for the determination.
- The factual basis for the determination.
- An analysis of how the facts result in the preliminary technical determination (see 518.XX)
- The conclusion or actual preliminary technical determination.
- Appropriate appeals and mediation rights.

### (c) Appeal and Mediation Rights

The following are the appeal and mediation rights that must be offered to the USDA participant when NRCS issues a preliminary technical determination:

- Field visit for re-evaluation of the facts.
- Reconsideration by the STC or designee.
- Mediation or, if applicable, Early-Intervention Alternative Dispute Resolution (ADR)
- Expedited finality.

See the hyperlinked flowcharts for the processes to be followed for HELC and WC violations as well as the NRCS Appeals procedures.

- Potential HELC Violation Discovered Flowchart
- Potential WC Violation Discovered Flowchart
- NRCS Appeals Process

### (d) Completion of the Determination

All preliminary technical determinations must be sent to the USDA participant no later than 10 working days following the date that NRCS completes the preliminary technical determination. "Completion of the determination" is satisfied when the decision-maker completes all of the required fact finding and analysis necessary to make the actual determination, including the completion of all required forms needed to fully document the findings.

**(e) Computation of Time for Appeal Actions**

The USDA participant must be given a sufficient period of time to read, understand, and, if desired, to request action pursuant to the appeal and/or mediation rights offered, which, by law is no more than 30 calendar days from the date that the USDA participant (and all of the parties to the parcel of land) receive the preliminary technical determination. For purposes of calculating time when the determination is sent via regular mail, the date that appeal rights expire will be as follows:

- No more than 37 calendar days (30 calendar days plus not to exceed (NTE) seven (7) calendar days for mail delivery) from the date that the determination has been mailed.
- Those preliminary technical determinations that are sent via Certified Mail with a return receipt requested will use the date on which the return receipt was signed by the USDA participant or responsible party.

If the person takes no action within the specified time not to exceed 37 calendar days, the Preliminary Technical Determination will automatically become a Final NRCS Technical Determination.

Final technical determinations will be given appeal rights in accordance with section 517.12

## 517.12 Final Technical Determinations

### (a) Making Final Technical Determinations

NRCS must make a final technical determination following a participant's request for a field review, reconsideration, or mediation of a preliminary technical determination issued regarding implementation of the HELC/WC provisions.

### (b) Required Content

Final technical determinations shall consist of the same format and content as required for preliminary technical determinations in accordance with section 517.11(b).

### (c) Final Appeal and Mediation Rights

The following are the appeal and mediation rights that must be offered to the USDA participant when NRCS issues a final technical determination:

- Informal appeal to either the FSA COC or the NRCS STC, but not both.
- Formal appeal to the National Appeals Division (NAD)

See the hyperlinked flowcharts for the processes to be followed for HELC and WC violations as well as the NRCS Appeals procedures.

- Potential HELC Violation Discovered Flowchart
- Potential WC Violation Discovered Flowchart
- NRCS Appeals Process

### (d) Completion of the Determination

All final technical determinations must be sent to the USDA participant no later than 10 working days following the date that NRCS finalizes the preliminary technical determination as a result of action taken by the USDA participant in accordance with section 517.11(c). "Completion of the determination" is satisfied when the decision-maker completes all of the required fact finding and analysis necessary to make the actual determination, including the completion of all required forms needed to fully document the findings.

### (e) Computation of Time for Appeal Actions

The USDA participant must be given a sufficient period of time to read, understand, and, if desired, to request action pursuant to the appeal and/or mediation rights offered, which, by law is no more than 30 calendar days from the date that the USDA participant (and all of the parties to the parcel of land) receive the preliminary technical determination. For purposes of calculating time when the determination is sent via regular mail, the date that appeal rights expire will be as follows:

- No more than 37 calendar days (30 calendar days plus not to exceed (NTE) seven (7) calendar days for mail delivery) from the date that the determination has been mailed.
- Those final technical determinations that are sent via Certified Mail with a return receipt requested will use the date on which the return receipt was signed by the USDA participant or responsible party.

If the person takes no action within the specified time not to exceed 37 calendar days, the Final NRCS Technical Determination will automatically become a Final USDA Technical Determination.

## **517.13 Equitable Relief**

### **a Applicability**

A participant may be eligible for Equitable Relief, as set forth in the regulation at 7 CFR §12.12 and 7 CFR 635.3, Reliance on Incorrect actions or information by an NRCS employee.

### **b Misinformation/Misaction Relief**

The State Conservationist has no authority to grant Equitable Relief under 7 U.S.C. §7996 (7 CFR §635) for violations of the HELC/WC provisions as a result of a participant's detrimental reliance on the advice or action of an NRCS employee. Only the Chief, NRCS may grant any request for this type of relief by a USDA participant.

All such requests made for relief must be accompanied by a complete description of the need for the relief, as well as completion of the applicable form (FSA-321). All requests for relief must be reviewed by the USDA Office of General Counsel prior to the Chief's approval.

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**Part 518 —Customer Conformance and Quality Assurance**

**Subpart A — Preparation for Conducting Compliance Reviews**

- 518.01      General Information**
- 518.02      Tract Selections**
- 518.03      Review and Adjustment of the Compliance Review List**

**Subpart B — Procedures for Conducting HELC Compliance Reviews**

- 518.10      HEL General Procedures**
- 518. 11      Exemptions from Compliance Reviews**
- 518.12      Reviewing Conservation Plans and Conservation System Documentation**
- 518.13      Conducting the HELC Compliance Review**
- 518.14      Compliance Review Documentation**

**Subpart C – Procedures for Conducting WC Compliance Reviews**

- 518.20      WC General Procedures**
- 518.21      WC Compliance Review Documentation**
- 518.22      Conducting the WC Compliance Review**
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**Subpart D — Decision Making**

- 518.40 Basic Decision Making Procedures**
- 518.41 Decision Making Formula**
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## National Food Security Act Manual, Fourth Edition

### Part 518 — Customer Conformance and Quality Assurance

#### Subpart A — Preparation for Conducting Compliance Reviews

##### 518.01 General Information

###### (a) Purpose

This part of the NFSAM addresses procedures to be used by NRCS employees for conducting compliance reviews of the highly erodible land and wetland conservation provisions of the Food Security Act of 1985.

Appropriate preparation for the compliance review process will ensure that —

- NRCS consistently evaluates USDA participants implementation of, and compliance with, the HELC/WC provisions.
- Variances and exemptions from the compliance provisions are executed promptly and completed within specified timeframes.
- All participants in USDA programs subject to the provisions are appropriately implementing and complying with the provisions prior to being awarded a USDA contract or receiving financial assistance payments.
- Execution of policy is consistent and uniform within the county, State, and among adjacent States.

###### (b) Compliance Review General Policy

Compliance reviews are based on a national *random* sample of tracts. Each compliance review is a technical review of *an entire tract* to determine conformance with *both* the Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) provisions of the Food Security Act of 1985.

**Definition of Compliance** – Compliance is a measure of client conformance with the specific program regulations. In a compliance review, a client’s activities are compared with the requirement of a statute, regulation, plan, contract, or standard. Compliance reviews provide a means to document any problems concerning compliance with the statutory and/or regulatory provisions and identify any problems with program implementation.

USDA agencies are responsible for ensuring that a person complies with the HELC/WC provisions of the Food Security Act of 1985 before providing program benefits (see 7 CFR 12.6(c)).

###### (c) General Information on Tract Selections

The number of tracts selected will be sufficient to accurately assess compliance with the both the HELC and WC provisions. Criteria used in making the national random tract selections are described in section 518.02.

**(d) Deployment of the Random Tract Lists**

All compliance status reviews must be completed annually, on a crop year basis. The national sample tract lists will be provided to the State Conservationists *by December 31*.

If a State has not received their national random tract lists by December 31st, contact the NRCS Information Technology Center (ITC) Help Desk at the following URL:

<https://merlin.sc.egov.usda.gov/magicssh/>.

**(e) Quality Assurance of the Compliance Review Procedures**

A percentage of the tracts selected for annual compliance status review will be reviewed as part of the overall State Quality Review in accordance with this part and other applicable NRCS policy.

The types of data collected during quality assurance *and* customer conformance reviews (either compliance or contract reviews) are determined by a number of factors—

- Areas of risk identified in prior external audits, investigations, and reviews.
- National and State priorities identified in Business and Strategic plans.
- Prior quality deficiencies identified during previous internal Agency reviews.
- Other priorities identified by Agency leadership.

**(f) Compliance Review Assignments**

The State Conservationist shall determine who will conduct compliance reviews within each State, as set forth in the following paragraphs:

- All employees responsible for conducting Compliance Reviews shall have the required knowledge, skills, and abilities to assess the status of both highly erodible land and wetland conservation compliance. If there are currently no employees in a county with the requisite training and knowledge, skills, and abilities to perform Compliance Reviews, the Area or State Conservationist shall assign another employee the responsibility for that specific county.
- State Conservationists and Directors, Caribbean and Pacific Basin, are responsible for assigning staff to conduct Status Reviews within each State using methods that comply with this policy, Part 518, and the regulatory provisions of 7 CFR Part 12. The State Conservationist may utilize any of the following approaches for staffing compliance reviews
  - State or Area-Assigned Compliance Review Teams.
  - Employees from adjacent counties.
  - A combination of (1) and (2).
- Effective with the passage of the Farm Security and Rural Investment Act of 2002, May 13, 2002, (the 2002 Farm Bill), Public Law 107-171, Section 1211(b) and Section 1221(e), only an NRCS employee has the authority to determine if a USDA participant is in compliance with the HEL and WC provisions.
- The State Conservationist is responsible for—
  - Ensuring Compliance Review procedures are consistent with Part 518 and the General Manual, where applicable.
  - Assuring consistent and uniform highly erodible land and wetland determinations and/or delineations within the State and between adjacent States.
  - Assuring that actions taken pertaining to requests for variances are executed and completed within the specified timeframes.

- Assuring that execution of policy is consistent and uniform within the State and among adjacent States.
- Assuring that corrective action is taken to address deficiencies found in quality reviews.
- Determining if additional reviews are required.
- Providing training and follow-up to correct deficiencies.
- Identifying potential cases of fraud, waste, and abuse. (See guidance in Part 520, Subpart A, and Part 520.08.)

**(g) Conservation System Revision**

NRCS will not provide technical assistance for conservation planning or conservation system modification or revision until after the compliance review has been completed, unless the following situations apply —

- A planned structural conservation practice is scheduled to be installed during the same crop year as the review, but after the review has taken place.
- Existing structural conservation practices need maintenance.
- The compliance review is completed at the same time that the onsite field work is being performed.
- A conservation system is being applied that meets the FOTG requirements, but has not been officially documented in the USDA participant's case file.

**(h) Timing of Reviews**

All compliance review must be completed as follows:

- Regular compliance reviews must be completed by no later than November 15th of each year. This includes correction and transmission of all data collected to NHQ for analysis.
- Whistleblower complaint generated compliance reviews must be investigated and completed within 45 days of receipt of the complaint. (See Part 520, Subpart C, Paragraph 520.04).

## 518.02 Tract Selections

### (a) Tract Selections for the National Sample

Tract selections are based on the following criteria—

- USDA payments subject to the HELC/WC provisions received during the past crop year, where a significant benefit level has been attained.
- Stratification of areas where annual crop production is high and participation in USDA programs subject to the HELC/WC is of a significant level.
- Tracts having potential HEL characteristics.
- Tracts having potential wetland characteristics.
- Tracts with CRP contracts, early contract termination, and contract expiration.
- Tracts with other significant characteristics where potential violations might be expected to occur.
- Where 20 percent or more of the tracts in a previous year's compliance review have been determined to be NA, PV, (see paragraph 518.11(f)) or given a variance, an appropriate number of tracts will automatically be added to the national sample for that State.

Annually, the national sample tract lists will be provided to the State Conservationist by *no later than* December 31st.

### (b) Optional State and Local Tract Selections

Prior to November 1st, Regional and State Conservationists may request that NHQ add tracts to the national sample list being drawn because of any of the following —

- Findings from the previous year's compliance review or quality assurance review.
- Either a high or low percentage or number of NA or PV determinations from the current or previous year's compliance review findings.
- A high percentage or number of recurring variances. (Exception: variances issued for a disaster).

The State Conservationist and/or the RAC will consult with the Director, Operations Management and Oversight Division (OMOD), to determine the number of additional compliance reviews to be performed. The Director, OMOD will select the additional tracts.

### (c) States May Additionally Supplement the National List

Tracts may be added to the nationally supplied tract list by either the State Conservationist or the local NRCS official in the USDA Service Center for any of the following reasons —

- State quality assurance procedures indicate the need for a more comprehensive review of either or both the HELC or WC compliance activities to determine if program participants are meeting the requirements of the HELC/WC provisions.
- When a producer has been determined to be in violation of either HELC or WC on one tract in a multi-tract operation and NRCS wants to ensure that this is not a systemic problem in the whole operation.
- To address specific issues or concerns related to internal management control issues identified through outside audits, whistleblower complaints, internal reviews, or other means.

- To ensure that products and services provided at the field service level of NRCS meet the intended outcomes and quality control standards, including, but not limited to reviews of new or experimental technology being used by producers.
- To make conservation program payment eligibility determinations.
- Other issues and needs as determined by the State Conservationist or the local NRCS official.

**(d) Mandatory Tract Selections to Be Added to the National Sample at the Local Level**

The following tract selections and/or additions will be made locally —

- Tracts for five percent of all FSA Farm Credit Loans.
- Tracts owned by USDA (FSA and NRCS) employees. At least one tract per operation will be reviewed at least once every three years.
- Tracts referred by other USDA agencies (See also Part 520, Subpart C, section 520.04).
- Tracts of USDA participants requesting reinstatement.
- Tracts where a variance or exemption was granted the previous year.
- Tracts with expired CRP contracts placed back into production of an annually tilled agricultural commodity crop. NRCS must review a sample of these tracts in order to ensure that this acreage is being cropped using an appropriate conservation system. As a minimum, at least two percent of all expiring CRP contracts will be reviewed in the year following contract expiration.

**Note:** Where a variance was provided because of a disaster event, those tracts do not need to be added to the following year's random compliance review list.

**(e) Compliance Review Following a Variance or Exemption**

Compliance reviews on tracts conducted in the year following a variance or exemption may be limited to either of the following —

- A review to determine if the reason the variance was granted has been alleviated or corrected.
- A review to determine if the USDA participant is using an acceptable conservation system.

**Note:** A complete compliance review does not need to be repeated unless determined by the DC or the tract is again selected through the random process.

**(f) Tract Selection Exemption from FOIA**

The listing of tracts selected for current year compliance reviews is an agency internal procedure and is exempt from disclosure under the Freedom of Information Act (FOIA) under exemption b(2). This provision exempts internal matters of a substantial nature, the disclosure of which would risk the circumvention of a statute or agency regulation.

**(g) Tract Selection Category Codes**

R — Tract selected by NRCS from the NCC based on a random sample

V — Tract added due to a prior year variance.

U — Tract owned or operated by a USDA employee.

A — Tract added due to any of the following –

- Reinstatement has been requested by a USDA participant.

- Tract was referred by another USDA agency.
- Tracts were reported through a whistleblower complaint (See also Part 520.04).
- Other additions, including adding tracts where a violation has been found on one tract in a multi-tract farming operation.

T — Technical assistance variance

- Prior-year potential violations that were observed by NRCS ((when the 45-day/1-year technical assistance variance rule (Part 520, Subpart B, Section 520.11) was applied)).

W — Tract added by State identifying a wetlands tract for review.

M — Replacement tract for an invalid or not found tract in the sample data or a replacement tract for an NN or NC determination.

Note: Categories R and V are made available by NHQ. Categories U, A, T, W, and M are choices for additional tracts entered by State or Field offices.

**518.03 Review of and Adjustment to the Compliance Review List**

**(a) Farm and/or Tract Number Reconciliation**

When the District Conservationist receives the tract list for the compliance review, he or she shall review and reconcile tract and/or farm number discrepancies with the local FSA office.

Tracts and farms that have been assigned new farm and/or tract numbers by FSA will be changed to the new farm and/or tract numbers on the compliance review database, including the current USDA participant name(s), address(es), and other contact information.

NRCS must review the entire acreage of a tract that has been reconstituted to ensure that all portions of the original tract are being farmed in compliance with the provisions of the Act.

**(b) Tracts Previously Determined “NA” or “CW+YR”**

If a tract on the current year’s compliance review list was previously determined as “Not Actively Applying”, (NA), or “Converted Wetland + Year”, (CW+YR), and has not been through the reinstatement process, then a replacement tract must be selected.

NRCS will reconcile this data with FSA to ensure that their violation flags are set correctly and will ensure that the USDA participant has been notified of the HEL or WC violation, as well as the appropriate appeal and mediation rights.

**(c) Requirements for Review and Tract Replacement**

If, through tract reconciliation or other means, there still remains a concern that a tract may not be subject to the compliance provisions, the following table provides general guidance for replacing those tracts. However, it must be remembered that a compliance review is a two-fold process — tracts must be reviewed for compliance with **both** HELC and WC provisions. Even if there are no annually tilled commodity crops being produced on the tract, a program participant is still responsible for complying with the WC provisions, and NRCS must ensure appropriate compliance.

STEP	ACTION	
1	Determine if there have been or are USDA benefits that are subject to the HELC/WC provisions, received by those persons affiliated with the tract. USDA benefits subject to the compliance provisions are as follows:	
	<b>HELC Compliance (16 U.S.C. § 3811 (a))</b>	<b>WC Compliance Only (16 U.S.C. 3821)</b>
	Contract payments received under a production flexibility (or successor) contracts, marketing assistance loans, and any type of price support or payment made available under the Agricultural Market Transition Act,	Contract payments received under a production flexibility (or successor) contracts, marketing assistance loans, and any type of price support or payment made available under the Agricultural Market Transition Act,

STEP	ACTION	
	or the CCC Charter Act (15 U.S.C. 714 <i>et seq.</i> ), or any other Act.	or the CCC Charter Act (15 U.S.C. 714 <i>et seq.</i> ), or any other Act.
	Farm storage facility loans made under §4(h) of the CCC Charter Act (15 U.S.C. 714b(h)).	Not applicable to WC.
	Disaster payments.	Not applicable to WC.*** Certain forms of disaster payments may be subject to the WC provisions.
	Loans made, insured, or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 <i>et seq.</i> ) or any other provision of law administered by FSA, if it is determined that the proceeds of such loan will be used for a purpose that will contribute to excessive erosion of HEL.	Loans made, insured, or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 <i>et seq.</i> ) or any other provision of law administered by FSA, if it is determined that the proceeds of such loan will be used for a purpose that will convert a wetland.
	Payments made under §§ 4 or 5 of the CCC Charter Act (15 U.S.C. 714b or 714c) during such crop year for storage of an agricultural commodity acquired by the CCC.	Not applicable to WC.
	Any payment made pursuant to a contract entered into under Title XII, Subtitle D (16 U.S.C. 3801 <i>et seq.</i> ).	Any payment made pursuant to a contract entered into under Title XII, Subtitle D (16 U.S.C. 3801 <i>et seq.</i> ).
	Any payment made under §§ 401 or 402 of the Agricultural Credit Act of 1978 (16 U.S.C. 2201 or 2202).	Any payment made under §§ 401 or 402 of the Agricultural Credit Act of 1978 (16 U.S.C. 2201 or 2202).
	Payments, loans or other assistance made under §§ 3 and 8 of the Watershed Protection and Flood Prevention Act (16 U.S.C. 1003 or 1006a).	Payments, loans or other assistance made under §§ 3 and 8 of the Watershed Protection and Flood Prevention Act (16 U.S.C. 1003 or 1006a).
	<p>Do any of the listed conditions apply? If YES, proceed to step 2.</p> <p>If NO, code the tract NN, review not needed and document the reason why the tract review is not needed from the following drop down menus: SELECT APPROPRIATE REASON</p>	
<b>2A</b>	Determine whether or not there are annually tilled agricultural commodity crops being produced on the tract. GO TO STEP 2B	

STEP	ACTION		
2B	Determine whether there is land that is or can be determined as being HEL on the tract where agricultural commodity crops (or sugarcane) are being produced. Go to step 2C.		
2C	Determine if there is land that is or should be determined to be a wetland on a tract where agricultural commodities are being produced or where production of such might be made possible. Proceed to step 2D		
2D	<p><b>If the answer to steps 2 A, B, and C are NO, then stop here. Code the tract NN. Select the appropriate reason from the drop down box provided:</b>  <b>SELECT APPROPRIATE REASON</b></p> <p>If YES, proceed to step 3.</p>		
3	<p><b>IF there have been...</b></p>	<p><b>AND there is or could be...</b></p>	<p><b>THEN...</b></p>
	<p>USDA benefits either pending or received that are subject to the <b>HELC</b> provisions and annually tilled agricultural commodity crops (or sugarcane) are being produced on the tract;</p>	<p>Land determined to be HEL and/or land that is or can be determined to be wetland;</p>	<p>A compliance review must be done when the tract is randomly selected. Stop here and perform the compliance review of the tract. If this step does not apply, go to Step 4.</p>
<p>USDA benefits either pending or received that are subject to the <b>WC</b> provisions and annually tilled agricultural commodity crops (or sugarcane) are being produced on the tract; or wetland has been converted for the purpose or to make possible production of an agricultural commodity.</p>	<p>Land determined to be wetland or can be determined to be a wetland;</p>	<p>A compliance review must be done when the tract is randomly selected. Stop here and perform the compliance review of the tract. If this step does not apply, go to Step 4.</p>	
4	<p>If there are no USDA benefits either pending or received that are subject to either of the provisions, then replace the tract by using either of the following methods—</p> <ul style="list-style-type: none"> <li>• Select the next sequentially numbered tract in the county that meets the above requirements.</li> <li>• Select a tract with a Title XII conservation program assistance contract, (i.e., CSP, CRP, EQIP, FRPP, GRP, WHIP or WRP).</li> </ul>		

STEP	ACTION
5	Perform the compliance status review.
6	If no such tracts meeting the above criteria can be found, notify the Operations Management and Oversight Division (OMOD) and the Conservation Planning and Technical Assistance Division (CPTAD) for a waiver from the compliance review requirements for that specific county. All waiver requests must be in writing and must set out the reasons why the specific county needs to be exempted from compliance reviews for the current year. All waivers must be requested by the State Conservationist or designee. Code the tract NN and select NN due to Waiver from the drop down box. SELECT APPROPRIATE REASON

**NOTE:** A tract may currently be listed as part of a farming concern that had received USDA benefits in the prior crop year on the NCC Kansas City, Missouri database. However, that database may not be up to date and may not reflect changes that affect the need for a compliance review and/or the separation of the tract from the original farming concern.

**(d) Review to Determine “Conflict of Interest”**

The Designated Conservationist shall review the completed compliance review list to determine if there might be a potential conflict of interest for the NRCS employee assigned to perform the compliance reviews. A potential conflict of interest may be, but is not limited to the following criteria:

- Tracts owned or operated by the employee, family members, personal friends, Conservation District officials, or any other individual that could present a conflict of interest.
- Tracts previously owned or operated by the employee or family members where circumstances might interfere with an impartial review of the tract.

Example: Foreclosure on a tract of land or loss of a contract bid for farming the land.

Where a potential or actual conflict of interest is found to exist, contact the next level line officer to arrange for assistance in completing reviews of those tracts.

**(e) Employee Farming Interest Report**

All employees are required to submit form NRCS-CPA-1 (see Part 518, Subpart C, Section 518.XX) to the State Conservationist no later than October 15<sup>th</sup>.

- Farms and tracts owner or operated by the employee or family member.
- Conservation program contracts under the employee’s control, or that of a family member.

**(f) Notification to the USDA Participant**

The NRCS employee shall notify the USDA participant in writing when a tract under his or her control has been selected for a compliance review. Notification shall not be more than 30 days prior to the review, or less than 15 days prior to the compliance review.

The landowner and/or operator should be invited, but is not required, to participate in the compliance review, unless the compliance review is for purposes of reinstatement. If the review is for reinstatement, the USDA participant **must be present.**

## 518.04 Tools for Conducting the Compliance Review

### (a) Web-Based Compliance Review Application

A web-based application, Food Security Act (FSA) Compliance Reviews has been developed to record, transmit, and store compliance review information. This application, as well as the instructions for use, is a part of the NRCS Integrated Accountability System. The Compliance Review program is used by NRCS employees to record Compliance Status Reviews.

### (b) User Guide

The User Guide is a part of the web-based application. (See <http://ias.sc.egov.usda.gov/help/csr/docs/CSR.pdf>).

### (c) Reports Available

The following reports are available at both the field service center level and the State Office level —

- Compliance Record Report
- Completed Tracts Detailed by County
- Incomplete Tracts Detailed by Administrative County
- Incomplete Tracts Detailed by Location County
- Tract Status Report
- Tract Status Report 2
- Compliance Review Summary by Determination Code
- HELC Violation (Whistleblower)
- HELC Violation (Non-Whistleblower)
- WC Violation

### (d) Data Analysis

Analysis of customer conformance is necessary to identify common or systemic areas of concerns, as well as areas where work of exceptional quality is being performed. The State Conservationist is responsible for analyzing the status of customer conformance (compliance status reviews) in his or her State. The reports described above provide a means of completing that analysis.

If the analysis of compliance status reviews reveals either systemic problems with NRCS implementation of the HELC/WC provisions or with compliance by program participants, the State Conservationist must take appropriate action to resolve those concerns. Actions may include, but are not limited to, the following:

- Suggested actions for correcting employee implementation problems:
  - Additional training
  - Performance critical element
  - Closer supervision
- Suggested actions for correcting customer conformance problems:
  - Informational meetings for participants
  - Public information brochures
  - Conservation planning followup assistance

## **518.05 Off-site Compliance Review Procedures**

### **(a) Appropriateness**

In some cases, it may be appropriate to use off-site procedures to collect the information needed for HEL and WC Reviews. Off-site procedures include the use of remote-sensing (maps or aerial photographs) or aerial platforms such as helicopters or airplanes. Off-site procedures may be considered only when they can—

- Increase or maintain quality of determinations,
- Decrease cost of conducting reviews as measured by staff time input,
- Increase efficiencies of operations,
- Reduce risk to agency or employee(s).

### **(b) Approval Process**

Before conducting off-site compliance reviews, each State Conservationist must—

- Develop a protocol for conducting compliance reviews utilizing off-site procedures; and
- Test the protocols to insure that they fulfill the objectives set forth in section 518.XX(x).

Protocols and the results of the testing must be submitted to the Deputy Chief for Programs Director for review. The Deputy Chief for Programs in consultation with the Deputy Chief for Strategic Planning and Accountability will approve all off-site protocols

States wishing to use off-site procedures should contact the National Cartographic and Geographic Center and their Regional Remote Sensing Laboratories for technical assistance in developing appropriate materials and protocols for conducting the reviews.

**Part 518 — Customer Conformance and Quality Assurance**

**Subpart B — Procedures for Conducting HELC Compliance Reviews**

**518.10 HELC General Procedures**

**(a) Data Collection**

Data collection will include, but is not limited to, the following—

- Review of field office files and records.
- Review of case files (including planning and design documents)
- Interviews with NRCS staff, partners, clients, and others, as necessary.
- Documented observations of conservation practices, which are made in the field or through remote sensing. .

**(b) Timing of Data Collection**

In collecting data, NRCS will ensure that resources are used efficiently and that data is collected during appropriate times of the year.

The State Conservationist must determine when compliance reviews will be conducted in his or her state. A compliance review-matrix will be developed to supplement this guidance for each State. The following factors must be considered when developing the State matrix for scheduling purposes—

- The time of year when the conservation practices can best be evaluated.
- The critical erosion period for either wind or water of the crop year for the annually tilled crop and the conservation system or conservation practice being reviewed.
- The period when the most conserving practices used in the most common conservation systems will be applied.
- When ephemeral gully erosion most likely to occur in cropland fields.
- When the major wind events are most likely to occur.
- Which HEL soils are the most highly erosive, and where they are most likely to occur.
- The usual planting time for annually tilled agricultural commodity crops in the State or region of the state.

The following table provides an *example only* of a data collection matrix for a State—

<b>Region of State</b>			
<b>Criteria to be Considered</b>	<b>East</b>	<b>Middle</b>	<b>West</b>
Critical Erosion - water	January-June	January-June	January-June
Minimum Tillage/Residue	April-July	April-July	March - July

<b>Region of State</b> <b>Criteria to be Considered</b>	<b>East</b>	<b>Middle</b>	<b>West</b>
Management			
No-tillage/residue management	May-July	Late April-July	Late April - July
Structural Practice Installation	November - April July - September	November - April July - September	November - April July - September
Crop Residue Management	September - November	September - November	September - November
Cover Crop Planting	September-November 15	September - October 25	September - October 15
Permanent Vegetative Cover Planting	August - October	September - November	September - November

**(c) Combining Reviews**

Compliance reviews may be conducted as stand-alone reviews or in conjunction with other customer conformance (contract reviews) or with State Quality Assurance Reviews.

**(d) Explanation of a “Crop Year”**

A crop year is the year in which a single crop is harvested. The crop year ends when that crop is harvested. When multiple crops are grown in a year, the crop year ends when the last crop is harvested. When a cover crop or fallow period is part of the cropping system, these time periods are considered to be part of the next crop year.

Example: In a wheat/fallow cropping system, the crop year begins immediately following the harvest of the preceding wheat crop and includes the fallow period, the planting, growth and harvest of the next wheat crop.

The appropriate time for conducting the compliance review is immediately following the planting of the new wheat crop.

An NRCS decision of non-compliance with the HEL provisions is effective for the entire crop year. NRCS shall identify the crop year for which the violation is applicable.

## 518.11 Exemptions from Compliance Reviews (for HEL Components Only)

### (a) Conditions for Exemptions of a Tract or Field from Compliance Reviews

NRCS may exempt the following tracts from the HELC portion of the compliance review process, if the tract has been selected randomly and the case file is properly documented—

- The tract has been reviewed at least once in the past two years, and found to be actively applying an approved conservation system or conservation plan. If an entire tract is exempted from the review, the DC shall replace the tract in accordance with the procedures in NFSAM 518.03(c).
- The USDA participant has self-certified application of the appropriate level of crop residue as required for the conservation system being used or as included in a conservation plan and as specified in the local FOTG.
- The USDA participant is applying a Resource Management System (RMS) for non-sodbuster HEL cropland.

Note: Tracts exempted for reasons set forth in Paragraphs 518.04(a through c) must still be investigated for any potential WC violations in accordance with the provisions of Subpart C of this part.

### (b) Required Documentation for Tracts Exempted from HEL Portion of Compliance Reviews

Self-certification records shall become a part of the compliance review record in the USDA participant's case file.

Only the HEL portion of the review can be exempted for the above listed conditions. All tracts on the compliance review list, with the exception of those added for a specific purpose, must be reviewed for potential wetland violations.

### (c) Tracts Exempted from Compliance Reviews

If an entire tract meets the criteria for exemption from the HEL portion of the compliance review, then the tract shall be coded "EX" for exemption from the HEL review. If only a field is exempted, then fully document the field exemption in the explanatory section of the compliance review tool, and conduct the compliance review on the remainder of the tract.

Tracts exempted from the HEL portion of the compliance review shall be reviewed for potential WC violations and appropriate WC codes shall be used.

### (d) Partial Review of a Tract

Compliance reviews may be limited to a partial review of the tract if the following criteria apply—

- A compliance review is being conducted as a result of a variance being granted in the prior crop year. The compliance review may be limited to the field or practice for which the variance was granted. If conditions warrant, the DC may elect to review the entire tract.

- The HEL review has been exempted due to any of the reasons listed in paragraphs 518.04(a through c) above. A review of the tract will be conducted for any potential wetland violations only.

**(e) Exemptions for Widespread Weather Variances**

Tracts where a variance was granted due to a disaster do not have to be included on the following year's compliance review list, unless other conditions for a specific tract prevail.

## **518.12      Reviewing Existing Conservation Plans and Conservation System Documentation**

### **(a)      Conservation System or Conservation Plan Review**

For all compliance review tracts, the most recent conservation plan or conservation system must be reviewed to ensure that the conservation system is adequate. This review will be used to make the following determinations—

- Whether the conservation system included in the conservation plan (if there is a plan) has been evaluated using the most current erosion prediction technology, as follows:
  - Has the conservation system been converted to the most current erosion prediction technology?
  - Does the new technology require a soil protection level that is less than the “T” -- tolerable soil loss tolerance for the major HEL soil in the field.
  - Are there ephemeral gullies present, and if so, are these areas adequately protection from soil erosion?
  - What is the required level of protection required for the major HEL soil in the field?
- Is any part of this tract subject to any conservation program contracts (Title XII of the 1985 Act) where compliance with the HELC/WC will determine eligibility for payments?
- Is there a wetland mitigation or restoration plan that must be either installed or maintained on the tract acreage?
- What is the status of wetland determinations and/or wetlands on the tract.
- What are the conservation practices that must have been installed to constitute substantial performance of a required conservation plan (reinstatement, good faith, TA variance)?
- If there are structural practices required, have they been maintained in accordance with the O&M plan?

### **(b)      Inadequate Conservation System**

Existing conservation plans or conservation systems currently being applied by USDA participants must be reviewed to determine if the conservation system is adequate for purposes of meeting HELC compliance-erosion protection definitions.

### **(c)      Conservation System Erosion Calculations**

The conservation system being used by the USDA participant to produce annually tilled commodity crops must be evaluated using the most current erosion prediction technology available at the time of the compliance review. A substantial reduction or the no substantial increase soil protection requirements of the HELC provisions must be met as set forth in Part 512, Subpart A, Section 512.03.

### **(d)      Review USDA Documents and Previous Contract or Compliance Reviews**

Review the following documents or databases to determine past and/or current status of the USDA participant’s compliance with HELC/WC provisions—

- Form AD-1026
- Register of Reconstitutions
- FSA Violations Database (Form FSA-493 data; [https://indianocean.sc.egov.usda.gov/FSA-493ViolationReports/helc\\_main.jsp](https://indianocean.sc.egov.usda.gov/FSA-493ViolationReports/helc_main.jsp))

**(e) Notification of USDA Participant(s) of the Review**

All USDA participants with tracts on the Compliance Review tract list are to be notified as set forth in Part 518.XX(X).

Notification will be in writing by regular mail. The example letter is provided for modification and use at the local Field Office level in the web-based FSA compliance status review application.

