

Outline of Conservation Programs Required By the Food Security Act of 1985

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I. Understanding the Purpose of USDA Conservation Programs

- A. The Food Security Act of 1985 (the Act) includes a conservation title that requires implementation and enforcement of four conservation programs:
 - 1. The "Sodbuster" Program: This program discourages agriculture production on highly erodible land (HEL) by denying farm program eligibility and benefits to farmers who bring new HEL into production.
 - 2. The "Swampbuster" Program: This program discourages conversion of wetlands to cropland by denying benefits to farmers who convert wetlands for agricultural use.
 - 3. The Conservation Plan Program: This program requires farmers to develop and implement a conservation plan on highly erodible cropland. Farmers who fail to comply with the required HEL conservation plan are ineligible for farm programs and other federal assistance.
 - 4. The CRP Program: Under this program, the farmers can retire cropland from production for ten-year periods. The farmer receives payments for keeping the land out of production in compliance with strict regulatory standards and CRP contract terms. Farmers who fail to comply with the applicable regulations and contract terms can be penalized (loss or refund of payments and loss of eligibility for other farm program assistance).

The Food, Agriculture, Conservation, and Trade Act of 1990 (the 1990 Farm Bill) substantially expanded federal conservation compliance programs. (See the 1990 Farm Bill Supplement for details on new conservation laws.)

- B. There are two basic purposes underlying each of the four conservation programs listed above:
 - 1. The need to control soil erosion.
 - a. Congress has actively been in the business of promoting soil conservation practices since the "dust bowl" years of the Depression.

- b. Although many farm operations voluntarily implemented conservation practices during the forties, fifties, and sixties, farming operations during the late sixties and seventies increasingly plowed under conservation projects to increase production. Soil erosion and depletion increased, and viable agricultural land deteriorated and disappeared.
 - c. Some farmers "sodbusted" large sections with marginal soil conditions, intending to farm the land for a few years and then abandon it. These practices led to loss of topsoil after the land was abandoned and resulted in loss of natural grasslands.
 - d. Congress responded to these problems in the sodbuster provisions of the Act by requiring farmers who participate in federal farm programs to apply conservation practices on HEL. The sodbuster provisions rely on economic disincentives and penalties to discourage agricultural production on HEL. However, these economic disincentives and penalties only apply to farmers who participate in farm programs.
2. The need to preserve wetlands.
- a. Historically, the federal government has encouraged large-scale drainage of wetlands for agricultural use. Homestead laws and federal assistance programs have generally promoted growth of agriculture production by converting wetlands into agricultural use. This problem is particularly pronounced in the Great Plains and western states where federal assistance programs have supported extensive water drainage and irrigation districts.
 - b. The federal policy to expand the acreage base for agricultural production has resulted in destruction of wetlands needed to maintain wildlife and water quality. Conversion of wetlands has also contributed to depletion and contamination of groundwater reserves.
 - c. Congress is now attempting to correct what is perceived to be a serious environmental mistake by promoting restoration of wetlands. The swampbuster provisions of the Act discourage conversion of wetlands for agricultural use. Participating farmers who convert wetlands are subject to penalties and loss of program benefits.
- C. Congress has historically relied on voluntary programs exclusively based on financial incentives to promote agricultural conservation practices (mostly soil conservation practices). The Act signals a shift in policy because it also relies on enforcement of mandatory conservation requirements and assessment of penalties for non-compliance to promote conservation practices.

1. The provisions of the Conservation Title in the Act remain voluntary in the sense that farmers can choose not to enter farm programs and therefore not be subject to conservation compliance requirements. However, there is a clear shift from voluntary persuasion to a reliance on penalties and economic disincentives as “tools” to enforce conservation policies and required practices.
2. The federal government is aggressively asserting control over water resources (Clean Water Act and environmental and wildlife protection laws), and various federal agencies are assuming increasing responsibility for monitoring and enforcing compliance with water quality legislation. Fish and Wildlife, the EPA, the Army Corps of Engineers, the U.S. Forest Service, and other federal agencies are assuming enforcement roles to see that expanding environmental and wildlife policies and laws are followed. Agriculture is feeling an increasing impact on government regulation of soil and water resources.
3. We can expect to see a continuing trend to increase enforcement measures in the future (water quality protection is a priority concern in the nineties), and Congress will probably pass new laws with even stricter requirements. Theoretically, Congress could expand mandatory conservation laws by requiring **all** farmers (not just participating farmers) to comply.

