Chapter 5

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Chapter 5

Emergency Conservation Program (ECP)

I. Introduction

The Emergency Conservation Program (ECP) is a disaster-related conservation program run by the Farm Service Agency (FSA). Through ECP, FSA can help farmers rehabilitate farmland damaged in natural disasters by reimbursing them for part of the costs of installing or adopting an approved conservation practice.

ECP is designed to help farmers in two ways. First, ECP can be used to restore farmland damaged by wind and water erosion, floods, hurricanes, or other natural disasters. Second, ECP can be used to provide water conservation and water enhancement measures during periods of severe drought.

A. ECP Changes Adopted in 2004

In March 2004, FSA issued a final rule making significant changes to the ECP regulations. FSA also issued a new handbook on ECP policies and procedures that state and county offices will use when administering the program. Producers can request a copy of this handbook from their local FSA offices.

B. ECP Availability Depends on Congressional Appropriation

ECP is only available when Congress specifically designates funds to be used for the program. Once funding is made available, ECP is offered through FSA county offices.

Congress last appropriated general funding for ECP in August 2007 under the U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007. This Act
provided $16 million in funding for ECP, to remain available until expended. On August 16, 2007, USDA issued a press release announcing how the Act’s funding would be appropriated among 18 states. It is not known how much of this appropriation remains available. Most recently, USDA allocated $2 million in ECP funds to assist producers in Kansas in October 2007.

II. Conservation Problems That Qualify for ECP

There are two types of conservation problems that qualify for ECP assistance. An FSA county office can implement ECP: (1) when a disaster creates new farmland conservation problems, or (2) when severe drought requires emergency water conservation and enhancement measures.

A. New Conservation Problems Created by Disaster or Erosion—Four Requirements

The FSA county committee may implement ECP where a natural disaster or wind erosion has created new conservation problems on farmland. The regulations emphasize that the conservation problems must be new—problems existing prior to the disaster are not eligible.

In order for ECP funds to be available, the new conservation problem must have all of the following four characteristics.

1. **Must Impair or Endanger Land or Water**

   ECP is only available when the conservation problem, if not treated, will impair or endanger the land.

2. **Must Materially Affect Productive Capacity**

   In order to trigger eligibility for ECP, a conservation problem must materially affect the productive capacity of the land.

3. **Must Be of Unusual Character—Except Wind Erosion**

   ECP is only available to address damage from conservation problems considered to be unusual in character. Except for wind erosion, the conservation problem must be of the type that would
not occur frequently in the same area. FSA will consider all relevant factors to determine if a disaster would occur frequently.\textsuperscript{17}

4. Assistance Must Be Needed to Restore the Land

To be eligible for ECP cost-share assistance, the damage must be so costly to repair that federal assistance will be needed to return the land to productive agricultural use.\textsuperscript{18}

B. Water Measures During Drought

FSA’s national office may authorize the use of ECP to carry out emergency water conservation and water enhancement measures during periods of severe drought.\textsuperscript{19} The decision whether ECP is needed will be based, in part, on reports from FSA state and county committees about drought conditions in the area.\textsuperscript{20} “Severe drought” is defined in the ECP Handbook as conditions where “available livestock water and irrigation water for orchards and vineyards have been reduced below normal[,] and survival is unlikely without additional water.”\textsuperscript{21}

C. “Qualifying Minimum Cost” Requirement

ECP is only available when restoring the land or water resources would cost at least $1,000.\textsuperscript{22} This is the national “qualifying minimum cost.”\textsuperscript{23} Each state may set a higher minimum qualifying cost.\textsuperscript{24}

Farmers may request a waiver of the minimum cost requirement.\textsuperscript{25} The waiver request must show how failure to grant the waiver will cause environmental damage or hardship to the farmer. The request must also show how a waiver would accomplish the goals of ECP.

III. Conservation Practices That May Be Funded with ECP

ECP regulations and policies limit the scope and, to a certain extent, type of conservation practice that will be authorized.
A. Only the Minimum Needed to Address the ECP Need

To be eligible for ECP cost-share assistance, the conservation practice specifications must represent the minimum levels of performance needed to address the ECP-qualifying need. And ECP cost-share funds may be used to replace or restore farmland, fences, or conservation structures only to a condition similar to that existing before the natural disaster.