(Need to provide letters to LeRoy Hall for inclusion in the web-based application.  
Letters to include as follows:

Letter notifying USDA participant of selection for random compliance status review.

Letter notifying USDA participant of whistleblower complaint and subsequent compliance status review.

Preliminary technical determination, HEL violation.

Field Review findings and final technical determination, HEL violation.

Preliminary technical determination, WC violation.

Field Review findings and final technical determination, WC violation.

Notification of variance or exemption.

Provision of HELC required conservation plan and requirements.

Provision of WC wetland mitigation or restoration plan and requirements.

## 518.13 Conducting the HELC Compliance Review

### (a) Conservation Plans and Conservation Systems

An office review of available data shall be completed prior to performing the field portion of the compliance review. The office review shall consist of the following steps—

- Review of aerial photography, slides, topographic, or other map bases to determine:
- Fields being cropped.
- Soil mapping.
- Review of the original HEL determination for accuracy.
- Review all supporting data in the case file to determine if all variances or exemptions issued have been fully reconciled.
- Evaluate the conservation system using the current version of RUSLE or WEQ.

Field reviews shall include the following components, unless exclusion has been specifically provided—

- Review the entire tract for compliance with HELC provisions.
- If a tract number on the random tract list has been reconstituted by FSA into two or more tracts, all the resulting tracts shall be included in the compliance review. Each separate tract shall be entered into the database separately, and coded as an “R” category.
- Review crop residue levels as per the National Agronomy Manual and/or the National Range Manual, as appropriate.
- Review the cropping system actually being used, using the current version of RUSLE or WEQ.
- Review the entire tract for potential wetland violations.

Note: Assumptions of past or future year plantings used to determine compliance with the HEL provisions is not appropriate. The actual conservation system, including the cropping rotation, cultural practices, and conservation practices installed and maintained shall be the basis for the compliance review determination to be made. Where evidence of compliance, including a USDA participant’s records is inconclusive, do not assume compliance or non-compliance. Instead, grant a variance, if appropriate.

### (b) Forms and Worksheets

- NRCS-CPA-06
- NRCS-CPA-026e
- Review AD-1026
- Review FSA-569 if potential violation reported on tract

### (c) Conservation System Erosion Documentation

When NRCS reviews sodbusted fields (those fields broken from native vegetation only), the following minimum documentation must be recorded:

- Date of the conversion from native vegetation to annually tilled agricultural commodity crop.
- The cropping history since the conversion from native vegetation.

In determining the conservation system being applied, use the current cropping year information and crop management history since the date of sodbusting. The cropping sequence evaluation starts with the date of the conversion and ends at harvest of the current year.

In no case will any carryover effect of the previous native vegetation (sod or trees) be considered when calculating the predicted soil loss for the conservation system being applied.

The rotation and tillage (cropping system) that is being used on the sodbusted field(s) should be used to calculate the predicted soil loss. The predicted soil loss for sodbusted fields must be no higher than the allowable soil loss tolerance for the field.

If a sodbusting violation is discovered during the first year of conversion from native vegetation, and the soil loss (to date) is less than the soil loss tolerance for the predominant HEL soil mapping unit, there may not be enough information to determine compliance with the requirements for meeting the “no substantial increase” definition for the entire system being used. Grant the appropriate variance and schedule compliance reviews until sufficient crop management information is available to determine compliance with the conservation provisions.

#### **(d) WEQ and HEL Compliance Determinations**

When using WEQ for evaluating conservation system planning and implementation, the following guidelines shall be followed:

- If the conservation system was planned using the Critical Period Method of WEQ, then the conservation system implementation shall be evaluated using the Critical Period Method.
- If the conservation system was planned using the Management Period Method of WEQ, then the conservation system implementation shall be evaluated using the Management Period Method.

Note: Do not mix the use of the two WEQ calculation methods. This will produce a false evaluation.

When a compliance review is conducted, the conservation system that is being used to produce the agricultural commodity crop at the time of the review will be fully documented.

#### **(e) Compliance Review Documentation**

A complete documentation for each tract where a compliance review is conducted will be entered in the appropriate data entry locations included in the Compliance Review Web Based Application. This application has been developed to provide adequate space for explanation and comments, as well as any other information that would support the rationale for the compliance review determination. It is especially important that all decisions regarding a USDA participant’s compliance be fully documented in this application, as this will constitute the official record of review for the crop year. **All tracts reviewed in a given crop year must be entered into this application.** A paper copy of the compliance review determination for each tract may be placed in the USDA participant case file.

**(f) Determining Compliance with the HELC Provisions**

The following criteria must be met for a person to be actively applying a conservation system of conservation plan—

- All conservation practices are being applied and maintained in accordance with FOTG requirements.
- The allowable soil loss from the conservation system does not exceed the maximum allowable soil loss for the predominant highly erodible soil mapping unit in the field, as set forth in Part [512.01](#).
- If a USDA participant is using a cropping system that is currently not included in the local FOTG the NRCS reviewer must determine if the cropping system being used by the participant will meet the appropriate soil protection requirements as defined in NFSAM 512.01(d).
- For reinstatement after an HEL violation, active application will be considered when the first crop is planted according to the conservation system agreed upon following the violation, or any revised conservation system that meets FOTG requirements for erosion reduction for the field conditions as set forth in Part [512.01](#). In no case will the years of non-active application be averaged into the conservation system being implemented following reinstatement procedures.
- For NRCS to consider that a crop rotation and/or a conservation cropping sequence are being used, a full cycle of the crop rotation does not need to be accomplished. When the most conserving portion of the conservation cropping sequence has been applied, the conservation system is considered actively applied.

Note: This does not alleviate the USDA participant's responsibility to fully implement and maintain a conservation system that will meet the HELC soil erosion-reduction requirements, the FOTG requirements, and Part [512.01](#)(d and e).

- Active application for conservation tillage systems or crop residue use or management is based on the amount of crop residue remaining following the planting of the agricultural commodity.

**(g) Supporting Documentation**

Supporting data, such as FSA records and the USDA participant's records may be used where appropriate to determine if the conservation system being used will meet the soil protection requirements. Place all documentation relied upon in making a technical determination in the USDA participant's case file to support the technical determination.

**(h) HEL Compliance and Conservation System Field Trials**

At the end of the conservation field trial period, if the conservation system under evaluation does not meet the HEL requirements, the tract will not be determined to be in violation. Rather, the USDA participant will be provided sufficient time, not to exceed 1 year, in which to develop and apply a conservation system that will meet the HELC requirements.

## 518.14 Compliance Review Documentation

### (a) Compliance Codes for HELC

The following codes are to be used when there are no violations or problems with the conservation system being used to produce the annually tilled agricultural commodity crop—

- **AA** - Actively applying a conservation system

A conservation system is being applied and maintained that meets the HELC requirements set forth in Part [512.01](#). This code shall only be used where a producer has just begun implementation of the approved conservation system for any of the following reasons—

- Reinstatement from a violation.
  - Land newly converted to cropland.
  - Land returned to commodity crop production from a CRP contract.
  - Land where a good faith exemption resulted in implementation of a newly developed conservation system.
  - Land where a variance given by NRCS when there had been a violation found while providing technical assistance other than during a compliance status review that resulted in implementation of a newly developed conservation system.
  - Other situations where a new conservation system is being implemented.
- **UA** - Using an approved system

All required structural and supporting management practices and treatments are installed, operating, and maintained in accordance with the FOTG prior to and at the time of the compliance review. The required treatment results in a substantial reduction or in no substantial increase in soil erosion or ephemeral gully erosion.

### (b) Variance Codes for HELC Violations

If the conservation system being used to produce the annually tilled agricultural commodity crop is not adequate and/or has specific deficiencies, review the variances and exemptions listed below to determine if any would apply to the specific situation.

Variances and/or exemptions are not an automatic alternative to a compliance review determination of “NA.” Grant a variance *only if all of the conditions* applicable to a specific variance have been met. (Also refer to Part 513, Subpart B for additional guidance).

- **AC** - Actively applying a conservation system with a temporary variance for special conditions.

The USDA participant is unable to comply with the HELC provisions because he or she could not apply or fully apply an approved conservation system due to the following natural occurrences—

- Severe weather such as drought, hailstorm, or flooding.
- Pests such as grasshoppers, mice, worms, loose cattle, or weeds.
- Diseases such as rot and fungal disease.

- **AH** - Actively applying a conservation system with an approved variance for a special problem.

The USDA participant is unable to comply with the HELC provisions because he or she could not apply or fully apply an approved conservation system due to the following reasons—

- A severe physical condition or death of the farm operator or a family member that prevented the application of the full conservation system.
- Destruction of equipment or farm holdings by fire, natural disaster, or other similar occurrences.
- Special problems or situations, including NRCS error, which prevented the USDA participant from applying the approved conservation system.

Note: This variance should ***only be used rarely***. Fully document the cause of the inability to apply an approved conservation system.

When citing NRCS error, including untimely provision of technical assistance or an inadequate conservation plan as the result of the failure to apply an approved conservation system, the following criteria must be examined:

- Did the USDA participant apply for assistance in a timely manner? If the answer to this question is YES, go to the next question. If the answer is NO, do not grant the variance, as per the governing regulation at 7 CFR 12.4(h).
- If the USDA participant was unable to obtain assistance from NRCS for development of an approved conservation system, did that person have the knowledge or should he or she have known of the types of conservation systems that would have met the HELC provisions? If the answer is NO, grant the variance. If the answer is YES, do not grant variance.

In either case, sufficient documentation ***must be included*** in the USDA participant's case file folder. In addition, if failure by NRCS to provide technical assistance is the cited problem and the variance is granted, the NRCS employee responsible for that county must provide a full report to the State Conservationist citing reasons why this occurred, and how this can be prevented in the future. This information will be entered into the compliance review database, 'explanation and additional information' section.

- **AM** – Actively applying an approved conservation system with an approved variance for a minor technical failure (HELC minimal effect).

This variance may ***only*** be used when the failure is minor, having only a minimal effect on the overall effectiveness of the soil protection requirements, is technical in nature, and does not affect the functioning of the conservation system(s) on the entire tract. The State Conservationist ***must develop criteria*** for granting this variance to supplement this handbook.

Some items to consider in developing the criteria for granting this variance are as follows:

- **Example Number 1:**  
**Criteria:** A conservation system that has been applied is found to have a soil loss in excess of the soil loss required to meet the definitions for either a substantial reduction in

soil erosion or no substantial increase in soil erosion.

**Example:** The soil loss calculations reveal that the soil loss only exceeds the requirement by one ton per acre per year or less.

- **Example Number 2:**

**Criteria:** A conservation system has been applied, but the residue levels are below those required.

**Example:** Row disturbance is no greater than 25 percent.

- **Example Number 3:**

**Criteria:** A no-till system has been applied and the residue levels do not meet those required.

**Example:** The levels are within those levels as set forth in the table below:

Required Percent Residue	Applied Residue Level
30	--
35	28
40	32
45	36
50	40
55	45
60	50
65	55
70	60
75	65
80	70

- **CA** - Conditionally applying a conservation system.

This label should only be used if the compliance review cannot be finalized due to the following criteria being present—

- Major maintenance of structure measure(s) are required.
- Planned structural conservation practices are scheduled to be installed.

- **TA** - Actively applying a conservation system with a variance for technical assistance.

This variance is granted when a USDA participant has been found to be in violation of the HELC provisions while NRCS is providing technical assistance in situations

other than during a compliance status review. This variance is not available for tracts on the compliance review list or for whistleblowers.

- The violation is only on HEL cropland.
- The violation was not found during an official compliance review or during a whistleblower review.
- The USDA participant has agreed, within 45 days of the violation to apply an approved conservation plan within 1 year.

**(c) Exemptions Codes (Granted only by FSA) for HELC Violations**

These codes are to be used when FSA grants either a good faith exemption or an economic hardship exemption. (Also refer to Part 513, Subpart B for additional guidance).

- **AE** - Actively applying a conservation system with an exemption for economic hardship

This is only for the HELC portion of the compliance provisions. The conservation systems were economically prohibitive to apply and maintain, as approved by the FSA County Committee and State Committee.

- **AG** - Actively applying a conservation system with an exemption based on a good faith exemption (Good Faith for HELC Violations)

The FSA County Committee may grant an exemption from an HELC violation by finding that the USDA participant did not deliberately violate the provisions. This exemption covers a participant who violates the HELC provisions on the advice of a USDA employee. (7 CFR 12.5(a)(5) and Part 520, Subpart B.)

**(d) HELC Violation Code**

The following code is to be used when a compliance review identifies a specific deficiency or violation of the HELC—

- **NA** - Not applying a conservation system that meets the HELC requirements.

The USDA participant is not applying or using the required conservation system on one or more HEL fields and the conditions do not constitute a minimal effect.

**(e) Other Codes**

- **NC** - Not Conducted

No review has been conducted. An entry in the comments section of the review application is required. An additional tract selection is required. (Part 518.03(c)).

- **NN** - An HELC conservation system does not need to be applied.

The USDA participant does not need to apply a conservation system to meet the HELC requirements due to those factors set out at paragraph 518.03(c). An entry in the comments section of the review application is required. An additional tract selection is required. (Part 518.03(c)).

## **Part 518 — Customer Conformance and Quality Assurance**

### **Subpart C —Wetland Conservation Compliance Review**

#### **518.20 Conducting WC Compliance Reviews**

##### **(a) Wetland Determinations**

A wetland compliance review will include —

- Review of certified wetland determinations
- Review of completed wetland inventories if a certified wetland determination has not been conducted on the site

##### **(b) Review Certified Wetland Determinations (post-November 28, 1990)**

Certified wetland determinations completed after November 28, 1990 will be reviewed based on approved mapping conventions and site conditions—

- Review offsite mapping conventions.
- Review supporting documentation used to complete certified wetland determination
- Review wetland labels.
- Review wetland location on the official map.
- Review accuracy of Scope and Effect determination, if applicable.
- Review documentation of the three wetland criteria.
- Field review wetland determination. Compare the wetland determination with field findings and note any discrepancies.
- Determine if discrepancies are due to WC violations or to errors in the wetland determination or the mapping..

##### **(c) Review Certified Wetland Determinations (Post-July 3, 1996)**

Certified wetland determinations completed after July 3, 1996, will be reviewed based on field accuracy of determinations. Off-site mapping conventions/inventories do not need to be reviewed when a post-July 3, 1996 wetland determination has been completed. Part 514 requires that all wetland determinations/delineations be conducted and/or verified on-site by a qualified employee—

- Review certified wetland determination on-site to determine accuracy of certified wetland determination. This review should be conducted by qualified individuals, i.e., biologist, soil scientist, or engineer trained in wetland determinations.
- Determine if discrepancies are due to WC violations or to errors in the wetland determination or the mapping..
- Review documentation and accuracy of CPA-026e.
- Review certified wetland map.
- Review Scope and effect determinations for PC, FW, and FWP labels.
- Review job approval authority of the individual (s) completing the certified wetland determination.
- Review wetland determination/violation transmittal letters.

**(d) Review Wetland Inventories Based on State's Approved Off-site Mapping Conventions.**

- Review offsite mapping conventions.
- Review other supporting documentation used to complete wetland inventory.
- Review the wetland inventory.
- Review the wetland inventory in the field. Compare the wetland inventory with the field findings and note any discrepancies.
- Determine if discrepancies are due to WC violations or to errors in the wetland determination or the mapping.
- Review job approval authority of the individual(s) completing the wetland inventory.

**518.21 Compliance Review Documentation****(a) Compliance Review Determination Codes for Wetlands**

The following table provides compliance review codes for wetlands—

<b>Code</b>	<b>Review Determination</b>	<b>Applicability and Use</b>
AG	FSA has granted a good faith determination for a converted wetland.	The FSA County Committee granted an waiver from a wetland violation by finding that the USDA participant did not deliberately violate the provisions And the participant agreed to implement an approved wetland mitigation or restoration plan.
NC or NN	Not Conducted or Not Needed	No review has been conducted or NRCS has determined that a review is not needed. An entry in the comments section is required. An additional tract selection is required. See Section 518.03(c).
NV	No Violations	There are no violations or potential violations of the WC Provisions.
PV	Potential Violations	There is a potential wetland violation.

**(b) Forms and Worksheets**

- NRCS-CPA-06
- NRCS-CPA-026e
- Wetland Determination Data Forms
- AD-1026
- FSA-569, if potential violation reported on tract
- Minimal effect procedure if used on tract
- Mitigation procedure (including wetland functional assessment) if used on tract

## **518.23 Notifications**

### **(a) Written Notification**

NRCS must furnish a written notification to the USDA program participant that contains the findings of the compliance review.

### **(b) Decision-making**

Decisions must be fully supported by documentation from the off-site (office review) and the on-site (field review) portions of the compliance review. All decisions must consist of the following information:

- Background Information
- Applicable Provisions
- Issues Reviewed
- Findings of the Review
- Conclusion

## Part 518 — Customer Conformance and Quality Assurance

### Subpart E — Decision Making

#### 518.40 Basic Decision Making Procedures

##### (a) General

All compliance reviews must have a written determination issued to the program participant following the conclusion of the review.

##### (b) Making Better Determinations and Decisions

Since the 1996 Farm Bill, NRCS has been responsible for implementing conservation programs that provide significant monetary benefits for producers across the United States. In order to ensure that these programs are appropriately implemented, NRCS must make technical determinations and program decisions in accordance with published program regulations and statutory guidelines.

Many of the determinations and decisions issued by NRCS are relatively simple, at least to agency personnel, but all the determinations and decisions that are made have a great impact on persons who, for whatever reason, may not fully understand the rationale behind the actual decision. Therefore, it is very important that all determinations and decisions be based on sound reasoning. All required regulatory steps and procedures and their outcomes must be fully documented.

This will assist NRCS to ensure two things:

- Better overall determinations and decisions; and
- Less likelihood of being overturned in appeal or litigation.

##### (c) Making Better Determinations and Decisions

There are many ways to improve decision making. This section includes a method by which decision making can be done to include all the documentation required by regulation and statute.

#### 518.41 Decision Making Formula

##### (a) IRAC (Issue, Rule, Analysis, Conclusion)\*

IRAC (Issue, Rule, Analysis, and Conclusion) forms the fundamental building blocks of legal analysis. It is the process by which lawyers think about any legal problem. IRAC allows you to reduce the complexities of the law to a simple equation.

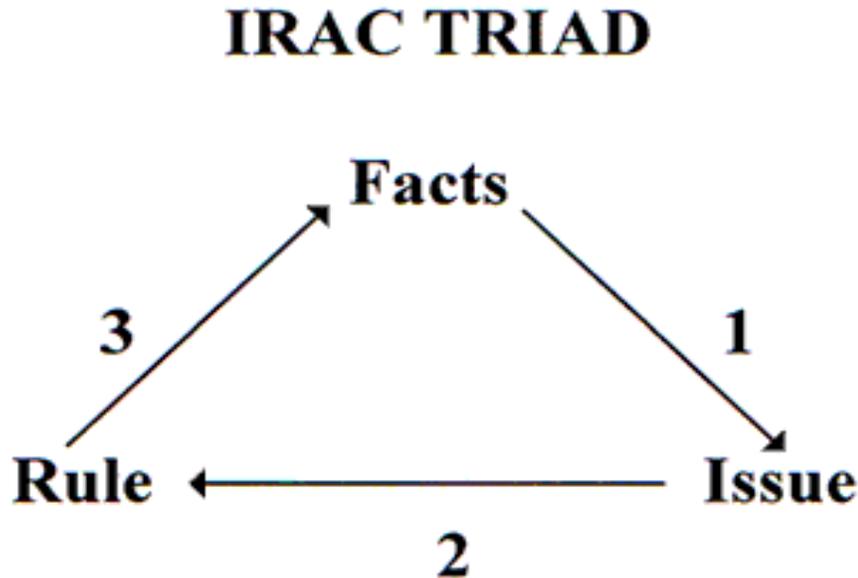
##### (b) IRAC Triad

The IRAC uses the facts, issues and rule as building blocks for the analysis. The analysis is the end product and primary goal of the IRAC process, but the role that facts play in

forming the analysis is highlighted. The process is represented by a simple flowchart, which sorts the facts and leads to a Conclusion.

\*(Provided by <http://www.lawnerds.com>)

The following diagram presents this concept—



**(c) Steps in the Triad**

- Step 1 — the facts compiled during the investigation will suggest an issue. The issue would not exist unless some event occurred.
- Step 2 — The issue is governed by a rule of law. The issue determines what rule is applied.
- Step 3 — Compare the facts to the rule to form the Analysis. Do the facts satisfy the requirements of the rule?

**518.42 Examples of Using IRAC**

**a Determining the Issue**

What are the facts and circumstances surrounding the determination to be made? (e.g., what is nature of the problem or decision to make?) This is always in the form of a question and is the matter to be answered by the NRCS employee making the decision or determination.

**b What is the Rule?**

Next, the NRCS employee needs to determine the rule of law governing the decision to be made. What is the governing law, regulation, and agency policy for the issue? This is a statement of the requirements as supported by the statute, the rule, and agency policy.

- Source for Rules -- (<http://www.gpoaccess.gov/cfr/index.html>)
- Source for U.S. Code -- (<http://www.gpoaccess.gov/uscode/index.html>)

- Source for NRCS policy -- (<http://policy.nrcs.usda.gov/>)

### **c Analyzing the Facts**

Does the rule apply to the unique facts of the particular participant's situation? (e.g., a USDA program participant that is in potential violation of the HELC or WC provisions). In this step, the facts that support the final decision are to be laid out. The facts are the circumstances that result in the need for a decision or a determination.

- Identification (Finding of Fact (FOF)) of the facts:
  - What are the facts that need to be found and why are certain facts relevant? Because they support or disprove the legal issue to be decided.
  - Which facts help prove which elements of the Rule?
  - How do these facts satisfy this rule?
  - What types of facts are applied to the rule?
  - Is there another solution?
  - What are the elements that prove the rule?
  - What are the exceptions (variances or exemptions) to the rule?
- From what authority does the rule come?
- Are there social considerations? (e.g., is this a new, socially disadvantaged, or limited resource farmer that may need additional clarification or assistance in order to adequately comply with the rule?)

### **d Developing the Conclusion**

The conclusion of the decision making process is actually the technical determination or program decision that the NRCS employee must make in response to the actions of or request for assistance from a producer. A few questions need to be answered when making a conclusion and/or issuing a technical determination or program decision.

The following are examples flowing from the previous identification of the issues, facts, and analysis—

- Is the program participant in violation of the HELC or WC provisions? What is the final determination or decision? Respond to the issue that has been identified. State the rule. In other words, take the question that is the issue, turn it around, and make it into a statement that is supported by the analysis of the facts and apply it to the rule.
- What is the determination?
- Can the determination be modified because of variances and/or exemptions?
- What is the procedural effect or outcome of the determination?
- What further actions will follow from this specific determination?
- Fully document the conclusion and the determination or decision that has been made.

### **e Writing the Technical Determination or Program Decision**

All technical determinations or program decisions must include the following information, at a minimum—

- Background Information— Background information should include a brief, but complete synopsis of the technical determination or program decision being made.

- **Applicable Program Provisions**— explain the laws, rules, and regulations that apply to the technical determination or technical decision. **Policy and procedure used by NRCS must be based on published rules and regulations.** NRCS was given the authority to carry out conservation programs by law, not by the manual or handbook. Manuals or handbooks simply state how the authority will be carried out.
- **Issues**— Determine and clearly identify all the issues of the decision. This will require a careful examination of the situation. Number the issues, and address each one in subsequent parts of this report.
- **Producer Situation**— Everything that is known about the appellant’s position in advance of the hearing should be included. Often very little will be known about the participant’s position before the hearing. Identify and number the points made by the appellant in the letter of appeal. These may or may not be relevant to the issues of the appeal.
- **Evidence Analysis**— this is the most important part of the report because it explains the basis for the Agency's decision. It contains the evidence and the basic conclusions on which the NRCS decision (ultimate conclusion) is based. Basic conclusions are called "findings of fact" because they sort out the pertinent evidence from the irrelevant evidence. There should be enough narrative to explain the logic and judgment that was used in sorting through the evidence and reaching the conclusions.
- Each point of the producer's position and any evidence provided by him or her, should be discussed relevant to the issues. Do not skip any points of the producer’s position. If a point is irrelevant, briefly state why.
- Findings made by NRCS and the evidence to support them are also part of the analysis. If there are NRCS established procedures for gathering information, reference the procedures and follow to the letter. This is very important. Supporting documentation should be attached to the report.
- Basic conclusions should be reached on each of the issues identified in the decision. If the issue is one of scope, the basic conclusions should address both context (substance) and intensity (extent).

Note: The following [hyperlinked information](#) provides additional information and explanation for documenting technical determinations and technical decisions.

#### **f Example -- HELC Violation**

- **Example Issue Question**— Has the USDA program participant violated the highly erodible land conservation (HELC) provisions by failing to use an appropriate conservation system or, in the alternative, by having failed to maintain required conservation practices in the conservation system?
- **Example Rule Statement**— A person is in violation of the HELC provisions when an annually tilled agricultural commodity crop has been produced on HEL cropland without using a conservation system that will meet the soil protection requirements.
- **Examples of Citations to the Statute:** The following are examples of correct citations to the Statute to support the determination and/or decision—
  - The governing law is: 16 U.S.C. 3801; 3811-3814. The following significant portions are provided—16 U.S.C. 3811(a), “Except as provided in section 1212, and notwithstanding any other provision of law, any person who in any crop year produces an agricultural commodity on a field on which highly erodible land is predominate, ... as determined by the Secretary shall be ineligible for....”; and
  - 16 U.S.C. 3812(c), “No person shall become ineligible under section 1211...(1) on highly erodible land in an area--(A) within a conservation district, under a conservation system that has been approved by a conservation district after the district has determined that the

conservation system is in conformity with the technical standards set forth in the Soil Conservation Service [now NRCS] technical guide for such district; or (b) not within a conservation district, under a conservation system determined by the Secretary to be adequate for the protection of highly erodible land that has been set aside or for the production of such agricultural commodity on any highly erodible land subject to this title;....”

- 16 U.S.C. 3812a(b) “For the purpose of determining whether there is a substantial reduction in soil erosion on a field containing highly erodible cropland, the measurement of erosion reduction achieved by the application of a conservation system under a person’s conservation plan shall be based on the estimated annual level of erosion that existed before the implementation of the conservation measures and management practices provided for in the conservation system.”
- Examples of Citations to the Rule: The following are examples of correct citations to the Rule to support the determination and/or decision—
  - The governing regulation is: 7 CFR part 12. The following significant portions are provided— 7 CFR 12.2, Definitions, “Highly erodible land means land that has an erodibility index of 8 or more.” ;
  - 7 CFR 12.4(a) Actions. “Except as provided in §12.5, a person shall be ineligible for all or a portion of USDA program benefits listed in this section if: (1) The person produces an agricultural commodity on a field in which highly erodible land is predominant,....”;
  - 7 CFR 12.5(a)(2) Compliance with a conservation plan or system. “As further specified in this part, no person shall be ineligible for the program benefits described in §12.4 as the result of production of an agricultural commodity on highly erodible land or the designation of such land for conservation use if compliance with a conservation plan or conservation system approved under paragraph (a)(2)(i) or (a)(2)(ii) of this section.
  - 7 CFR 12.22(a) Predominance. “Highly erodible land shall be considered to be predominant on a field if either: (1) 33.33 percent or more of the total field acreage is identified as soil map units which are highly erodible; or (2) 50 or more acres in such field are identified as soil map units which are highly erodible.”
  - 7 CFR 12.23(a) Use of field office technical guide. “A conservation plan or conservation system developed for the purposes of §12.5(a) must be based on, and to the extent practicable, conform with, the NRCS field office technical guide in use at the time the plan is developed or revised....”
  - 7 CFR 12.23(b) Substantial reductions in soil erosion. “For the purpose of determining whether there is a substantial reduction in soil erosion on a field containing highly erodible cropland which was used to produce an agricultural commodity prior to December 23, 1985, the measurement of erosion reduction achieved by applying a conservation plan or system shall be based on a comparison of the estimated annual level of erosion that is expected to occur on that portion of the field for which a conservation plan or system was developed and is being applied....”
  - 7 CFR 12.23(h) Application of a conservation plan or system. “A person is considered to be applying a conservation plan for purposes of §12.5(a) if the system or plan being applied achieves or exceeds the substantial reduction in soil erosion described in paragraph (b) which the conservation system or plan was designed to achieve....”
- Examples of Citations to the Applicable Agency Policy: The following are examples of correct citations to the applicable agency policy to support the determination and/or decision—
  - Part 511, Section 511.11, paragraph 511.11(c) Determine HEL by Field
  - Part 512 Conservation Systems and Plans (entire part)
  - Part 518, Subpart B, Determining Compliance with the HELC Provisions (entire section)

- Part 518, Subpart D, HEL and Wetland Conservation Compliance Violation Determinations (entire section)
- Part 520, Section 520.04 Handling Reports of Possible Noncompliance (entire section)
- Part 520, Subpart B - Handling HEL Compliance Deficiencies, Exemptions
- Example Analysis of the Facts— Findings to be Made: The following is an example showing an analysis of the facts and the specific findings to be made to arrive at the appropriate determination—
  - Obtain the latest version of form AD-1026 from FSA to ascertain the participant’s certification of compliance.
  - Determine if USDA benefits were received for the past and/or current cropping year.
  - Determine the status of the person’s certification on the AD-1026, (i.e., what was the last date on which this person actually signed the certification statement). (Annual certification on the AD-1026 was effectively eliminated in the 1996 Farm Bill; a person only needs to provide a new certification when a change in the agricultural operation has been made that affects the validity of the previous certification).
  - Determine if the field is being used to produce an annually tilled agricultural commodity crop. If the field is currently in the fallow part of the crop rotation, the “trigger” for a violation will not exist, as the field must be actively “producing an annually tilled agricultural commodity crop”. If the field is in “crop residue” and there has not enough residues left on the ground following harvest, the actual violation of the provisions will occur when the next annually tilled agricultural commodity crop is planted.
  - Is there an existing conservation plan, Title XII conservation program contract, or other type of planning document in the NRCS files that would provide basic information on the tract in question?
  - Assemble all existing information about the tract, including soils maps and legends, HEL soils legends.
  - Obtain aerial photocopies of the tract and fields to be reviewed.
  - Review any previous compliance status review information to ascertain if the tract in question has been in compliance and/or previously received any variances or exemptions from the provisions.
  - Review any notes regarding technical assistance previously provided.
  - Review any letters or previously issued technical determinations or program decisions relevant to the tract in question.
  - Obtain the official cropping history/crop reporting from FSA (if available).
  - If no conservation plan is available, ascertain from the FOTG the conservation system that is applicable for the land in question.
  - Determine if there is an existing HEL determination; if not, why not?
  - If no determination, perform an HEL determination.
  - If existing determination, field review to ensure correctness. Ensure that the existing HEL determination (if any) is correct using USLE or WEQ and the frozen factor values for these equations. (This is required if there are any PHEL soil mapping units in the field that have NOT been previously field verified and fully documented).
  - Document all findings.
  - Field review application of the conservation system being used to produce the annually tilled agricultural commodity crop.
  - Is the field currently planted to an annually tilled agricultural commodity crop or is the field being used as a conservation use for pay (set aside or diversion) or CRP?
  - Determine the best time period for evaluation of the conservation system, unless the decision or determination to be made is the result of a whistleblower complaint.

- If the field is not currently planted to an annually tilled agricultural commodity crop determine if the field will be planted to an annually tilled agricultural commodity crop.
- Review the slope, length, unsheltered distance (wind), cropping sequence, cultural tillage methods used, and crop residue levels.
- Determine what the crop rotation consists of.
- Determine the “before” soil erosion levels. Comparison of before and after soil loss for implementation of a conservation system is done using the most current technology available, e.g., RUSLE2.
- Determine the potential erodibility (PE) of the field using the major HEL soil factor values for either RUSLE2 or WEQ (use the most current soil prediction technology to determine implementation of a conservation system) to determine if the system meets the after-7/3/96 definition of “substantial reduction in soil erosion” if needed.
- Determine the soil erosion levels for the actual conservation system as currently applied. (Use the most current technology available in making conservation system implementation decisions).
- Determine if the actual soil loss exceeds or is in compliance with the allowable soil loss (i.e., no substantial increase for sod buster; or a substantial reduction in soil erosion for non sod buster).
- Determine if the practices being applied by the program participant are being maintained as required.
- Fully document the analysis of the facts in arriving at the conclusion.

Note: This list is not all inclusive and may not include everything that needs to be considered for a specific situation. This is only meant as an example of the types of information that need to be “found”.

- Example Findings of Fact: The following are examples of findings of the fact—
  - FOF#1 - The owner/operator of the farm or ranch is receiving USDA benefits that are subject to the HELC provisions. If the person operating the farm/tract is not receiving USDA benefits subject to the HELC provisions, then, the provisions do not apply. Those benefits subject to the HELC provisions are set forth at 7 CFR 12.4 paragraphs (d) and (e).
  - FOF#2 - What is the date of the latest certification with the HELC provisions. Check this AD1026 to see if YES has been checked on question 8 and to see if any of the fields on the tract are sodbuster from native vegetation.
  - FOF#3- The field is being used to produce an annually tilled agricultural commodity crop (specify the crop). If this is not a commodity crop that is annually tilled (or sugarcane), then the HELC provisions do not apply. (e.g., if this is a nursery crop, vineyard, vegetable, or other non-commodity crop that is not annually tilled, then the provisions do not apply).
  - FOF#4 - There is a Title XII conservation program contract that is subject to the HELC/WC provisions. If there is a contract, consider conducting a contract review for compliance with those provisions at the same time as well as for whether or not those practices are being used as a part of the conservation system needed to comply with the HELC provisions.
  - FOF#5 - There have/have not been any variances or exemptions granted in a previous year that have/have not been rectified. All previously granted variances and/or exemptions require a review of the field/tract in the year following the year in which the variance and/or exemption were granted. In addition, a TA variance or Good Faith exemption require that a Conservation Plan must have been developed, accepted by signature of the USDA participant, and applied in not to exceed one year from the date of the original violation.

- FOF#6 - The field where the annually tilled agricultural commodity crop is being produced meets (does not meet) the definition of HEL. Does the field meet the requirements for HEL cropland as set forth at 7 CFR 12.22? In other words, does the field have a predominance of soil mapping units that have been classified as being HEL as set forth at 7 CFR 12.21(b) or 12.21(c) as field verified?
- FOF#7 - The conservation system being used to produce the annually tilled commodity crop on the HEL field allows only that loss of soil as required by the regulation at 7 CFR 12.23(b) and as clarified in the agency policy (Part 512.01 paragraphs (e) or (f)).