II. ASCS and SCS Implement and Enforce the Conservation Provisions of the Food Security Act of 1985

- A. The USDA regulations implementing the conservation enforcement provisions of the Act are primarily set out in 7 C.F.R. Part 12.
 1. 7 C.F.R. § 12.1(b) describes the purpose of conservation provisions:

[T]he purposes of the provisions are in part to remove certain incentives for persons to produce agricultural commodities on highly erodible land or converted wetland and to thereby—

 - (1) reduce soil loss due to wind and water erosion,
 - (2) protect the nation’s long-term capability to produce food and fibre,
 - (3) reduce sedimentation and improve water quality,

- (4) assist in preserving the nation's wetlands, and
- (5) curb production of surplus commodities.

7 C.F.R. § 12.1(b).

2. The regulations establish two basic conservation enforcement provisions that apply to farmers who participate in USDA farm programs:
 - a. The regulations prohibit production of agricultural commodities on HEL **unless** there is an SCS-approved conservation plan in effect.
 - b. The regulations prohibit conversion of wetland to cropland.
3. The penalties for noncompliance with conservation provisions include:
 - a. Determination of ineligibility for USDA farm programs, loans from FmHA, disaster payments, federal crop insurance, and federal farm storage loans (16 U.S.C. § 3811).
 - Note: The 1990 Farm Bill expanded the impact of ineligibility determinations by denying benefits for the Disaster Assistance for Weather Damaged Trees Program, the Agricultural Conservation Program (ACP), the Conservation Reserve Program (CRP), the Small Watershed Program, and emergency conservation payments.
 - b. Loss of eligibility to receive farm program payments in the year of the violation.
 - The 1990 Farm Bill softens enforcement sanctions by allowing farmers to remain eligible for programs, in spite of conservation compliance violations, if the farmer has had no recent violations and acted in good faith without an intent to violate conservation requirements. If the farmer has a "clean record," the financial penalties are also capped. (See 1990 Farm Bill Supplement for details.)
 - c. Loss of eligibility to participate in farm programs in the future until the violation is cured.
4. USDA regulations and administrative rules delegate the decision-making responsibility for implementing the conservation enforcement provisions of the Act to ASCS and SCS (FmHA has some involvement in the determination of conservation easements through its loan programs).
 - a. USDA regulations delegate to ASCS the authority to make the following decisions:

- (1) Whether the crop produced on HEL was required under the terms of a lease (7 C.F.R. § 1413.99);
- (2) Whether the conversion of wetland was commenced prior to December 23, 1985 (7 C.F.R. § 12.6(b)(3)(vii)); or
- (3) Whether the conversion was required by a third party (7 C.F.R. § 12.6(b)(3)(ix)).

An authorized representative of ASCS can make an inspection of the farm to determine compliance with any requirement specified in the regulations to obtain benefits. Thus, ASCS is delegated general "policing" authority to enforce program requirements. In fact, ASCS is required to spot check a certain percentage of farms each year to monitor compliance.

b. USDA regulations delegate the following responsibilities to SCS:

- (1) Determining whether land is highly erodible wetland or converted wetland (7 C.F.R. § 12.6(c)(2)(i));
- (2) Determining whether HEL predominates in a field (7 C.F.R. § 12.6(c)(2)(ii));
- (3) Determining whether the conservation plan the person is actively applying is based on the SCS Technical Guide and approved by the agency (7 C.F.R. § 12.6(c)(2)(iii));
- (4) Determining whether agricultural production on a wetland is permissible as a result of a natural condition without actually destroying the character of the natural wetland (7 C.F.R. § 12.6(c)(2)(v)); and
- (5) Determining whether the production of agricultural commodities on a converted wetland will have only a minimal impact on the hydrological and biological characteristics of the wetland (7 C.F.R. § 12.6(c)(2)(vi)).

5. It is important to keep in mind that each of these agencies has its own regulations and procedures, including separate appeal regulations and procedures. There are important differences between the regulations and procedures for each agency.

