



CIRCULAR 180-19-2

Title 180, National Food Security Act Manual, Fifth Edition Part 512 Subpart A and Part 520 Subpart B.

SUBJECT: ECS – Handling HEL Compliance Deficiencies, Exemptions, and Variances.

Purpose. To provide clarification and instruction for highly erodible land conservation (HELC) planning and conducting HELC status reviews according to policy in Title 180, National Food Security Act Manual (NFSAM), Fifth Edition.

Effective Date. This circular is effective upon receipt.

Background. Circular 180-17-1 reaffirmed the requirement for U.S. Department of Agriculture (USDA) program participants to control ephemeral gully erosion on highly erodible land (HEL) to be eligible for most USDA program benefits in response to the Office of Inspector General audit report 50601-0005-31 "USDA Monitoring of Highly Erodible Land and Wetland Conservation Violations." Following that policy clarification, concerns were raised with the details of the policies regarding the control of ephemeral gully erosion on HEL. The following issues have been identified as needing clarification to national guidance:

- The lack of policy to handle situations where an ephemeral gully is caused by offsite conditions, or actions by others, and not caused by a person's normal farming activities.
- The need for specific guidance regarding abnormal precipitation events as a potential cause of noncompliance due to ephemeral gully occurrence on HEL.
- The lack of information regarding a person's ability to pursue an economic hardship variance with the Farm Service Agency (FSA) when a person has indicated that applying a conservation system according to the HELC requirements would impose an undue economic hardship on their operation (7CFR Section 12.23(a)).

In response to these concerns, the following clarifications and additions to the NFSAM are summarized below and are specifically defined in the policy section of this circular.

- 1) NRCS shall provide an exemption to the HELC provisions when it has been determined that an ephemeral gully(s) on HEL are caused by offsite runoff conditions, or actions by others, and not caused by a person's farming activities.
- 2) Upon a person's request, NRCS will consider whether recent precipitation events have abnormally contributed to the formation of an ephemeral gully(s) and grant a variance.
- 3) Clarification is provided which can be used to inform a producer that believes the application of an approved conservation plan or system would impose an undue economic hardship on their operation.

Policy. The following NFSAM revised or additional policy will be used when making HELC technical determinations:

NFSAM-520, Subpart B, Section 520.14 is revised to add Paragraph D:

D. Ephemeral Gully Erosion Due to Offsite Conditions (7CFR12.5(a)(6)(B)).

1. Description of the exemption: This exemption provides for instances of ephemeral gully erosion that are due to a point of discharge on the subject field, are not manageable by the person, and occur due to conditions on lands not under the persons control. They may include situations such as: an upslope ephemeral or classic gully that contributes runoff to the subject field, a road ditch/culvert that directs water onto the subject field, or increased runoff caused by failed maintenance of structural conservation practices on neighboring upslope fields.

2. Documentation: NRCS will document specific offsite conditions that are creating the ephemeral gully erosion on the subject field, and prevent the person from installing a technically and economically feasible conservation system. Documentation must include photos of the subject field ephemeral gullies and offsite conditions affecting their occurrence (to the extent possible given potential site access limitations), maps showing the locations of subject field ephemeral gullies and offsite conditions affecting their occurrence, and a written narrative.

3. Actions: To document the use of this exemption, NRCS will take the following actions:

Step	Action
1	NRCS collects documentation which will be justification for the use of this exemption.
2	<p>If an approved conservation plan or system is being followed on the rest of the field, NRCS must use the "AA" or "UA" compliance determination codes as appropriate to record the exemption. Use of this exemption will be approved by the Area Conservationist or equivalent position.</p> <p>If an approved conservation plan or system is not being followed on the rest of the field, the "NA" (not applying a conservation system) compliance determination code must be applied.</p>
3	A follow up compliance status review is not mandatory. If the tract is subject to a subsequent compliance review, the previously documented conditions of the exemption must be reviewed to determine if the exemption is still applicable.
4	NRCS will advise the person that they may seek technical and financial assistance to adequately treat the erosion issue.

3. Limitations for the use of this exemption:

- (i) Does not exempt ephemeral gullies that develop wholly within the HEL crop field from farming activities.

- (ii) Does not exempt other erosion issues, such as excessive sheet and rill erosion within the same field or tract.

NFSAM–520, Subpart B, Section 520.15A is revised to read as follows:

A. Description of the Temporary Variance

A temporary variance from the practices specified in the person’s HEL conservation system involving the use of practices or measures to address weather, pest, or disease problems, may be granted (Section 512.20) (7 CFR Section 12.5(a)(6)(i)(C)). In addition, a person may be granted a variance to the requirement for controlling ephemeral gully erosion if the erosion is due to an abnormal weather event.

NFSAM–520, Subpart B, Section 520.15B is revised to add Paragraph (3) and (4):

(3) For considering a variance to the requirement to control ephemeral gully erosion, the abnormal weather event must have precipitation documented to exceed a 10-year frequency event. To consider whether a weather event exceeds the threshold, follow the procedures in Attachment A to evaluate the NOAA Atlas 14 Point Precipitation Frequency Estimates, or consult your state hydraulic engineer or state conservation engineer for assistance.

NFSAM-520, Subpart B, Section 520.18A. is added:

A. Economic Hardship

1. When a producer asserts during the planning or compliance review process that applying a conservation system according to the NRCS developed alternatives would impose an undue economic hardship on their operation, NRCS will refer the producer to the FSA to request relief. The FSA will subsequently work with the NRCS to evaluate the request as described below and discussed in FSA Handbook 6-CP (Highly Erodible Land Conservation and Wetland Conservation Provisions) paragraph 204:
2. Actions:

Step	Action
1	Producer will complete FSA form AD-1026D Part B and include all supporting information including NRCS planning information.
2	NRCS will complete FSA form AD-1026D Part C and return to FSA.
3	The FSA County Committee will make a recommendation to the FSA State Committee.
4	The FSA State Committee will render a final determination and inform the FSA County Office who will in turn inform the NRCS field office.

A. Classifying the Recurrence Interval (Frequency) of Actual Storm Events using the National Weather Service Precipitation-Frequency Data Server

Filing Instructions. This circular is to be printed in hardcopy and retained in local files until such time as the NFSAM is updated to include this information.

/s/

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