If the person had received USDA benefits prior to 7/3/96 and has been applying and maintaining a conservation system that was in the FOTG prior to 7/3/96 and is still using that conservation system, then the conservation system meets the requirements. (This includes a person that takes over the farm/ranch from the person that was the original signatory to the conservation plan (pre-7/3/96 and is still using the conservation system in the pre-7/3/96 conservation plan). These systems may have soil losses in excess of 2T and still be considered to be in compliance with the provisions. (These systems have been 'grandfathered' into the 1996 Farm Bill definition of meeting the requirements of what constitutes substantial reduction of soil erosion).

In addition, if the person has modified or revised the original conservation system to another conservation system for use in producing an annually tilled agricultural commodity crop, and the allowable soil loss either is equal to or provides for a greater level of protection to the HEL cropland as the original conservation system in the pre 7/3/96 conservation plan, then that conservation system is deemed to meet the HELC provisions as well.

If the person either begins farming or ranching a tract of land to produce an annually tilled agricultural commodity crop after 7/3/96 or succeeds to (takes over) the farming/ranching on a tract of land after 7/3/96, and does not adopt the previously used conservation system, then the conservation system that is to be used must meet the following criteria: 75% PE not to exceed 2T.

Note: There may be significantly more Findings of Fact than the 7 shown here. These are only for example purposes to show the logical progression through the decision-making process.

- Example of a Conclusion Resulting From the Previous Analysis: The Food Security Act of 1985, requires any person who produces an annually tilled agricultural commodity crop on highly erodible land (HEL) to be actively applying an approved conservation plan or conservation system in order to be eligible for certain US Department of Agriculture (USDA) program benefits, as set forth in the USDA regulation, 7 CFR Part 12, §12.4.

On April 23, 2004, the Natural Resources Conservation Service (NRCS) conducted a compliance status review on Tract Number 1472 following the receipt of a whistleblower complaint for potential non-compliance with the HELC provisions. As required by regulation and NRCS policy, I have made a Preliminary Technical Determination that you are: Not Actively Applying an Approved Conservation Plan or Conservation System (NA) on Tract Number 1472 for the following reason(s):

The current conservation plan in effect for Tract Number 1472 that was signed by Participant 1 on November 23, 2001, requires that you use a corn/soybean rotation using residue management techniques.

The plan states that the producers will no-till soybeans into standing corn stalks leaving 60% residue after planting.

It also states that corn will be planted into soybean stubble using only one tillage operation that will leave 20 percent of the previous crop's residues after planting the corn crop.

The allowable soil losses from this system are calculated at 5.0 tons per acre per year or a total reduction in soil erosion of 16 tons per acre per year as specified in the USDA regulation, 7 CFR 12.23(b) which states that all conservation systems used to produce an annually tilled commodity crop on fields classified as being highly erodible must meet the soil reduction requirements that result in a substantial reduction in soil erosion. If you are not using the conservation system as agreed upon in the conservation plan that bears Participant One's signature of agreement dated November 23, 2001, then you must be using a conservation system that will provide for the same reduction in soil erosion on the field as the agreed upon conservation system or one that provides for an increased reduction in the estimated soil erosion.

Since the last correspondence letter dated February 26, 2004, you had agreed to frost seed oats on 26.4 acres at 2 bushels per acre by March 15, 2004. The oats were to emerge and it was agreed that you were to plant through them. Once the oats were planted, you were to have signed the seeding plan and turned in the bills for verification. Our office checked the field on a regular basis to see if there was any evidence of the oats having been seeded. On April 6th, 2004, our office noticed that all of the slopes had been worked as if the oats had been seeded and dragged in, although no seeding plan or bills have been signed or turned in.

As many farmers were beginning to plant in the County, we noted that the field was planted to corn on April 19, 2004, with no evidence of any oats. Due to the rainy weather, we did not take residue measurements until Friday, April 23, 2004, so as to not track through the muddy field. Field residue measurements were taken showing only 8% residue, which will not be sufficient to meet the residue management requirements of your conservation plan or any equivalent conservation system. Therefore, the conservation system will not meet the substantial reduction in soil erosion requirements as set forth in the program regulation at 7 CFR 12.23(b) as previously stipulated.

Note: This is just the conclusion of the fact finding and is not the official notification of either a preliminary or final determination with all the required appeals and mediation notifications. This example would be a part of the official notification.

#### **(g) Example -- WC Violation**

- Example Issue Question — Has the USDA program participant violated the wetland conservation (WC) provisions by making possible the production of an agricultural commodity by converting a wetland after November 28, 1990, or by planting a crop on a converted wetland after December 23, 1985?
- Example Rule Statement — A person is in violation of the WC provisions when production of an annually tilled agricultural commodity crop has been made possible through manipulation of a wetland after 11/28/90 or a crop has been produced on a wetland manipulated after 12/23/85.
- Examples of Citations to the Statute: The following are examples of correct citations to the Statute to support the determination and/or decision—
  - The governing law is 16 U.S.C. 3801; 3821-3824. The following significant portions are—
    - 16 U.S.C. 3821(c), “Except as provided in section 1222, and notwithstanding any other provision of law, any person who in any crop year beginning after November (180-V-NFSAM Fifth Edition, August 2005)

28, 1990, converts a wetland by draining, dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland shall be ineligible for those payments, loans or programs ...for that crop year and all subsequent crop years.”; and

- 16 U.S.C. 3822(b), “No person shall become ineligible under section 1221 for program loans or payments under the following circumstances: (cite all exemptions that may apply)
- Examples of Citations to the Rule: The following are examples of correct citations to the Rule to support the determination and/or decision—
  - The governing regulation is 7 CFR part 12. The following significant portions are—
    - 7 CFR 12.2, Definitions, “Wetland, except when such term is a part of the term “converted wetland”, means land that – 1) has a predominance of hydric soils; 2) is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and 3) under normal circumstances does not support a prevalence of such vegetation, except that this term does not include lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soils. ”;
    - 7 CFR 12.4(a) Actions. “Except as provided in §12.5, a person shall be ineligible for all or a portion of USDA program benefits listed in this section if: ...(2) The person produces an agricultural commodity on wetland that was converted after December 23, 1985; or (3) after November 28, 1990, the person converts a wetland by draining, dredging, filling, leveling, removing woody vegetation, or other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible.”;
    - 7 CFR 12.5(b)(4) Mitigation. No person shall be determined to be ineligible under §12.4 for any action associated with the conversion of a wetland if the wetland functions and values are adequately mitigated, as determined by NRCS, through the restoration of a converted wetland, the enhancement of an existing wetland, or the creation of a new wetland.....”
    - 7 CFR 12.32(a) Converted wetland identification criteria. (1)....
- Examples of Citations to the Applicable Agency Policy: The following are examples of correct citations to the applicable agency policy to support the determination and/or decision—
  - Part 514.01, Wetland Determination and Delineation
  - Part 515 Subpart B, Mitigation Exemption
  - Part 517, HELC/WC Violation Determinations and Administrative Record (entire section)
- Example Analysis of the Facts — Findings to be Made: The following is an example showing an analysis of the facts and the specific findings to be made to arrive at the appropriate determination—
  - Review client’s compliance certification—
    - Obtain the latest version of form AD-1026 from FSA to ascertain the participant’s certification of compliance.
    - Determine if USDA benefits were received for the past and/or current cropping year.
    - Determine the status of the person’s certification on the AD-1026, i.e., what was the last date on which this person actually signed the certification statement. (Annual certification on the AD-1026 was effectively eliminated in the Federal Agriculture Improvement and Reform Act of 1996; a person only needs to provide a new

certification when a change in the agricultural operation has been made that affects the validity of the previous certification).

- Complete a certified wetland determination:
  - Determine if there is an existing certified wetland determination for the tract (or relevant portion).
  - Assemble all mapped information about the tract, including soils maps and legends, National Wetland Inventory maps, and current and historic aerial photographs.
  - If there is no certified wetland determination, perform a certified wetland determination according to instructions in Part 514.
- Determine if a violation has occurred—
  - Determine if wetlands are or were present on the tract after 12/23/85 (excluding prior converted cropland) and if manipulation has occurred in these areas since 12/23/85.
  - Determine if an annually tilled agricultural commodity crop has been produced on a wetland converted after 12/23/85, or if a wetland has been converted to make the production of an annually tilled agricultural commodity crop possible after 11/28/90. If so, obtain the official cropping history/crop reporting from FSA (if available).
  - Determine if the wetland was converted to another use that has not made annual production possible, or if production has occurred under natural conditions (i.e., without manipulation), the “trigger” for a violation will not exist.
- Determine if any exemptions administered by NRCS apply—
  - The wetland conversion was authorized by the COE (may be eligible for a CPD exemption).
  - The wetland conversion is eligible for a Minimal Effect exemption or Categorical Minimal effect exemption.
  - The wetland conversion was conducted by a third party.
- Document all findings—
  - Form NRCS-CPA-026e
  - Wetland Determination Data Forms
  - Others

Note: This list is not all inclusive and may not include everything that needs to be considered for a specific situation. This is only meant as an example of the types of information that need to be “found”.

- Example Findings of Fact: The following are examples of findings of the fact—
  - FOF#1 - The owner/operator of the farm or ranch is receiving USDA benefits that are subject to the WC provisions. If the person operating the farm/tract is not receiving USDA benefits subject to the WC provisions, then, the provisions do not apply. Those benefits subject to the WC provisions are set forth at 7 CFR 12.4 paragraph (d).
  - FOF#2 - The date of the latest AD-1026 certification is... Check this AD-1026 to see if YES has been checked on question 9 and/or 10 indicating manipulation that has not been evaluated by NRCS has occurred or is planned on the tract.
  - FOF#3 - The date of the latest wetland determination is...
  - If the determination is certified according to current policy and procedures and there are no wetlands on the tract, the WC provisions do not apply.
  - FOF#4- A wetland has been converted to produce, or make possible the production of, an annually tilled agricultural commodity crop after 12/23/85 or 11/28/90, respectively?
  - Did the converted area meet the definition of a wetland as set forth at 7 CFR 12.2 and field verified?

- FOF#5 – There is a Title XII conservation program contract existing or pending that is subject to the HELC/WC provisions?
- If there is an existing contract, consider conducting a contract review for compliance with those provisions at the same time to see if practices are being applied in the area of the converted wetland.
- FOF#6 – The converted wetland does not qualify for an exemption in 7 CFR §12.5(b)?
- Determine if any exemptions apply to the activity. If an exemption does apply, the activity does not make the producer ineligible.
- FOF# 7 – There have/have not been any waivers or exemptions granted in a previous year containing conditions that have not been followed?
- If previously granted exemptions contained conditions required to maintain the exemption, the conditions must be checked for compliance at appropriate intervals. In addition, a Good Faith exemption requires that a Mitigation Plan must have been developed, accepted by signature of the USDA participant, and applied in not to exceed one year from the date of the original violation.

Note: There may be significantly more Findings of Fact than those shown here. These are only for example purposes to show the logical progression through the decision-making process.

- Example of a Conclusion Resulting From the Previous Analysis:

Per the Food Security Act of 1985, any person who produces an annually tilled agricultural commodity crop on a converted wetland after 12/23/85 or converts a wetland for the purpose or to have the effect of making such production possible after 11/28/90, is ineligible for USDA program benefits, unless the activity is exempt under 7 CFR Part 12.5 (b).

On April 23, 2004, the Natural Resources Conservation Service (NRCS) conducted a compliance status review on Tract Number 1472 following an onsite observation of potential non-compliance with the WC provisions. As required by regulation and NRCS policy, I have made a Preliminary Technical Determination that you are not in compliance with the Wetland Conservation provisions of the Food Security Act of 1985, as amended, on Tract Number 1472 for the following reason(s):

An area of 3.2 acres determined to be a wetland was cleared of woody vegetation (including removal of stems and stumps) on Tract Number 1472. The clearing was determined to have taken place between February 1997 and November 1998, based on review of aerial photography of the tract. Aerial photographs dated February 1997, March 1990, and December 1984 showed that the wetland contained a predominance of pond cypress (*Taxodium ascendens*) trees. *Taxodium ascendens* is a hydrophytic plant species. An onsite evaluation, which verified the presence of hydric soil and indicators of wetland hydrology, verified that the 3.2-acre area is a converted wetland. A functional assessment was conducted on the converted wetland, and as a result the determination was made that the activity does not qualify for a minimal effect exemption. Nor do any other exemptions apply to the conversion...

Note: This is just the conclusion of the fact finding and is not the official notification of either a preliminary or final determination with all the required appeals and mediation notifications. This example would be a part of the official notification.

## Part 518 — Customer Conformance and Quality Assurance

### Subpart E — HELC/WC Quality Assurance Reviews

#### 518.50 General Information

##### a Quality Reviews

Quality Control and Assurance reviews are conducted to ensure that NRCS properly carries out its responsibilities for the HELC/WC provisions. Quality Assurance reviews often present an opportunity for NRCS to commend current actions or to make recommendations for improvement.

##### b Purpose

Each STC will establish a process for ensuring that the HELC/WC program responsibilities are carried out in a manner that meets the requirements of the law, regulation, and agency policy.

##### c Quality Assurance Responsibilities

The Deputy Chief for Programs and Regional Assistant Chiefs will—

- Be responsible for implementing quality assurance for the HELC/WC provisions and for coordination with the Deputy Chief for Strategic Planning and Accountability.
- Ensure that any new HELC/WC policies or procedures are implemented efficiently and uniformly among the States.
- Ensure consistent and uniform wetland determinations and/or delineations among the States.
- Coordinate allowable erosion rates permitted across State lines for conservation systems.

The State Conservationist will—

- Initiate quality control procedures consistent with HELC/WC policy in this manual, specific conservation program policy, and in [GM-300, Part 400](#), [GM-330, Part 405](#), and [GM-450, Part 407](#).
- Ensure consistent and uniform HELC/WC determinations and within the State and between adjacent States.
- Ensure that actions taken pertaining to requests for variances are executed and completed within the specified time frames and as set forth in this manual.
- Ensure that execution of policy is consistent and uniform within the State and among adjacent States.
- Ensure that State quality control reviews are conducted.
- Ensure that corrective action is taken to address deficiencies found in status and quality reviews.
- Determine if additional reviews are required.
- Provide training and followup to correct deficiencies.
- Identify potential cases of fraud, waste, and abuse.

**d Quality Control Standards**

Quality control standards are the criteria used to determine whether products or services meet or exceed expectations. Standards provide consistent parameters for interpreting the results of quality control or customer conformance reviews. In NRCS, quality control standards are found in policy, rules, or statute. For example, quality control standards (policy) for NRCS and individuals providing technical service developing conservation plans can be found in the General Manual (GM 180, 409.10), while the procedures are found in the National Planning Procedures Handbook (GM 180, Part 600).

Quality control standards are utilized during Agency reviews to ensure that data collected provides consistent and compatible information for the Agency to use in determining the quality of technical assistance provided, as well as to determine specific areas where adjustments or improvements need to be made.

**e State Quality Assurance Report**

By October 31 of each year, States will prepare a State Quality Assurance Report for the fiscal year just ended as part of the State Business Plan, and submit to the Director, Operations Management, and Oversight Division. The report will include the following:

- Discussion of deficiencies identified including causes for deficiencies and the effect deficiencies have or have not had on Agency operations, customer expectations, and expected outcomes.
- What corrective actions have been taken to eliminate the cause of the deficiency including dates for completion of actions?
- Request for assistance to remedy or further define quality concerns.

## 518.51 Guidelines for Quality Assurance Reviews

### a Procedure

In conducting quality assurance reviews—

- Conduct complete and comprehensive reviews.
- Coordinate the review schedule with all parties to the review.
- Randomly select—
  - Field offices and tracts for reviews, if the quality assurance review is completed by the State Office.
  - State, Area, and Field offices and tracts for reviews if the reviews are done at the National level.
- Conduct an entrance and an exit conference.
- Outline all of the findings and recommendations for needed corrective action.
- When a prior decision is found to be in error, change the prior decision to reflect the correct findings. All parties to the incorrect decision shall be notified, and appeal rights, if applicable, shall be provided as set forth in the [CPM, Part 510](#).
- Ensure that corrective action is taken to address deficiencies found within an appropriate time frame.
- Provide information copies of all quality reviews completed by the National level to the appropriate division directors, including—
  - Narrative of the review findings.
  - Recommendations for improvement of NRCS operations.
  - Corrective actions that need to be taken and the timeline for completing all actions.

### b Reports

A detailed report of the quality assurance activities, findings, and recommendations shall be prepared that sets forth the following:

- Purpose and/or objectives
- Participants
- Background – total tracts, tracts reviewed, offices visited, approved variances, State quality control plan implementation, conservation plan quality, etc.
- Scope of review (identified deficiencies)
- Findings—
  - Recommendations to correct identified deficiencies
  - Agreed-to items and response dates
  - Appropriate commendations
- Signature of the reviewing official.
- Copies to the appropriate division directors if the review was conducted by NHQ.

### c Quality Assurance Agreement

A quality assurance agreement shall be developed that will set forth—

- A table of all corrective and recommended actions.
- A schedule for completion of corrective actions.

**d Quality Assurance Follow-up**

The appropriate NRCS official shall—

- Document all action taken in response to any agreed to items.
- Report, in detail, on all actions taken to the next-higher level of supervision.

**e Data Collection-Review Period**

Data collected during quality assurance activities will occur on work performed during a predefined period. This period varies based upon the type and subject of the review.

Type of Review	Review Period
State Quality Reviews	12 to 24 months or since the last review
Quality review of customer conformance activities	No more than 12 months

**f Data Collection-Sample Size and Selection Methods**

The type and quantity of data collected during reviews will be a representative sample of ongoing products and services and include new and existing records. Each type of review requires a different size sample and method of sampling.

Type of Review	Size of Sample	Method of Sample Selection <sup>1</sup>
Compliance Review	<ul style="list-style-type: none"> <li>• Annually</li> <li>• Tracts for 5% of all FSA Farm Credit Loans</li> <li>• Tracts owned by USDA employees (representative sample of tracts farmed once every 3 years)</li> <li>• Tracts referred by other USDA agencies</li> <li>• Tracts of USDA participants requesting reinstatement</li> <li>• Tracts where a variance or exemption was granted the previous year</li> <li>• CRP contracts early contract termination</li> <li>• Supplemental tracts added by the State Conservationist</li> </ul>	Tracts are selected randomly at the national level with sufficient number being selected to assess accurately, national rates of compliance plus mandatory and optional tract selection (Part <a href="#">518.02</a> ).
State Quality Reviews	Two percent of the Field Offices	Selection of the individual

Type of Review	Size of Sample	Method of Sample Selection <sup>1</sup>
	<p>in each State are selected for State Quality Reviews at the National level. The selection is made after an analysis has been conducted on States' prior year Quality Assurance Report, current year Quality Assurance Plan, documented technical assistance as reported in current and prior years in the Integrated Accountability System and Protracts databases. A listing of alternative field offices will also be drawn.</p> <p>A minimum of 5 percent of the documented technical assistance in a Field Office will be reviewed.</p> <p><u>State Options:</u></p> <p>States may supplement the list of field offices and conduct additional State Quality reviews.</p>	<p>sample units is based upon the total amount of technical assistance required to be reviewed in a county.</p>

**g Types of Data to Be Collected**

Types of data collected during quality assurance and customer conformance reviews are determined by a number of factors—

- Areas of risk identified in prior external audits, investigations, and reviews.
- National and State priorities identified in Business and Strategic plans.
- Prior quality deficiencies identified during previous internal Agency reviews.
- Other priorities identified by Agency leadership.

## 518.52 Quality Control Reviews

### a Items Covered in a Quality Control Review

All work conducted by NRCS in administering the the HELC/WC provisions will be incorporated in the State quality control review, including the following:

- A sample of all HEL and Wetland Determinations and/or delineations.
- Outline of wetlands on FSA base maps/digital orthophotography.
- Conservation program eligibility determinations where HELC/WC compliance is a condition of program eligibility and/or participation.
- HEL conservation plan and/or conservation system implementation.
- Status reviews previously completed, including variance and exemptions granted.
- A sample of all appeals of HELC or WC determinations and/or delineations.

### b Content of a Quality Control Review

The Quality Control Review will include, as appropriate—

- Staff assignments for quality control functions.
- Actions and procedures to be used to ensure quality of all completed status reviews and/or other HELC/WC activities.
- Training activities scheduled and/or completed that were held to correct identified deficiencies from current and prior years, and other scheduled training.
- Other actions needed to correct deficiencies.
- Specific staff assignments for action items.
- Specific timing for completion of action items.
- Procedures to be followed in conducting quality reviews including written notification to field offices of deficiencies found.
- Procedure for ensuring that "not actively applying" determinations made during quality reviews have an FSA-569 issued.
- Guidance on the delegation of authority and the use and/or approval of status review variances.
- Guidance issued on the release of information regarding HELC/WC records under the Freedom of Information Act and the Privacy Act.
- State guidance on national policy to be followed on servicing appeals, complaints, and possible violations.
- The official list of NRCS employees who own or operate farms subject the HELC/WC provisions, updated annually.
- A review to ensure that all status reviews have been completed as set forth in [Part 518](#), and in a timely manner.

### c Conducting Quality Control Reviews

Quality control reviews shall be conducted—

- In accordance with the following NRCS policy—
  - [GM-120, Part 404](#)
  - [GM-120, Part 408](#)
  - [GM-180, Part 409](#)
  - [GM-450, Part 401](#)

- [GM-450, Part 407](#)
- [National Planning Procedures Handbook \(NPPH\)](#)
- [National Food Security Act Manual \(NFSAM\)](#)
- [Conservation Programs Manual \(CPM\)](#)
- Emergency Watershed Program Manual (EWPM) (This document is currently under development)
- National Watershed Manual (NWM)
- [National Agronomy Manual \(NAM\)](#)
- National Range and Pasture Handbook (NRPH)
- By persons from outside the subject NRCS office.
- If appropriate, in coordination with the local FSA office.
- Throughout the year and coordinated with other conservation program quality assurance activities.
- To include tracts having current year activity including both positive and negative determinations, and variances granted.
- To include specific tracts selected by NHQ.
- To include all new activity on NRCS employee-owned and/or employee-operated land having current year activity, including positive and/or negative determinations.

**d Errors with Prior Determinations and/or Delineations**

When a prior technical determination and/or decision is found to be in error during a quality control review, the following actions will be taken:

- Certified wetland determinations, even if erroneous, remain valid and in effect as long as the area is devoted to an agricultural use or until the person affected by it requests review of the certification (16 U.S.C. §3822(a)(4)). If a certified wetland determination is found to be in error, contact the participant and ask if he/she would like to request a review of the certification.
- Other incorrect technical determination and/or decision will be changed to reflect the correct finding.
- Appropriate notifications shall be made to all parties potentially affected by the changed determination and/or decision.
- Appeal and mediation rights will be provided as set forth in the [CPM, Part 510](#).

**e Data Collection**

Data collection will involve a variety of methodologies including, but not limited to—

- Review of field office files and records;
- Review of case files (including planning and design documents);
- Interviews with NRCS staff, partners, clients, and others; and
- Documented observations of conservation practices.

**f Timing**

In collecting data, NRCS will ensure that resources are used efficiently and that data is collected during appropriate times of the year. For example, NRCS should review management practices in a conservation plan at a time when the effectiveness of the practice can be observed in the field.

**g Data Analysis**

Analysis of quality assurance and customer conformance is necessary to identify common or systemic areas of concerns, as well as areas where work of exceptional quality is being performed.



## **518.53 Preventing Fraud, Waste, and Abuse**

### **a Introduction**

There is potential for fraud, waste, or abuse in administration of the HELC/WC compliance provisions unless all of the requirements set forth in the statute (16 U.S.C. 3801 et seq.), regulation (7 CFR Part 12), and this manual are followed.

### **b Examples of Fraud, Waste, and Abuse**

Fraud includes, but is not limited to, knowingly and willfully—

- Entering false information into government records.
- Making an improper determination of eligibility for any conservation program.
- Reporting tracts as having HEL conservation plans or systems adequately applied when no plans or systems exist.
- Determining an HEL field to be NHEL or determining wetland to be non-wetland.
- Failing to report a finding of not actively applying or using an approved conservation system during a status review.
- Providing a minimal effect determination that does not follow established policy.
- Determining an area to be prior converted cropland.
- Willfully allowing the 30-day time limit to expire on a request for temporary variances that involves the use of practices or measure to address weather, pest, or disease-related problems.
- Willfully not providing notification of the possible violations within the specified 45-day time period when the potential violation is found during the regular provision of technical assistance.

### **c Responsibilities and Action**

All employees are responsible for understanding the correct actions to take when there is any suspicion of fraud, waste, or abuse. The State Conservationist will ensure that each case where an employee is suspected of fraud is turned over to the Office of the Inspector General (OIG), Investigation Branch.

Note: Each State shall supplement this section with the name and address of the appropriate regional OIG office.



## **518.54 Threats, Assaults, Harassment, and Bribery**

### **a The Potential for Threats, Assaults, and Harassment**

The potential for encountering a threat or assault is always present. The performance of duties relating to the implementation of the HELC/WC provisions has increased the potential for employees to encounter threatening situations.

Threats, assaults, or harassment may occur in the field, in the office, over the telephone, by letter, or from a third party. All incidents of threats, assaults, or harassment will be taken seriously by NRCS and will be dealt with appropriately.

### **b Employee Action**

All incidents should be reported to the supervisor regardless of where it occurs or how insignificant it may appear. Seek medical attention, if necessary. A doctor's report may serve as evidence. Notify the State Conservationist, the supervisor, the CD, OIG, the OGC Field Office, and other employees who might also be at risk.

### **c Employee Action Details**

If an NRCS employee is threatened while providing technical assistance either in the office or in the field—

- Remain calm and do not argue.
- Leave the scene as quickly as possible or ask the person to leave the office.
- Call the local law enforcement authorities if the person refuses to leave and/or persists in making threats.
- Prepare a written report on the incident as set forth in paragraph 520.07(d).

### **d Report Requirements**

Prepare a written report on all threats, assaults, or harassment accurately—

- State events that led to the incident.
- Describe the incident in detail.
- Use direct quotes whenever possible.
- State facts and avoid supposition.
- Include statements of witnesses whenever possible.

Contact local law enforcement authorities and file charges as appropriate.

### **e Suspend Technical Services**

Suspend technical services until the threat to employees has been removed to the satisfaction of the State Conservationist. The State Conservationist shall—

- Inform the person, in writing, that technical services are withdrawn.
- Send copies of the letter to the Area Conservationist or designee and District Conservationist.

### **f Status or Quality Reviews**

Take action according to this table if a threat or assault resulted during a status or quality review.

<b>IF an incident occurs...</b>	<b>THEN...</b>
And the status or quality review was completed on a tract,	Complete the review documentation and follow policy as set forth in paragraphs 520.07 <a href="#">paragraph d</a> and <a href="#">paragraph e</a> ).
And an NRCS employee was prevented from making or completing the status or quality review,	Request FSA to issue an FSA–569.  NRCS will report the tract as not meeting the requirements of the HELC/WC provisions because the employee was prevented from entering the site or from completing required reviews according to the regulation.

**g Definition of Bribery**

Bribery is the offering, giving, receiving, or soliciting of anything of value to influence an official act of an employee.

Bribery or attempted bribery of NRCS employees is a serious violation of Federal law and is punishable by prison terms and fines. Bribes may be—

- An offer of money or anything else of value in excess of \$20.00.
- Offered directly or indirectly and/or subtly or unsubtly.

**h Employee Responsibility**

Employees must be perceptive and alert in recognizing bribes and report them immediately. Employees are not to report bribery or attempted bribery through normal administrative channels. If a report of bribery or attempted bribery is given to an employee, he or she is not to discuss it or attempt to investigate it.

Employees who are offered a bribe or who believe that a bribe was offered to, solicited by, or accepted by another employee are to immediately report the incident directly to the appropriate regional Office of the Inspector General (OIG).

The State Conservationist shall supplement this sub-paragraph to include the address of the appropriate regional office. Employees are also to report situations in which, although a direct offer is not made, it is suspected that the employee is being "felt out" and that an offer of a bribe could be inferred.

**i      Supervisor Responsibility**

Supervisors who receive bribery information not previously reported must report it to OIG immediately.



## **518.55 Incorrect Information by a Person**

### **a Incorrect Information**

If NRCS suspects that a person has knowingly supplied incorrect information, review the information with the person prior to taking action according to this paragraph.

Incorrect information includes the following:

- Not providing information on an AD-1026.
- Providing incorrect information on an AD-1026
- Providing other inaccurate or incorrect information.

### **b NRCS Actions**

If NRCS confirms that incorrect information has been provided, NRCS will—

- Suspend any further services to the person.
- Inform the person and FSA of the finding and action needed to correct information.
- If a potential violation exists, request an FSA-569 from FSA.
- Document the findings in a letter, through channels, to the State Conservationist with a copy to FSA and the person.
- Place a copy of the letter and FSA-569 in the person's case file.

### **c Resume Services**

Services may resume when the person provides correct information.

## **Part 519—FSA and NRCS Forms for Conservation Compliance**

- 519.01 AD-1026 HELC/WC Certification**
- 519.02 AD-1026B - HELC Exemption Request**
- 519.03 AD -1068 - Good Faith Determination - HEL Violations**
- 519.04 AD-1069 - Good Faith Determination- Wetland Violations**
- 519.05 FSA-569 - NRCS Report of HELC and WC Compliance for Review Purposes**
- 519.06 NRCS-CPA-026E - Recording HEL and Wetland Determinations**
- 519.07 SCS-CPA-027 - Certification of Highly Erodible Land Conservation Plans and Systems**
- 519.08 SCS-CPA-I - NRCS Employee Data on Farm Interest**

## Part 519 — FSA and NRCS Forms for Conservation Compliance

### 519.01 AD-1026 – Highly Erodible Land Conservation (HEL) and Wetland Conservation (WC) Certification

#### (a) Purpose of Form

The AD-1026 is a producer's self-certification of compliance with the HEL/WC provisions. FSA uses the AD-1026 to refer to NRCS tracts where a highly erodible determination, a certified wetland determination or a scope and effect evaluation may be needed. The producer's signature on the form authorizes NRCS to make a HELC and/or certified wetland determination on the property(s) in question.

#### (b) Conditions for Referral to NRCS

FSA forwards the AD-1026 to NRCS to conduct a determination of compliance, a certified wetland determination or other technical determination when a producer answers Yes to questions #9 or #10, indicating that he/she has or intends to plant or produce an agricultural commodity on land for which an HEL or wetland determination has not been made, or plans to conduct new drainage, land leveling, filling, dredging, clearing or stump removal, or improve or modify an existing drainage that has not been evaluated by NRCS.

**The State Conservationist may develop a prioritization system for conducting HEL and certified wetland determinations.**

#### (c) FSA and NRCS Responses to the AD-1026

Participant answers-	FSA's Actions	NRCS' Actions
<b>#5 YES</b>	Circle tract on AD-1026A. Refer photocopies, AD-1026 and AD-1026A to NRCS for wetland determination.	Date stamp when AD-1026 received. Conduct wetland determination within 15 calendar days.
<b>#9 YES</b>	Circle tract on AD-1026A. Refer photocopies, AD-1026 and AD-1026A to NRCS for HEL determination.	Date stamp when AD-1026 received. Estimate priority. Complete determination for checked fields (w/in 15 days for office; as soon as field conditions allow for field determination).
<b>#9 NO</b>	Verify that HEL determinations have been made on all cropped fields Check aerial photos for HEL determinations. Check AD-1026A and verify that person has approved conservation plan for each tract with HEL that is being cropped <b>If person does not have a conservation plan on HEL that will be cropped, refer person to NRCS for a plan.</b>	
<b>#10 YES</b>	Verify whether or not wetland determinations done for tract(s). Circle tract #. Refer person to NRCS for certified wetland determination. Provide NRCS with photocopies, AD-1026, AD-1026 A	Date stamp when AD-1026 received. If certified wetland determination has not previously done, conduct determination and forward preliminary technical determination to participant on NRCS-CPA-026e. If certified wetland determination was previously done,

		evaluate scope and effect, if necessary, and provide results to participant with a letter describing effect of proposed action on wetlands subject to WC provisions.
<b>#10 NO</b>	FSA will not refer the AD-1026 to NRCS. Will advise the person that any proposed manipulations will require a certified wetland determination from NRCS.	NRCS will not conduct certified wetland determinations when no manipulation is proposed.

## Part 519.02 AD-1026B – HELC Exemption Request

### a. Purpose of form

Under the provisions of the 1990 Act, if a person other than landlord is ineligible for benefits for violating HELC provisions, the ineligibility may be limited only to the farm on which the violation occurred if the person has established to the satisfaction of the COC that -

- An approved conservation plan was obtained for the farm;
- The landlord refuses to allow the person (tenant or renter) to comply with the conservation plan;
- The person makes a good faith effort to meet HELC requirements;
- Lack of compliance is not part of a scheme or device to avoid compliance;
- The person is not in control of application of all measures necessary to meet compliance.

### b. NRCS Responsibilities

Upon receipt, NRCS will complete the items in AD-1026B, Part B, and return to FSA. An FSA-569 will be completed to show the tract as "not actively applying" the plan. The COC will use the information to make a person (tenant or renter) exemption determination. When AD-1026B, Part B is completed, NRCS will return the form to FSA to make the exemption determination.

Below are the items to be completed by NRCS.

Item	Requested Entry
11	If the landlord has a plan, or if the person had a plan in a timely manner but was not allowed by the landlord to install a practice, mark "Yes" and complete questions 12 and 13 based on the landlord's decisions.
12	Structural measures that are required by the plan that have not been applied.
13	Planting practices that are required by the plan.
14	Signature by District Conservationist and date.

## Part 519.03 AD -1068 - Good Faith Determination - HEL Violations

### a. Purpose of Form

Enables NRCS to provide information to FSA related to whether HEL noncompliance was conducted in good faith. 7 CFR Part 12 provides that a person who is determined ineligible for failure to comply with HELC provisions may regain eligibility for benefits if -

- FSA determines that the person acted in good faith and without intent to violate the HELC provisions;
- The person agrees to implement the practices according to a conservation plan within an agreed period, not to exceed 1 year.

If good faith requirements are met, and the violating land is -

- Not sodbusted, no payment reduction shall apply;
- Sodbusted, a payment reduction of not less than \$500 or more than \$5,000, depending on the seriousness of the violation, shall be applied.