B. Authorized Emergency Conservation Practices

The prior ECP regulations included a list of conservation practices authorized under ECP. Under the rule issued in March 2004, the regulations provide only general guidance about what conservation practices will be authorized. In comments accompanying the final rule, FSA stated that “there is not a discrete number of eligible ECP practices.”

The ECP Handbook includes a rather detailed discussion of eligible conservation practices, including authorized and unauthorized examples of each practice discussed. Approved conservation practices vary somewhat with the type of disaster.

1. Debris Removal

ECP funds may be used to remove debris from farmland, farmstead property, windbreaks, shelterbelts, and access roadways. Cost-sharing assistance will not be authorized if the debris would not interfere with normal farming operations.

2. Grading, Shaping, and Leveling Land

ECP funds may be used to grade, shape, or level land damaged by a natural disaster in order to return the land to agricultural use.

3. Restoring Permanent Fences

ECP funds may be used to restore permanent fences. The term “permanent fence” is not defined, but the ECP Handbook’s examples of authorized practices include cross fences, boundary
fences, and cattle gates. Corrals and feedlots, ornamental fences, holding pens, cattle guards, and any fences not used to enclose or exclude livestock are considered ineligible for ECP assistance.

As more livestock farmers use rotational grazing practices, a question may arise as to whether the restoration of mobile fencing qualifies under ECP. Arguably, these fences, although sometimes rotated within the same pasture, qualify as permanent fencing. This argument should be especially compelling since rotational grazing has conservation benefits as a production method.

4. Restoring Structures and Installations

ECP funds may be used to restore “structures and other installations.” The ECP Handbook’s examples of authorized practices in this category include water impoundments for agricultural uses, sod waterways, installed drainage systems, diversions or spreader ditches, terrace systems, wells, springs, pipelines, buried mainlines, structures for the protection of outlets or water channels, and animal waste lagoons repaired or replaced in a 100-year floodplain or higher. Examples of unauthorized practices include irrigation wells and movable systems, portable pumps and pipe, roadways, motors, and animal waste lagoons in less than 100-year floodplains.

In conjunction with eligible structures or installations, ECP assistance may be available to establish permanent vegetative cover when needed to prevent erosion or siltation or to achieve some other ECP purpose.

5. Emergency Wind Erosion Control

ECP funds may be used for emergency wind erosion control measures. Examples of authorized practices from the ECP Handbook include chiseling (with a preference for contour or cross slope chiseling) and deep plowing or similar measures to bring subsoil clods to the surface.
6. **Drought Emergency Measures**

ECP funds may be used for drought emergency measures when authorized by the FSA national office. According to the ECP Handbook, these measures are intended to permit livestock grazing of rangeland, pasture, or forage; supply emergency water for existing irrigation systems serving orchards and vineyards; and provide emergency water for confined livestock operations.

Examples of authorized practices in this category include: (1) installing pipe to a new water source; (2) providing water storage facilities to meet the immediate needs of livestock; (3) constructing and deepening wells for livestock; (4) constructing recovery pits for orchard and vineyard irrigation systems; (5) developing springs or seeps for livestock water; (6) permanently installed submersible pumps; (7) solar panels to power water pumps; (8) wells (if no other source of emergency water is available); and (9) measures to provide emergency water for confined livestock on the farm at the time of the disaster.

7. **Windbreaks and Shelterbelts**

ECP funds may also be used to restore or replace field windbreaks and farmstead shelterbelts to help stop erosion and provide energy conservation. The windbreak or shelterbelt must not be on land enrolled in the Conservation Reserve Program. Authorized practices in this category include buying tree seedlings or young shrubs, planting windbreaks or shelterbelts, establishing vegetative cover where needed to prevent serious erosion until trees or shrubs are established, and limited weed control measures.

8. **Other Emergency Conservation Measures**

ECP funds may be used for emergency conservation measures not covered by these specified categories when approved by the FSA national office.
IV. ECP Eligibility

Only agricultural producers may receive ECP cost-share assistance, and ECP funds may only be used on certain lands.

A. Producer Eligibility

Only agricultural producers with an interest in the land affected by the natural disaster may receive ECP cost-share assistance. An “agricultural producer” is defined in the ECP regulations as an owner, operator, or tenant of a farm or ranch used for commercial production of crops or livestock. The producer must be liable for the expense to be reimbursed through ECP.