III. How Do the Conservation Programs Actually Work?

A. SCS is responsible for making most determinations about HEL and conservation plans.

1. HEL is defined in the Act and in USDA regulations.

a. The statute defines the term “highly erodible land” to mean:

Land—

(i) that is classified by the Soil Conservation Service as Class IV, VI, VII, or VIII land under the Land Capability Classification System in effect on the date of the enactment of this Act; or

(ii) that has, or that if used to produce an agricultural commodity, would have an excessive average annual rate of erosion in relation to the soil loss tolerance level, as established by the Secretary, and is determined by the Secretary through application factors from the Universal Soil Loss Equation and the Wind Loss Equation, including factors for climate, soil erodibility, and field slope.

16 U.S.C. § 3801(7)(A).

b. USDA regulations define “highly erodible land” as “land that has an erodibility index of eight or more.” 7 C.F.R. § 12.2(a)(14).

c. Practically, highly erodible land means land with top soil that will erode faster than it can be naturally replaced or restored if the land is cropped.

2. There are two types of HEL land: **highly erodible cropland** and **newly converted HEL**. The difference between the two types of HEL is important because SCS requires different standards in conservation plans depending on the type of HEL.

a. Highly Erodible Cropland: HEL that was in production prior to January 23, 1985.

(1) The Act and USDA regulations required farmers to develop a conservation plan on highly erodible cropland and submit the plan to SCS for approval on or before January 1, 1990.

— Note that there is an exception to these deadlines. If SCS has not completed a soil survey on the farm (SCS is responsible for doing a soil survey of all the farmland in the nation to determine which land is HEL), the farmer has either two years from the completion of the soil survey or two years after the statutory deadline, whichever is later, to submit a

conservation plan to qualify the land as highly erodible cropland.

- (2) The approved conservation plans must be fully implemented by 1995.
 - (3) Before the conservation plan can be approved, SCS must determine that the plan satisfies the standards of the SCS Field Office Technical Guide.
 - (4) HEL land that was cropped prior to January 23, 1985, will be considered as newly converted HEL if the farmer failed to submit a conservation plan by January 1, 1990.
- b. Newly converted HEL: HEL that has been newly cropped after January 23, 1985.
- (1) Farmers who intend to start cropping HEL after December 23, 1985, are required to submit a conservation plan to SCS for approval in order to remain eligible for farm programs and other federal assistance.
 - (2) The plan must be approved and in effect before the HEL is cropped.
3. The regulations define conservation plan as "a document containing the decisions of a person with respect to location, land use, tillage systems and conservation treatment measures and schedule which, if approved, must be or have been established on highly erodible cropland in order to control erosion on such land." 7 C.F.R. § 12.2(a)(4).
- a. The Act requires that the Secretary, Soil Conservation Service, and local Conservation Service Districts shall minimize the quantity of documentation a person must submit to comply with conservation requirements. 16 U.S.C. § 3812(a)(2).
 - b. Conservation plans contain very specific terms and requirements with which the farmer is legally bound to comply.
 - c. Because conservation compliance is voluntary, a farmer can choose to cultivate HEL without violating any law. However, participating farmers who do so risk loss of eligibility and program benefits (nonrecourse loans, payments, and other USDA assistance) based on contractual violations.

4. The conservation plan is a contract between the farmer and the USDA. However, it is possible that persons who are not party to the contract will be held liable for failure to comply with the conservation plan.
 - a. Tenant/landlord relations; and
 - b. Borrower/lender.
 5. The regulatory standards applicable to conservation plans depend on the type of HEL:
 - a. Newly converted HEL: The conservation plan must be designed to control soil losses to a level that will attain or approximate the soil loss tolerance level (T level). In other words, the land must be farmed so that loss from soil erosion and depletion will not exceed the ability of the soil to restore itself. 7 C.F.R. § 12.23(a).
 - b. Highly erodible cropland: The conservation plan must be designed to achieve substantial reductions in soil erosion, taking into consideration economic and technical feasibility and other resource-related factors. 7 C.F.R. § 12.23(a). Therefore, SCS can relax the soil erosion standards if it determines that meeting strict standards is impractical or too expensive.
 - c. Obviously, under the relaxed standards for highly erodible cropland, it is possible that the conservation plan will be approved even though the farming practices will result in soil erosion or depletion in excess of the soil's ability to restore itself.
 - d. The SCS Field Office Technical Guide establishes standards and procedures that SCS will use to determine approval of conservation plans.
 6. Under the Act, conservation plans only apply to HEL. Wetlands cannot be converted pursuant to a conservation plan. However, the 1990 Farm Bill establishes the Wetlands Reserve Program (WRP), which requires conservation plans under a WRP contract that retires wetland from agricultural production for 30 years or more. (See 1990 Farm Bill Supplement.)
- B. SCS is also responsible for identifying wetlands. In making this determination, SCS relies on three observations:
1. Saturated soil conditions (presence of surface or subsurface water);
 2. Predominance of hydric soils (soil that is saturated long enough to develop an anaerobic condition that supports hydrophytic vegetation);