*Note - Good faith determinations are not required for HELC deficiencies observed while providing technical assistance.*

Relief for HELC violations according to subparagraph (a) may be applied only to those determinations made after July 3, 1996.

### b. NRCS Responsibilities

- Provide the COC with any information NRCS and CD may have that may assist the COC to determine if a violation occurred in good faith.
- Provide information concerning the fields in violation and the erodibility index of fields with sod buster violations to assist FSA with determining a graduated payment reduction.
- Prepare a conservation plan according to Part 512 for producers who are determined to have violated in good faith.

AD-1068	<b>NRCS' actions</b>
Block 9	<p>Any facts about the case that may affect COC determination, such as:</p> <ul style="list-style-type: none"> <li>• Was there face-to-face discussion with the person concerning the HELC violation?</li> <li>• Did the landlord attempt to work with NRCS in developing a conservation plan that could be actively applied by the person?</li> <li>• Practices scheduled in previous years not yet applied;</li> <li>• Soil losses: <ul style="list-style-type: none"> <li>➤ Before the plan was developed;</li> <li>➤ Planned level for current year;</li> <li>➤ Actual level with current treatment.</li> </ul> </li> <li>• Document the acreage of the field(s) where the practice(s) have not been installed and therefore the area is "not actively applying" the conservation plan or conservation system.</li> </ul>
Block 10	District Conservationist sign and date form
Block 11	For sodbusted land determined in violation, list field or CTU number(s) as they exist in the conservation plan or conservation system.
Block 12	<ul style="list-style-type: none"> <li>• Enter the erodibility index (EI) for the predominant soil for each field or CTU;</li> <li>• Identify the EI for the predominant (greatest acreage) highly erodible soil map unit in the field. If there is no HE soil map unit that clearly has the greatest acreage within the field, a weighted average EI will be calculated for the two HE soil map units with the greatest acreage within the field.</li> </ul>
	<b>When AD-1068, Part B and C are completed, sign and date in item 10. Return the form to FSA for a good faith determination.</b>

*Note - Only "sodbusted" areas shall be reported in items 11 and 12. FSA will complete Items 13, 14, and 15.*

*NOTE - The intent is to use acres of the whole field or CTU from the conservation plan or system. However, occasionally, when the person has made an effort by installing all but one practice currently required and a portion of the field includes soil map units of lesser erodibility, that portion of the field may, as a result of the practices applied, meet the ACS level of treatment. It would be appropriate to reduce the acreage to that which doesn't meet the ACS level*

### **C. If FSA Determines Good Faith**

If the COC determines that the person acted in good faith based on the information provided on AD-1068, FSA will –

	<b>NRCS' actions</b>
Block 19 – FSA enters date; returns AD-1068 to NRCS for completion of Part E.	<ul style="list-style-type: none"> <li>• After receiving AD-1068 from FSA, contact person regarding a conservation plan or conservation system.</li> <li>• Follow instructions in Part 512 on preparation of a conservation plan or conservation system.</li> <li>• Do not complete items 20 through 23 until a conservation plan has been signed by all parties or a conservation system is applied.</li> <li>• Then, complete items 20 through 23;</li> <li>• Return the AD-1068 to FSA.</li> </ul>

*NOTE - FSA will reinstate benefits to the producer when FSA receives the AD-1068 indicating that the conservation plan has been signed or an approved conservation system is applied.*

**EXAMPLE - A 35 acre field was planned to have contour farming and residue management with 30% cover. The status review indicated residue cover at 40% but the contour farming was not implemented. Upon review of the soil map, it was apparent that the contour farming was necessary on only 15 acres of the field. Soil loss calculations indicate that the remaining 20 acres of the field met the ACS treatment level due to the residue management alone.**

**NRCS Action - Advise FSA in Block 8 that they may consider reducing the area of not actively applying within the field to 15 acres, and explain why. List the predominant EI of the 15 acres in Block 11 if the violating land was sodbusted. Revise the conservation plan or conservation system to the new CTU's.**

**NOTE - For site specific practices such as grassed waterways or field borders, the whole field or CTU is to be shown as the acres involved.**

**Before benefits can be reinstated for a person who violated the HELC provisions in good faith, a conservation plan or system must be completed as required per Part 512. NRCS is primarily responsible for working with the person to develop a conservation plan or conservation system.**

## Part 519.04 AD-1069 - Good Faith Determination- Wetland Violations

### a. Purpose of Form

Enables NRCS to provide information to FSA related to whether WC noncompliance was conducted in good faith. NRCS is required to complete Part B on the AD-1069 for making a good faith determination.

### b. NRCS Responsibilities

Complete AD-1069, Part B, items 9 through 12. Enter any details that may be pertinent to the case and may affect the COC decision. The information provided will determine the extent of knowledge the person had about the wetland on which the violation occurred.

AD-1069	NRCS' actions
Block 9	<ul style="list-style-type: none"> <li>• Any facts known by NRCS or the CD about the case that may affect the COC determination;</li> <li>• Whether the person was provided a completed SCS-CPA-026 or NRCS CPA-026E prior to the manipulation.</li> <li>• Specific issues to address -               <ul style="list-style-type: none"> <li>○ Whether the characteristics of the site were such that the person should have been aware that a wetland existed on the subject land;</li> <li>○ Whether NRCS had informed the person about the existence of a wetland on the subject land;</li> <li>○ Whether the person did not convert the wetland, but planted an agricultural commodity on converted wetland when the person should have known that a wetland previously existed on the subject land;</li> <li>○ Whether the person has a record of violating the wetland provisions of this part or other Federal, State, or local wetland provisions; or</li> <li>○ Whether there exists other information that demonstrates that the person acted with the intent to violate the WC provisions.</li> </ul> </li> </ul>
Block 10	<ul style="list-style-type: none"> <li>• Whether there was any face-to-face discussion with the person concerning the wetland before the violation occurred.</li> </ul>
Block 11	<ul style="list-style-type: none"> <li>• Whether NRCS or the CD has knowledge that the person was involved in previous National, State, or local wetland violation issues</li> </ul>
Block 12	<ul style="list-style-type: none"> <li>• Mark yes or no as appropriate. If yes, explain.</li> </ul>
	<p><b>When AD-1069, Part B, items 9 through 12 are completed, sign and date in item 13 and 14 and return the form to FSA for a good faith determination.</b></p>

Before benefits can be reinstated for a person who violated the WC provisions in good faith, a mitigation plan must be completed as required. NRCS is primarily responsible for working with the person to develop a mitigation plan.

### C. If FSA Determines Good Faith

If the COC determines that the person acted in good faith based on the information provided on the AD-1069, FSA will—

	<b>NRCS' actions</b>
Block 20 – FSA enters date; returns AD-1069 to NRCS for completion of Part D.	<ul style="list-style-type: none"><li>• After receiving AD-1069 from FSA, NRCS shall—<ul style="list-style-type: none"><li>○ contact the person regarding a mitigation plan;</li><li>○ Prepare a mitigation plan</li></ul></li><li>• Do not complete items 21 through 23 until a mitigation plan has been signed by all parties.</li><li>• Then, complete items 21 through 23;</li><li>• Return the AD-1069 to FSA.</li></ul>

*NOTE - FSA will reinstate benefits to the producer when FSA receives the AD-1069 indicating that the mitigation plan has been signed.*

## **Part 519.05 FSA-569 - NRCS Report of HELC and WC Compliance for Review Purposes**

### **a. Purpose of the Form**

Determination of potential HELC or WC noncompliance.

### **b. When it is used.**

FSA issues the FSA-569 to NRCS when—

- FSA or NRCS have reason to believe or another person reports that a potential noncompliance of HELC or WC provisions has occurred.
- A USDA employee is denied access to the property.

Potential noncompliance includes—

- Not actively applying an approved conservation plan or not using an approved conservation system;
- Area without HEL determination appears to have an agricultural commodity planted;
- Planting an agricultural commodity on converted wetland (CW);
- Planting an agricultural commodity on land designated as wetland (W) or (WX) that could not be farmed under natural conditions;
- Wetland (W, FW, FWP or WX) appears to have been cleared, drained, filled, leveled, or dredged or any other manipulation that could make production of an agricultural commodity possible.
- Increasing drainage on FW or FWP

The following table provides the process for the FSA-569 referral.

## PROCESS

Tract is identified as a potential noncompliance by:

- NRCS status review or FSA spot checks
- observation by any agency personnel
- complaint (whistleblower) to FSA or NRCS.
- person denying access to the farm to any USDA employee or their representative.

- FSA will complete Part A of the FSA-569, attach two aerial photocopies, identify applicable field(s) or area(s) with a red "X", and issue the FSA-569 and attachments to NRCS.
- FSA will indicate in Part B whether the FSA-569 is for (1) an HELC compliance determination, (2) a wetland determination on land that was planted to an agricultural commodity, or (3) a wetland determination on an area that was converted to agricultural production after November 28, 1990.

When an FSA-569 is received from FSA, NRCS does the following:

- Assigns a control number by completing one line of data on NRCS-CPA-18 software showing the field as NA or PV.
- Makes a determination of compliance or noncompliance with the HEL conservation plan/system or WC provisions.
- If needed, revise NRCS-CPA-18 to reflect the findings of the investigation.
- Check the appropriate block in Part C when:
  - It is determined there is no violation
  - It is determined there is a violation and the NRCS technical determination is final. Enter applicable date in Part A, item 10
  - Access to the property has been denied by the person.
- Retain a copy of the FSA-569 and back up data in the case file or report of possible violations file.
- Sign and date FSA-569 and return to FSA.

If a noncompliance is found, NRCS will issue a letter of Preliminary Technical Determination, which becomes final after 30 days, to include the following:

- the technical determination (NRCS-CPA-026e and wetland determination map)
- the clients options, including the rights to a field visit and rights to appeal to the COC after the preliminary? determination becomes final
- USDA program ineligibility information

The letter will indicate that the preliminary determination will become final in 30 days, unless a field visit is requested.

NRCS will notify FSA on FSA-569 after the NRCS preliminary technical determination becomes final

When FSA receives the FSA-569 from NRCS that indicates that a violation has occurred and the NRCS preliminary? technical determination is final, the COC will determine the ineligible persons and begin withholding benefits.

Complete Part C on FSA-569 according to this table.

Item	Part C Completion Instructions	
1	"Check" the appropriate <b>NRCS</b> determination.	
2	Enter the field numbers for which the determination checked in item #1 applies.	
3	Enter the acres to which the determination applies. (For HEL, this will be the same acres as the field or CLU in the conservation plan. For wetlands, it will be the area of CW, "not a CW", or area converted after 11/28/90).	
	<b>IF...</b>	<b>THEN...</b>
	a determination of noncompliance with HEL or wetland conservation provisions was made,	<ul style="list-style-type: none"> <li>• keep <b>FSA-569</b> until the <b>NRCS preliminary? technical determination is final</b></li> <li>• <b>when the NRCS preliminary? technical determination is final</b>, enter the applicable date in Part A, item 10.</li> </ul>
	the land is determined to be in compliance with HELC and/or WC provisions	FSA-569 shall immediately be referred to FSA
	<b>access is denied to USDA employees or their representatives</b>	<ul style="list-style-type: none"> <li>• <b>Check the applicable block in Part C.</b></li> <li>• <b>Sign, date, and return FSA-569 to FSA for their action.</b></li> </ul>
4	NRCS employee shall sign and enter the date FSA-569 is referred to FSA with completed entries.	

**NOTE - There must be an onsite investigation for all field(s) or area(s) identified in Part C, items 2 and 3.**

FSA-569 Tracking System—

Each District Conservationist is to establish a tracking system with the following information:

- Tract number;
- Person name;
- Type of FSA-569 (HELC or WC);
- Date FSA-569 requested from FSA by NRCS, when applicable;
- Date FSA-569 received from FSA;
- Date appealed, if applicable;
- Date the NRCS preliminary? technical determination becomes final;
- Date FSA-569 returned to FSA.

## Part 519.06 NRCS-CPA-026E - Recording HEL and Wetland Determinations

### a. HEL Field Boundaries

The statutory provisions require that HEL determinations be based on a definition of a field within a farm.

Definition - A field is defined as a part of a farm that is separated from the balance of the farm by permanent boundaries, such as fences, permanent waterways, woodlands, and croplines in cases where farming practices make it probable that the cropline is not subject to change.

***NOTE - If a sodbusted field is determined NHEL and there are existing SCS-CP A-026 or NRCS-CPA-026E HEL determinations for the tract, a new NRCS-CPA-026E is not needed.***

#### Multi-tract Fields

Some fields will be assigned multi-tract numbers by FSA according to FSA Handbook 6-CP, Paragraph 346 (HEL determination for Multi-tracts), because the field is not within tract boundaries. This occurs when a single field crosses one or more tract boundaries within a farm. For these situations:

- Use multi-tract field boundaries provided by FSA for making HEL determinations on fields for which there were no prior HEL determinations made;
- Record the HEL determination made for the multi-tract on all parent tracts;
- Complete only one **NRCS-CPA-026E** for the multi-tract.

***Example - Field No. 10 is assigned multi-tract No. 1000. Multi-tract No. 1000 contains tracts Nos. 20 and 21. Field No. 10 is determined to be HEL. Complete one NRCS-CPA-026E for multi-tract 1000 indicating field 10 as HEL. Also record a determination of HEL for both parent tracts Nos. 20 and 21. Record a note for whatever field(s) represents field No. 10 in the parent tracts that the determination is based on field 10 of multi-tract 1000.***

NRCS will redetermine HEL for multi-tracts if both of the following apply:

- The original HEL determination on the land was made using tract subdivision of a field rather than field boundaries within a farm;
- The producer requests a redetermination in writing.

***NOTE - An HEL redetermination shall not be made by NRCS if the original determination was correct based on the permanent field boundaries in existence at the time the determination was made.***

*If field boundary changes are made on fields initially determined NHEL, the HEL status for the resulting field or fields shall be determined using the 33-1/3 percent or 50-acre rule, (See Part 511, Subpart B).*

*To maintain integrity of the parent tracts for data sharing, status reviews, and other purposes, compliance plans shall continue to be developed and maintained by NRCS by tract rather than by multi-tract.*

## **b. Documenting HEL Fields on Aerial Photograph**

HEL determinations will be documented by NRCS on the NRCS-CPA-026E as well as on aerial photocopies with the determinations delineated. One NRCS-CPA-026E will be generated from data entered in the Customer Service Toolkit? for each tract or multi-tract.

FSA is responsible for maintaining the official record of HEL determinations on FSA official aerial photography.

This table provides the HEL identification labels to enter on aerial photocopies.

<u>Determination</u>	<u>Label the Field</u>
Predominately HEL (Part 511.21)	HEL
Not predominately HEL (Part 511.21)	NHEL

## **c. Distribution of HEL Determinations**

Provide the person who signed the AD-1026 and all primary owners, operators, and tenants provided by FSA:

- Copy of NRCS-CPA-026E;
- Completed FSA aerial photocopy with HEL/NHEL designations; and
- Transmittal letter.

For all official HEL determinations made, provide FSA—

- Copy of NRCS-CPA-026E - and
- Completed FSA aerial photocopy with HEL/NHEL designations.

Maintain the following items in the case file—

- AD-1026 and AD-1026A;
- NRCS-CPA-026E or SCS-CPA-026 and 026A;

- Completed FSA aerial photocopy with HEL/NHEL designations:
- HEL calculations including field documentation of PHEL soil map units.

#### **d. Recording Certified Wetland Determinations on maps and NRCS-CPA-026E, Section II**

NRCS will delineate all wetlands subject to the WC provisions by outlining the boundaries of the wetland on aerial photography, digital imagery, or other graphic representation. If possible, NRCS will use GPS to digitally map the wetland boundary in the field and to import that data onto digital orthophotoquadrangle maps (DOQ's) or other GIS digital photo imagery. Refer to Part 514, Subpart B to determine the appropriate labels to apply to the delineated wetlands.

The complete boundaries and acreage of all areas within the tract that were delineated and identified must be shown on the map, including areas identified as NW. All other parts of the tract, outside of the delineated areas, will be labeled NI. This must be clearly depicted on the certified wetland determination map. Use the label and acreage information from the map to prepare the CPA-026e [Link to Form and Instructions]. Provide a copy of the CPA-026e, along with the supporting documentation, to the producer and FSA. NRCS maintains digital certified wetland determination files for participants.

#### **e. Distribution of Certified Wetland Determinations**

- For all certified wetland determinations, provide to FSA—
  - A copy of NRCS-CPA-026e; and
  - The digital wetland determination file or manually-marked FSA base map with the wetland area delineated and labeled.
- For all scope and effect evaluations, provide FSA a copy of the letter provided to the person.
- Send all FSA-supplied affiliated persons—
  - A transmittal letter;
  - A copy of NRCS-CPA-026E; and
  - The aerial photocopy with certified areas delineated and labeled
- Maintain in the case file—
  - The AD-1026;
  - The NRCS-CPA-026e;
  - Aerial photocopies with certified areas delineated and labeled.
  - Copies of correspondence relating to NRCS-CPA-026e.

## Part 519.07 SCS-CPA-027 - Certification of Highly Erodible Land Conservation Plans and Systems

### a. Use of SCS-CP A-027

Provide FSA with a completed SCS-CP A-027 when:

- A person develops a plan/system for a highly erodible field.
- A person has developed a plan/system for reinstatement purposes.
- A plan has been developed as a result of an exemption or variance.
- A previous conservation plan or system for a tract is no longer valid.

The following table provides guidance for completion of the SCS-CPA027.

Item	Action
1	Enter the county name where the farm is located.
2	Enter the person's name and address as shown on AD-1026.
3	Enter the FSA farm number.
4	Enter the FSA tract number. Use a separate line for each tract or field as needed.
5	Enter the field numbers(s).
6	Enter the total field acres where a conservation system has been planned.
7	Enter the plan approval date. Indicate if this is NRCS approved.
8	Enter the system application date.  <b>NOTE - FSA does not require this</b> in normal circumstances. FSA will assume that a conservation system is being used unless <b>informed otherwise</b> .
9& 10	Enter any applicable remarks specific to any line entry or to the entire farm. <b>If form is being used for reinstatement, the following must appear in item 10 - NOTE - "This SCS-CPA-027 is effective beginning with the ____ crop year subject to completion of a status review for that year."</b>

11	The NRCS Representative signs as documentation that a conservation plan or system meeting FOTG requirements has been developed for the HEL cropland fields listed in Item 5. If a date is entered in Item 8 for any fields or tracts, the signature documents that the conservation system and practices meet FOTG requirements.
12	Enter the date signed by the NRCS representative.

## **Part 519.08 SCS-CPA-I - NRCS Employee Data on Farm Interest**

### **a. Use of SCS-CPA-I**

NRCS is required to complete a status review of all tracts owned or operated by NRCS employees receiving USDA program benefits at least once every three years

Employees are required to submit an SCS-CPA-I to the State Conservationist to report or confirm their interest in tracts that are subject to HELC/WC requirements.

Each State Conservationist is to develop a process to ensure completion of this responsibility.

The State Conservationist will refer tracts located in other States to the State Conservationist in that State.

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## **Part 520 — Appendices**

### **Subpart A — Statute and Regulations**

- 520.01      Food Security Act of 1985 HELC/WC Compliance Provisions**
- 520.02      HELC/WC Regulations at 7 CFR Part 12**

### **Subpart B— Wetland Background Information**

- 520.10      Guidance for Wetland Minimal Effects Determinations**
- 520.11      The 2-4-5 RULE Using the Minimal Effect/Mitigation Worksheet**
- 520.12      Example Showing Use of 50/20 Rule for Vegetation Sampling**

### **Subpart C — Sample HELC and WC Letters**

- 520.20      Sample Letters**

### **Subpart D — Glossary and Acronyms**

- 520.30      Glossary**
- 520.31      Acronyms**

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## Part 520 — Appendices

### 520.01 Food Security Act of 1985 HELC/WC Compliance Provisions

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4-1

FOOD SECURITY ACT OF 1985

Sec. 1201

#### FOOD SECURITY ACT OF 1985<sup>1-1</sup>

[As Amended Through P.L. 107-195, June 16, 2002]

#### TITLE XII—CONSERVATION

#### SUBTITLE A—DEFINITIONS

#### DEFINITIONS

SEC. 1201.<sup>1201-1</sup> [16 U.S.C. 3801] (a) For purposes of subtitles A through E:

(1) The term “agricultural commodity” means—

(A) any agricultural commodity planted and produced in a State by annual tilling of the soil, including tilling by one-trip planters; or

(B) sugarcane planted and produced in a State.

(2)<sup>1201-1</sup> CONSERVATION PLAN.—The term “conservation plan” means the document that—

(A) applies to highly erodible cropland;

(B) describes the conservation system applicable to the highly erodible cropland and describes the decisions of the person with respect to location, land use, tillage systems, and conservation treatment measures and schedule; and

(C) is approved by the local soil conservation district, in consultation with the local committees established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)(5)) and the Secretary, or by the Secretary.

(3)<sup>1201-1</sup> CONSERVATION SYSTEM.—The term “conservation system” means a combination of 1 or more conservation measures or management practices that—

(A) are based on local resource conditions, available conservation technology, and the standards and guidelines contained in the Natural Resources Conservation Service field office technical guides; and

(B) are designed to achieve, in a cost effective and technically practicable manner, a substantial reduction in soil erosion or a substantial improvement in soil conditions on a field or group of fields containing highly erodible cropland when compared to the level of erosion or soil conditions that existed before the application of the conservation measures and management practices.

(4) The term “conservation district” means any district or unit of State or local government formed under State or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a “conservation district”, “soil conservation district”, “soil and water conservation district”, “resource conservation district”, “natural resource district”, “land conservation committee”, or a similar name.

<sup>1-1</sup> P.L. 99-198, 99 Stat. 1504, Dec. 23, 1985.  
<sup>1201-1</sup> Sec. 301(a) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 980, April 4, 1996, amended this section by redesignating former paragraphs (2) through (16) as paragraphs (4) through (18), respectively, and by inserting new paragraphs (2) and (3).

(5) The term “cost sharing payment” means a payment made by the Secretary to an owner or operator of a farm or ranch containing highly erodible cropland under the provisions of section 1234 (b) of this Act.

(6)(A) The term “converted wetland” means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if—

(i) such production would not have been possible but for such action; and

(ii) before such action—

(I) such land was wetland; and

(II) such land was neither highly erodible land nor highly erodible cropland.

(B) Wetland shall not be considered converted wetland if production of an agricultural commodity on such land during a crop year—

(i) is possible as a result of a natural condition, such as drought; and

(ii) is not assisted by an action of the producer that destroys natural wetland characteristics.

(7)<sup>1201-2</sup> FIELD.—The term “field” means a part of a farm that is separated from the balance of the farm by permanent boundaries such as fences, roads, permanent waterways, or other similar features. At the option of the owner or operator of the farm, croplines may also be used to delineate a field if farming practices make it probable that the croplines are not subject to change. Any highly erodible land on which an agricultural commodity is produced after December 23, 1985, and that is not exempt under section 1212, shall be considered as part of the field in which the land was included on December 23, 1985, unless the owner and Secretary agree to modification of the boundaries of the field to carry out this title.

(8) The term “highly erodible cropland” means highly erodible land that is in cropland use, as determined by the Secretary.

(9)(A) The term “highly erodible land” means land—

(i) that is classified by the Soil Conservation Service as class IV, VI, VII, or VIII land under the land capability classification system in effect on the date of the enactment of this Act; or

(ii) that has, or that if used to produce an agricultural commodity, would have an excessive average annual rate of erosion in relation to the soil loss tolerance level, as established by the Secretary, and as determined by the Secretary through application of factors from the universal soil loss equation and the wind erosion equation, including factors for climate, soil erodibility, and field slope.

(B) For purposes of this paragraph, the land capability class or rate of erosion for a field shall be that determined by

<sup>1201-2</sup> Sec. 301(b) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 980, April 4, 1996, amended this paragraph in its entirety. For the previous version of this paragraph, see p. 5-1 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

the Secretary to be the predominant class or rate of erosion under regulations issued by the Secretary.

(C)<sup>1201-3</sup> EQUATIONS.—Not later than 60 days after the date of enactment of this subparagraph, the Secretary shall publish in the Federal Register the universal soil loss equation and wind erosion equation used by the Department of Agriculture as of that date. The Secretary may not change the equations after that date except following notice and comment in a manner consistent with section 553 of title 5, United States Code.

(10) The term “hydric soil” means soil that, in its undrained condition, is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation.

(11) The term “hydrophytic vegetation” means a plant growing in—

(A) water; or

(B) a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(12) The term “in-kind commodities” means commodities that are normally produced on land that is the subject of an agreement entered into under subtitle D.

(13) The term “rental payment” means a payment made by the Secretary to an owner or operator of a farm or ranch containing highly erodible cropland to compensate the owner or operator for retiring such land from crop production and placing such land in the conservation reserve in accordance with subtitle D.

(14) The term “Secretary” means the Secretary of Agriculture.

(15) The term “shelterbelt” means a vegetative barrier with a linear configuration composed of trees, shrubs, and other approved perennial vegetation.

(16) The term “State” means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(17) The term “vegetative cover” means—

(A) perennial grasses, legumes, forbs, or shrubs with an expected life span of 5 or more years; or

(B) trees.

(18)<sup>1201-4</sup> The term “wetland”, except when such term is part of the term “converted wetland”, means land that—

(A) has a predominance of hydric soils;

(B) is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and

<sup>1201-3</sup> Sec. 301(c) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 981, April 4, 1996, added this subparagraph.

<sup>1201-4</sup> The last sentence was added by the Urgent Supplemental Appropriation Act, 1986, P.L. 99-349, 100 Stat. 714, July 8, 1986. Sec. 1421(a) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3572, Nov. 28, 1990, revised the first sentence in its entirety.

- (C) under normal circumstances does support a prevalence of such vegetation. For purposes of this Act, and any other Act, this term shall not include lands in Alaska identified as having high potential for agricultural development which have a predominance of permafrost soils.<sup>1201-5</sup>
- (b) The Secretary shall develop—
- (1) criteria for the identification of hydric soils and hydrophytic vegetation; and
  - (2) lists of such soils and such vegetation.

SUBTITLE B—HIGHLY ERODIBLE LAND CONSERVATION

**SEC. 1211. [16 U.S.C. 3811] PROGRAM INELIGIBILITY.**<sup>1211-1</sup>

(a) IN GENERAL.—Except as provided in section 1212, and notwithstanding any other provision of law,<sup>1211-2</sup> any person who in any crop year produces an agricultural commodity on a field on which highly erodible land is predominate, or designates land on which highly erodible land is predominate to be set aside, diverted, devoted to conservation uses, or otherwise not cultivated under a program administered by the Secretary to reduce production of an agricultural commodity, as determined by the Secretary shall be ineligible for—<sup>1211-3</sup>

- (1)<sup>1211-4</sup> as to any commodity produced during that crop year by such person—
  - (A)<sup>1211-5</sup> contract payments under a production flexibility contract, marketing assistance loans, and any type of price support or payment made available under the Agricultural Market Transition Act, the Commodity Credit Corporation Charter Act (15 U.S.C. 714 et seq.), or any other Act;
  - (B) a farm storage facility loan made under section 4(h) of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b(h));
  - (C)<sup>1211-6</sup> a disaster payment; or
  - (D)<sup>1211-7</sup> a loan made, insured, or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) or any other provision of law adminis-

<sup>1201-5</sup>The last sentence was added by the Urgent Supplemental Appropriation Act, 1986, P.L. 99-349, 100 Stat. 714, July 8, 1986.

<sup>1211-1</sup>Sec. 2002(a)(1) of the Farm Security and Rural Investment Act of 2002, P.L. 107-171, 116 Stat. 233, May 13, 2002, amended this sec. by striking the section heading and all that follows through “Except as provided in” and inserting the sec. heading and all that follows through “Except as provided in”.

<sup>1211-2</sup>Sec. 311(1) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-982, 110 Stat. 1004, April 4, 1996, amended this section by striking “following the date of enactment of this Act.”

<sup>1211-3</sup>Sec. 1411(1) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3569, Nov. 28, 1990, revised the first sentence by adding the phrase “, or designates” through “determine by the Secretary”.

<sup>1211-4</sup>Sec. 311(2) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this paragraph by striking former subparagraph (C) and by redesignating subparagraphs (D) and (E) as subparagraphs (C) and (D), respectively. For the previous version of this paragraph, see pp. 5-3 and 5-4 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1211-5</sup>Sec. 311(2)(A) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended subparagraph (A) in its entirety.

<sup>1211-6</sup>Sec. 311(2)(C) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this subparagraph by striking “made under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.), under section 132 of the Disaster Assistance Act of 1989 (7 U.S.C. 1421 note), or under any similar provision enacted subsequent to August 14, 1989”.

<sup>1211-7</sup>Sec. 1411(4) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3569, Nov. 28, 1990, deleted “or” after the semicolon.

tered by the Consolidated Farm Service Agency,<sup>1211-8</sup> if the Secretary determines that the proceeds of such loan will be used for a purpose that will contribute to excessive erosion of highly erodible land;

(2)<sup>1211-9</sup> a payment made under section 4 or 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b or 714c) during such crop year for the storage of an agricultural commodity acquired by the Commodity Credit Corporation; or

(3)<sup>1211-10</sup> during the crop year—

(A) a payment made pursuant to a contract entered into under the environmental quality incentives program under chapter 4 of subtitle D;

(B) a payment under any other provision of subtitle D;

(C) a payment under section 401 or 402 of the Agricultural Credit Act of 1978 (16 U.S.C. 2201 and 2202); or

(D) a payment, loan, or other assistance under section 3 or 8 of the Watershed Protection and Flood Prevention Act (16 U.S.C. 1003 and 1006a).

(b)<sup>1211-11</sup> **HIGHLY ERODIBLE LAND.**—The Secretary shall have, and shall not delegate to any private person or entity, authority to determine whether a person has complied with this subtitle.

#### EXEMPTIONS

SEC. 1212. **[16 U.S.C. 3812]** (a)<sup>1212-1(1)</sup> During the period beginning on the date of the enactment of this Act and ending on the later of January 1, 1990, or the date that is 2 years after the date land on which a crop of an agricultural commodity is produced was mapped by the Soil Conservation Service for purposes of classifying such land under the land capability classification system in effect on the date of enactment of this Act, except as provided in paragraph (2), no person shall become ineligible under section 1211 for program loans, payments, and benefits as the result of the production of a crop of an agricultural commodity on any land that was—

(A) cultivated to produce any of the 1981 through 1985 crops of an agricultural commodity; or

(B) set aside, diverted or otherwise not cultivated under a program administered by the Secretary for any such crops to reduce production of an agricultural commodity.

(2) If, as of January 1, 1990, or 2 years after the Soil Conservation Service has completed a soil survey for the farm, whichever is later, a person is actively applying a conservation plan,<sup>1212-2</sup> such person shall have until January 1, 1995, to comply with the plan

<sup>1211-8</sup> Sec. 311(2)(D) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this subparagraph by striking “Farmers Home Administration” and inserting “Consolidated Farm Service Agency”.

<sup>1211-9</sup> Sec. 1411(4) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3569, Nov. 28, 1990, deleted the period and inserted “; or”.

<sup>1211-10</sup> Sec. 311(3) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this paragraph in its entirety. For the previous version of this paragraph, see p. 5-4 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1211-11</sup> Subsec. (b) added by sec. 2002(a)(2) of the Farm Security and Rural Investment Act of 2002, P.L. 107-171, 116 Stat. 233.

<sup>1212-1</sup> Sec. 1412(a) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3569, Nov. 28, 1990, added paragraphs (3) and (4).

<sup>1212-2</sup> Sec. 301(d)(1) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 981, April 4, 1996, amended this paragraph by striking “that documents” and all that follows through “by the Secretary”. For the previous version of this paragraph, see pp. 5-4 and 5-5 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

without being subject to program ineligibility. In carrying out this subsection, the Secretary, Soil Conservation Service, and local soil conservation districts shall minimize the quantity of documentation a person must submit to comply with this paragraph.

(3) Any person who owns or operates highly erodible land that was the subject of a contract entered into under subchapter B of chapter 1 of subtitle D shall only be required to apply a conservation plan established under this subtitle. The person shall not be required to meet a higher conservation standard than the standard applied to other highly erodible cropland located within the same area. If the person's conservation plan requires structures to be constructed, the person shall <sup>1212-3</sup> have until 2 years after the expiration of such contract to comply with the conservation plan, or a longer period of time if the Secretary determines compliance is otherwise technically or economically not feasible, or such longer period is otherwise appropriate, before such person will be subject to program ineligibility with respect to such land under section 1211.

(4) On the expiration of a contract entered into under subchapter B of chapter 1 of subtitle D, the provisions of this subtitle shall apply to the acreage that was the subject of such contract.

(b) <sup>1212-4</sup> No person shall become ineligible under section 1211 for program loans, payments, and benefits as the result of the production of a crop of an agricultural commodity—

(1) planted before the date of enactment of this Act; or

(2) planted during any crop year beginning before the date of enactment of this Act.

(c) <sup>1212-5</sup> No person shall become ineligible under section 1211 for program loans, payments, and benefits as the result of the production of a crop of an agricultural commodity or the designation of land to be set aside, diverted, devoted to conservation uses, or otherwise not cultivated under a program administered by the Secretary to reduce production of an agricultural commodity (hereafter in this subsection referred to as "set aside")—

(1) on highly erodible land in an area—

(A) within a conservation district, under a conservation system that has been approved by a conservation district after the district has determined that the conservation system is in conformity with technical standards set forth in the Soil Conservation Service technical guide for such district; or

(B) <sup>1212-6</sup> not within a conservation district, under a conservation system determined by the Secretary to be adequate for the protection of highly erodible land that has been set aside or for the production of such agricultural

<sup>1212-3</sup> Sec. 312 of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this paragraph by striking "shall, if the conservation plan established under this subtitle for such land requires structures to be constructed," and inserting "shall only" and all that follows through "the person shall".

<sup>1212-4</sup> Sec. 1412(b) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-124, 104 Stat. 3569, Nov. 28, 1990, amended this subsection by inserting "or" after the semicolon in para. (1); by striking the semicolon in para. (2) and inserting a period.

<sup>1212-5</sup> Sec. 1412(b) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3570, Nov. 28, 1990, redesignated subsec. (b)(3)-(5) as subsec. (c)(1)-(3), respectively and added the first sentence to this Subsection.

