



CIRCULAR 180-21-1

Title 180, National Food Security Act Manual, Fifth Edition
Part 510 (Subpart A) and Part 514 (Subpart A and D)

SUBJECT: ECS – Highly Erodible Land and Wetland Conservation Compliance

Purpose. To provide updated policy and guidance for the wetland and highly erodible land (HEL) conservation policy in Title 180, National Food Security Act Manual (NFSAM), Fifth Edition.

Effective Date. This circular is effective on March 15, 2021.

Background. On August 28, 2020, the United States Department of Agriculture (USDA) issued a final rule for the highly erodible land conservation (HEL) and wetland conservation (WC) provisions of the Food Security Act of 1985, as amended. This rulemaking finalized many of the changes made in the December 7, 2018, interim rule, which clarified how USDA makes technical determinations for implementation of the WC and HEL provisions. The final rule provided responses to public comments received on the interim rule and made some clarifying changes in response to those comments as detailed below. The final rule will not result in different decisions regarding what is or is not a wetland, but is intended to provide transparency to the public on how these technical determinations are made.

The final rule made the following changes to the regulation at Title 7, Part 12 of the Code of Federal Regulations:

- Provided minor changes to the definitions of farmed wetland and farmed-wetland pasture to promote consistency in basic terminology.
- Provided clarification on making decisions about whether a site meets hydrologic criteria for farmed wetland and farmed-wetland pasture or hayland.
- Relocated a provision (established in the interim rule) clarifying that wetland determinations will be done on a tract, field, or sub-field basis.
- Provided that NRCS will make a reasonable effort to include the affected person in an on-site investigation prior to making a determination that may result in ineligibility.
- Clarified that consideration of the best-drained condition will only occur when a site did not support woody vegetation on December 23, 1985, such that production of an agricultural commodity on that date was possible.

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

NFSAM-510, Subpart A, Section 510.0(C) is revised to read as follows:

C. Contents of the Manual

- (1) This manual contains USDA and NRCS policy and operating procedures for implementing Federal Regulation 7 CFR Part 12, including—
 - (i) Interim rules published
 - June 27, 1986
 - September 6, 1996
 - December 7, 2018
 - (ii) Final rules published
 - September 17, 1987
 - February 11, 1988
 - April 23, 1991
 - April 24, 2015
 - August 28, 2020
- (2) The procedures in this manual provide NRCS policy for implementation of the following:
 - (i) HELC
 - (ii) WC

NFSAM-514, Subpart A, Section 514.1(A)(3)(i) is revised to read as follows:

(i) Before any USDA benefits are withheld (7 CFR Section 12.30(c)(4)). Prior to issuing a preliminary technical determination which may cause ineligibility for USDA benefits, NRCS will make a reasonable effort to include the affected person in the on-site investigation. NRCS will attempt to schedule the site visit at a time when the affected person can be present at the site, and if applicable, when site conditions are favorable for the evaluation of soils, hydrology, and vegetation. If NRCS makes a reasonable effort to include the affected person and the person is not able to attend, NRCS may conduct the site visit without the presence of the affected person. NRCS will provide the affected person at least 30 calendar days to agree to a time for the site visit. A template letter is provided in the exhibit in section 514.8C which will be used to notify the affected person of the requirement for the site visit. The template may be modified to fit individual situations and include additional information, such as whether other contacts have already been attempted or are planned, e.g. phone calls or email correspondence.

The following definition at NFSAM-514-A-514.2 is revised to read as follows:

Best Drained Condition.—The hydrologic conditions with respect to depth, duration, frequency, and timing of soil saturation or inundation resulting from drainage manipulations that occurred prior to December 23, 1985, and that exist during the wet portion of the growing season during normal climatic conditions. Consideration of the best-drained condition will only occur when a site did not support woody vegetation on December 23, 1985, such that production of an agricultural commodity on that date was possible.

NFSAM-514-A-514.6 is revised to read as follows:

514.6 Wetland Hydrology

A. Definition

- (1) Wetland hydrology is defined as inundation or saturation by surface or groundwater during a growing season at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions. (7 CFR Section 12.2)
- (2) When a wetland is affected by drainage manipulations that occurred prior to December 23, 1985, and did not support woody vegetation on December 23, 1985, such that production of an agricultural commodity on that date was possible, wetland hydrology shall be identified on the basis of the best-drained condition resulting from such drainage manipulations.
- (3) When making a decision on wetland hydrology, NRCS will utilize a fixed precipitation date range of 1971-2000 for determining normal climatic conditions.
- (4) Additional methods for wetland hydrology determinations are described in the wetland identification procedures in the exhibit in section 514.8A.

NFSAM-514-A-514.8 is revised to read as follows:

514.8 Exhibits

- A. Food Security Act Wetland Identification Procedures
- B. Form SCS-CPA-026, Person Copy (June 1991)
- C. Potential Wetland Violation Field Visit Template Letter

The definition of farmed wetlands (FW) at NFSAM-514-D-514.31 is revised to read as follows:

A. Definition

- (1) Farmed Wetlands (FW) are wetlands that prior to December 23, 1985, were 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); 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); and that meet all of the following criteria:

- (i) If the area is not a pothole, playa, or pocosin, it experienced inundation 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), as determined through:
 - Observation of wetland hydrology indicators as identified in the local NRCS Field Office Technical Guide;
 - Procedures identified in State Off-Site Methods for wetland identification set forth in the local NRCS Field Office Technical Guide; or
 - The use of analytic techniques, such as the use of drainage equations or the evaluation of monitoring data.
 - (ii) If the area is a pothole, playa, or pocosin, it experienced inundation for at least 7 consecutive days or saturation for at least 14 consecutive days during the growing season in most years (50-percent chance or more). Wetlands which are found to support wetland hydrology through Step 1 of the wetland determination process in section 514.7 and application of the procedures described in section 514.6 will be determined to meet the requisite criteria.
 - (iii) Production was made possible or enhanced by the manipulation.
 - (iv) The area has not been abandoned (section 514.33).
- Note:** Reference (7 CFR Section 12.2)
- (2) The presence and extent of pothole, playa, and pocosin wetlands in each State will be determined by the State conservationist with advice from the State technical committee.

The definition of farmed wetland pasture or hayland (FWP) at NFSAM-514-D-514.32 is revised to read as follows:

A. Definition

A farmed wetland pasture or hayland (FWP) is a wetland that prior to December 23, 1985, was 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) and used for pasture or hayland (includes native pasture or hayland); was not used to produce an agricultural commodity at least once before December 23, 1985; and as of December 23, 1985, the area was capable of being used for pasture or hayland (i.e., did not support woody vegetation and was sufficiently drained to support the use of pasture or hayland); and meets both of the following criteria:

- (i) The area experienced inundation for at least 7 consecutive days during the growing season or saturation for at least 14 consecutive days during the growing season in most years (50-percent chance or more). Wetlands which are found to support wetland hydrology through Step 1 of the wetland determination process in section 514.7 and application of the procedures described in section 514.6 will be determined to meet the requisite criteria.
- (ii) The area has not been abandoned (section 514.33).

Note: Reference (7 CFR Section 12.2)

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.

Attachment – Potential Violation Field Visit Notification Letter