3. The prevalence of hydrophytic vegetation (meaning plants that have adapted to living in saturated soil conditions). 16 U.S.C. § 3801(a)(16).

— Hydrophytic vegetation is vegetation that grows in water or soil that is at least periodically deficient in oxygen during a growing season because of excess water. 16 U.S.C. § 3801(a)(9).

4. The procedures and standards used for identifying hydric soils and hydrophytic vegetation are found in 7 C.F.R. § 12.31. The standards and procedures for determining wetlands are also described in the U.S. Manual for Delineation of Wetlands, which is a federal manual developed by an interagency task force (Army Corps of Engineers, EPA, SCS and FWS) to standardize federal wetland determinations.

C. There are five classifications of wetlands under the Act and USDA regulations:

1. Natural wetlands: These are wetlands that exist in their natural state and they are protected under existing laws and regulations. Natural wetlands **cannot** be converted for agricultural use.
2. Abandoned wetlands: Under the regulations, wetlands can be abandoned after one year of non-use if the farmer intended to abandon them. Intent is the controlling issue. If a farmer does not cultivate converted wetlands for five years or more, the wetlands are presumed abandoned, and the farmer will have to rebut this presumption to show that the wetlands have not been abandoned. Abandoned wetlands are protected under existing laws and regulations and cannot be converted back to cropland after being abandoned.
3. Converted wetlands: A converted wetland is a wetland that has been drained or filled for agricultural purposes. Farmers who convert wetland to cropland after December 23, 1985, are in violation of the conservation compliance provisions and are ineligible for farm programs and federal assistance.
 - a. Under the Act and existing FmHA regulations, a farmer is not liable for conversion of wetlands unless he/she physically alters the characteristics of the wetland by physical manipulation **and** plants a commodity crop on the land. Planting a commodity crop is the critical act that sets in motion the enforcement provisions penalties. Therefore, prior to the passage of the 1990 Farm Bill, farmers could drain wetlands without penalty as long as they did not plant them.
 - b. Section 1421 of the 1990 Farm Bill covers the definition of wetlands conversion. Under the 1990 Farm Bill, the violation occurs at the time the farmer plants a commodity crop on converted wetland or at the time

the wetland was actually physically converted if the conversion **has the effect of making possible the production of a commodity crop.**

4. Farmed wetlands: Wetlands on which there has been some manipulation, such as tilling, making agricultural production possible without removing all wetland characteristics. Farmers can continue to produce agricultural commodities on farmed wetland as long as they make no further improvements and maintain agricultural production at the existing level.
 - Basically, this means that as long as farmers do not try to manipulate the land (draining or filling) and simply farm the land when the land becomes dry enough under natural conditions, the farmer can produce a commodity crop on the wetland without penalty. As long as natural conditions permit cultivation of a commodity crop without destruction to the wetlands, farming is permissible.
 5. Prior converted wetlands: Wetlands converted before December 23, 1985, are not protected under existing laws and regulations. However, ASCS must have determined that these are in fact prior converted wetlands.
 - a. The Act and FmHA regulations established a procedure for identifying prior converted wetlands. 16 U.S.C. § 3822(a) (1988); 7 C.F.R. §§ 12.5(d) and 12.33(b). Under these procedures, farmers were required to request a "commencement determination" from ASCS on or before September 19, 1988.
 - b. Presumably, farmers who failed to request a commencement determination on or before September 19, 1988, lost the right to claim a prior converted exemption on the wetland.
- D. There are several exemptions under existing laws and regulations making it possible to farm converted wetlands.
1. Prior converted wetlands: Wetlands that were converted before December 23, 1985, are exempt and therefore not protected under existing laws and regulations (provided the farmer requested a commencement determination by September 19, 1988). 16 U.S.C. § 3822(a); 7 C.F.R. §§ 12.5(d)(i) and 12.33(b).
 - a. Even though prior converted wetlands are exempt, farmers cannot bring any additional wetland into production. Therefore, farmers cannot make any further developments in their drainage systems. 7 C.F.R. § 12.5(d).