<sup>1212-6</sup> Sec. 1421(b) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3570, Nov. 28, 1990, added "for the protection of highly erodible land that has been set aside or".



plan,<sup>1212-15</sup> if the Secretary determines that the person has acted in good faith and without an intent to violate this subtitle. A person who meets the requirements of this paragraph shall be allowed a reasonable period of time, as determined by the Secretary, but not to exceed 1 year, during which to implement the measures and practices necessary to be considered to be actively applying the person's conservation plan.<sup>1212-16</sup>

(2) If the Secretary determines that a person who has failed to comply with the provisions of section 1211 with respect to highly erodible cropland that was not in production prior to December 23, 1985, and has acted in good faith and without an intent to violate the provisions,<sup>1212-17</sup> the Secretary shall, in lieu of applying the ineligibility provisions in section 1211, reduce by not less than \$500 nor more than \$5,000, depending on the seriousness of the violation as determined by the Secretary, program benefits described in section 1211 that such producer would otherwise be eligible to receive in a crop year.

(3) Any person whose benefits are reduced in any crop year under this subsection shall continue to be eligible for all of the benefits described in section 1211 for any subsequent crop year if, prior to the beginning of such subsequent crop year, the Secretary determines that such person is actively applying a conservation plan<sup>1212-18</sup> according to the schedule set forth in such plan.

(4)<sup>1212-19</sup> Notwithstanding any other provision of this subtitle, no person shall become ineligible under section 1211 for program loans, payments, and benefits as a result of the failure of such person to actively apply a conservation plan,<sup>1212-20</sup> if the Secretary—

(A)<sup>1212-21</sup> determines that such failure results in a violation of section 1211 that is technical and minor in nature and that such violation has a minimal effect on the erosion control purposes of the conservation plan applicable to the land on which such violation has occurred;

<sup>1212-15</sup> Sec. 301(d)(4)(A) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 981, April 4, 1996, amended this paragraph by striking "that documents" and all that follows through "under subsection (a)". For the previous version of this paragraph, see pp. 5-6 and 5-7 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1212-16</sup> Sec. 313(a)(2) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this paragraph by striking "person has—" and all that follows through the period at the end of former subparagraph (B) and inserting "the person has" and all that follows through "person's conservation plan.". For the previous version of this paragraph, see pp. 5-6 and 5-7 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1212-17</sup> Sec. 313(b) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this paragraph by striking "meets the requirements of paragraph (1)" and inserting "with respect to highly erodible cropland that was not in production prior to December 23, 1985, and has acted in good faith and without an intent to violate the provisions".

<sup>1212-18</sup> Sec. 301(d)(4)(B) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 981, April 4, 1996, amended this paragraph by striking "prepared under subsection (a)".

<sup>1212-19</sup> Sec. 313(c) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 983, April 4, 1996, amended this paragraph by striking a former last sentence. For the previous version of this paragraph, see p. 5-7 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1212-20</sup> Sec. 301(d)(4)(C) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 981, April 4, 1996, amended this paragraph by striking "that documents" and all that follows through "subsection (a)". For the previous version of this paragraph, see p. 5-7 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1212-21</sup> Sec. 204(2) of the Food, Agriculture, Conservation, and Trade Act Amendments of 1991, P.L. 201-237, 105 Stat. 1855, Nov. 28, 1991, deleted "such violations" and inserted "such violation".

(B) determines that such failure is due to circumstances beyond the control of the person; or

(C) grants the person a temporary variance from the practices specified in the plan for the purpose of handling a specific problem, including weather, pest, and disease problems.<sup>1212-22</sup>

(5)<sup>1212-23</sup> **EXPEDITED PROCEDURES FOR TEMPORARY VARIANCES.**—After consultation with local conservation districts, the Secretary shall establish expedited procedures for the consideration and granting of temporary variances under paragraph (4)(C). If the request for a temporary variance under paragraph (4)(C) involves the use of practices or measures to address weather, pest, or disease problems, the Secretary shall make a decision on whether to grant the variance during the 30-day period beginning on the date of receipt of the request. If the Secretary fails to render a decision during the period, the temporary variance shall be considered granted.

(g)<sup>1212-24</sup> The Secretary, in providing assistance to an individual in the preparation or revision of a conservation plan under this section, shall provide such individual with information—

(1) concerning cost effective and applicable erosion control measures that may be available to such individual to meet the requirements of this section; and

(2)<sup>1212-25</sup> concerning crop flexibility, base adjustment, and conservation assistance options that may be available to such individual to meet the requirements of this section, including the provisions of titles X, XII, and XIII of the Food, Agriculture, Conservation, and Trade Act of 1990 (or the amendments made by such titles).

(h)<sup>1212-26</sup> Section 1211 shall not apply to the noncommercial production of agricultural commodities on a farm if such production is limited to two acres or less and if the Secretary determines that such production is not intended to circumvent the conservation requirements otherwise applicable to lands under this subtitle.

**SEC. 1213. [16 U.S.C. 3812a] DEVELOPMENT AND IMPLEMENTATION OF CONSERVATION PLANS AND CONSERVATION SYSTEMS.**<sup>1213-1</sup>

(a) **TECHNICAL REQUIREMENTS.**—In connection with the standards and guidelines contained in Natural Resources Conservation Service field office technical guides applicable to the development and use of conservation measures and management practices as part of a conservation system, the Secretary shall ensure that the standards and guidelines permit a person to use a conservation system that—

(1) is technically and economically feasible;

(2) is based on local resource conditions and available conservation technology;

<sup>1212-22</sup>Sec. 314(1) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 983, April 4, 1996, amended this subparagraph by striking “problem” and inserting “problem, including weather, pest, and disease problems”.

<sup>1212-23</sup>Sec. 314(2) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 983, April 4, 1996, added paragraph (5).

<sup>1212-24</sup>Sec. 1412(e) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3571, Nov. 28, 1990, added this subsection.

<sup>1212-25</sup>Sec. 204(2) of the Food, Agriculture, Conservation, and Trade Act of 1991, P.L. 102-237, 105 Stat. 1855, Dec. 13, 1991, deleted “XIII,” and inserted “XIII”.

<sup>1212-26</sup>Sec. 1412(f) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3571, Nov. 28, 1991, added this subsection.

<sup>1213-1</sup>Sec. 315(a)(2) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 984, April 4, 1996, added this section.

(3) is cost-effective; and

(4) does not cause undue economic hardship on the person applying the conservation system under the person's conservation plan.

(b) **MEASUREMENT OF EROSION REDUCTION.**—For the purpose of determining whether there is a substantial reduction in soil erosion on a field containing highly erodible cropland, the measurement of erosion reduction achieved by the application of a conservation system under a person's conservation plan shall be based on the estimated annual level of erosion at the time of the measurement compared to the estimated annual level of erosion that existed before the implementation of the conservation measures and management practices provided for in the conservation system.

(c) **RESIDUE MEASUREMENT.**—

(1) **RESPONSIBILITIES OF THE SECRETARY.**—For the purpose of measuring the level of residue on a field, the Secretary shall—

(A) take into account any residue incorporated into the top 2 inches of soil, as well as the growing crop, in the measurement;

(B) provide technical guidelines for acceptable residue measurement methods;

(C) provide a certification system for third parties to perform residue measurements; and

(D) provide for the acceptance and use of information and data voluntarily provided by the producer regarding the field.

(2) **ACCEPTANCE OF PRODUCER MEASUREMENTS.**—Annual residue measurements supplied by a producer (including measurements performed by a certified third party) shall be used by the Secretary if the Secretary determines that the measurements indicate that the residue level for the field meets the level required under the conservation plan.

(d) **CERTIFICATION OF COMPLIANCE.**—

(1) **IN GENERAL.**—For the purpose of determining the eligibility of a person for program benefits specified in section 1211 at the time application is made for the benefits, the Secretary shall permit the person to certify that the person is complying with the person's conservation plan.

(2) **STATUS REVIEWS.**—If a person makes a certification under paragraph (1), the Secretary shall not be required to carry out a review of the status of compliance of the person with the conservation plan under which the conservation system is being applied.

(3) **REVISIONS AND MODIFICATIONS.**—The Secretary shall permit a person who makes a certification under paragraph (1) with respect to a conservation plan to revise the conservation plan in any manner, if the same level of conservation treatment provided for by the conservation system under the person's conservation plan is maintained. The Secretary may not revise the person's conservation plan without the concurrence of the person.

(e) **TECHNICAL ASSISTANCE.**—The Secretary shall, using available resources and consistent with the Secretary's other conservation responsibilities and objectives, provide technical assistance to a person throughout the development, revision, and application of

the conservation plan and any conservation system of the person. At the request of the person, the Secretary may provide technical assistance regarding conservation measures and management practices for other lands of the person that do not contain highly erodible cropland.

(f) ENCOURAGEMENT OF ON-FARM RESEARCH.—To encourage on-farm conservation research, the Secretary may allow a person to include in the person's conservation plan or a conservation system under the plan, on a field trial basis, practices that are not currently approved but that the Secretary considers have a reasonable likelihood of success.

#### SOIL SURVEYS

SEC. 1214.<sup>1214-1</sup> **[16 U.S.C. 3813]** The Secretary shall, as soon as is practicable after the date of enactment of this Act, complete soil surveys on those private lands that do not have a soil survey suitable for use in determining the land capability class for purposes of this subtitle. In carrying out this section, the Secretary shall, insofar as possible, concentrate on those localities where significant amounts of highly erodible land are being converted to the production of agricultural commodities.

#### SEC. 1215. **[16 U.S.C. 3814] NOTICE AND INVESTIGATION OF POSSIBLE COMPLIANCE DEFICIENCIES.**<sup>1215-1</sup>

(a) IN GENERAL.—An employee of the Department of Agriculture who observes a possible compliance deficiency or other potential violation of a conservation plan or this subtitle while providing on-site technical assistance shall provide to the responsible persons, not later than 45 days after observing the possible violation, information regarding actions needed to comply with the plan and this subtitle. The employee shall provide the information in lieu of reporting the observation as a compliance violation.

(b) CORRECTIVE ACTION.—The responsible persons shall attempt to correct the deficiencies as soon as practicable after receiving the information.

(c) REVIEW.—If the corrective action is not fully implemented not later than 1 year after the responsible persons receive the information, the Secretary may conduct a review of the status of compliance of the persons with the conservation plan and this subtitle.

#### Subtitle C—Wetland Conservation

#### SEC. 1221. **[16 U.S.C. 3821] PROGRAM INELIGIBILITY.**<sup>1221-1</sup>

(a) PRODUCTION ON CONVERTED WETLAND.—Except as provided in this subtitle and notwithstanding any other provision of law, any person who in any crop year produces an agricultural commodity on converted wetland, as determined by the Secretary, shall be—

(1) in violation of this section; and

<sup>1214-1</sup> Sec. 315(1) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 983, April 4, 1996, redesignated former section 1213 as section 1214.

<sup>1215-1</sup> Sec. 316 of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 985, April 4, 1996, added this section.

<sup>1221-1</sup> Sec. 321 of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 986, April 4, 1996, amended this section by redesignating subsection (b) as subsection (c) and by striking the section heading and all that follows through the end of subsection (a) and inserting the text printed above. For the previous version of this section, see pp. 5-8 and 5-9 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

(2) ineligible for loans or payments in an amount determined by the Secretary to be proportionate to the severity of the violation.

(b) **INELIGIBILITY FOR CERTAIN LOANS AND PAYMENTS.**—If a person is determined to have committed a violation under subsection (a) during a crop year, the Secretary shall determine which of, and the amount of, the following loans and payments for which the person shall be ineligible:

(1) Contract payments under a production flexibility contract, marketing assistance loans, and any type of price support or payment made available under the Agricultural Market Transition Act, the Commodity Credit Corporation Charter Act (15 U.S.C. 714 et seq.), or any other Act.

(2) A loan made or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) or any other provision of law administered by the Consolidated Farm Service Agency, if the Secretary determines that the proceeds of the loan will be used for a purpose that will contribute to conversion of a wetland (other than as provided in this subtitle) to produce an agricultural commodity.

(3) During the crop year:

(A) A payment made pursuant to a contract entered into under the environmental quality incentives program under chapter 4 of subtitle D.

(B) A payment under any other provision of subtitle D.

(C) A payment under section 401 or 402 of the Agricultural Credit Act of 1978 (16 U.S.C. 2201 and 2202).

(D) A payment, loan, or other assistance under section 3 or 8 of the Watershed Protection and Flood Prevention Act (16 U.S.C. 1003 and 1006a).

(c) <sup>1221-2</sup> **WETLAND CONVERSION.**—Except <sup>1221-3</sup> as provided in section 1222 and notwithstanding any other provision of law, any person who in any crop year beginning after November 28, 1990, <sup>1221-4</sup> converts a wetland by draining, dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland shall be ineligible for those payments, loans, or programs specified in subsection (b) <sup>1221-5</sup> for that crop year and all subsequent crop years.

(d) <sup>1221-6</sup> **PRIOR LOANS.**—This section shall not apply to a loan described in subsection (b) made before December 23, 1985.

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<sup>1221-2</sup> Sec. 1421(b)(6) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3572, Nov. 28, 1990, added this subsection. For redesignation, see note 1221-1.

<sup>1221-3</sup> Sec. 321(b)(1)(A) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 986, April 4, 1996, amended this subsection by striking “Except” and inserting “WETLAND CONVERSION.—Except”.

<sup>1221-4</sup> Sec. 321(b)(1)(B) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 986, April 4, 1996, amended this subsection by striking “subsequent to the date of enactment of the Food, Agriculture, Conservation, and Trade Act of 1990” and inserting “beginning after November 28, 1990.”

<sup>1221-5</sup> Sec. 321(b)(1)(C) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 986, April 4, 1996, amended this subsection by striking “subsections (a) (1) through (3)” and inserting “subsection (b)”.

<sup>1221-6</sup> Sec. 321(b)(2) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 986, April 4, 1996, added subsection (d).

(e)<sup>1221-7</sup> WETLAND.—The Secretary shall have, and shall not delegate to any private person or entity, authority to determine whether a person has complied with this subtitle.

**SEC. 1222.**<sup>1222-1</sup> [16 U.S.C. 3822] **DELINEATION OF WETLANDS; EXEMPTIONS.**

(a)<sup>1222-2</sup> **DELINEATION BY THE SECRETARY.**—

(1) **IN GENERAL.**—Subject to subsection (b) and paragraph (6), the Secretary shall delineate, determine, and certify all wetlands located on subject land on a farm.

(2) **WETLAND DELINEATION MAPS.**—The Secretary shall delineate wetlands on wetland delineation maps. On the request of a person, the Secretary shall make a reasonable effort to make an on-site wetland determination prior to delineation.

(3) **CERTIFICATION.**—On providing notice to affected persons, the Secretary shall—

(A) certify whether a map is sufficient for the purpose of making a determination of ineligibility for program benefits under section 1221; and

(B) provide an opportunity to appeal the certification prior to the certification becoming final.

(4) **DURATION OF CERTIFICATION.**—A final certification made under paragraph (3) shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary.

(5) **REVIEW OF MAPPING ON APPEAL.**—In the case of an appeal of the Secretary's certification, the Secretary shall review and certify the accuracy of the mapping of all land subject to the appeal to ensure that the subject land has been accurately delineated. Prior to rendering a decision on the appeal, the Secretary shall conduct an on-site inspection of the subject land on a farm.

(6) **RELIANCE ON PRIOR CERTIFIED DELINEATION.**—No person shall be adversely affected because of having taken an action based on a previous certified wetland delineation by the Secretary. The delineation shall not be subject to a subsequent wetland certification or delineation by the Secretary, unless requested by the person under paragraph (4).

(b)<sup>1222-3</sup> **EXEMPTIONS.**—No person shall become ineligible under section 1221 for program loans or payments under the following circumstances:

(1) As the result of the production of an agricultural commodity on the following lands:

(A) A converted wetland if the conversion of the wetland was commenced before December 23, 1985.

<sup>1221-7</sup> Sec. 2002(b) of the Farm Security and Rural Investment Act of 2002, P.L. 107-171, 116 Stat. 233, May 13, 2002, added subsection (e).

<sup>1222-1</sup> Sec. 1422 of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3573, Nov. 28, 1990, revised this section in its entirety.

<sup>1222-2</sup> Sec. 322(a) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended subsection (a) in its entirety. For the previous version of this subsection, see pp. 5-9 and 5-10 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1222-3</sup> Sec. 322(b) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended subsection (b) in its entirety. For the previous version of this subsection, see p. 5-10 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

(B) Land that is a nontidal drainage or irrigation ditch excavated in upland.

(C) A wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation.

(D) A wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce an agricultural commodity in a manner that is consistent for the area where the production is possible as a result of a natural condition, such as drought, and is without action by the producer that destroys a natural wetland characteristic.

(E) Land that is an artificial lake or pond created by excavating or diking land (that is not a wetland) to collect and retain water and that is used primarily for livestock watering, fish production, irrigation, wildlife, fire control, flood control, cranberry growing, or rice production, or as a settling pond.

(F) A wetland that is temporarily or incidentally created as a result of adjacent development activity.

(G) A converted wetland if the original conversion of the wetland was commenced before December 23, 1985, and the Secretary determines the wetland characteristics returned after that date as a result of—

- (i) the lack of maintenance of drainage, dikes, levees, or similar structures;
- (ii) a lack of management of the lands containing the wetland; or
- (iii) circumstances beyond the control of the person.

(H) A converted wetland, if—

(i) the converted wetland was determined by the Natural Resources Conservation Service to have been manipulated for the production of an agricultural commodity or forage prior to December 23, 1985, and was returned to wetland conditions through a voluntary restoration, enhancement, or creation action subsequent to that determination;

(ii) technical determinations regarding the prior site conditions and the restoration, enhancement, or creation action have been adequately documented by the Natural Resources Conservation Service;

(iii) the proposed conversion action is approved by the Natural Resources Conservation Service prior to implementation; and

(iv) the extent of the proposed conversion is limited so that the conditions will be at least equivalent to the wetland functions and values that existed prior to implementation of the voluntary wetland restoration, enhancement, or creation action.

(2) For the conversion of the following:

(A) An artificial lake or pond created by excavating or diking land that is not a wetland to collect and retain water and that is used primarily for livestock watering, fish production, irrigation, wildlife, fire control, flood con-

trol, cranberry growing, rice production, or as a settling pond.

(B) A wetland that is temporarily or incidentally created as a result of adjacent development activity.

(C) A wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce an agricultural commodity in a manner that is consistent for the area where the production is possible as a result of a natural condition, such as drought, and is without action by the producer that destroys a natural wetland characteristic.

(D) A wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date as a result of—

(i) the lack of maintenance of drainage, dikes, levees, or similar structures;

(ii) a lack of management of the lands containing the wetland; or

(iii) circumstances beyond the control of the person.

(E) A wetland, if—

(i) the wetland was determined by the Natural Resources Conservation Service to have been manipulated for the production of an agricultural commodity or forage prior to December 23, 1985, and was returned to wetland conditions through a voluntary restoration, enhancement, or creation action subsequent to that determination;

(ii) technical determinations regarding the prior site conditions and the restoration, enhancement, or creation action have been adequately documented by the Natural Resources Conservation Service;

(iii) the proposed conversion action is approved by the Natural Resources Conservation Service prior to implementation; and

(iv) the extent of the proposed conversion is limited so that the conditions will be at least equivalent to the wetland functions and values that existed prior to implementation of the voluntary wetland restoration, enhancement, or creation action.

(c) **ON-SITE INSPECTION REQUIREMENT.**—No program loans, payments, or benefits shall be withheld from a person under this subtitle unless the Secretary has conducted an on-site visit of the subject land.

(d) <sup>1222-4</sup> **IDENTIFICATION OF MINIMAL EFFECT EXEMPTIONS.**—For purposes of applying the minimal effect exemption under subsection (f)(1), the Secretary shall identify by regulation categorical minimal effect exemptions on a regional basis to assist persons in avoiding a violation of the ineligibility provisions of section 1221. The Secretary shall ensure that employees of the Department of Agriculture who administer this subtitle receive appropriate train-

<sup>1222-4</sup> Sec. 322(c) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended subsection (d) in its entirety. For the previous version of this subsection, see p. 5-10 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

ing to properly apply the minimal effect exemptions determined by the Secretary.

(e) **NONWETLANDS.**—The Secretary shall exempt from the ineligibility provisions of section 1221 any action by a person upon lands in any case in which the Secretary determines that any one of the following does not apply with respect to such lands:

(1) Such lands have a predominance of hydric soils.

(2) Such lands are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.

(3) Such lands, under normal circumstances, support a prevalence of such vegetation.

(f) <sup>1222-5</sup> **MINIMAL EFFECT; MITIGATION.**—The Secretary shall exempt a person from the ineligibility provisions of section 1221 for any action associated with the production of an agricultural commodity on a converted wetland, or the conversion of a wetland, if 1 or more of the following conditions apply, as determined by the Secretary:

(1) The action, individually and in connection with all other similar actions authorized by the Secretary in the area, will have a minimal effect on the functional hydrological and biological value of the wetlands in the area, including the value to waterfowl and wildlife.

(2) The wetland and the wetland values, acreage, and functions are mitigated by the person through the restoration of a converted wetland, the enhancement of an existing wetland, or the creation of a new wetland, and the restoration, enhancement, or creation is—

(A) in accordance with a wetland conservation plan;

(B) in advance of, or concurrent with, the action;

(C) not at the expense of the Federal Government;

(D) in the case of enhancement or restoration of wetlands, on not greater than a 1-for-1 acreage basis unless more acreage is needed to provide equivalent functions and values that will be lost as a result of the wetland conversion to be mitigated;

(E) in the case of creation of wetlands, on greater than a 1-for-1 acreage basis if more acreage is needed to provide equivalent functions and values that will be lost as a result of the wetland conversion that is mitigated;

(F) on lands in the same general area of the local watershed as the converted wetland; and

(G) with respect to the restored, enhanced, or created wetland, made subject to an easement that—

(i) is recorded on public land records;

(ii) remains in force for as long as the converted wetland for which the restoration, enhancement, or creation to be mitigated remains in agricultural use or is not returned to its original wetland classification with equivalent functions and values; and

<sup>1222-5</sup> Sec. 322(d) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended subsection (f) in its entirety. For the previous version of this subsection, see p. 5-11 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

(iii) prohibits making alterations to the restored, enhanced, or created wetland that lower the wetland's functions and values.

(3) The wetland was converted after December 23, 1985, but before November 28, 1990, and the wetland values, acreage, and functions are mitigated by the producer through the requirements of subparagraphs (A), (B), (C), (D), (F), and (G) of paragraph (2).

(4) The action was authorized by a permit issued under section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) and the wetland values, acreage, and functions of the converted wetland were adequately mitigated for the purposes of this subtitle.

(g) **MITIGATION APPEALS.**—A person<sup>1222-6</sup> shall be afforded the right to appeal, under section 1243, the imposition of a mitigation agreement requiring greater than one-to-one acreage mitigation to which the person<sup>1222-6</sup> is subject.

(h)<sup>1222-7</sup> **GOOD FAITH EXEMPTION.**—

(1) **EXEMPTION DESCRIBED.**—The Secretary may waive a person's ineligibility under section 1221 for program loans, payments, and benefits as the result of the conversion of a wetland subsequent to November 28, 1990, or the production of an agricultural commodity on a converted wetland, if the Secretary determines that the person has acted in good faith and without intent to violate this subtitle.

(2) **PERIOD FOR COMPLIANCE.**—The Secretary shall provide a person who the Secretary determines has acted in good faith and without intent to violate this subtitle with a reasonable period, but not to exceed 1 year, during which to implement the measures and practices necessary to be considered to<sup>1222-8</sup> actively restoring the subject wetland.

(i) **RESTORATION.**—Any person who is determined to be ineligible for program benefits under section 1221 for any crop year shall not be ineligible for such program benefits under such section for any subsequent crop year if, prior to the beginning of such subsequent crop year, the person has fully restored the characteristics of the converted wetland to its prior wetland state or has otherwise mitigated for the loss of wetland values, as determined by the Secretary, through the restoration, enhancement, or creation of wetland values in the same general area of the local watershed as the converted wetland.<sup>1222-9</sup>

(j)<sup>1222-10</sup> **DETERMINATIONS; RESTORATION AND MITIGATION PLANS; MONITORING ACTIVITIES.**—Technical determinations, the development of restoration and mitigation plans, and monitoring ac-

<sup>1222-6</sup> Sec. 322(e) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended this subsection by striking "producer" and inserting "person". The amendment was executed to both places where "producer" appeared as the probable intent of Congress.

<sup>1222-7</sup> Sec. 322(f) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended subsection (h) in its entirety. For the previous version of this subsection, see p. 5-12 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1222-8</sup> So in original. Probably should be "to be".

<sup>1222-9</sup> Sec. 322(g) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended this subsection by inserting "or has otherwise" and all that follows through "as the converted wetland".

<sup>1222-10</sup> Sec. 322(h) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended subsection (j) in its entirety. For the previous version of this subsection, see pp. 5-12 and 5-13 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

tivities under this section shall be made by the National<sup>1222-11</sup> Resources Conservation Service.

(k)<sup>1222-12</sup> MITIGATION BANKING PROGRAM.—Using authorities available to the Secretary, the Secretary may operate a pilot program for mitigation banking of wetlands to assist persons to increase the efficiency of agricultural operations while protecting wetland functions and values. Subsection (f)(2)(C) shall not apply to this subsection.

**SEC. 1223.**<sup>1223-1</sup> [16 U.S.C. 3823] **AFFILIATED PERSONS.**

If a person is affected by a reduction in benefits under section 1221 and the affected person is affiliated with other persons for the purpose of receiving the benefits, the benefits of each affiliated person shall be reduced under section 1221 in proportion to the interest held by the affiliated person.

**SEC. 1224.**<sup>1224-1</sup> [16 U.S.C. 3824] **FAIRNESS OF COMPLIANCE.**

If the actions of an unrelated person or public entity, outside the control of, and without the prior approval of, the landowner or tenant result in a change in the characteristics of cropland that would cause the land to be determined to be a wetland, the affected land shall not be considered to be wetland for purposes of this subtitle.

Subtitle D—Agricultural Resources Conservation Program<sup>1230-1</sup>

**CHAPTER 1—COMPREHENSIVE CONSERVATION  
ENHANCEMENT PROGRAM**<sup>1230-2</sup>

**Subchapter A—General Provisions**

**SEC. 1230.** [16 U.S.C. 3830] **COMPREHENSIVE CONSERVATION ENHANCEMENT PROGRAM.**<sup>1230-3</sup>

(a) ESTABLISHMENT.—

(1) IN GENERAL.—During the 1996 through 2002<sup>1230-4</sup> calendar years, the Secretary shall establish a comprehensive con-

<sup>1222-11</sup> So in original. Probably should be “Natural”.

<sup>1222-12</sup> Sec. 322(i) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, added this subsection.

<sup>1222-2</sup> Sec. 324 of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 992, April 4, 1996, added this section. Sec. 323 of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 992, April 4, 1996, repealed a former section 23 (relating to consultation with the Secretary of the Interior). For the previous version of this section, see pp. 5-13 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1224-1</sup> Sec. 1424 of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3576, Nov. 28, 1990, added this section.

<sup>1230-1</sup> Sec. 1431(1) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3576, Nov. 28, 1990, deleted “Conservation Reserve” and “Agricultural Resources Conservation Program”.

<sup>1230-2</sup> Sec. 1432 of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3577 added this entire chapter.

Sec. 2006(a) of the Farm Security and Rural Investment Act of 2002, P.L. 107-171, 116 Stat. 237, May 13, 2002, amended the heading of chapter 1 in its entirety.

<sup>1230-3</sup> Sec. 331 of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 992, April 4, 1996, amended this section in its entirety. For the previous version of this section, see pp. 5-13 and 5-14 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

Sec. 2006(b)(1) of the Farm Security and Rural Investment Act of 2002, P.L. 107-171, 116 Stat. 237, May 13, 2002, amended the heading of sec. 1230 in its entirety.

Sec. 2006(b)(3) of the Farm Security and Rural Investment Act of 2002, P.L. 107-171, 116 Stat. 237, May 13, 2002, struck former subsec. (c). For the text, see p. 4-19 of Soil Conservation Laws (as of December 27, 2001).

<sup>1230-4</sup> So in original. Probably should be “2002 through 2007”.

## 520.02 HELC/WC Regulations at 7 CFR Part 12

### § 12.2

where a wetland had previously existed.

*Secretary* means the Secretary of USDA.

*Sharecropper* means a person who performs work in connection with the production of a crop under the supervision of the operator and who receives a share of such crop for such labor.

*Soil map unit* means an area of the landscape shown on a soil map which consists of one or more soils.

*State* means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

*Tenant* means a person usually called a "cash tenant", "fixed-rent tenant", or "standing rent tenant" who rents land from another for a fixed amount of cash or a fixed amount of a commodity to be paid as rent; or a person (other than a sharecropper) usually called a "share tenant" who rents land from another person and pays as rent a share of the crops or proceeds therefrom. A tenant shall not be considered the farm operator unless the tenant is determined to be the operator pursuant to this part and 7 CFR part 718.

*Wetland*, except when such term is a part of the term "converted wetland", means land that—

- (1) Has predominance of hydric soils;
- (2) Is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
- (3) Under normal circumstances does support a prevalence of such vegetation, except that this term does not include lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soils.

*Wetland determination* means a decision regarding whether or not an area is a wetland, including identification of wetland type and size. A wetland determination may include identification of an area as one of the following types of wetland—

- (1) *Artificial wetland* is an area that was formerly non-wetland, but now

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meets wetland criteria due to human activities, such as:

- (i) An artificial lake or pond created by excavating or diking land that is not a wetland to collect and retain water that is used primarily for livestock, fish production, irrigation, wildlife, fire control, flood control, cranberry growing, or rice production, or as a settling pond; or

- (ii) A wetland that is temporarily or incidentally created as a result of adjacent development activity;

- (2) *Commenced-conversion wetland* is a wetland, farmed wetland, wetland pasture, or a converted wetland on which conversion began, but was not completed, prior to December 23, 1985.

- (3) *Converted wetland* is a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose of or to have the effect of making possible the production of an agricultural commodity without further application of the manipulations described herein if:

- (i) Such production would not have been possible but for such action, and

- (ii) Before such action such land was wetland, farmed wetland, or farmed-wetland pasture and was neither highly erodible land nor highly erodible cropland;

- (4) *Farmed wetland* is a wetland that prior to December 23, 1985, was manipulated and used to produce an agricultural commodity, and on December 23, 1985, did not support woody vegetation and met the following hydrologic criteria:

- (i) Is inundated for 15 consecutive days or more during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more), or

- (ii) If a pothole, playa, or pocosion, is ponded for 7 or more consecutive days during the growing season in most years (50 percent chance of more) or is saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more);

- (5) *Farmed-wetland pasture* is wetland that was manipulated and managed for pasture or hayland prior to December

23, 1985, and on December 23, 1985, met the following hydrologic criteria:

(i) Inundated or ponded for 7 or more consecutive days during the growing season in most years (50 percent chance or more), or

(ii) Saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more);

(6) *Not-inventoried land*, is an area for which no evaluation of soils, vegetation, or hydrology has been conducted to determine if wetland criteria are met;

(7) *Non-wetland* is:

(i) Land that under natural conditions does not meet wetland criteria, or

(ii) Is converted wetland the conversion of which occurred prior to December 23, 1985, and on that date, the land did not meet wetland criteria but an agricultural commodity was not produced and the area was not managed for pasture or hay;

(8) *Prior-converted cropland* is a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:

(i) Inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); and

(ii) If a pothole, playa or pocosin, ponding was less than 7 consecutive days during the growing season in most years (50 percent chance or more) and saturation was less than 14 consecutive days during the growing season most years (50 percent chance or more); or

(9) *Wetland*, as defined above in this section.

*Wetland delineation* means outlining the boundaries of a wetland determination on aerial photography, digital imagery, other graphic representation of the area, or on the land.

(b) *Terms for FSA operations*. In the regulations in this part, and in all instructions, forms, and documents in connection therewith, all other words and phrases specifically relating to FSA operations shall, unless required

by the subject matter or the specific provisions of this part, have the meanings assigned to them in the regulations at part 718 of this title that govern reconstitutions of farms, allotments, and bases and any subsequent amendment thereto.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996]

### § 12.3 Applicability.

(a) *Geographic scope*. The provisions of this part shall apply to all land, including Indian tribal land, in the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Island of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Federated States of Micronesia, the Republic of Palau, and the Republic of the Marshall Islands.

(b) *Effective date*. The provisions of this part apply to all actions taken after July 3, 1996, and to determinations made after or pending on July 3, 1996, except to the extent that § 12.5(a)(5) and 12.5 (b)(4) through (b)(8) specify retroactive application on December 23, 1985, and November 28, 1990, for certain actions and determinations regarding wetlands and converted wetlands. Actions taken and determinations made prior to July 3, 1996, are subject to regulations set forth in this part as of July 2, 1996, except as otherwise provided in this part. Further, to the extent that a person may be eligible for an exemption for an action taken before July 3, 1996, the action is subject to the provisions of this part.

### § 12.4 Determination of ineligibility.

(a) *Actions*. Except as provided in § 12.5, a person shall be ineligible for all or a portion of USDA program benefits listed in this section if:

(1) The person produces an agricultural commodity on a field in which highly erodible land is predominant, or designates such a field for conservation use;

(2) The person produces an agricultural commodity on wetland that was converted after December 23, 1985; or

(3) After November 28, 1990, the person converts a wetland by draining, dredging, filling, leveling, removing woody vegetation, or other means for

the purpose, or to have the effect, of making the production of an agricultural commodity possible.

(b) *Highly erodible land.* A person determined to be ineligible under paragraph (a)(1) of this section may be ineligible for all program benefits listed in (d) and (e) of this section.