In certain circumstances, ECP funds may be available to a group of producers. Under a “pooling arrangement,” two or more eligible persons on two or more farms agree in writing to jointly solve shared conservation problems. If the agreement is approved by the FSA county committee, the group will be eligible for ECP funds.

B. Land Eligibility

In general, most private land is eligible for ECP cost-share assistance, but there are some restrictions.

1. ECP Implemented in the County

The land must be physically located in a county in which ECP has been authorized.

2. Involved in Agricultural Production

To be eligible for ECP cost-share assistance, the affected land must be expected to have annual agricultural production. The only exceptions are field windbreaks, farmstead shelterbelts, and farm access roads needing removal of disaster-related debris because the debris is interfering with normal farming operations.

Land uses expressly not eligible for ECP assistance are: (1) stream banks, channels, levees, and dikes; (2) native woodland areas;
(3) roads (other than debris removal); (4) land in recreational use; (5) land devoted to trees, including timber production; and (6) land used for greenhouses or other confined areas, including corrals, milking parlors, barn lots, or feeding areas.58

3. Not Subject to Frequent or Severe Damage

Land that is subject to frequent damage or is susceptible to severe damage will not be eligible for ECP.59 Factors considered by FSA when determining the likely frequency of damage include, but are not limited to, the location of the land, the history of damage to the land, and whether it is protected by a levee or dike built to U.S. Army Corps of Engineers (Corps) or Natural Resources Conservation Service (NRCS) standards.60 The ECP Handbook states that ECP funds will not be available for practices on land that has been severely damaged three or more times in the past 25 years, including the current disaster.61

Other specific land exclusions set out in the ECP regulations are: (1) land on which a levee or dike is located; (2) land protected by a levee or dike that was not properly functioning during the disaster or that was not built to Corps or NRCS standards; (3) land between any levee or dike and a stream, river, or other body of water;62 (4) land adjacent to water impoundment reservoirs that is subject to inundation when the reservoir is filled to capacity; (5) land subject to flowage or flood easements and inundations when water is released in normal operations; and (6) land located in an old or new channel of a stream, creek, river, or other waterway.63 Land located on the banks of an irrigation canal may be eligible for ECP if FSA determines that the canal or channel is not subject to flooding.64

4. Not Owned by Federal, State, or Local Government—Tribal Land Okay

Land owned or controlled by the United States government, a state government, or a political subdivision of a state—such as a
county—is not eligible for ECP. This is a change from the prior ECP regulations which expressly allowed ECP on all lands owned by a state or political subdivision and on many types of land owned by the United States government.

Although federal and state lands are no longer eligible for ECP assistance, tribal lands remain eligible. Tribes that own eligible land and otherwise qualify are eligible for ECP cost-share assistance. Individual Native Americans operating on tribal lands are eligible for ECP if they qualify as tenants or sharecroppers on the land. And persons—whether Native American or not—who have grazing rights on tribal lands will be eligible for ECP if the rights arise out of a written lease or permit approved by the Bureau of Indian Affairs.

5. Not Damaged byPoor Farming Practices

ECP is not available if poor farming practices have materially contributed to the damage. The regulations list failure to farm on the contour as an example of poor farming practices for this purpose.

V. ECP Cost-Sharing

ECP provides funds through cost-sharing. This means that FSA reimburses the farmer for part of the farmer’s expenses to install or implement the conservation practice. Key factors in determining the amount of an ECP award will be the amount of eligible expenses and the ECP program limits.

A. Expenses Eligible for ECP Cost-Sharing

In general, once FSA has decided that a farmer is eligible for ECP assistance, cost-sharing is granted for all reasonable expenses incurred in the completion of the approved conservation practice. Eligible costs may include new or used materials, services, labor, and sales tax. FSA regulations set some limits on the conservation practice expenses that may be eligible for ECP cost-sharing.
1. **Personal Expenses Must Be Beyond the Normal Operation of the Farm or Ranch**

Expenses for labor and equipment provided by the farmer are only eligible if they are beyond what is required for the normal operation of the farm or ranch.74

2. **Personal Expenses Must Be Less Than What a Contractor Would Charge**

Expenses for labor and equipment provided by the farmer must be less than what would be charged by contractors regularly employed in such work.75

3. **Only Expenses of Meeting Minimum Performance Standards**

As discussed earlier, conservation practices under ECP cannot exceed the minimum performance needed to fix the new conservation problem.76 Expenses for practices exceeding minimum performance are not eligible for ECP cost-sharing.77 Similarly, ECP cost-sharing is not authorized for normal upkeep or maintenance of conservation practices.78

