

Highly Erodible Land and Wetland Conservation Compliance Provision: U.S. Department of Agriculture Issues Final Rule



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The United States Department of Agriculture (“USDA”) published an August 28th Federal Register Notice and issued a final rule addressing the highly Erodible Land and Wetland Conservation provisions of the Food Security Act of 1985. See 85 Fed. Reg. 53137.

The USDA describes the rule as clarifying the processes for delineating, determining, and certifying wetlands on subject lands in order to determine eligibility for certain USDA program benefits.

The Food Security Act of 1985 (as amended) requires producers participating in most of the programs administered by the USDA Farm Service Agency and the Natural Resources Conservation Service (“NRCS”) to comply with certain conditions on any land owned or farmed that is “highly erodible or that is considered a wetland.” Producers participating in such programs, along with any person or entity considered to be an “affiliated person” to the producer, are, therefore, subject to these conditions. The regulations implementing this program are set forth in the Code of Federal Regulations at 7 C.F.R. Part 12.

The Highly Erodible Land Conservation (“HEL”) and Wetland Conservation (“WC”) compliance programs are often denominated the “Sodbuster” and “Swampbuster” programs, respectively. They encourage USDA program participants to adopt land management practices by linking USDA benefits to farming practices. Further, the HELC or Sodbuster provisions provide that after December 23, 1985, USDA program participants are ineligible for certain USDA benefits associated with the production of an agricultural commodity on a field comprised primarily of highly erodible land.

Likewise, the WC or Swampbuster provisions make ineligible certain USDA program benefits for production of an agricultural commodity on a “converted wetland.” This program also applies the ineligibility to any wetland converted to agricultural production after November 28, 1990.

The programs have the twin objectives of both promoting conservation and removing marginal acres from commodity production. Besides the previously referenced Code of Federal Regulations, the USDA NRCS maintains policy guidance for the implementation of these programs. These are found at Title 180, National Food Security Act Manual (180-MFSAM).

Prior to the issuance of the final rule, NRCS had previously published an interim rule. See 83 Fed. Reg. 63046 (December 7, 2018). A link to a post describing the interim rule can be found [here](#).

The final rule issued by USDA states that it has finalized most of the changes made by the December 2018 interim rule. However, it references the following additional changes/additions in the final rule. They include:

- Adding the requirement of the 2018 Farm Bill that USDA will make a reasonable effort to include the affected person in an on-site investigation conducted prior to making a wetland violation technical determination
- Further clarifying how wetland hydrology is identified for farmed wetlands and farmed wetland pasture
- Adding clarification to the consideration of best-drain condition for wetland hydrology in keeping with the definition of prior converted cropland
- Relocating the provision that wetland determinations can be done on a tract, field, or sub-field basis in order to improve clarity

A copy of the final rule can be found [here](#).