(c) *Wetland conservation.* A person determined to be ineligible under paragraph (a)(2) of this section shall be ineligible for all or a portion of the USDA program benefits listed in paragraph (d) of this section for which the person otherwise would have been eligible during the crop year of the commodity that was planted on the converted wetland. A person determined to be ineligible under paragraph (a)(3) of this section for the conversion of a wetland shall be ineligible for all or a portion of the USDA program benefits listed in paragraph (d) of this section for which the person otherwise would have been eligible during the crop year which is equal to the calendar year during which the violation occurred and each subsequent crop year until the converted wetland is restored or the loss of wetland functions and values have been mitigated prior to the beginning of such calendar year in accordance with §12.5(b)(4)(i) (A) and (C) through (F) of this part. Ineligibility under paragraph (a)(2) or (a)(3) of this section may be reduced, in lieu of the loss of all benefits specified under paragraph (d) of this section for such crop year, based on the seriousness of the violation, as determined by the FSA Deputy Administrator for Farm Programs or designee upon recommendation by the FSA County Committee. Factors such as the information that was available to the affected person prior to the violation, previous land use patterns, the existence of previous wetland violations under this part or under other Federal, State, or local wetland provisions, the wetland functions and values affected, the recovery time for full mitigation of the wetland functions and values, and the impact that a reduction in payments would have on the person's ability to repay a USDA farm loan shall be considered to making this determination.

(d) *Programs subject to either highly erodible land or wetland conservation.*

USDA program benefits covered by a determination of ineligibility under this rule are:

(1) Contract payments under a production flexibility contract, marketing assistance loans, and any type of price support or payment made available under the Agricultural Market Transition Act, the Commodity Credit Corporation Charter Act (15 U.S.C. 714 et seq.), or any other Act;

(2) A farm credit program loan made or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) or any other provision of law administered by FSA if the Secretary determines that the proceeds of such loan will be used for a purpose that contributes to the conversion of wetlands that would make production of an agricultural commodity possible or for a purpose that contributes to excessive erosion of highly erodible land (i.e., production of an agricultural commodity or highly erodible land without a conservation plan or conservation system as required by this part);

(3) A payment made pursuant to a contract entered into under the Environmental Quality Incentives Program under chapter 4 of subtitle D of the Food Security Act of 1985, as amended; or a payment under any other provision of Subtitle D of that Act;

(4) A payment made under section 401 or 402 of the Agricultural Credit Act of 1978 (16 U.S.C. 2201 or 2202);

(5) A payment, loan, or other assistance under section 3 or 8 of the Watershed Protection and Flood Prevention Act (16 U.S.C. 1003 or 1006a).

(e) *Programs subject to highly erodible land only.* In addition to programs listed in paragraph (d) of this section, a person determined to be ineligible under paragraph (a)(1) of this section shall be ineligible as determined by FSA for the following USDA program benefits for which the person otherwise would have been eligible during the crop year for which the determination applies:

(1) A farm storage facility loan made under section 4(h) of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b(h));

(2) A disaster payment made under the Federal Agricultural Improvement

and Reform Act, Pub. L. 104-127, or any other act; and

(3) A payment made under section 4 or 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b or 714c) for the storage of an agricultural commodity acquired by the Commodity Credit Corporation.

(f) *Prior loans.* The provisions of paragraphs (a), (b), and (c) of this section do not apply to any loan described in paragraphs (d) or (e) of this section that was made prior to December 23, 1985.

(g) *Determination of ineligibility.* For the purpose of paragraph (a) of this section, a person shall be determined to have produced an agricultural commodity on a field in which highly erodible land is predominant or to have designated such a field for conservation use, to have produced an agricultural commodity on converted wetland, or to have converted a wetland if:

(1) NRCS has determined that—

(i) Highly erodible land is predominant in such field, or

(ii) All or a portion of the field is converted wetland; and

(2) FSA has determined that the person is or was the owner or operator of the land, or entitled to share in the crops available from the land, or in the proceeds thereof; and

(3) With regard to the provisions of paragraph (a)(1) and (a)(2) of this section, FSA has determined that the land is or was planted to an agricultural commodity or was designated as conservation use during the year for which the person is requesting benefits.

(h) *Intent to participate in USDA programs.* Persons who wish to participate in any of the USDA programs described in paragraph (d) or (e) of this section are responsible for contacting the appropriate agency of USDA well in advance of the intended participated date so that Form AD-1026 can be completed. This contact will help assure that the appropriate determinations regarding highly erodible land or wetland, and conservation plans or conservation systems are scheduled in a timely manner. A late contact may not allow sufficient time for USDA to service the request and could result in a substantial delay in receiving a USDA

determination of eligibility or ineligibility.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996]

#### § 12.5 Exemption.

(a) *Exemptions regarding highly erodible land—(1) Highly erodible cropland in production or in USDA programs during 1981 through 1985 crop years.* During the period beginning on December 23, 1985, and ending on the later of January 1, 1990, or the date that is two years after the date the cropland on which an agricultural commodity is produced was surveyed by NRCS to determine if such land is highly erodible, no person shall be determined to be ineligible for benefits as provided in §12.4 as the result of the production of an agricultural commodity on any highly erodible land:

(i) That was planted to an agricultural commodity in any year 1981 through 1985; or

(ii) That was set aside, diverted, or otherwise not cultivated in any such crop years under a program administered by the Secretary for any such crops to reduce production of an agricultural commodity.

(2) *Compliance with a conservation plan or conservation system.* As further specified in this part, no person shall be ineligible for the program benefits described in §12.4 as the result of production of an agricultural commodity on highly erodible land or the designation of such land for conservation use if such production or designation is in compliance with a conservation plan or conservation system approved under paragraph (a)(2)(i) or (a)(2)(ii) of this section. A person shall not be ineligible for program benefits under §12.4 as the result of the production of an agricultural commodity on highly erodible land or as the result of designation of such land as conservation use if the production or designation is:

(i) In an area within a CD, under a conservation system that has been approved by the CD after the CD determines that the conservation system is in conformity with technical standards set forth in the NRCS field office technical guide for such district; or

(ii) In an area not within a CD, under a conservation system that has been approved by NRCS to be adequate for

the production of such agricultural commodity on highly erodible land or for the designation of such land as conservation use.

(3) *Reliance upon NRCS determination for highly erodible land.* A person may be relieved from ineligibility for program benefits as the result of the production of an agricultural commodity which was produced on highly erodible land or for the designation of such land as conservation use in reliance on a determination by NRCS that such land was not highly erodible land, except that this paragraph shall not apply to any agricultural commodity that was planted on highly erodible land, or for the designation of highly erodible land as conservation use after NRCS determines that such land is highly erodible land, and the person is notified of such determinations.

(4) *Areas of 2 acres or less.* No person shall be determined to be ineligible under §12.4 for noncommercial production of agricultural commodities on highly erodible land on an area of 2 acres or less if it is determined by FSA that such production is not intended to circumvent the conservation requirements otherwise applicable under this part.

(5) *Good faith.* (i) No person shall become ineligible under §12.4 as a result of the failure of such person to apply a conservation system on highly erodible land that was converted from native vegetation, i.e. rangeland or woodland, to crop production before December 23, 1985, if FSA determines such person has acted in good faith and without the intent to violate the provisions of this part and if NRCS determines that the person complies with paragraph (a)(5)(ii) of this section.

(ii) A person is who determined to meet the requirements of paragraph (a)(5)(i) of this section shall be allowed a reasonable period of time, as determined by NRCS, but not to exceed one year, during which to implement the measures and practices necessary to be considered applying the person's conservation plan. If a person does not take the required corrective actions, the person may be determined to be ineligible for the crop year during which such actions were to be taken as well as any subsequent crop years. Notwith-

standing the good-faith requirements of paragraph (a)(5)(i) of this section, if NRCS observes a possible compliance deficiency while providing on-site technical assistance, NRCS shall provide to the responsible person, not later than 45 days after observing the possible violation, information regarding actions needed to comply with the plan and this subtitle. NRCS shall provide this information in lieu of reporting the observation as a violation, if the responsible person attempts to correct the deficiencies as soon as practicable, as determined by NRCS, after receiving the information, and if the person takes corrective action as directed by NRCS not later than one year after receiving the information. If a person does not take the required corrective actions, the person may be determined to be ineligible for the crop year during which the compliance deficiencies occurred as well as any subsequent crop years.

(iii) No person shall become ineligible under §12.4 as a result of failure to apply a conservation system with respect to highly erodible cropland that was converted from native vegetation, i.e., rangeland or woodland, to crop production after December 23, 1985, if such person has acted in good faith and without an intent to violate the provisions of this part. The person shall, in lieu of the loss of all benefits specified under §12.4 (d) and (e) for such crop year, be subject to a reduction in benefits of not less than \$500 nor more than \$5,000 depending upon the seriousness of the violation, as determined by FSA. The dollar amount of the reduction will be determined by FSA and may be based on the number of acres and the degree of erosion hazard for the area in violation, as determined by NRCS, or upon such other factors as FSA deems appropriate.

(iv) Any person whose benefits are reduced in a crop year under paragraph (a)(5) of this section may be eligible for all of the benefits specified under §12.4 (d) and (e) for any subsequent crop year if NRCS determines that such person is applying a conservation plan according to the schedule set forth in the plan on all highly erodible land planted to an agricultural commodity or designated as conservation use.

(6) *Allowable variances.* (i) Notwithstanding any other provisions of this part, no person shall be determined to be ineligible for benefits as a result of the failure of such person to apply a conservation system if NRCS determines that—

(A) The failure is technical and minor in nature and that such violation has little effect on the erosion control purposes of the conservation plan applicable to the land on which the violation has occurred; or

(B) The failure is due to circumstances beyond the control of the person; or

(C) NRCS grants a temporary variance from the practices specified in the plan for the purpose of handling a specific problem, including weather, pest, and disease problems, which NRCS determines cannot reasonably be addressed except through such variance.

(ii) If the person's request for a temporary variance involves the use of practices or measures to address weather, pest, or disease problems, NRCS shall make a decision on whether to grant the variance during the 30-day period beginning on the date of receipt of the request. If NRCS fails to render a decision during the period, the temporary variance shall be considered granted unless the person seeking the variance had reason to know that the variance would not be granted. In determining whether to grant a variance for natural disasters such as weather, pest, or disease problems, NRCS will consider such factors as:

(A) The percent of a stand damaged or destroyed by the event;

(B) The percent of expected crop production compared to normal production for that crop;

(C) The documented invasion of non-native insects, weeds, or diseases for which no recognized treatment exists;

(D) Whether an event is severe or unusual based on historical weather records; and

(E) Other specific circumstances caused by a natural event that prevented the implementation of conservation practices or systems, installation of structures, or planting of cover crops.

(b) *Exemptions for wetlands and converted wetlands—(1) General exemptions.*

A person shall not be determined to be ineligible for program benefits under § 12.4 as the result of the production of an agricultural commodity on converted wetland or the conversion of wetland if:

(i) The land is a prior-converted cropland and meets the definition of a prior-converted cropland as of the date of a wetland determination by NRCS;

(ii) The land has been determined by NRCS to be a prior-converted cropland and such determination has been certified, and NRCS determines that the wetland characteristics returned after the date of the wetland certification as a result of—

(A) The lack of maintenance of drainage, dikes, levees, or similar structures,

(B) The lack of management of the lands containing the wetland, or

(C) Circumstances beyond the control of the person;

(iii) The land was determined by NRCS to be a farmed wetland or a farmed-wetland pasture and—

(A) Such land meets wetland criteria through a voluntary restoration, enhancement, or creation action after that determination,

(B) The technical determinations regarding the baseline site conditions and the restoration, enhancement, or creation action have been adequately documented by NRCS,

(C) The proposed conversion action is documented by the NRCS prior to implementation, and

(D) The extent of the proposed conversion is limited so that the conditions will be at least equivalent to the wetland functions and values that existed at the time of implementation of the voluntary wetland restoration, enhancement, or creation action;

(iv) NRCS has determined that the conversion is for a purpose that does not make the production of an agricultural commodity possible, such as conversions for fish production, trees, vineyards, shrubs, cranberries, agricultural waste management structures, livestock ponds, fire control, or building and road construction and no agricultural commodity is produced on such land;

(v) NRCS has determined that the actions of the person with respect to the

conversion of the wetland or the combined effect of the production of an agricultural commodity on a wetland converted by the person or by someone else, individually and in connection with all other similar actions authorized by NRCS in the area, would have only a minimal effect on the wetland functions and values of wetlands in the area;

(vi)(A) After December 23, 1985, the Army Corps of Engineers issued an individual permit pursuant to section 404 of the Clean Water Act, 33 U.S.C. 1344, authorizing such action and the permit required mitigation that adequately replaced the functions and values of the wetlands converted, as determined by NRCS; or

(B) After December 23, 1985, the action is encompassed under section 404 of the Clean Water Act, 33 U.S.C. 1344, by an Army Corps of Engineers nationwide or regional general permit and the wetland functions and values were adequately mitigated, as determined by NRCS; or

(vii) The land is determined by NRCS to be—

(A) An artificial wetland,

(B) A wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation,

(C) A nontidal drainage or irrigation ditch excavated in non-wetland, or

(D) A wetland converted by actions of persons other than the person applying for USDA program benefits or any of the person's predecessors in interest after December 23, 1985, if such conversion was not the result of a scheme or device to avoid compliance with this part. Further drainage improvement on such land is not permitted without loss of eligibility for USDA program benefits, unless NRCS determines under paragraph (b)(1)(v) of this section that further drainage activities applied to such land would have minimal effect on the wetland functions and values in the area. In applying this paragraph, a converted wetland shall be presumed to have been converted by the person applying for USDA program benefits unless the person can show that the conversion was caused by a third party with whom the person was not associated through a scheme or device as de-

scribed under § 12.10 of this part. In this regard, activities of a water resource district, drainage district, or similar entity will be attributed to all persons within the jurisdiction of the district or other entity who are assessed for the activities of the district or entity. Accordingly, where a person's wetland is converted due to the actions of the district or entity, the person shall be considered to have caused or permitted the drainage. Notwithstanding the provisions of the preceding sentences and as determined by FSA to be consistent with the purposes of this part, the activities of a drainage district or other similar entity will not be attributed to a person to the extent that the activities of the district or entity were beyond the control of the person and the wetland converted is not used by the person for the production of an agricultural commodity or a forage crop for harvest by mechanical means or mitigation for the converted wetland occurs in accordance with this part.

(2) *Commenced conversion wetlands.* (i) The purpose of a determination of a commenced conversion made under this paragraph is to implement the legislative intent that those persons who had actually started conversion of a wetland or obligated funds for conversion prior to December 23, 1985, would be allowed to complete the conversion so as to avoid unnecessary economic hardship.

(ii) All persons who believed they had a wetland or converted wetland for which conversion began but was not completed prior to December 23, 1985, must have requested by September 19, 1988, FSA to make a determination of commencement in order to be considered exempt under this section.

(iii) Any conversion activity considered by FSA to be commenced under this section lost its exempt status if such activity as not completed on or before January 1, 1995. For purposes of this part, land on which such conversion activities were completed by January 1, 1995, shall be evaluated by the same standards and qualify for the same exemptions as prior-converted croplands. For purposes of this part, land on which such conversion activities were not completed by January 1, 1995, shall be evaluated by the same

standards and qualify for the same exemptions as wetlands or farmed wetlands, as applicable.

(iv) Only those wetlands for which the construction had begun, or to which the contract or purchased supplies and materials related, qualified for a determination of commencement. However, in those circumstances where the conversion of wetland did not meet the specific requirements of this paragraph, the person could have requested a commencement of conversion determination from the FSA Deputy Administrator for Farm Programs, upon a showing that undue economic hardship would have resulted because of substantial financial obligations incurred prior to December 23, 1985, for the primary and direct purpose of converting the wetland.

(3) *Wetlands farmed under natural conditions.* A person shall not be determined to be ineligible for program benefits under §12.4 of this part as a result of the production of an agricultural commodity on a wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce agricultural commodities in a manner that is consistent for the area, where such production is possible as a result of natural conditions, such as drought, and is without action by the producer that alters the hydrology or removes woody vegetation.

(4) *Mitigation.* (i) No person shall be determined to be ineligible under §12.4 for any action associated with the conversion of a wetland if the wetland functions and values are adequately mitigated, as determined by NRCS, through the restoration of a converted wetland, the enhancement of an existing wetland, or the creation of a new wetland, if the mitigation—

(A) Is in accordance with a mitigation plan approved by NRCS;

(B) Is in advance of, or concurrent with, the wetland conversion or the production of an agricultural commodity, as applicable;

(C) Is not at the expense of the federal government in either supporting the direct or indirect costs of the restoration activity or costs associated with acquiring or securing mitigation sites, except if conducted under a miti-

gation banking pilot program established by USDA;

(D) Occurs on lands in the same general area of the local watershed as the converted wetlands, provided that for purposes of this paragraph, lands in the same general area of the local watershed may include regional mitigation banks;

(E) Is on lands for which the owner has granted an easement to USDA, recorded the easement on public land records, and has agreed to the maintenance of the restored, created, or enhanced wetland for as long as the converted wetland for which the mitigation occurred remains in agricultural use or is not returned to its original wetland classification with equivalent functions and values; and

(F) Provides the equivalent functions and values that will be lost as a result of the wetland conversion.

(ii) A mitigation plan is a record of decisions that document the actions necessary to compensate for the loss of wetland functions and values that result from converting a wetland. The mitigation plan may be a component of a larger natural resources conservation plan.

(iii) The State Conservationist, in consultation with the State Technical Committee, may name certain types or classes of wetland not eligible for exemption under paragraph (b)(4)(i) of this section where the State Conservationist determines that mitigation will not achieve equivalent replacement of wetland functions and values within a reasonable time frame or for other reasons identified by the State Conservationist. Any type or class of wetland that a State Conservationist identifies as not eligible for exemption under paragraph (b)(4)(i) of this section will be published in the FEDERAL REGISTER for inclusion in this part.

(5) *Good faith violations.* (i) A person who is determined under §12.4 to be ineligible for benefits as the result of the production of an agricultural commodity on a wetland converted after December 23, 1985, or as the result of the conversion of a wetland after November 28, 1990, may regain eligibility for benefits if—

(A) FSA determines that such person acted in good faith and without the intent to violate the wetland provisions of this part, and

(B) NRCS determines that the person within an agreed to period, not to exceed 1 year, is implementing all practices in a mitigation plan.

(i) In determining whether a person acted in good faith under paragraph (b)(5)(i)(A) of this section, the FSA shall consider such factors as whether—

(A) The characteristics of the site were such that the person should have been aware that a wetland existed on the subject land,

(B) NRCS had informed the person about the existence of a wetland on the subject land,

(C) The person did not convert the wetland, but planted an agricultural commodity on converted wetland when the person should have known that a wetland previously existed on the subject land,

(D) The person has a record of violating the wetland provisions of this part or other Federal, State, or local wetland provisions, or

(E) There exists other information that demonstrates that the person acted with the intent to violate the wetland provisions of this part.

(iii) After the requirements of paragraph (b)(5)(i) of this section are met, USDA may waive applying the ineligibility provisions of §12.4.

(6) *Reliance upon NRCS wetland determination.* (i) A person shall not be ineligible for program benefits as a result of taking an action in reliance on a previous certified wetland determination by NRCS.

(ii) A person who may be ineligible for program benefits as the result of the production of an agricultural commodity on converted wetland or for the conversion of a wetland may seek relief under §12.11 of this part if such action was taken in reliance on an incorrect technical determination by NRCS as to the status of such land. If the error caused the person to make a substantial financial investment, as determined by the NRCS, for the conversion of a wetland, the person may be relieved of ineligibility for actions related to that portion of the converted

wetland for which the substantial financial investment was expended in conversion activities. The relief available under this paragraph shall not apply to situations in which the person knew or reasonably should have known that the determination was in error because the characteristics of the site were such that the person should have been aware that a wetland existed on the subject land, or for other reasons.

(7) *Responsibility to provide evidence.* It is the responsibility of the person seeking an exemption related to converted wetlands under this section to provide evidence, such as receipts, crop-history data, drawings, plans or similar information, for purposes of determining whether the conversion or other action is exempt in accordance with this section.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996]

**§ 12.6 Administration.**

(a) *General.* A determination of ineligibility for benefits in accordance with the provisions of this part shall be made by the agency of USDA to which the person has applied for benefits. All determinations required to be made under the provisions of this part shall be made by the agency responsible for making such determinations, as provided in this section.

(b) *Administration by FSA.* (1) The provisions of this part which are applicable to FSA will be administered under the general supervision of the Administrator, FSA, and shall be carried out in the field in part by State FSA committees and county FSA committees (COC).

(2) The FSA Deputy Administrator for Farm Programs may determine any question arising under the provisions of this part which are applicable to FSA and may reverse or modify any determination of eligibility with respect to programs administered by FSA made by a State FSA committee or COC or any other FSA office or FSA official (except the Administrator) in connection with the provisions of this part.

(3) FSA shall make the following determinations which are required to be made in accordance with this part:

(i) Whether a person produced an agricultural commodity on a particular field as determined under § 12.5(a)(1);

(ii) The establishment of field boundaries;

(iii) Whether land was planted to an agricultural commodity in any of the years, 1981 through 1985, for the purposes of § 12.5(a)(1);

(iv) Whether land was set aside, diverted, or otherwise not cultivated under a program administered by the Secretary for any crop to reduce production of an agricultural commodity under § 12.4(g) and § 12.5(a)(1);

(v) Whether for the purposes of § 12.9, the production of an agricultural commodity on highly erodible land or converted wetland by a landlord's tenant or sharecropper is required under the terms and conditions of the agreement between the landlord and such tenant or sharecropper;

(vi) Whether the conversion of a particular wetland was commenced before December 23, 1985, for the purposes of § 12.5(b)(3);

(vii) Whether the conversion of a wetland was caused by a third party under § 12.5(b)(1)(vii)(D);

(viii) Whether certain violations were made in good faith under §§ 12.5(a)(5) or 12.5(b)(5);

(ix) The determination of the amount of reduction in benefits based on the seriousness of the violation, based on technical information provided by NRCS;

(x) The determination of whether the application of the producer's conservation system would impose an undue economic hardship on the producer; and

(xi) Whether the proceeds of a farm loan made, insured, or guaranteed by FSA will be used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetland.

(4) A representative number of farms selected in accordance with instructions issued by the Deputy Administrator shall be inspected by an authorized representative of FSA to determine compliance with any requirement specified in this part as a prerequisite for obtaining program benefits.

(5) FSA may consult with U.S. Fish and Wildlife Service on third-party determinations.

(c) *Administration by NRCS.* (1) The provisions of this part that are applicable to NRCS shall be administered under the general supervision of the Deputy Chief for Natural Resources Conservation Programs, and shall be carried out in the field by the regional conservationist, state conservationist, area conservationist, and district conservationist or other NRCS representative.

(2) An NRCS representative shall make the following determinations which are required to be made in accordance with this part:

(i) Whether land is highly erodible or has a wetland type or a converted wetland identified in accordance with the provisions of this part;

(ii) Whether highly erodible land is predominant on a particular field under § 12.22;

(iii) Whether the conservation plan that a person is applying is based on the local NRCS field office technical guide and is approved by—

(A) The CD and NRCS, or

(B) By NRCS;

(iv) Whether the conservation system that a person is using has been approved by the CD under § 12.5(a)(2) or, in an area not within a CD, a conservation system approved by NRCS to be adequate for the production of an agricultural commodity on highly erodible land;

(v) Whether the actions of a person(s) with respect to the conversion of a wetland or production of an agricultural commodity on converted wetland would have only a minimal effect on the functions and values of wetlands in the area;

(vi) Whether an approved conservation plan is being applied on highly erodible fields in accordance with the schedule specified therein or whether a failure to apply the plan is technical and minor in nature, due to circumstances beyond the control of the person, or whether a temporary variance from the requirements of the plan should be granted;

(vii) Whether an approved conservation system is being used on a highly erodible field;

(viii) Whether the conversion of a wetland is for the purpose or has the effect of making the production of an agricultural commodity possible;

(ix) Whether a farmed wetland or farmed-wetland pasture is abandoned;

(x) Whether the planting of an agricultural commodity on a wetland is possible under natural conditions;

(xi) Whether maintenance of existing drainage of a wetland described in §12.33 exceeds the scope and effect of the original drainage;

(xii) Whether a plan for the mitigation of a converted wetland will be approved and whether the mitigation of a converted wetland is accomplished according to the approved mitigation plan;

(xiii) Whether all technical information relating to the determination of a violation and severity of a violation has been provided to FSA for making payment-reduction determinations; and

(xiv) Whether or not a commenced-conversion activity was completed by January 1, 1995.

(3) NRCS may provide such other technical assistance for implementation of the provisions of this part as is determined to be necessary.

(4) A person may obtain a highly erodible land or a wetland scope-and-effect determination by making a written request on Form AD-1026. The determination will be made in writing, and a copy will be provided to the person.

(5) A determination of whether or not an area meets the highly erodible land criteria or whether wetland criteria, identified in accordance with the current Federal wetland delineation methodology in use at the time of the determination and that are consistent with current mapping conventions, may be made by the NRCS representative based upon existing records or other information and without the need for an on-site determination. This determination will be made by the NRCS representative as soon as possible following a request for such a determination.

(6) An on-site determination as to whether an area meets the applicable criteria shall be made by an NRCS representative if the person has disagreed

with the determination made under paragraph (c)(5) of this section, or if adequate information is not otherwise available to an NRCS representative on which to make an off-site determination.

(7) An on-site determination, where applicable, will be made by the NRCS representative as soon as possible following a request for such a determination, but only when site conditions are favorable for the evaluation of soils, hydrology, or vegetation.

(8) With regard to wetland determinations, if an area is continuously inundated or saturated for long periods of time during the growing season to such an extent that access by foot to make a determination of predominance of hydric soils or prevalence of hydrophytic vegetation is not feasible, the area will be determined to be a wetland.

(9) Persons who are adversely affected by a determination made under this section and believe that the requirements of this part were improperly applied may appeal, under §12.12 of this part, any determination by NRCS.

(d) *Administration by CSREES.* The CSREES shall coordinate the related information and education program for USDA concerning implementation of this rule.

(e) *Assistance of other Federal agencies.* If NRCS determines, through agreement or otherwise, that the purposes of this part would be furthered by the assistance of other Federal agencies with wetland responsibilities, NRCS may accept such assistance and adopt any or all such actions by these agencies as an action by an NRCS representative under this part.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996]

#### §12.7 Certification of compliance.

(a) *Self-certification.* In order for a person to be determined to be eligible for any of the benefits specified in §12.4:

(1) It must be determined by USDA whether any field in which the person applying for the benefits has an interest and intends to produce an agricultural commodity contains highly erodible land;

(2) The person applying for or receiving the benefits must certify in writing on Form AD-1026 that such person will not produce an agricultural commodity on highly erodible land, or designate such land for conservation use; or plant an agricultural commodity on a converted wetland; or convert a wetland to make possible the production of an agricultural commodity during the crop year in which the person is seeking such benefits, unless such actions are exempt, under §12.5, from the provisions of §12.4 of this part;

(3) A person may certify application of practices required by the person's conservation plan. NRCS shall permit a person who makes such a certification with respect to a conservation plan to revise the conservation plan in any manner, if the same level of conservation treatment provided for by the conservation system under the person's conservation plan is maintained. NRCS may not revise the person's conservation plan without the concurrence of the person;

(4) The person applying for a FSA direct or guaranteed farm credit program loan must certify that such person shall not use the proceeds of the loan for a purpose that will contribute to excessive erosion on highly erodible land or to conversion of wetlands for the purpose, or to have the effect, of making the production of an agricultural commodity possible; and

(5) The person applying for the benefits must authorize and provide representatives of USDA access to all land in which such person has an interest for the purpose of verifying any such certification.

(b) *Availability to other agencies.* Each agency of USDA shall make all certifications of compliance received by such agency and the results of investigations concerning such certifications of compliance available to other agencies.

(c) *Compliance.* A certification made in accordance with this section does not relieve any person from compliance with provisions of this part.

#### § 12.8 Affiliated persons.

(a) *Ineligibility of affiliated persons.* Ineligibility of an individual or entity under this part for benefits shall also be an ineligibility for benefits for "af-

filiated persons" as defined in this section.

(b) *Affiliated persons of an individual.* If the person requesting benefits is an individual, the affiliated persons are:

(1) The spouse and minor child of such person or guardian of such child; except that spouses who establish to the satisfaction of the COC that operations of the husband and wife are maintained separately and independently shall not be considered affiliates;

(2) Any partnership, joint venture, or other enterprise in which the person or any person listed in paragraphs (b)(1) has an ownership interest or financial interest; unless such interest is held indirectly through another business enterprise; or

(3) Any trust in which the individual, business enterprise, or any person listed in paragraph (b)(1) is a beneficiary or has a financial interest, unless such interest is held indirectly through another business enterprise.

(c) *Affiliated persons of an entity.* If the person who has requested benefits from USDA is a corporation, partnership, or other joint venture, the affiliated persons are any participant or stockholder therein of the corporation, partnership, or other joint venture, except for persons who have an indirect interest through another business enterprise in such corporation, partnership, or other joint venture or persons with a 20 percent or less share in a corporation.

(d) *Limitation.* Any reduction in payments which results only from the application of the affiliation provisions of this section to a partnership, joint venture, trust, or other enterprise shall be limited to the extent of interest held in such partnership, joint venture, trust, or other enterprise by the person or business enterprise that committed the violation. However, for violations for which the business enterprise is considered directly responsible under the provisions of this part, the business enterprise shall be subject to a full loss of benefits, including those instances in which the business enterprise has an interest in the land where the violation occurred or where the business enterprise had an interest in the crops produced on the land.

(e) *Avoidance of this part.* Limitations on affiliation shall not apply as needed to correct for any action that would otherwise tend to defeat the purposes of this part.

#### § 12.9 Landlords and tenants.

(a) *Landlord eligibility.* (1) Except as provided in paragraph (a)(2) of this section, the ineligibility of a tenant or sharecropper for benefits (as determined under § 12.4) shall not cause a landlord to be ineligible for USDA program benefits accruing with respect to land other than those in which the tenant or sharecropper has an interest.

(2) The provisions of paragraph (a)(1) of this section shall not be applicable to a landlord if the production of an agricultural commodity on highly erodible land or converted wetland by the landlord's tenant or sharecropper is required under the terms and conditions of the agreement between the landlord and such tenant or sharecropper and such agreement was entered into after December 23, 1985, or if the landlord has acquiesced in such activities by the tenant or sharecropper.

(b) *Tenant or renter eligibility.* (1) The ineligibility of a tenant or renter may be limited to the program benefits listed in § 12.4(c) accruing with respect to only the farm on which the violation occurred if:

(i) The tenant or renter shows that a good-faith effort was made to comply by developing an approved conservation plan for the highly erodible land in a timely manner and prior to any violation of the provisions of this part; and

(ii) The owner of such farm refuses to apply such a plan and prevents the tenant or renter from implementing certain practices that are a part of the approved conservation plan; and

(iii) FSA determines that the lack of compliance is not a part of a scheme or device as described in § 12.10.

(2) If relief is granted under paragraph (b)(1) of this section, the tenant or renter must actively apply those conservation treatment measures that are determined to be within the control of the tenant or renter.

#### § 12.10 Scheme or device.

All or any part of the benefits listed in § 12.4 otherwise due a person from USDA may be withheld or required to be refunded if the person adopts or participates in adopting any scheme or device designed to evade, or which has the effect of evading, the provisions of this part. Such acts shall include, but are not limited to, concealing from USDA any information having a bearing on the application of the provisions of this part or submitting false information to USDA or creating entities for the purpose of concealing the interest of a person in a farming operation or to otherwise avoid compliance with the provisions of this part. Such acts shall also include acquiescence in, approval of, or assistance to acts which have the effect of, or the purpose of, circumventing these regulations.

#### § 12.11 Action based upon advice or action of USDA.

The provisions of part 718 of this Title, as amended, relating to performance based upon the action or advice of a County Committee (COC) or State FSA Committee shall be applicable to the provisions of this part. In addition, if it is determined by the appropriate USDA agency that the action of a person which would form the basis of any ineligibility under this part was taken by such person in good-faith reliance on erroneous advice, information, or action of any other authorized representative of USDA, the appropriate agency may make such benefits available to the extent that similar relief would be allowed under 7 CFR part 718.

#### § 12.12 Appeals.

Any person who has been or who would be denied program benefits in accordance with § 12.4 as the result of any determination made in accordance with the provisions of this part may obtain a review of such determination in accordance with the administrative appeals procedures of the agency which rendered such determination. Agency appeal procedures are contained in the Code of Federal Regulations as follows: FSA, part 780 of this title; NRCS, part 614 of this title; Rural Utilities Service, part 1900, subpart B of this title.

### Subpart B—Highly Erodible Land Conservation

#### § 12.20 NRCS responsibilities regarding highly erodible land.

In implementing the provisions of this part, NRCS shall, to the extent practicable:

- (a) Develop and maintain criteria for identifying highly erodible lands;
- (b) Prepare and make available to the public lists of highly erodible soil map units;
- (c) Make soil surveys for purposes of identifying highly erodible land; and
- (d) Provide technical guidance to conservation districts which approve conservation plans and systems, in consultation with local county FSA committees, for the purposes of this part.

#### § 12.21 Identification of highly erodible lands criteria.

(a) *Basis for identification as highly erodible.* Soil map units and an erodibility index will be used as the basis for identifying highly erodible land. The erodibility index for a soil is determined by dividing the potential average annual rate of erosion for each soil by its predetermined soil loss tolerance (T) value. The T value represents the maximum annual rate of soil erosion that could occur without causing a decline in long-term productivity. The equation for measuring erosion is described below.

(1) The potential average annual rate of sheet and rill erosion is estimated by multiplying the following factors of the Universal Soil Loss Equation (USLE):

- (i) Rainfall and runoff (R);
- (ii) The degree to which the soil resists water erosion (K); and
- (iii) The function (LS), which includes the effects of slope length (L) and steepness (S).

(2) The potential average annual rate of wind erosion is estimated by multiplying the following factors of the Wind Erosion Equation (WEQ): Climatic characterization of windspeed and surface soil moisture (C) and the degree to which soil resists wind erosion (I).

(3) The USLE is explained in the U.S. Department of Agriculture Handbook

537, "Predicting Rainfall Erosion Losses." The WEQ is explained in the paper by Woodruff, N.P., and F. H. Siddaway, 1965, "A Wind Erosion Equation," Soil Science Society of America Proceedings, Vol. 29, No. 5, pages 602-608. Values for all the factors used in these equations are contained in the NRCS field office technical guide and the references which are a part of the guide. The Universal Soil Loss Equation, the Revised Universal Soil Loss Equation, and the Wind Erosion Equation and the rules under which NRCS uses the equations are published at §§ 610.11 through 610.15 of this title.

(b) *Highly erodible.* A soil map unit shall be determined to be highly erodible if either the RKLS/T or the CI/T value for the map unit equals or exceeds 8.