4. **Compensated Expenses Are Not Included**

The amount of any expenses that are reimbursed by a third party—including an insurance indemnity payment—will be excluded from the expenses eligible for ECP cost-sharing.79 Similarly, farmers may not receive ECP assistance for land that is also benefiting from a similar program, such as the Wetland Reserve Program (WRP), the Emergency Wetland Reserve Program (EWRP), or the Emergency Watershed Protection Program (EWP).80

If a farmer receives an ECP award and then later receives duplicate payments or benefits for the same or similar expenses, the farmer must refund any ECP payments received.81
B. ECP Cost-Share Assistance Limits

The ECP regulations set the following limits on the amount of cost-share assistance that can be awarded.

1. **In General, Maximum Award Is 75 Percent of Eligible Expenses**

   The prior ECP regulations set out a complicated, three-tiered calculation for determining the amount of an ECP award. The March 2004 rule greatly simplified the calculation. Under the new regulations, an eligible producer may receive up to 75 percent of either the producer’s total actual costs or total allowable costs, whichever is less.

2. **Limited Resource Producer—Up to 90 Percent of Eligible Expenses**

   An eligible limited resource producer may receive up to 90 percent of either the producer’s total actual costs or total allowable costs, whichever is less. For ECP purposes, a limited resource producer is a person with no more than $100,000 in gross farm sales and a household income at or below specified levels in each of the previous two years.

3. **Expenses Resulting From a 2005 Hurricane — Up to 90 Percent of Eligible Expenses**

   Producers with eligible expenses resulting from hurricanes that occurred in 2005 could receive up to 90 percent of either the producer’s total actual costs or total allowable costs, whichever was less. The types of expenses eligible for 90 percent cost-share assistance include expenses related to debris removal and water for livestock; oyster bed rehabilitation and refurbishing; removing nursery debris; and reconstruction or repair of uninsured poultry houses.
4. Maximum Payment Levels for Individual Conservation Practices

Although not discussed in the regulations, the ECP Handbook states that FSA county committees will set maximum payment levels for particular conservation practices that can reduce an award below the general percent-of-cost levels discussed above. These maximum payment levels are based on the average cost of performing the particular practice and are intended to be the “minimum incentive needed to encourage producer participation and solve the problem.” According to the ECP Handbook, percent-of-cost levels are to be used to determine ECP awards only when there is no data on actual costs or there is “considerable variation in actual cost practices within the county.”

5. No More Than 50 Percent of the Land’s Agricultural Value

Generally, an ECP payment cannot be more than 50 percent of the agricultural value of the affected land, as determined by FSA. According to the ECP Handbook, this limitation only applies to conservation practices that rehabilitate damaged farmland. This limitation did not apply to expenses related to rehabilitating or refurbishing oyster beds damaged by a 2005 hurricane.

6. Maximum of $200,000 Per Person, Per Disaster

The maximum ECP cost-share payment is $200,000 per person, per disaster for all conservation practices. The definition of “person” includes individuals, business enterprises, trusts, and estates.

7. Total Payments Cannot Exceed Total Expenses

Total cost-share payments from all sources cannot exceed the total eligible expenses of installing or implementing the conservation practice.
8. **County Committee Approval Authority Up to $50,000**

An FSA county committee may approve ECP payments of up to $50,000 per person, per disaster. ECP payments of $50,001 to $100,000 must be approved by the FSA state committee. ECP payments over $100,000 per person, per disaster must be approved by the FSA national office.97

VI. **ECP Request and Approval**

Farmers must submit their requests for ECP cost-share assistance to the FSA county committee.

A. **Submitting a Request for ECP Cost-Share**

A specific ECP sign-up period will be set when ECP is authorized in a county, but the regulations and ECP Handbook set out general time limits for submitting requests.

