

Highly Erodible Land/Wetland Conservation: U.S. Department of Agriculture Issues Interim Rule



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08/03/2026

The United States Department of Agriculture ("USDA") published in the July 29th Federal Register an interim rule with request for comments ("Interim Rule") amending the regulations implementing the Highly Erodible Land and Wetland Conservation provisions of the Food Security Act of 1985 ("FSA"). See 91 Fed. Reg. 47779.

This section of the FSA is intended to ensure that wetland determinations issued after November 28, 1990, have been and will be certified as sufficient to serve as the basis for determining ineligibility for certain USDA program benefits under the Wetland Conservation provisions of the Food Security Act of 1985, as amended.

The FSA (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 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.

Relevant program benefits include most USDA commodity and conservation programs, loans, and crop insurance subsidies. The wetland conservation provisions state that after December 23, 1985, a program participant is ineligible for certain USDA program benefits if they produce an agricultural commodity on a converted wetland. Further, after November 28, 1990, participants may not convert a wetland that makes it possible to produce an agricultural commodity and still maintain eligibility for program benefits. Note that if program participants meet certain conditions, some actions are exempt from the ineligibility provisions.

The NRSC is tasked with assisting farm program participants in complying with Wetland Conservation provisions by providing certified wetland determinations.

A wetland determination is a decision regarding whether an area is a wetland, which includes identifying the:

- Wetland type.
- Wetland size.

A wetland determination is obtained by USDA program participants by completing a HELC and WC self-certification form and indicating on the form whether they have conducted (or are planning to conduct) activities that may alter land in a manner that could result in the conversion of a wetland. If the form

indicates that land is being altered in a manner that could result in wetland conversion, the request is referred to NRCS to evaluate whether a certified wetland determination needs to be completed.

The above referenced Interim Rule is stated to be published to adhere to the statutory Farm Bill provisions regarding certification and duration of wetland determinations. The *Lohr* decision is cited for the proposition that the APA requires an agency to provide a reasoned explanation when changing its prior policy position. The Interim Rule is stated to provide the history of previous statutes and regulations and explains NRCS's implementation of policy regarding the certification status of wetland determinations over time. The APA is also stated to require an agency to consider any serious reliance interests that may be affected by a change in policy.

The preamble for the Interim Rule further notes in part:

... Considering reliance interests ensures that policy changes do not unfairly disrupt the expectations of regulated parties who have structured their actions around existing policy. Producers who received a certified wetland determination between November 28, 1990 and July 3, 1996, faced changing policy regarding those determinations. This created uncertainty for these producers. Producers have relied on their certified wetland determinations (since 1990) when making decisions about their agricultural operations.

NRCS states that the Interim Rule:

- Addresses inconsistencies in how wetland determinations certified and issued in the past.
- Aligns USDA policy with statutory requirements.
- Protects producers' reliance interests.
- Reduces unnecessary administrative burden by preventing the reinterpretation or replacement of previously certified determinations unless the producer asks for a review.

The Interim Rule is stated to ensure all wetland determinations issued after November 28, 1990, are considered certified if:

1. Producer was notified of the determination; and,
2. Producer was given appeal rights at the time.

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