(c) *Potentially highly erodible.* Whenever a soil map unit description contains a range of a slope length and steepness characteristics that produce a range of LS values which result in RKLS/T quotients both above and below 8, the soil map unit will be entered on the list of highly erodible soil map units as "potentially highly erodible." The final determination of erodibility for an individual field containing these soil map unit delineations will be made by an on-site investigation.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996]

#### § 12.22 Highly erodible field determination criteria.

(a) *Predominance.* Highly erodible land shall be considered to be predominant on a field if either:

- (1) 33.33 percent or more of the total field acreage is identified as soil map units which are highly erodible; or
- (2) 50 or more acres in such field are identified as soil map units which are highly erodible.

(b) *Modification of field boundaries.* A person may request the modification of field boundaries for the purpose of excluding highly erodible land from a field. Such a request must be submitted to, and is subject to the approval of, FSA. FSA shall use the technical determination of NRCS in approving this request.

(c) *Impact of changing field boundaries.* When field boundaries are changed to include areas of land that were included in a field that was previously determined to be predominately highly erodible according to paragraph (a) of this section, such areas shall continue to be subject to the requirements for predominately highly erodible fields, except as provided in paragraph (b) of this section.

(d) *Small area of noncropland.* Small areas of noncropland within or adjacent to the boundaries of existing highly erodible crop fields such as abandoned farmsteads, areas around filled or capped wells, rock piles, trees, or brush which are converted to cropland are considered to meet the requirement of § 12.5(a)(2) if they are included in an approved conservation plan for the entire highly erodible field.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996]

**§ 12.23 Conservation plans and conservation systems.**

(a) *Use of field office technical guide.* A conservation plan or conservation system developed for the purposes of § 12.5(a) must be based on, and to the extent practicable conform with, the NRCS field office technical guide in use at the time the plan is developed or revised. For highly erodible croplands which were used to produce agricultural commodities prior to December 23, 1985, the applicable conservation systems in the field office technical guide are designed to achieve substantial reductions in soil erosion. Conservation systems shall be technically and economically feasible; based on local resource conditions and available conservation technology; cost-effective; and shall not cause undue economic hardship on the person applying the conservation system. Any conservation plans or systems that were approved prior to July 3, 1996, are deemed to be in compliance with this paragraph.

(b) *Substantial reduction in soil erosion.* For the purpose of determining whether there is a substantial reduction in soil erosion on a field containing highly erodible cropland which was used to produce an agricultural commodity prior to December 23, 1985, the meas-

urement of erosion reduction achieved by applying a conservation plan or system shall be based on a comparison of the estimated annual level of erosion that is expected to occur on that portion of the field for which a conservation plan or system was developed and is being applied, to the estimated annual level of erosion that existed on that same portion of the field before the application of a conservation plan or system. On a field that is converted from native vegetation after July 3, 1996, and where any crop production will result in increased erosion, in no case will the required conservation plan or system permit a substantial increase in erosion.

(c) *Field trials.* NRCS may allow a person to include in the person's conservation plan or a conservation system under the plan, on a field-trial basis, practices that are not currently approved but that NRCS considers have a reasonable likelihood of success. These trials must have prior approval by NRCS, and must be documented in the person's conservation plan specifying the limited time period during which the field trial is in effect. If, at the end of the conservation field trial period, NRCS finds that the practice does not meet conservation compliance requirements, the person will not be ineligible for USDA program benefits during the period of the field trial.

(d) *Highly erodible land previously under a Conservation Reserve Program contract.* Any person who owns or operates highly erodible land that was under a Conservation Reserve Program contract as authorized by section 1231 of the Food Security Act of 1985, as amended, shall have 2 years after the expiration of termination of the contract to fully apply a conservation system if the conservation plan for such land requires the installation of structural measures for the production of an agricultural commodity. NRCS officials may extend this period one additional year for circumstances beyond the control of the person. The person shall not be required to meet a higher conservation standard than the standard applied to other highly erodible cropland located within the area served by the field office technical guide for the area in which the field is located.

(e) *Information regarding conservation options.* NRCS, in providing assistance to a person for the preparation or revision of a conservation plan under this part, will provide such person with information concerning cost-effective and applicable erosion control alternatives, crop flexibility, or other conservation assistance options that may be available.

(f) *Timely request for assistance.* Persons who require NRCS assistance for the development of a conservation plan or the installation of a conservation system are encouraged to request this assistance well in advance of deadline dates for compliance; otherwise the person may not be able to comply with these provisions and maintain eligibility for USDA program benefits.

(g) *Action by conservation districts.* Conservation districts approve or disapprove conservation plans or conservation systems after NRCS determines that the plans or systems conform to the NRCS field office technical guide. If a conservation district fails, without due cause, to act on a request for conservation plan or conservation system approval within 45 days, or if no conservation district exists, NRCS will approve or disapprove, as appropriate, the conservation plan or system in question.

(h) *Application of a conservation plan or system.* A person is considered to be applying a conservation plan for purposes of §12.5(a) if the conservation system or plan being applied achieves or exceeds the substantial reduction in soil erosion as described in paragraph (b) which the conservation system or plan was designed to achieve. It is the responsibility of the person to:

(1) Certify that the conservation plan or system is being applied; and

(2) Arrange for a revision of the conservation plan with NRCS, if changes are made in land use, crop rotation or management, conservation practices, or in the original schedule of practice installation that would affect the achievement of substantial reduction in soil erosion in a given crop year.

(i) *Appeal to FSA.* Persons who are adversely affected by the determinations made under this subpart and believe that the requirements of this subpart

were improperly applied may appeal the decision to FSA under §12.12.

(j) *Undue economic hardship.* After a technical determination has been made, the FSA county committee shall, if a person asserts that the application of the person's conservation system would impose an undue economic hardship on the person, make a recommendation to the State FSA Committee as to whether or not the application of the conservation system would impose an undue economic hardship. The State FSA Committee may provide the person with a variance on the basis of the hardship. Under this variance, and any conditions that may be required in the variance, the person will be considered to be in compliance with the applicable provisions of this part. The State FSA Committee will consider relevant factors, such as the cost of installation of required conservation practices and benefits earned through programs subject to compliance with this part, and the person's general economic situation.

## Subpart C—Wetland Conservation

### §12.30 NRCS responsibilities regarding wetlands.

(a) *Technical and coordination responsibilities.* In carrying out the provisions of this part, NRCS shall:

(1) Oversee the development and application of criteria to identify hydric soils in consultation with the National Technical Committee for Hydric Soils and make available to the public an approved county list of hydric soil map units, which is based upon the National List of Hydric Soils;

(2) Coordinate with the U.S. Fish and Wildlife Service and others in updating the National List of Plant Species that Occur in Wetlands;

(3) Make or approve wetland determinations, delineations and certifications, functional assessments, mitigation plans, categorical minimal effects, and other technical determinations relative to the implementation of the wetland conservation provisions of this part;

(4) Develop and utilize off-site and on-site wetland identification procedures;

(5) Assure quality of service and determinations through procedures developed by NRCS in consultation with other Federal agencies that have wetland responsibilities;

(6) Investigate complaints and make technical determinations regarding potential violations;

(7) Develop a process at the state level, in coordination with the U.S. Fish and Wildlife Service, to ensure that these provisions are carried out in a technically defensible and timely manner, seek assistance as appropriate, and annually review the progress being made on implementation; and

(8) Conduct reviews of implementation and provide the Army Corps of Engineers, Environmental Protection Agency, and the U.S. Fish and Wildlife Service an opportunity to participate in this review.

(b) *Technical assistance from others* In carrying out the provisions of this part, NRCS may request technical assistance from the U.S. Fish and Wildlife Service, State or local agencies, conservation districts, or qualified private entities when NRCS determines that additional staff resources or technical expertise are needed to address adequately the requirements of this part or to enhance the quality of implementation of this part.

(c) *Certification of wetland determinations and wetland delineations.* (1) Certification of a wetland determination means that the wetland determination is of sufficient quality to make a determination of ineligibility for program benefits under §12.4 of this part. Certification of a wetland determination shall be completed according to delineation procedures agreed to by the Army Corps of Engineers, the Environmental Protection Agency, the U.S. Fish and Wildlife Service and NRCS. NRCS may certify a wetland determination without making a field investigation. NRCS will notify the person affected by the certification and provide an opportunity to appeal the certification prior to the certification becoming final. All wetland determinations made after July 3, 1996, will be done on a tract basis and will be considered certified wetland determinations. A not-inventoried designation

within a certified wetland is subject to change when the soil, hydrology, and vegetation evaluation is completed and identified as to type of wetland or as a non-wetland. This change from a not-inventoried designation to an approved wetland designation will be done at the request of the landowner or during a formal investigation of a potential violation.

(2) The wetland determination and wetland delineation shall be certified as final by the NRCS official 30 days after providing the person notice of certification or, if an appeal is filed with USDA, after the administrative appeal procedures are exhausted.

(3) In the case of an appeal, NRCS will review and certify the accuracy of the determination of all lands subject to the appeal to ensure that the subject lands have been accurately delineated. Prior to a decision being rendered on the appeal, NRCS will conduct an on-site investigation of the subject land.

(4) Before any benefits are withheld, an on-site investigation of a potential wetland violation will be made by NRCS. The affected person will be provided an opportunity to appeal the on-site determination to USDA if the on-site determination differs from the original determination. Such action by NRCS shall be considered a review of the prior determination and certification of the delineation. If the prior determination was a certified wetland determination, an appeal of the NRCS on-site determination shall be limited to the determination that the wetland was converted in violation of this part.

(5) A copy of the information from the final certified wetland determination and the wetland delineation shall be recorded on official USDA aerial photography, digital imagery, or other graphic representation of the area.

(6) As long as the affected person is in compliance with the wetland conservation provision of this part, and as long as the area is devoted to the use and management of the land for production of food, fiber, or horticultural crops, a certification made under this section will remain valid and in effect until such time as the person affected by the certification requests review of the certification by NRCS. A person may request review of a certification

only if a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions, or if NRCS concurs with an affected person that an error exists in the current wetland determination

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996]

**§ 12.31 On-site wetland identification criteria.**

(a) *Hydric soils.* (1) NRCS shall identify hydric soils through the use of published soil maps which reflect soil surveys completed by NRCS or through the use of on-site reviews. If a published soil map is unavailable for a given area, NRCS may use unpublished soil maps which were made according to the specifications of the National Cooperative Soil Survey or may conduct an on-site evaluation of the land.

(2) NRCS shall determine whether an area of a field or other parcel of land has a predominance of hydric soils that are inundated or saturated as follows:

(i) If a soil map unit has hydric soil as all or part of its name, that soil map unit or portion of the map unit related to the hydric soil shall be determined to have a predominance of hydric soils;

(ii) If a soil map unit is named for a miscellaneous area that meets the criteria for hydric soils (i.e., riverwash, playas, beaches, or water) the soil map unit shall be determined to have a predominance of hydric soils; or

(iii) If a soil map unit contains inclusions of hydric soils, that portion of the soil map unit identified as hydric soil shall be determined to have a predominance of hydric soils.

(3) *List of hydric soils.* (i) Hydric soils are those soils which meet criteria set forth in the publication "Hydric Soils of the United States 1985" which was developed by the National Technical Committee for Hydric Soils and which is incorporated by reference. This publication may be obtained upon request by writing NRCS at U.S. Department of Agriculture, P.O. Box 2890, Washington, DC 20013, and is available for inspection at the Office of the Federal Register Information Center, 800 North Capitol Street NW., Suite 700, Washington, DC 20408. Incorporation of this

publication by reference was approved by the Director of the Federal Register on June 24, 1986. The materials are incorporated as they exist on the date of the approval and a notice of any change in these materials will be published in the FEDERAL REGISTER.

(ii) An official list of hydric soil map units shall be maintained at the local NRCS office and shall include—

(A) All soils from the National List of Hydric Soils that can be found in that field office area, and

(B) Any soil map units or areas which the state conservationist determines to meet such hydric soil criteria.

(iii) Any deletions of a hydric soil unit from the hydric soil map unit list must be made according to the established procedure contained in the publication "Hydric Soils of the United States 1985" for adding or deleting soils from the National List of Hydric Soils.

(b) *Hydrophytic vegetation.* Hydrophytic vegetation consists of plants growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(1) A plant shall be considered to be a plant species that occurs in wetland if such plant is listed in the National List of Plant Species that Occur in Wetlands. The publication may be obtained upon request from the U.S. Fish and Wildlife Service at National Wetland Inventory, Monroe Bldg. Suite 101, 9720 Executive Center Drive, St. Petersburg, Florida 33702.

(2) For the purposes of the definition of "wetland" in §12.2 of this part, land shall be determined to have a prevalence of hydrophytic vegetation if:

(i) NRCS determines through the criteria specified in paragraph (b)(3) of this section that under normal circumstances such land supports a prevalence of hydrophytic vegetation. The term "normal circumstances" refers to the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed; or

(ii) In the event the vegetation on such land has been altered or removed, NRCS will determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric

soil map unit under non-altered hydrologic conditions.

(3) The determination of prevalence of hydrophytic vegetation will be made in accordance with the current Federal wetland delineation methodology in use by NRCS at the time of the determination.

(c) *Mitigation wetlands.* Notwithstanding the provisions of this section, wetlands which are created in order to mitigate the loss of other wetlands as a result of irrigation, recreation, municipal water, flood control, or other similar projects shall not be considered to be artificial wetland for the purposes of § 12.5(b)(1)(vii)(A) of this part.

(d) *Minimal effect determination.* For the purposes of § 12.5(b)(1)(v) of this part, NRCS shall determine whether the effect of any action of a person associated with the conversion of a wetland, the conversion of wetland and the production of an agricultural commodity on converted wetland, or the combined effect of the production of an agricultural commodity on a wetland converted by someone else has a minimal effect on the functions and values of wetlands in the area. Such determination shall be based upon a functional assessment of functions and values of the wetland under consideration and other related wetlands in the area, and will be made through an on-site evaluation. A request for such determination will be made prior to the beginning of activities that would convert the wetland. If a person has converted a wetland and then seeks a determination that the effect of such conversion on wetland was minimal, the burden will be upon the person to demonstrate to the satisfaction of NRCS that the effect was minimal.

The production of an agricultural commodity on any portion of a converted wetland in conformance with a minimal-effect determination by NRCS is exempt under § 12.5(b)(1)(v) of this part. However, any additional action of a person that will change the functions and values of a wetland for which a minimal-effect determination has been made shall be reported to NRCS for a determination of whether the effect continues to be minimal. The loss of a minimal effect determination will cause a person who produces an agri-

cultural commodity on the converted wetland after such change in status to be ineligible, under § 12.4, for certain program benefits. In situations where the wetland functions and values are replaced by the restoration, enhancement or creation of a wetland in accordance with a mitigation plan approved by NRCS, the exemption provided by the determination will be effective after NRCS determines that all practices in a mitigation plan are being implemented.

(e) *Categorical Minimal Effect Exemptions.* (1) The state conservationist, in consultation with the state technical committee established under 16 U.S.C. 3861, shall identify any categories of conversion activities and conditions which are routinely determined by NRCS to have minimal effect on wetland functions and values, as described in paragraph (d) of this section, and recommend to the Chief, NRCS, or a designee, inclusion on a list of categorical minimal effect exemptions.

(2) The Chief, or designee, shall evaluate the conversion practices recommended by the state conservationists in the region to ensure consistency across State and regional lines, and to determine whether any categories of conversion activities identified pursuant to paragraph (e)(1) of this section, if such activities were exempt from the ineligibility provisions of § 12.4, would only have a minimal effect on wetland functions and values in a wetland system within the region.

(3) Any categories of conversion activities which meet the criteria of paragraph (e)(2) of this section will be published in the FEDERAL REGISTER for inclusion in this part and shall be exempt under § 12.5(b)(1)(v) of this part.

(4) The NRCS local field office shall maintain a list of any activities and conditions which are determined by the Chief, or designee, exempt pursuant to this section and will provide the list to a person upon request.

#### § 12.32 Converted wetland identification criteria.

(a) Converted wetland shall be identified by determining whether the wetland was altered so as to meet the definition of converted wetland. In making

this determination, the following factors are to be considered:

(1) Where hydric soils have been used for production of an agricultural commodity and the effect of the drainage or other altering activity is not clearly discernible, NRCS will compare the site with other sites containing the same hydric soils in a natural condition to determine if the hydric soils can or cannot be used to produce an agricultural commodity under natural conditions. If the soil on the comparison site could not produce an agricultural commodity under natural conditions, the subject wetland will be considered to be converted wetland.

(2) Where woody hydrophytic vegetation has been removed from hydric soils for the purpose of or permitting the production of an agricultural commodity, the area will be considered to be converted wetland.

(b) A wetland shall not be considered to be converted if:

(1) Production of an agricultural commodity on such land is possible as a result of a natural condition, such as drought, and it is determined that the actions of the person producing such agricultural commodity does not permanently alter or destroy natural wetland characteristics. Destruction of herbaceous hydrophytic vegetation (i.e., plants other than woody shrubs or trees) as a result of the production of an agricultural commodity shall not be considered as altering or destroying natural wetland characteristic if such vegetation could return following cessation of the natural condition which made production of the agricultural commodity possible; or

(2) Such land is correctly identified as farmed wetland or farmed-wetland pasture.

**§ 12.33 Use of wetland and converted wetland.**

(a) The provisions of § 12.32(b)(2) are intended to protect remaining functions and values of the wetlands described therein. Persons may continue to farm such wetlands under natural conditions or as they did prior to December 23, 1985. However, no action can be taken to increase effects on the water regime beyond that which existed on such lands on or before Decem-

ber 23, 1985, unless NRCS determines the effect on losing remaining wetland values would be minimal under § 12.5(b)(1)(v). If, after December 23, 1985, changes due to human activity occurred in the watershed and resulted in an increase in the water regime on a person's land, the person may be allowed to adjust the existing drainage system to accommodate the increased water regime on the condition that the person affected by this additional water provides NRCS with appropriate documentation of the increased water regime, the causes thereof, and the planned changes in the existing drainage system. In order to maintain program eligibility, a person must provide sufficient documentation and receive approval from NRCS prior to making any changes that will have the effect of increasing the capacity of the existing drainage systems.

(b) Unless otherwise provided in this part, the production of an agricultural commodity on land determined by NRCS to be prior-converted cropland is exempted by law from these regulations for the area which was converted. Maintenance or improvement of drainage systems on prior-converted croplands are not subject to this rule so long as the prior-converted croplands are used for the production of food, forage, or fiber and as long as such actions do not alter the hydrology of nearby wetlands or do not make possible the production of an agricultural commodity on these other wetlands. Other wetlands under this section means any natural wetland, farmed wetland, farmed-wetland pasture, or any converted wetland that is not exempt under § 12.5 of this part.

(c) Abandonment is the cessation for five consecutive years of management or maintenance operations related to the use of a farmed wetland or a farmed-wetland pasture. Unless the criteria for receiving an exemption under § 12.5(b)(1)(iii) are met, such land is considered to be abandoned when the land meets the wetland criteria of § 12.31. In order for documentation of site conditions to be considered adequate under § 12.5(b)(1)(iii), the affected person must provide to NRCS available information concerning the extent of hydrological manipulation, the extent

of woody vegetation, and the history of use. In accordance with §12.5(b)(1)(iii), participation in a USDA approved wetland restoration, set-aside, diverted acres, or similar programs shall not be deemed to constitute abandonment.

(d) The maintenance of the drainage capacity or any alteration or manipulation, including the maintenance of a natural waterway operated and maintained as a drainage outlet, that affects the circulation and flow of water made to a farmed wetland or farmed-wetland pasture would not cause a person to be determined to be ineligible under this part, provided that the maintenance does not exceed the scope and effect of the original alteration or manipulation, as determined by NRCS, and provided that the area is not abandoned. Any resultant conversion of wetlands is to be at the minimum extent practicable, as determined by NRCS.

**§ 12.34 Paperwork Reduction Act assigned number.**

The information collection requirements contained in this regulation (7 CFR part 12) have been approved by the Office of Management and Budget under provisions of 44 U.S.C. chapter 35 and have been assigned OMB Number 0560-0004.

**PART 13 [RESERVED]**

**PART 14—DETERMINING THE PRIMARY PURPOSE OF CERTAIN PAYMENTS FOR FEDERAL TAX PURPOSES**

Sec.

- 14.1 Purpose.
- 14.2 Applicability.
- 14.3 Objective.
- 14.4 Policy.
- 14.5 Procedure.
- 14.6 Criteria for determining the primary purpose of payments with respect to potential exclusion from gross income.
- 14.7 Non-Federal programs and payments.

AUTHORITY: Sec. 543, Pub. L. 95-600; as amended by sec. 105, Pub. L. 96-222; 26 U.S.C. 126, 1255 and 5 U.S.C. 301.

SOURCE: 45 FR 58507, Sept. 4, 1980, unless otherwise noted.

**§ 14.1 Purpose.**

(a) Part 14 sets forth criteria to be used by the Secretary of Agriculture in determining the primary purpose of certain payments received by persons under applicable programs. Determining the primary purpose for which applicable payments are made is one step toward the exclusion of all or part of the payments from gross income for Federal income tax purposes.

(b) The criteria set forth in part 14 apply only to the determinations to be made by the Secretary of Agriculture.

**§ 14.2 Applicability.**

(a) Part 14 applies only to payments received under the programs listed in paragraphs (a)(1) through (10) of this section. Payments received under programs not listed in paragraphs (a)(1) through (10) of this section, are not considered eligible for exclusion from gross income under this part.

(1) The rural clean water program authorized by section 208(j) of the Federal Water Pollution Control Act (33 U.S.C. 1288(j)).

(2) The rural abandoned mine program authorized by section 406 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1236).

(3) The water bank program authorized by the Water Bank Act (16 U.S.C. 1301 *et seq.*).

(4) The emergency conservation measures program authorized by title IV of the Agricultural Credit Act of 1978 (16 U.S.C. 2201 *et seq.*).

(5) The agricultural conservation program authorized by the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590a).

(6) The Great Plains conservation program authorized by section 16 of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590p(b)).

(7) The resource conservation and development program authorized by the Bankhead-Jones Farm Tenant Act and by the Soil Conservation and Domestic Allotment Act (7 U.S.C. 1010; 16 U.S.C. 590a *et seq.*).

(8) The forestry incentives program authorized by section 4 of the Cooperative Forestry Assistance Act of 1978 (16 U.S.C. 2103).

## Subpart B— Wetland Background Information

### 520.10 Guidance for Wetland Minimal Effects Determinations

#### Minimal Effects Evaluation Check Sheet

The minimal effect Evaluation Check Sheet is used to assure all necessary steps are completed prior to issuance of the exemption.

Step	Qualification and/or Criteria						
<b>1</b>	Double check for red and yellow flags. Are there any present? <table border="1" style="width: 100%; margin-top: 5px;"> <thead> <tr> <th style="text-align: left;">If there are...</th> <th style="text-align: left;">THEN...</th> </tr> </thead> <tbody> <tr> <td>Red or yellow flags present</td> <td>Issue a letter denying the minimal effect exemption. Provide appropriate appeal rights.</td> </tr> <tr> <td>No red or yellow flags,</td> <td>Proceed to Step 2.</td> </tr> </tbody> </table>	If there are...	THEN...	Red or yellow flags present	Issue a letter denying the minimal effect exemption. Provide appropriate appeal rights.	No red or yellow flags,	Proceed to Step 2.
If there are...	THEN...						
Red or yellow flags present	Issue a letter denying the minimal effect exemption. Provide appropriate appeal rights.						
No red or yellow flags,	Proceed to Step 2.						
<b>2</b>	Are there special and/or unusual conditions that result in a significant loss of faunal community and/or habitat functions as identified by the State Technical Committee? <table border="1" style="width: 100%; margin-top: 5px;"> <thead> <tr> <th style="text-align: left;">If it has been determined ...</th> <th style="text-align: left;">THEN...</th> </tr> </thead> <tbody> <tr> <td>That the significant loss is not a minimal effect</td> <td>Issue a letter denying the minimal effect exemption. Provide appropriate appeal rights.</td> </tr> <tr> <td>That the answer is NO</td> <td>Proceed to Step 3.</td> </tr> </tbody> </table>	If it has been determined ...	THEN...	That the significant loss is not a minimal effect	Issue a letter denying the minimal effect exemption. Provide appropriate appeal rights.	That the answer is NO	Proceed to Step 3.
If it has been determined ...	THEN...						
That the significant loss is not a minimal effect	Issue a letter denying the minimal effect exemption. Provide appropriate appeal rights.						
That the answer is NO	Proceed to Step 3.						
<b>3</b>	Is the proposed conversion a minimal effect? <table border="1" style="width: 100%; margin-top: 5px;"> <thead> <tr> <th style="text-align: left;">If the proposed conversion is ...</th> <th style="text-align: left;">THEN...</th> </tr> </thead> <tbody> <tr> <td>A minimal effect</td> <td>Proceed to Step 4.</td> </tr> <tr> <td>Not a minimal effect</td> <td>Stop. Issue a letter denying the minimal effect exemption. Provide appropriate appeal rights.</td> </tr> </tbody> </table>	If the proposed conversion is ...	THEN...	A minimal effect	Proceed to Step 4.	Not a minimal effect	Stop. Issue a letter denying the minimal effect exemption. Provide appropriate appeal rights.
If the proposed conversion is ...	THEN...						
A minimal effect	Proceed to Step 4.						
Not a minimal effect	Stop. Issue a letter denying the minimal effect exemption. Provide appropriate appeal rights.						
<b>4</b>	Is an analysis of secondary or cumulative impacts appropriate and consistent with the rules articulated by the State Technical Committee? <table border="1" style="width: 100%; margin-top: 5px;"> <thead> <tr> <th style="text-align: left;">If it has been determined ...</th> <th style="text-align: left;">THEN...</th> </tr> </thead> <tbody> <tr> <td>That the answer is YES</td> <td>Conduct a minimal effect assessment and proceed to Step 5.</td> </tr> <tr> <td>That the answer is NO</td> <td>Issue a minimal effect agreement.</td> </tr> </tbody> </table>	If it has been determined ...	THEN...	That the answer is YES	Conduct a minimal effect assessment and proceed to Step 5.	That the answer is NO	Issue a minimal effect agreement.
If it has been determined ...	THEN...						
That the answer is YES	Conduct a minimal effect assessment and proceed to Step 5.						
That the answer is NO	Issue a minimal effect agreement.						

<b>5</b>	Does the secondary or cumulative impacts assessment change the minimal effects decision?	
	<b>If the secondary or cumulative impacts assessment...</b>	<b>THEN...</b>
	Changes the minimal effects decision,	Issue a letter denying the minimal effect exemption. Provide appropriate appeal rights.
	That there is no change,	Issue a minimal effect agreement.
<b>6</b>	Minimal Effects/Mitigation Evaluation completed? <input type="checkbox"/> YES <input type="checkbox"/> NO	
<b>7</b>	Red Flags and Yellow Flags list consulted? Red Flag site? <input type="checkbox"/> YES <input type="checkbox"/> NO Yellow Flag site? <input type="checkbox"/> YES <input type="checkbox"/> NO	
<b>8</b>	Categorical Minimal Effects conditions met? <input type="checkbox"/> YES <input type="checkbox"/> NO	
<b>9</b>	Conduct the Functional Assessment using the HGM Model <<Enter type HGM Model>> Record results on the appropriate tally sheets.	
<b>10</b>	Has the appropriate Minimal Effects and/or Mitigation Worksheet been completed? <input type="checkbox"/> YES <input type="checkbox"/> NO	
<b>11</b>	Check the appropriate block to indicate the results of the Functional Assessment. <input type="checkbox"/> Minimal Effect no special condition <input type="checkbox"/> Minimal Effect with special condition (requires agreement) <input type="checkbox"/> Not a Minimal Effect (requires mitigation, mitigation plan, possible easements) <input type="checkbox"/> Not a Minimal Effect and Cannot be Mitigated <input type="checkbox"/> Categorical Minimal Effect	

## 520.11 The 2-4-5 RULE Using the Minimal Effect/Mitigation Worksheet

Calculate reduction in significant functions (F1, F2 ...). Determine for each of the Hydrological and Biogeochemical functions (not the Plant & Animal Functions) in the model if the conversion results in exceeding the "minimal" threshold level using the following table.

When the Function Score of the Initial Condition is:	Then, the threshold is exceeded if the manipulation would cause the index of the function to be decreased by:
0.8 - 1.0	more than 20% of the existing score
0.5 - 0.79	more than 40% of the existing score
<0.5	more than 50% of the existing score

### The Decision Rule—

If 50 percent or more of the functions present in either the Hydrology or Biogeochemistry functional group are reduced beyond the threshold level, the effect is not minimal.

If fewer than 50 percent of the Hydrology functions and fewer than 50 percent of the Biogeochemical functions are reduced beyond the threshold level, and no important habitat functions identified by FWS or the State Technical Committee are lost, the effect is minimal.

This approach to processing functional assessment output for use in making minimal effects determinations is provided as a national framework for direct application or to be modified by NRCS and FWS, in consultation with the State Technical Committee, to better reflect local conditions. Threshold levels may be adjusted through modification of baseline index of performance categories or shifting the acceptable level of decrease within each category. The process may also be modified by altering the decision rule if appropriate.

## 520.12 Example Showing Use of 50/20 Rule for Vegetation Sampling

Exhibit 4XX.xx: Calculations and determinations of dominant species using the 50/20 rule.

Species	Stratum	% Actual Cover	% Relative Cover	Dominant
Canopy = all woody plants >20' height + >5" DBH				
<i>Quercus falcata</i> var. <i>pagodifolia</i>	Canopy	35	<b>24</b>	<b>X</b>
<i>Nyssa sylvatica</i> var. <i>biflora</i>	Canopy	30	<b>21</b>	<b>X</b>
<i>Fagus grandifolia</i>	Canopy	25	<b>17</b>	<b>X</b>
<i>Liquidambar styraciflua</i>	Canopy	25	<b>17</b>	<b>X</b>
<i>Quercus phellos</i>	Canopy	15	10	
<i>Acer rubrum</i>	Canopy	10	7	
<i>Carya cordiformis</i>	Canopy	5	4	
Canopy total		145	100	
Understory = all woody plants >20' height + <5" DBH				
<i>Acer rubrum</i>	Understory	25	<b>30</b>	<b>X</b>
<i>Ilex opaca</i>	Understory	25	<b>30</b>	<b>X</b>
<i>Asimina triloba</i>	Understory	20	<b>24</b>	<b>X</b>
<i>Nyssa biflora</i>	Understory	10	12	
<i>Liquidambar styraciflua</i>	Understory	3	4	
Understory stratum total		83	100	
Shrub stratum = all woody plants between 3' - 20' height				
<i>Clethra alnifolia</i>	Shrub	15	<b>33</b>	<b>X</b>
<i>Lindera benzoin</i>	Shrub	10	<b>22</b>	<b>X</b>
<i>Acer rubrum</i>	Shrub	10	<b>22</b>	<b>X</b>
<i>Viburnum recognitum</i>	Shrub	10	<b>22</b>	<b>X</b>
Shrub stratum total		45	99	
Herbaceous stratum = all plants (including woody plants) <3' height				
<i>Microstegium viminium</i>	Herb	40	<b>52</b>	<b>X</b>
<i>Lonicera japonica</i>	Herb	20	<b>26</b>	<b>X</b>
<i>Acer rubrum</i>	Herb	5	7	
<i>Ilex opaca</i>	Herb	5	7	
<i>Leeria virginica</i>	Herb	3	4	
<i>Chasmanthium laxum</i>	Herb	3	4	
<i>Carex intumescens</i>	Herb	1	1	
Herbaceous stratum total		77	101	

## **Subpart C — Sample HELC and WC Letters**

- 520.20 Preliminary Technical Determination — Wetland Conservation**
- 520.21 Preliminary Technical Determination — Highly Erodible Land Conservation**
- 520.22 Preliminary Technical Determination — Technical Assistance Variance**

**520.20 Preliminary Technical Determination — Wetland Conservation**

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DATE

NAME  
ADDRESS

CERTIFIED MAIL

Dear NAME:

We received Form FSA-569 NRCS REPORT OF HELC AND WC COMPLIANCE from the NAME County FSA Office, which indicates that you may have converted wetlands in violation of the wetland conservation provisions of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*). Based on a site visit of DATE, I have made a preliminary certified wetland determination on TRACT ##, that:

- Field ##, shown in Section II of the enclosed NRCS-CPA-026E “HIGHLY ERODIBLE LAND AND WETLAND DETERMINATION” form, contains XX acres of Converted Wetland (CW + **year**). The converted wetland area formerly met the hydric soils, wetland plants, and soil or surface wetness criteria of wetlands subject to the Food Security Act. Wetlands on the site were identified and delineated using the procedures in the National Food Security Act Manual and the 1987 Corps of Engineers Wetland Delineation Manual.

The wetland conservation provisions of the Food Security Act of 1985 prohibit USDA program participants from converting wetlands to agricultural use. A converted wetland is defined as a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow or circulation of water) for the purpose or to have the effect of making possible the production of an agricultural commodity (7 CFR §12.2). Persons who convert wetlands after November 28, 1990 are ineligible for USDA program benefits, until the converted wetlands are restored or mitigated.

The CW + **year** determination for the above-referenced field is based on the presence of wetlands, along with evidence of (**DESCRIBE ACTIVITY**). The conversion activity does not qualify for any of the exemptions described in the regulations at 7 CFR §12.5(b), for which NRCS has responsibility. This action may qualify for a Good-Faith Exemption [7CFR, 12.5 (b) 5], which can be requested from the Farm Service Agency County Committee, using Form AD-1069.

All areas labeled as CW+ **year** must be fully restored before USDA program eligibility is regained. A good-faith exemption, if obtained from FSA, will result in reinstatement in USDA program eligibility once restoration is substantially complete. The

landowner is responsible for bearing all costs associated with the restoration and the restoration efforts must be approved by NRCS.

This preliminary certified wetland technical determination has been conducted for the purpose of implementing the wetland conservation provisions of the Food Security Act of 1985. This determination may not be valid for identifying the extent of the Corps of Engineers' Clean Water Act jurisdiction for this site. If you intend to conduct any activity that constitutes a discharge of dredged or fill material into wetlands or other waters, you should request a jurisdictional determination from the local office of the Corps of Engineers before starting the work.