1. **Sign-Up Period—At Least 30 Days After ECP Is Authorized in the County**

Once ECP assistance has been authorized for a county, the FSA county committee must notify affected producers and establish a sign-up period for ECP cost-share requests.98 The regulations do not specify a minimum sign-up period, but the ECP Handbook states that the sign-up period must be at least 30 days and no more than 60 days from the date ECP authorization is granted.99 The FSA national office may extend the sign-up period beyond 60 days.100

2. **Late Requests Accepted If “Justifiable”**

The FSA county committee may accept late requests for ECP cost-share assistance in justifiable cases.101 Neither the ECP Handbook nor the regulations give any guidance about what might be considered a justifiable reason for filing an ECP cost-share request after the deadline.
3. **When Funds Are Not Available**

Because ECP is only available when Congress has specifically designated funds for the program, ECP cost-share assistance may not be available at all times. If a county does not have funds for ECP—either because no funds have been allocated or the allocation has been exhausted—the FSA office is still required to accept ECP requests and respond in writing to explain the current status of the program and the action, if any, taken on the request.102

If the county has received state-level approval to implement ECP, but funds are not available, the FSA county office may complete the preliminary steps toward approval, including making an on-site inspection (discussed below).103 The farmer will be notified that these actions do not ensure ECP assistance will be available.

4. **Conservation Practices Started Before an ECP Request Is Submitted or Approved**

ECP cost-share assistance is generally available only for conservation practices started after approval of an ECP request, but there are limited exceptions.

   a. **General Rule: No Coverage for Measures Started Before Approval**

   In general, FSA will not provide ECP assistance for conservation practices or practice components that are started before a request for ECP cost-sharing is submitted and approved.104

   b. **Waiver Possible If Immediate Action Needed to Prevent Further Loss**

   A waiver of this requirement is possible on a case-by-case basis if the disaster created a situation that required the farmer to take immediate action.105
(1) Request Submitted Within 15 Days of Sign-Up Start

A waiver to allow cost-share coverage of conservation practices begun before an ECP request was submitted and approved will only be available if an ECP request is filed within 15 days after the start of the sign-up period for the county.\textsuperscript{106}

(2) Practice Started No More Than 60 Days Before ECP Authorization for County

A pre-submission or pre-approval conservation practice will be eligible for ECP cost-share under a waiver only if the practice was started no more than 60 days before the ECP disaster designation was approved by the FSA county office.\textsuperscript{107}

(3) Justifying Pre-Approval Action

The farmer will be required to demonstrate that it was necessary to take immediate action. The ECP Handbook provides examples of situations that could justify a waiver and allowance of pre-submission and pre-approval conservation measures. For practices begun before an ECP request is submitted, the ECP Handbook lists emergency repair of fences to contain livestock and a pond dam that poses an immediate threat to life and property as examples of measures that could qualify for a waiver.\textsuperscript{108}

For practices begun after an ECP request has been submitted, but before cost-sharing has been approved, the ECP Handbook lists contractor availability and the need to take steps to prevent further losses as examples of measures that could qualify for a waiver.\textsuperscript{109}
B. ECP Cost-Share Approval Process

ECP requests may be approved if the funds are available and the requested practice is determined eligible for cost-share assistance. Although this seems straightforward, FSA will take two key actions before an ECP request will be approved: inspection and ranking.

1. On-Site Damage Inspection

Before approving an ECP request, FSA will make an on-site visit to the farm to assess the type and extent of the damage and determine whether the ECP eligibility requirements are met. The farm visit is to be made “as soon as possible” after an ECP request is submitted.

2. ECP Funding Priorities

The FSA county committee will prioritize all ECP requests received before making approval decisions. Priority for ECP approval is based on factors such as: (1) the type and degree of damage; (2) the type of practices needed to address the problem; (3) the availability of funds; (4) the availability of technical assistance; (5) environmental concerns; (6) safety factors; and (7) the welfare of eligible livestock.

VII. Completing Conservation Practices

In general, cost-shares approved under ECP will not be considered earned until all components of the approved practice are completed according to FSA specifications and ECP provisions.

A. Completed by FSA Deadline—Typically Six Months From Approval

After receiving approval for ECP cost-share, the farmer must complete the approved conservation practice within a specific period of time. FSA refers to the deadline for completing an approved ECP practice as an “expiration date.” The FSA county committee establishes an expiration date for each approved practice. Expiration dates for most
conservation practices will be no more than six months from the date of approval. The expiration date for drought emergency measures will be no more than 60 calendar days from the date of approval. Extensions of time to complete an approved ECP conservation practice may be approved by the FSA state committee.

