

Highly Erodible Land Conservation and Wetland Conservation Compliance Provisions: U.S. Department of Agriculture Interim Rule/Revisions



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On Friday December 7, 2018, the United States Department of Agriculture (USDA) published in the Federal Register an interim rule for the Highly Erodible Land Conservation and Wetland Conservation Compliance regulations of the Food Security Act of 1985.

The interim rule clarifies the Department's processes for delineating, determining and certifying wetlands on subject lands in order to determine ineligibility for certain USDA program benefits. 83 Fed. Reg. 63046 (Dec. 7, 2018).

The Department is seeking comments on the proposal, which will be accepted until February 5, 2019, and will be considered in the codification of a final rule. Id.

The Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) compliance programs are more often referred to as "Sodbuster" and "Swampbuster," respectively. The programs were codified as part of the 1985 Farm Bill, and they encourage USDA program participants to adopt land management practices by linking USDA program benefits to farming practices. The HELC or Sodbuster provisions provide that after December 23, 1985, USDA program participants are ineligible for certain USDA benefits associated with production of an agricultural commodity on a field comprised primarily of highly erodible land. Similarly, the WC or Swampbuster provisions make ineligible certain USDA program benefits for production of an agricultural commodity on a "converted wetland." Swampbuster also applies the ineligibility to any wetland converted to agricultural production after November 28, 1990. The programs had the twin aims of promoting conservation and also removing marginal acres from commodity production.

The regulations implementing the Sodbuster and Swampbuster provisions are found at 7 CFR part 12. The USDA's Natural Resource Conservation Service also maintains policy guidance for implementation of Sodbuster and Swampbuster provisions. See Title 180, National Food Security Act Manual (180-MFSAM).

USDA's interim rule focuses on wetlands, noting the "complexity of making a wetland determination in highly altered agricultural landscapes requires flexibility in the approach used to identify wetlands." 83 Fed. Reg. at 63047. Over nearly 35-years of implementation USDA's processes have been the subject of statutory changes, scientific updates, and modified agency guidance. This interim rule aims to codify into regulation many of the technical updates that have never been the subject of public review and comment. Specifically, the interim rule:

- Codifies previously conducted wetland determinations
- Outlines clear procedures for identifying wetland hydrology, including new definitions for “wetland hydrology”, “best drained condition”, and “normal climatic conditions”
- Establishes that normal climatic conditions for determining wetland hydrology will rely on the precipitation dataset from 1971 through 2000
- Codifies definitions for “pothole”, “playa”, and “pocosin”
- Removes requirements for onsite assessments for wetlands, other than the impacted wetland, when determining whether a particular site satisfies minimal effect exemptions
- Removes requirements for onsite assessments for evaluation of potentially highly erodible soils

The changes are not intended to alter the decisions of what is or is not a wetland, but are geared toward greater transparency to the public about how wetland determinations and certifications are made. USDA is accepting comments on the proposed interim rule until February 5, 2019.

A copy of the Federal Register notice can be found [here](#).