You may appeal this preliminary technical determination in accordance with the laws and federal regulations set forth at 7 U.S.C. 6991, *et seq.*, 7 CFR 614, the NRCS Appeals Procedures, 7 CFR 780, the FSA Appeals Procedures, and 7 CFR 11, the NAD Rules of Procedure, as follows:

- (1) A field visit may be made by our office to review with you the basis for our preliminary technical determination, answer any questions you have concerning the determination, and to gather additional information from you concerning the preliminary determination. (The determination will not become final until 30 days after the field visit.)
- (2) Reconsideration by the State Conservationist.
- (3) Mediation\* may be used in an attempt to settle your concerns with the preliminary technical determination.

\* Mediation is a process in which a trained, impartial person ( a neutral mediator) helps look at mutual problems, identify and consider options, and determine if we can agree on a solution. Unlike an appeal, mediation is private, confidential, and informal. The mediator will help us work together to evaluate the information in your case and to identify alternatives that will assist us in resolving the dispute. The mediator has no decision-making authority. Unlike the appeal process, a mediator cannot decide what is "right" or "make" anyone do anything. If the mediation is successful the mediator will help us to reach an agreement and document that solution in writing. Each party will sign the agreement, and receive a copy. If an agreement is not reached, the mediation process ends; and, you may continue to pursue your appeal. If you choose mediation, you must contact the mediator directly and make arrangements for the mediation process. Contact NAME at:

ADDRESS  
PHONE

A final certified wetland determination will be issued within 30 days after the field visit, if one is requested, and/or within 30 days following the completion of

mediation. If none of the previously discussed options have been selected, **this preliminary determination becomes final on DATE [30 days after date letter received, no more than 7 calendar days from date of mailing]**. The final technical determination, whether it is a result of the expiration of the 30-day period following receipt of this preliminary technical determination or receipt of a final determination may be appealed to either of the following:

- 1) The FSA County Committee **or** the NRCS STC but not both
- 2) The National Appeals Division

If you take no action during the preliminary 30-day period, your appeal rights for this final technical determination begin on DATE and end on DATE + 30 days.

If you are the owner of this tract of land and have a tenant, I urge you to discuss this letter and accompanying NRCS-CPA-026E with your tenant. Likewise, if you are the tenant of this tract of land, I urge you to discuss this letter with your landlord.

Sincerely,

NAME  
District Conservationist

Attachments (2)

Cc: (without attachments)  
NAME Soil & Water Conservation District  
NAME, CED, County FSA

**520.21 Preliminary Technical Determination — Highly Erodible Land Conservation**

---

DATE

NAME  
ADDRESS

CERTIFIED MAIL

Dear NAME:

The Food Security Act of 1985, as amended, requires any person who produces an annually tilled agricultural commodity crop on highly erodible land (HEL) to be actively applying an approved conservation plan or conservation system in order to be eligible for certain US Department of Agriculture (USDA) program benefits, as set forth in the USDA regulation, 7 CFR Part 12, §12.4.

On DATE, the Natural Resources Conservation Service (NRCS) conducted a compliance status review on Tract Number XX following the receipt of a whistleblower complaint for potential non-compliance with the HELC provisions. As required by regulation and NRCS policy, I have made a Preliminary Technical Determination that you are: Not Actively Applying an Approved Conservation Plan or Conservation System (NA) on Tract Number XX for the following reason(s): (LIST REASONS)

EXAMPLE: The allowable soil losses from this system are calculated at X tons per acre per year or a total reduction in soil erosion of X tons per acre per year as specified in the USDA regulation, 7 CFR 12.23(b) which states that all conservation systems used to produce an annually tilled commodity crop on fields classified as being highly erodible must meet the soil reduction requirements that result in a substantial reduction in soil erosion. If you are not using the conservation system as agreed upon in the conservation plan, then you must be using a conservation system that will provide for the same reduction in soil erosion on the field as the agreed upon conservation system or one that provides for an increased reduction in the estimated soil erosion.

During a field visit on DATE, we observed WHAT. Therefore, the conservation system you are using will not meet the substantial reduction in soil erosion requirements as set forth in the program regulation at 7 CFR 12.23(b) as previously stipulated.

You may appeal this preliminary technical determination in accordance with the laws and federal regulations set forth at 7 U.S.C. 6991, *et seq.*, 7 CFR 614, the NRCS

Appeals Procedures, 7 CFR 780, the FSA Appeals Procedures, and 7 CFR 11, the NAD Rules of Procedure, as follows:

- 1) A field visit may be made by our office to review with you the basis for our preliminary technical determination, answer any questions you have concerning the determination, and to gather additional information from you concerning the preliminary determination. (The determination will not become final until 30 days after the field visit.)
- 2) Reconsideration by the State Conservationist.
- 3) Mediation\* may be used in an attempt to settle your concerns with the preliminary technical determination.

\* Mediation is a process in which a trained, impartial person ( a neutral mediator) helps look at mutual problems, identify and consider options, and determine if we can agree on a solution. Unlike an appeal, mediation is private, confidential, and informal. The mediator will help us work together to evaluate the information in your case and to identify alternatives that will assist us in resolving the dispute. The mediator has no decision-making authority. Unlike the appeal process, a mediator cannot decide what is “right” or “make” anyone do anything. If the mediation is successful the mediator will help us to reach an agreement and document that solution in writing. Each party will sign the agreement, and receive a copy. If an agreement is not reached, the mediation process ends; and, you may continue to pursue your appeal. If you choose mediation, you must contact the mediator directly and make arrangements for the mediation process. Contact NAME at:

ADDRESS  
PHONE

If none of the previously discussed options have been selected, **this preliminary determination becomes final on DATE [30 days after date letter received, no more than 7 calendar days from date of mailing]**. The final technical determination, whether it is a result of the expiration of the 30-day period following receipt of this preliminary technical determination or receipt of a final determination may be appealed to either of the following:

- 1) The FSA County Committee **or** the NRCS STC, but not both
- 2) The National Appeals Division

If you take no action during the preliminary 30-day period, your appeal rights for this final technical determination begin on DATE and end on DATE + 30 days.

If you are the owner of this tract of land and have a tenant, I urge you to discuss this letter and accompanying NRCS-CPA-026E with your tenant. Likewise, if you are the tenant of this tract of land, I urge you to discuss this letter with your landlord.

Sincerely,

NAME  
District Conservationist

Attachments (2)

Cc: (without attachments)  
NAME Soil & Water Conservation District  
NAME, CED, County FSA

## 520.22 Preliminary Technical Determination — Technical Assistance Variance

<<enter date>>

<<enter USDA producer name>>  
<<enter street address>>  
<<enter City, State, Zip>>

### CERTIFIED MAIL

Dear Mr. or Ms. <<enter last name>>:

The Food Security Act of 1985, as amended, requires any person who produces an annually tilled agricultural commodity crop on highly erodible land (HEL) to be actively applying an approved conservation plan or conservation system in order to be eligible for certain U.S. Department of Agriculture (USDA) program benefits, as set forth in the USDA regulation, 7 CFR Part 12, Section 12.4.

On <<enter date of observance of violation>>, the Natural Resources Conservation Service (NRCS) observed a violation of the Highly Erodible Land Conservation (HEL) provisions on Tract Number <<enter tract number>>. The nature of the violation that has been observed is as follows:

- The current conservation system <<use plan if applicable>> being used to produce annually tilled agricultural commodities on Tract Number <<enter the tract number>> must be one that will result in a << enter either of the following: substantial reduction in soil erosion or no substantial increase in soil erosion>>.
- The conservation system observed on <<enter the date of observance>> by NRCS does not meet the required level of protection, <<enter the allowable soil loss>>, exceeding this limit by <<enter the excess soil loss>>, for a total soil loss on tract number <<enter the tract number>> for field number <<enter the specific field numbers separately, if there is more than one field>>.
- <<Use this statement if applicable to the situation>>You must also manage your cropland so that ephemeral (recurring) gully erosion is also controlled either by grassed waterways or other conservation practices that will protect the soil resource from ephemeral gullies.

Since this tract was not the subject of a required compliance review or was not being investigated due to a whistleblower complaint, NRCS is required by statute at 16 U.S.C. 3814, to provide you with the following information:

- Notification of the HEL violation and the nature of the deficiency in the application of the requisite conservation system.
- Provide you with 45 days from the date that you received this notification to contact NRCS and develop a conservation system that will adequately protect the soil resources on your Highly Erodible cropland.
- Provide you with ample time, not to exceed one year to apply the agreed-upon conservation system
- A compliance review will be conducted during the following crop year to ensure that you have applied the appropriate conservation system.

In return for your agreement to develop and apply a conservation system that will meet the soil protection requirements for your tract number <<enter tract>> and field number(s) <<enter field number(s)>>, USDA will not withdraw your eligibility to the USDA benefits that you have requested in agreement with compliance with the HELC provisions as certified on the AD-1026 on <<enter date of certification>>.

If you do not contact NRCS within 45 days of the date that you received this notification, NRCS must provide notification to the Farm Service Agency (FSA) in <<enter the county/State name>> regarding this violation of the HELC provisions by issuing a final technical determination and completing form FSA-569, Highly Erodible Land Conservation and Wetland Conservation Violation.

For the purposes of issuing you appeal rights, this constitutes a Preliminary Technical Determination of the HELC violation previously noted should you decide not to utilize your rights previously articulated. The following are your rights under the USDA Administrative Appeals Process, as follows:

Under the USDA appeals and mediation process, as set forth in 7 CFR Part 614, Sections 614.101 and 614.102, your preliminary technical determination will become final 30 calendar days from the date of this notification unless you request either of the following options:

- (4) You may request a field visit. This request must be in writing, and can be sent by email, fax, regular mail, or be hand delivered to the NRCS office located at: <<enter the NRCS office address, City, State, and Zip>>; <<enter the NRCS Fax number>>; <<enter the NRCS Telephone Number>>.

A field review will be conducted by personnel in the NRCS office to review with you the basis for our preliminary technical determination, answer any questions you have concerning the determination, and to gather additional information from you concerning the preliminary determination, including whether or not you have changed your conservation system to account for the reduction in the crop residues required for protection of the soil and water resources.

- (5) You may request mediation. Mediation\* may be used in an attempt to explain the preliminary technical determination, review other information that may be pertinent to your farming operation, and to provide a forum for a potential solution to any concerns you have with the preliminary technical determination. In order for Mediation to be considered, you must contact either of the following persons: <<enter the contact name for mediation. In States with USDA certified mediation programs see your FSA CED for the appropriate information. For non-certified States contact the NRCS ADR Division in Beltsville, MD for appropriate information>> at:

<<enter the name of the>> Mediation Service  
<<enter the street address>>  
<<enter the City, State, Zip>>  
<<enter the telephone number>>  
<<enter the FAX number>>

\* Mediation is a process in which a trained, impartial person (a neutral mediator) helps look at mutual problems, identify and consider options, and determine if we can agree on a solution. Unlike an appeal, mediation is private, confidential, and informal. The mediator will help us work together to evaluate the information in your case and to identify alternatives that will assist us in resolving the dispute. The mediator has no decision-making authority. Unlike the appeal process, a mediator cannot decide what is “right” or “make” anyone do anything. If the mediation is successful the mediator will help us to reach an agreement and document that solution in writing. Each party will sign the agreement, and receive a copy.

If an agreement is not reached, the mediation process ends. If you choose mediation, NRCS will pay up to one-half of the costs which are associated with securing the services that are appropriate and reasonable of a trained mediator when the services are provided on other than a voluntary basis. The NRCS will have discretion over what is considered appropriate and reasonable.

If a final technical determination is issued due to non-response by you to this notification, you may request an appeal of the final technical determination from the <<enter the county name>> County Farm Service Agency committee at the address below.

<<enter the county name>> County Farm Service Agency Committee  
<<enter the street address>>  
<<enter the City, State, Zip>>  
<<enter the telephone number>>  
<<enter the FAX number>>

A final determination of not actively applying the approved conservation plan or conservation system will be used by the Farm Service Agency (FSA) in determining your eligibility for USDA program benefits for 2004 as set forth in the regulation at 7 CFR 12.4.

If you are the owner of this tract of land and it is farmed by a tenant, I urge you to discuss this letter with your tenant. Likewise, if you are the tenant of this tract of land, I urge you to discuss this letter with your landlord.

Sincerely,

<<ENTER DISTRICT CONSERVATIONIST NAME>>  
District Conservationist

Cc: <<enter county name>> Soil & Water Conservation District  
<<enter name of>> Mediation Service  
<<enter county name>> County Farm Service Agency  
<<enter Area/State Resource Conservationist name>>

## Subpart D — Glossary and Acronyms

### 520.30 Glossary

TERM	DEFINITION
Abandonment:	Abandonment is the cessation of crop or active forage production on Farmed Wetland (FW) or Farmed Wetland Pasture and Hayland (FWP) for five consecutive years such that wetland criteria are met.
Acceptable Conservation System:	Any conservation system for HEL documented in the NRCS Field Office Technical Guide (FOTG) or a conservation system that is the equivalent of one contained in the FOTG.
Agricultural Commodity:	Any crop planted and produced by the annual tilling of the soil, including tilling by one-trip planters, or as applied to sugarcane.
Agricultural Use:	Open land planted to an agricultural crop, used for the production of food or fiber, used for haying or grazing, left idle per USDA programs, or diverted from crop production to an approved cultural practice that prevents erosion or other degradation. It does not include barns, silos, chicken houses, other buildings or structures used on a farm or for agricultural purposes.
Alternative Conservation System (ACS):	A conservation system for treating sheet, rill, wind, and gully erosion on highly erodible land that is documented in the FOTG and that achieves a substantial reduction in existing soil loss rates.  This term applies only to conservation plans and conservation systems developed to carry out the provisions of the Food Security Act of 1985, as amended prior to July 3, 1996.
Artificial Wetland (AW):	Land that was formerly a nonwetland under natural conditions, but now exhibits wetland characteristics due to human activities.
Built Information:	Engineering plans and/or drawings that indicate how the wetland manipulation was performed or field investigations that provide information on wetland manipulation as it currently exists.
Base Map:	Map on which wetland determinations are maintained. These are NRCS maps if a GIS system is used, and

	FSA maps until GIS systems are available.
Basic Conservation System (BCS):	<p>An erosion control system for treating sheet, rill, wind, and gully erosion on highly erodible land.</p> <p>A BCS may be a component of a Resource Management System (RMS). The BCS must achieve soil loss tolerance requirements for the principal soil it is designed to protect and be documented in the FOTG.</p> <p>This term applies only to conservation plans and conservation systems developed to carry out the provisions of the Food Security Act of 1985, as amended.</p>
Case File:	<p>This is the record of resource information, decisions, and technical assistance specific to an individual client.</p> <p>A case file is established and maintained in the NRCS field office for each client where NRCS has decided to provide continuing technical assistance on a planning unit. The case file will be maintained in an electronic record-keeping system, as set forth in NRCS policy, to the extent possible.</p> <p>Where no electronic record-keeping system is available, the case file may be maintained in a folder. Some items, such as maps, must be maintained as hard copies even if an electronic record-keeping system is fully utilized.</p>
Certification:	A wetland determination made by the Natural Resources Conservation Service (NRCS) that is of sufficient quality to make a determination of ineligibility for program benefits under the Food Security Act of 1985.
Client:	<p>A customer of the field office.</p> <p>An individual, or representative of a unit of government with responsibility for making decisions about land and water use and treatment.</p>
Conservation Assistance Notes:	Notes kept by NRCS personnel in the case file for each individual client receiving planning and implementation assistance. These notes are to be a concise, factual, and chronological narrative of significant conservation activities, and may summarize progress in planning an implementation.
Conservation District:	A subdivision of State, Indian Tribe, or territory

	<p>organized pursuant to the State soil conservation district law, as amended.</p> <p>These may be called soil conservation districts, soil and water conservation districts, resource conservation districts, land conservation committees, or natural resource districts.</p>
Conservation District Cooperator:	An individual, group of people, or representative of a unit of government who has entered into a working arrangement or cooperative agreement with a conservation district to work together in planning and carrying out resource use, development, and conservation on a specific land area.
Conservation Impacts:	The differences between anticipated effects of treatment in comparison to existing or benchmark conditions. Differences may be expressed by narrative, quantitative, visual, or other means. Impacts are used as a basis for making informed conservation decisions.
Conservation Management System (CMS):	A generic term that includes any combination of conservation practices and management that achieves a level of treatment of the five natural resources that satisfies criteria contained in the FOTG, such as a resource management system, or an acceptable management system.
Conservation Plan:	<p>The document that:</p> <p>Applies to highly erodible cropland.</p> <p>Describes the conservation system applicable to the highly erodible cropland and describes the decisions of the person with respect to location, land use, tillage systems, and conservation treatment measures and schedules.</p> <p>Is approved by the local soil conservation district in consultation with the local committees established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)(5) and the Natural Resources Conservation service (NRCS) for purposes of compliance.</p> <p>This has also been referred to as a compliance plan.</p>
Conservation Planning:	The activity of NRCS and other using the NRCS planning process intended to result in a conservation plan.
Conservation System:	A combination of one or more conservation measures

	<p>or management practices that are:</p> <p>Based on local resource conditions, available conservation technology, and the standards and guidelines contained in the NRCS Field Office Technical Guides.</p> <p>Designed to achieve, in a cost-effective and technical practicable manner, a substantial reduction in soil erosion or a substantial improvement in soil conditions on a field or group of fields containing highly erodible cropland when compared to the level of erosion or soil conditions that existed before the application of the conservation measures and management practices.</p>
Conservation Treatment Unit (CTU):	<p>A field, group of fields, or other land parcels of the same land use having similar treatment needs and planned management.</p> <p>A CTU is a grouping by the planner to simplify planning activities and facilitates development of conservation systems. A CTU has definite boundaries, such as fence, drainage, vegetation, topography, or soil lines.</p> <p>Normally, a defined CTU has a single Conservation Management System applicable to it, although each component of the system is not necessarily applicable to all lands within the CTU.</p>
Conservation Use or Set-Aside:	<p>Cropland that is designated as conservation-use acreage, set aside, or other similar designation for the purpose of fulfilling provisions under any acreage-limitation or land-diversion program administered by the Secretary of Agriculture requiring that the producer devote a specific acreage to conservation or other non-crop production uses.</p>
Converted Wetland:	<p>A wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible.</p>
Coordination:	<p>Providing the COE and/or EPA an opportunity (45 days) to review, comment, and approve for CWA, the findings of NRCS prior to making a final wetland determination on non-agricultural land or any change in wetland designation during the appeals process.</p>
Creation (of a wetland), or	<p>The manipulation of the physical, chemical, or</p>

“establishment”:	biological characteristics present to develop a wetland on an upland or deepwater site, where a wetland did not previously exist. Establishment results in a gain in wetland acres.
Crop Acreage Base:	The acreage of a commodity crop that a person is permitted to plant as a participant in the USDA commodity crop programs.
Cropping:	The use of an area for the production of agricultural commodity crops, including grasses, or legumes, in a commonly used rotation related to the production of agricultural commodity crop.
Cultural Resources:	All of the activities, accomplishments, and artifacts of people throughout time. The most common are sites, buildings, structures, and objects that have scientific, historical, or archaeological value.
Delineation:	Outlining the boundaries of a wetland determination on aerial photography, digital imagery, or other graphic representation; or on the land.
Determination:	Completing a highly erodible land finding for a field; or, for a wetland, a decision regarding whether or not an area is a wetland, including identification of appropriate wetland labels and acres of each label,
Direct Relative:	Father, mother, husband, wife, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepdaughter, stepsister, half brother, and half sister.
Drainage District:	A legally established entity that has responsibility for developing, installing, and maintaining a drainage program for a specified land area that encompasses multiple ownership.
Easement Site:	The site that is resorted as compensation for wetland losses associated with mitigation and replacement. Easement sites must be prior converted cropland (PC) and protected by easement.
Enhancement (of a wetland):	Manipulation of the physical, chemical, or biological characteristics of a wetland (undisturbed or degraded) site to heighten, intensify, or improve specific function(s) or to change the growth stage or composition of the vegetation present. Enhancement is undertaken for a specified purpose(s) such as water quality improvement, flood water retention, or

	wildlife habitat. Enhancement results in a change in wetland function(s) and can lead to a decline in other wetland functions, but does not result in a gain in wetland acres.
Environmental Assessment:	A concise public document that briefly provides sufficient evidence and analysis to determine whether to prepare a more comprehensive environmental impact statement or a finding of no significant impact. (See <a href="#">GM-190, Part 410.4(b)</a> ).
Environmental Evaluation (EE):	A concurrent part of the planning process in which the potential long and short-term impacts of an action on people, their physical or social surroundings, and nature are evaluated and alternative actions explored. (See <a href="#">GM-190, Part 410.4(b)</a> ).
Environmental Impact Statement (EIS):	A document detailing the environmental impact of a proposed law, a construction project, or other major action that may significantly affect the quality of the environment.  EIS's are required by the National Environmental Policy Act (NEPA) and various State environmental laws. (See <a href="#">GM-190, Part 410.4(b)</a> ).
Farmed Wetland (FW):	Wetlands that were manipulated and used to produce an agricultural commodity prior to December 23, 1985, but had not been converted prior to that date and, therefore, are not prior converted wetlands.  These areas include potholes, playas, and pocosins that still meet specific wetland hydrology criteria, and other wetlands that are seasonally ponded or flooded for an extended period of time during the growing season (see definition of FW label, part 514.21).
Farmed Wetland Pasture or Hayland (FWP):	Wetlands that were manipulated and managed for pasture or hayland prior to December 23, 1985, but still meet specific wetland hydrology criteria and are not abandoned (see definition of FWP label, part 514.22).
Field Office Technical Guide (FOTG):	The official NRCS guidelines, criteria, and standards for planning and applying conservation treatments for each of the five resources.  The FOTG contains technical information, important conservation considerations for each resource, resource quality criteria for treatment levels, CMS guide sheets by land use, NRCS practice standards for the conservation of soil, water, air, plant, and animal

	<p>resources, and information on the effects of applied conservation treatments.</p> <p>The guide specifically applies to the working area of the field office.</p> <p>It has been developed and maintained for use by field office employees in helping clients in resource conservation planning and implementation.</p>
Field:	A part of a farm that is separated from the balance of the farm by permanent boundaries such as fences, roads, permanent waterways, woodlands, croplines (in cases where farming practices make it probable that such croplines are not subject to change), or other similar features.
Flooded:	A condition in which the soil surface is temporarily covered with flowing water from any source, such as streams overflowing their banks, runoff from adjacent or surrounding slopes, inflow from high tides, or any combination of sources.
Forage Production:	The production of grasses, legumes, or other forage on pasture and hayland. This includes planting, grazing, haying, or harvesting.
FSA Farm Serial Number (FSN):	An identifying number assigned by FSA to a farm.
Growing Season:	<p>That part of the year when soil temperatures at 19.7 inches below the soil surface are higher than biologic zero (5 degrees Centigrade (C)).</p> <p>As this quantitative determination requires in-ground instrumentation, the growing season may be estimated by approximating the number of frost free days.</p> <p>Using air temperature data from county soil surveys, the growing season can be approximated as the first killing frost in the fall (see part 514.05(c)).</p>
Hayland:	Land on which perennial plants are managed for hay production and harvest. Land on which the primary use is for production of adapted close growing forage crops for harvest.
Highly Erodible Land (HEL):	Land that has an erodibility index of 8 or more.
Human Considerations:	The set of considerations that includes the social, cultural, and economic aspects that are involved in the planning process.

Hydric Soil:	Soil that formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part. (USDA Soil Conservation Service 1994).
Hydrophytic Vegetation:	Plants growing in water or in a substrate that is at least periodically deficient in oxygen during the growing season as a result of saturation or inundation by water.
Inundation:	The ground is covered by water due to ponded, flowing, or flooded water.
Irrigation Induced Wetlands (AW):	A wetland area created by irrigation water or seepage from an irrigation delivery system; but was nonwetland in its natural state.
Irrigation District:	A legally established entity that has responsibility for developing, installing, and maintaining an irrigation program for a specified land area that encompasses multiple ownership.
Land Unit:	Any area of land that is of concern to NRCS in the planning process. This is typically a client's tract, field, or subfield. Land units are related to each other in a hierarchy. For example, a tract has one or more fields, and a field can have one or more subfields.
Land Use:	A term used by NRCS to identify the clients intended use of the land.
Long Duration:	Hydrologic term that describes a period of inundation from a single event that ranges from seven days to one month.
Management:	Those operations that support cropping or pasture and hayland production such as tillage planting, mowing, harvesting, haying, or grazing.
Making Production Possible (on a wetland):	Manipulation that allows production of an agricultural commodity where such production was not previously possible.  Also includes making an area cropable more years than previously possible, or increasing crop yields.
Manipulation:	The alteration of the hydrology and/or removal of woody vegetation (including stems and stumps) on a wetland.
Minimal Effect:	Determination that the conversion of a wetland, in connection with all other similar actions in the area,

	would have minimal effect on the hydrological and biological functions of the wetland and wetlands in the area.
Mitigation:	Compensation for functions that are lost on a converted wetland through restoration, enhancement, or creation.
National Environmental Policy Act (NEPA):	The 1970 Act hat requires Federal agencies to consider the effects on the environment of proposed Federal actions. This Act established the requirement for the environmental impact statement.
Native Pasture:	Land use name. Land that is used and managed primarily for production of native plants for forage.
Natural Resource:	Any naturally occurring component of the environment that can sustain or benefit organisms, populations, or communities within an ecosystem. NRCS applies this term to soil, water, air, plants, and animals.
Non-Wetland:	An area that does not meet technical wetland criteria at the time of the evaluation, and does not meet the definition of CW or CW + Year.
Offsite:	Locations outside boundaries of the land unit for which conservation treatment or other actions are being considered or evaluation is being made.
Onsite:	Locations within the boundaries of the land unit for which conservation treatment or other actions are being considered, or evaluation is being made.
Operator:	The person who is in general control of the farming operations on the farm during the crop year.
Owner:	A person who has legal ownership of the land including a person who is purchasing farmland under contract.
Pasture:	Land use name. Land on which the primary cover is introduced or native forage plants managed by using agronomic practices, such as regular fertilizer applications, liming, and weed control in addition to grazing management.
Person:	An individual, partnership, association, corporation, cooperative, estate, trust, joint venture, joint operation, or other business enterprise or other legal entity and, whenever applicable, a State, a political

	subdivision of a State, or any agency thereof and such person's affiliates as provided in 7 CFR, Section 12.8.
Person Having Control:	The person who has the authority to make the final land use and treatment decisions in the development and application of a conservation plan or selection and application of a conservation system.
Plan Map:	An aerial photograph or sketch of a land area developed during the planning process that shows property boundaries, land unit boundaries, physical features, location of planned and applied practices, and other features that are useful to the client in plan implementation. NRCS uses a standard set of map symbols on plan maps. (See <a href="#">GM-170, Part 401</a> ).
Planned System:	The conservation management system selected for implementation by the client that will be described in the plan document.
Playa:	The usually dry and nearly level lake plain that occupies the lowest parts of closed depressions (basins).  Temporary inundation occurs primarily in response to precipitation-runoff events.  Playas may or may not be characterized by high water table and saline conditions.  They occur primarily in the Southern Great Plains.
Pocosin:	A wet area on nearly level interstream divides in the Atlantic coastal plain. Soils are generally organic but may include some areas of high organic mineral soils.
Ponded:	A condition where water stands in a closed depression.  The water is removed only by percolation, evaporation, or transpiration.
Pothole:	A closed depression, generally circular, elliptical, or linear in shape, occurring in glacial outwash plains, moraines, glacial till plains, and glacial lake plains.
Prior Converted Cropland (PC):	Wetland that was converted from a non-agricultural use to cropland prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and, as of December 23, 1985, the area was capable of producing an agricultural commodity (i.e., did not support woody vegetation and was sufficiently drained to support

	production of an agricultural commodity).
Quality Assurance:	The process used to ensure that State Conservationist's have an adequate quality control process relative to the delivery of NRCS technical assistance.
Quality Control:	An evaluation of NRCS activities by the State Conservationist to determine if the quality of assistance is consistent with established policies.
Range or Rangeland:	Land use name. Land on which the native vegetation (climax or natural potential plant community) is predominantly grasses, grass-like plants, forbs, or shrubs. Rangelands include natural grassland, savannas, wet meadows and marshes, some deserts, tundra, and certain forb and shrub communities.
Ratio of Crops:	The percent or proportion of the total crop acreage devoted to a single crop species in a given year on a tract or farm.
Record of Cooperator Decisions:	A part of the conservation plan document that contains the decisions for one or more fields or CTU.
Recreation:	Land use name. Land or water that is used primarily for recreation purposes.
Resource Management System (RMS):	A combination of conservation practices and management identified by land or water uses that, when installed, will prevent resource degradation and permit sustained use by meeting criteria established in the FOTG for the treatment of soil, water, air, plant, and animal resources.
Restoration (of a wetland):	<p>Manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural and/or historic functions to a former or degraded wetland.</p> <p>For the purpose of tracking net gains in wetland acres, restoration is divided into the following categories:</p> <p>Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former wetland. Re-establishment results in rebuilding a former wetland and results in a gain in wetland acres.</p> <p>Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with</p>

	the goal of repairing natural/historic functions of a degraded wetland. Rehabilitation results in a gain in wetland function but does not result in a gain in wetland acres.
Revised Plan:	A resource management plan that has been changed by mutual agreement of NRCS and the client to the extent that a new plan document needs to be generated to show changes in land and unit boundaries, conservation management systems or type of enterprise.
Saturation:	When the soil water pressure is zero or positive. Most of the soil pores are filled with water.
Seasonally Flooded or Ponged:	Surface water is present for extended periods, especially early in the growing season, but is absent by the end of the season in most years.
Soil Map Unit:	An area of the landscape shown on a soil map that consists of one or more soils.
Sponsoring Organization:	A legally constituted body that has authority to carry out projects that will require the attainment of land rights, contracting and maintenance for conservation treatments on land that is not initially owned by the body.
Subdivision of Field:	Division of a field into smaller units because different crops are produced, such as in a strip cropping situation.
Technical Assistance:	<p>Help provided by NRCS, and employees of other agencies under the technical supervision of NRCS to clients on opportunities, potentials, and problems related to natural resource use.</p> <p>Technical assistance may include program formulation, planning, application, and maintenance. All technical assistance activities will be carried out using the planning process as set forth in the National Planning Procedures Handbook (<a href="#">NPPH</a>).</p> <p>Technical assistance is generally confined to assisting clients with those activities that the client could not reasonably be expected to do alone and that are not available from other sources.</p>
Third Party:	A person, organization, or unit of government unassociated with the person applying for USDA benefits or the person's predecessors in interest.

Tract:	A land unit under one ownership operated as a farm or part of a farm.
Treatment Standard:	An established criterion that must be met by an identified conservation treatment before it will be accepted by NRCS as solving a resource problem.
USDA Participant:	Individual landowners or operators who are eligible to receive USDA program benefits covered under Title XII of the Food Security Act of 1985.
Wetland:	An area that: Has a predominance of hydric soils. Is inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions. Under normal circumstances does support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.
Wetland Hydrology:	Inundation or saturation by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.
Wildlife Land:	Land use name. Land or water on which the primary use is habitat for wildlife.
Woodland:	Land use name. Land on which the primary vegetation is forest (climax, natural, or introduced) and is used primarily for production of wood products.

## 520.31 Acronyms

AC	Area Conservationist
ACS	Alternative Conservation System
ADR	Alternative Dispute Resolution
AMA	Agricultural Management Assistance
BCS	Basic Conservation System
C	<ul style="list-style-type: none"><li>• Cropping factor for Sheet and Rill Erosion (USLE)</li><li>• Climatic factor for Wind Erosion (WEQ)</li></ul>
CCC	Commodity Credit Corporation
CD	Conservation District
CED	County Executive Director (FSA)
CES	Cooperative Extension Service
COC	County Committee (FSA)
COD	Conservation Operations Division, NRCS
COE	U.S. Army Corps of Engineers
CPGL	Conservation of Private Grazing Lands
CRP	Conservation Reserve Program
CSP	Conservation Security Program
CSREES	Cooperative State Research, Education, and Extension Service
CTA	Conservation Technical Assistance
CTU	Conservation Treatment Unit
CWA	Clean Water Act
DC	District Conservationist
EI	Erodibility Index
EJ	Environmental Justice
EQIP	Environmental Quality Incentives Program

EPA	Environmental Protection Agency
EWP	Emergency Watershed Program
EWP-FPE	Emergency Watershed Program, Floodplain Easement Component
EWRP	Emergency Wetland Reserve Program
FIP	Forestry Incentives Program
FOIA	Freedom of Information Act
FOTG	Field Office Technical Guide
FRPP	Farmland and Ranch Lands Protection Program
FPPA	Farmland Protection Policy Act
FSA	Farm Service Agency
FWS	U.S. Fish and Wildlife Service
GAO	General Accounting Office
GLCI	Grazing Lands Conservation Initiative
GRP	Grassland Reserve Program
HE	Highly Erodible
HEL	Highly Erodible (Crop)Land
HELC	Highly Erodible Land Conservation Provision of the 1985 Act, as Amended
HRC	High Residue Crop
I	Soil Erodibility Factor for Wind Erosion
K	Soil Erodibility Factor for Sheet and Rill Erosion
LS	Factor relating to length and steepness of slope for Sheet and Rill Erosion
LRC	Low Residue Crop
MOA	Memorandum of Agreement
NFSAM	National Food Security Act Manual
NHEL/NAD	A label for a field resulting from a decision from the National Appeals Division.

NPPH	National Planning Procedures Handbook
NRCS	Natural Resources Conservation Service
OIG	Office of the Inspector General
OGC	Office of General Counsel
OW	Other Waters of the U.S.
PHEL	Potentially Highly Erodible (Crop)Land
QAR	Quality Assurance Reviews
QAT	Quality Action Team
R	Rainfall Factor for Sheet and Rill Erosion
RC&D	Resource Conservation and Development Program
RD	Rural Development
RUSLE	Revised Universal Soil Loss Equation
RMS	Resource Management System
SIP	Stewardship Incentives Program
SWCA	Soil and Water Conservation Assistance
T	Tolerable Soil Loss in Tons per Acre per Year
USDA	United States Department of Agriculture
WC	Wetland Conservation Provision of the 1985 Act, as amended
WEQ	Wind Erosion Equation
WHIP	Wildlife Habitat Incentives Program
WPFPP	Watershed Protection and Flood Prevention Program
WRP	Wetland Reserve Program
WWD	Watersheds and Wetlands Division, NRCS
2-CRP	FSA Handbook for Administering CRP
6-CP	FSA Handbook for Administering HELC and WC Provisions