B. Performance Must Meet Minimum Requirements

FSA establishes minimum requirements for ECP conservation practices. In some cases, a farmer may receive ECP cost-share assistance for work done even if the minimum requirements for the approved practice are not met. The farmer must establish that a reasonable effort was made to satisfy the minimum requirements for the practice and that the practice, as performed, will adequately address the problem.

C. Reporting Work Performed and Requesting Payment

No later than the “payment request deadline” specified in the ECP agreement, the farmer must: (1) certify to FSA that the practice has been performed, and (2) request payment. By that same deadline, the farmer must provide FSA with a signed performance report setting out information establishing that the farmer has performed the approved conservation practice and complied with other ECP requirements. Supporting data for a performance report may include invoices, canceled checks, receipts, analysis tags, and similar evidence of expenses.

FSA may make an exception to the deadline for reporting performance and requesting payment in cases where failure to submit the required information within the time limit was due to reasons beyond the farmer’s control.

VIII. ECP Cost-Share Payments

After the farmer certifies completion of the practice and requests payment, FSA will calculate the cost-share earned and issue payment.
A. Partial Payments

A farmer may be paid for the completed components of a conservation practice before the rest of the conservation practice is completed, if the FSA county committee determines that the completed components are a “reasonable attainment” toward completing the approved practice. Partial payments will only be made if the farmer will complete the remaining components of the conservation practice within the time set by the FSA county committee, whether or not cost-share payments will be available for those remaining components. If the remaining components are not completed within the time required, the farmer must refund the partial payment unless reasons beyond the farmer’s control prevented completion of the practice.

B. Division of Cost-Share

The cost-share for an ECP conservation practice will be credited to the person who performed the practice or paid a third party to perform it. If more than one person contributed, FSA will determine the amount of cost-share payment each person will receive.

1. More Than One Person Contributes

If more than one person contributes to the performance of the practice, the cost-share for the practice will be divided according to each person’s contribution, as determined by FSA. Contributions will be calculated based on the value of labor, equipment, or material contributed by each participant, and “any other factors deemed relevant.”

2. One Eligible Person Credits Another

When one person eligible for ECP cost-share credits another eligible person—through an adjustment in rent, cash payment, or otherwise—for a purpose directly related to the approved conservation practice, the credit may be considered an eligible expense under ECP. A person who is fully reimbursed through
credit or payment from another eligible person will not be considered to have contributed to the practice performance.\textsuperscript{133}

3. Contribution From an Ineligible Person

Any contribution to the practice performance from someone who is not eligible for ECP—such as a state agency or a non-farming relative—will be deducted from the expenses eligible for cost-share.\textsuperscript{134} The FSA Deputy Administrator may waive the deduction if the FSA state committee so recommends and there is a demonstrated need for the waiver.\textsuperscript{135}

C. ECP Payments Not Subject to Creditor Claims, Other Than U.S. Government

In general, ECP cost-share payments will be made to a farmer without regard to claims against the farmer or liens on his or her property by creditors other than the United States government.\textsuperscript{136} Under the ECP regulations, cost-share payments are subject to liens and claims from the federal government, including administrative offset.\textsuperscript{137} The new ECP regulations state that offset and withholding regulations that are “most favorable to a collection of the debt shall control.”\textsuperscript{138}

D. ECP Payments May Be Assigned

If a farmer entitled to ECP cost-share payments properly assigns the ECP payment to another person, the assignment will be honored by FSA.\textsuperscript{139}

IX. Farmer’s Long-Term Obligations

Farmers receiving ECP cost-share assistance are responsible for the maintenance and proper use of the conservation practice.\textsuperscript{140}

A. Maintenance and Proper Use During Practice “Lifespan”

For many conservation practices, FSA establishes a “lifespan,” or minimum period of time that the practice is expected to function with proper maintenance.\textsuperscript{141} ECP conservation practices are subject to spot
checks by FSA throughout their lifespan. If FSA believes that a conservation practice has not been properly maintained during its lifespan, the farmer will have to refund all or part of the cost-share assistance for that practice. FSA will determine what constitutes failure to maintain a practice and the amount, if any, that must be refunded.

B. Loss of Control of the Land Where Practice Is Located

ECP regulations state that if a farmer voluntarily or involuntarily loses control of the land during the lifespan of a conservation practice, and the person taking control of the land chooses not to maintain the practice, the farmer must refund cost-share payments received for that practice. But the ECP Handbook states that refunds will only be required if the land is lost voluntarily, not involuntarily, and that no refund will be required in any case if FSA determines that the practice has served its purpose for its lifespan or failure to maintain the practice was due to conditions beyond the farmer’s control. It is likely that the reference in the regulations to involuntary loss of the land is an error. The prior ECP regulations only addressed voluntary loss of land.

X. ECP Appeals

Adverse decisions made by FSA may be appealed. Therefore, decisions made under ECP are appealable. For example, a determination of ineligibility for ECP, denial of ECP benefits, or a decision that the farmer has not complied with ECP requirements should all be subject to appeal.

USDA’s National Appeals Division (NAD) handles appeals of FSA decisions. NAD regulations set out a structured appeals process with important deadlines and other requirements. For example, appeals must be filed with NAD within 30 days after the farmer first receives notice of the adverse decision.
XI. Discrimination Is Illegal

FSA is prohibited from subjecting any person to discrimination on the basis of race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, disability, or because all or part of an individual’s income is derived from any public assistance program. Prohibited discrimination may involve excluding a person from participation in ECP or denying program benefits.
Chapter 5 Notes

1 Statutory authorization for the program is found at 16 U.S.C. §§ 2201-2205.

2 16 U.S.C. §§ 2201-2202; 7 C.F.R. § 701.3(a)-(b) (2008). The ECP regulations make the general statement that funds may also be used to purchase floodplain easements when necessary to safeguard life and property. See 7 C.F.R. § 701.3(c)(2) (2008). However, neither the regulations nor the ECP Handbook discusses how floodplain easements are made available under the program. It seems likely that the statement is mistakenly referring to the floodplain easements available under the Emergency Watershed Protection Program administered by the Natural Resources Conservation Service under 16 U.S.C. § 2203. See 7 C.F.R. pt. 624 (2008).


6 7 C.F.R. § 701.1(b) (2008).


Pub. L. No. 110-28, Title IX, § 9003, 121 Stat. 112 (May 25, 2007). Unlike other ECP funds, the $16 million provided by this Act is subject to Adjusted Gross Income (AGI) requirements. 7 C.F.R. § 701.17 (2008). Generally, the AGI requirements make producers ineligible for benefits if (1) their AGI for the preceding three years exceeds $2.5 million; and (2) less than 75 percent of the AGI is derived from “farming, ranching, or forestry operations.” 7 C.F.R. § 1400.600 (a)-(b) (2008).

“USDA Allocates $16 Million in Emergency Conservation Aid to 18 States,” USDA News Release 0218.07 (August 16, 2007), listing amount of ECP funding allocated to 18 specified states. USDA news releases can be found at www.usda.gov/Newsroom/.


7 C.F.R. § 701.5(c) (2008). The factors FSA may consider include the location of the land, the history of damage to the land, and whether the land was or could have been protected by a levee or dike built to U.S. Army Corps of Engineers or NRCS standards.
ECP Handbook, page 1-60, para. 35.H (Mar. 30, 2004). The drought must be so severe that federal assistance is required to return the land to productive use or provide emergency water for livestock. 7 C.F.R. § 701.10(a) (2008).
23  7 C.F.R. § 701.10(b) (2008).
24  7 C.F.R. § 701.10(b) (2008).
25  7 C.F.R. § 701.10(c) (2008).
28  See 7 C.F.R. § 701.49(b) (2004).
33  ECP Handbook, Exhibit 8, pages 5-7 (Mar. 30, 2004).
7 C.F.R. § 701.2(b) (2008). For this purpose, crops include, but are not limited to, grain, row crops, seed crops, vegetables and fruits, hay forage and pasture, orchards and vineyards, flowers and bulbs, and field grown ornamentals. 7 C.F.R. § 701.2(b) (2008), “Agricultural producer”). Livestock includes, but is not limited to, dairy and beef cattle, poultry, swine, sheep and goats, fish and other animals raised by aquaculture, and other livestock or fowl. 7 C.F.R. § 701.2(b) (2008), “Agricultural producer”).

7 C.F.R. § 701.4(a) (2008). The regulations which took effect in 2004 do not address what entity types are eligible for ECP, but the ECP Handbook retains the provisions from the prior ECP rule (7 C.F.R. §§ 701.7, 701.48 (2004)). Under this language, ECP is available to individuals, partnerships, corporations, trusts, and other business enterprises that—as owners, landlords, tenants, or sharecroppers—participate in the operation of a farm or ranch. ECP Handbook, page 1-159, para. 92.A (Mar. 30, 2004).


7 C.F.R. § 701.5(a)(3)(i) (2008). “Annual agricultural production” is defined as the production of crops for food or fiber in a commercial operation that occurs on an annual basis under normal conditions. 7 C.F.R. § 701.2(b) (2008), “Annual agricultural production”).


7 C.F.R. § 701.5(b)(5), (10), (11), (12) (2008).

7 C.F.R. § 701.5(b)(6), (c) (2008).

7 C.F.R. § 701.5(c) (2008).


7 C.F.R. § 701.5(b)(8) (2008). This includes land between two or more levees or dikes.

7 C.F.R. § 701.5(b) (3)-(5), (7)-(9) (2008).


7 C.F.R. § 701.23(a) (2008).


7 C.F.R. § 701.23(b)(1)-(2) (2008).


7 C.F.R. § 701.23(b)(4), (c) (2008).

7 C.F.R. § 701.31(a) (2008).

7 C.F.R. § 701.23(d) (2008).

7 C.F.R. § 701.11(a) (2008).

7 C.F.R. § 701.11(b) (2008).

See 7 C.F.R. § 701.51(b) (2008).


7 C.F.R. § 701.26(b) (2008).

ECP Handbook, Exhibit 2, page 2, “Limited Resource Producer” (Mar. 30, 2004). Household income must be at or below the national poverty level for a family of four or less than 50 percent of the county median household income.

7 C.F.R. §§ 701.53, 701.54(b), 701.55(b), 701.56(c) (2008).

7 C.F.R. §§ 701.53, 701.54(b), 701.55(b), 701.56(c) (2008).


7 C.F.R. § 701.26(c) (2008). The agricultural value of the land is determined by FSA’s Deputy Administrator for Farm Programs, or a designee.


7 C.F.R. § 701.54(c) (2008).

7 C.F.R. § 701.27 (2008).

7 C.F.R. § 701.27 (2008) (referring to definition in 7 C.F.R. pt. 1400); 7 C.F.R. § 1400.3(b), “Person” (2008). Specifically, the term includes “(i) An individual, including any individual participating in a farming operation as a partner in a general partnership, a participant in a joint venture, or a participant in a similar entity; (ii) A corporation, joint stock company, association, limited partnership, limited liability partnership, limited liability company, irrevocable trust, revocable trust combined with the grantor of the trust, estate, or charitable organization, including any such entity or organization participating in the farming operation as a partner in a general partnership, a participant in a joint venture, a grantor of a revocable trust, or as a participant in a similar entity; and (iii) A State, political subdivision, or agency thereof.”

7 C.F.R. § 701.23(e) (2008).


106  ECP Handbook, page 3-58, para. 175.E (Feb. 8, 2007). See also 7 C.F.R. § 701.15(b)(3) (2008), for the general requirement that FSA must determine that the request for assistance was submitted within a “reasonable amount of time” after the start of the sign-up period.


110  7 C.F.R. § 701.16(b) (2008).


114  7 C.F.R. § 701.16(a) (2008); ECP Handbook, page 3-55, para. 173.B (Feb. 8, 2007). The regulations state that this list is not exclusive, and other factors “deemed appropriate by FSA” may be considered. 7 C.F.R. § 701.16(a) (2008).


118  ECP Handbook, page 3-67, para. 182.B, C (Mar. 30, 2004). For most conservation practices, two extensions of up to six months each may be approved. For drought conservation practices, only one extension of up to 60 additional calendar days may be approved.


121  7 C.F.R. § 701.21(a) (2008).


124  7 C.F.R. § 701.21(c) (2008).
An “adverse decision” is defined as

... an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant. The term includes a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or right of the participant within timeframes specified by agency program statutes or regulations or within a reasonable time if timeframes are not specified in such statutes or regulations.


151 7 C.F.R. § 11.6(b)(1) (2008). For a detailed discussion of NAD procedures, see USDA’s National Appeals Division Practice and Procedures by FLAG attorney Karen Krub, available at www.flaginc.org/topics/pubs/arts/NADarticle_NatlAglawCtr2003.pdf, or contact FLAG by telephone at 651-223-5400; by fax at 651-223-5335; by mail at 360 North Robert Street, Suite 500, Saint Paul, MN 55101; or by electronic mail at lawyers@flaginc.org.