- b. Abandoned converted wetlands are protected (can be abandoned in one year with intent; presumed to be abandoned after five years of non-use).
 - c. Farmers who “commenced” activities to convert wetlands before December 23, 1985, have exempted these wetlands from existing laws and regulations. 7 C.F.R. § 12.5(d)(4). ASCS determines whether or not the farmer has “commenced” conversion of wetlands and makes this determination based on:
 - (1) Physical acts on the land to effect drainage; or
 - (2) Expenditure of substantial funds for materials or work performed to initiate a conversion project.
 - d. USDA has promulgated special rules for drainage districts. 7 C.F.R. § 12.5(d)(4). Under these rules, ASCS applies a three-part test to determine if converted wetland in a drainage district is exempt:
 - (1) Is there a project drainage plan setting out in detail the planned drainage measures that have been officially adopted by the drainage district?
 - (2) Has the district started installation of the drainage measures or legally committed substantial funds toward the conversion by entering into a contract of installation or purchase of supplies?
 - (3) Has the person applying for benefits shown that the wetland conversion was the basis of a financial obligation to the district prior to December 23, 1985, and that a specific assessment for the project of a legal obligation to pay a specific assessment was made as to the person’s wetlands, prior to December 23, 1985?
2. Farmed wetlands exemption: If agricultural production on a wetland is possible because of natural conditions such as drought and agricultural production will not destroy natural wetland characteristics, that agricultural production is exempt.
 - Applies when agricultural production on a wetland is possible with only minimal impact on the hydrological and biological aspects of the wetlands.
 3. Wetland that has been excavated for purposes such as collecting water for livestock, irrigation, fish or rice production, or flood control, is exempt.
 4. Agricultural production on a wet area created by a water delivery system or in connection with irrigation is exempt.

5. The 1990 Farm Bill allows farmers to farm converted wetlands if the farmer exchanges a restored converted wetland to mitigate the effect of the new converted wetland. (See the 1990 Farm Bill Supplement.)
 - a. The restored converted wetland must be similar in characteristics and at least equal in size to the new converted wetland.
 - b. The restored wetland must be near the new converted wetland (in the same watershed).
- E. When a farmer signs up to participate in a farm program or conservation program, he/she becomes contractually liable for certain legal obligations, including the obligation to comply with conservation laws. Farmer commit themselves to this legal obligation in several contractual documents:
 1. The farmer always signs a contract to participate in farm programs. The contract includes many terms and conditions that are legally binding. All farm program contracts incorporate the conservation enforcement provisions discussed in this outline.
 - a. ASCS/CCC program contracts have many "boilerplate" provisions, including:
 - (1) An acknowledgement that the farmer has read and understands all laws and regulations applicable to the program and agrees to strictly comply with all of these requirements;
 - (2) An acknowledgement that ASCS has the authority to change regulations and program requirements at any time, and the farmer is liable for strict compliance with future changes on regulations;
 - (3) An agreement to comply with applicable conservation requirements; and
 - (4) An agreement to pay back certain made payments in the event of a non-compliance determination.
 - b. The basic contract that the farmer signs incorporates several appendixes and addendums. In many cases, the farmer has not had a chance to review these and does not have appendixes and addendums at the time he/she signs the contract. Nevertheless, many farmers sign the contracts without looking at and understanding the contract terms and obligations contained in these documents.

2. The conservation plan that the farmer submits to SCS for approval to farm HEL also contains contract terms and conditions that are legally binding. In effect, the farmer promises to comply with the contract terms and conditions in exchange for the right to participate in farm programs and receive federal assistance.
3. Farmers who participate in farm programs and conservation programs must sign an annual conservation compliance certification form (USDA Form AD1026, Highly Erodible Land and Wetland Conversion Certification). This certification form contains the conservation enforcement provisions and commits the farmer to compliance under regulations and contract terms. Form AD1026 includes the following questions concerning the farmer's intentions:
 - a. Will the farmer produce an agricultural commodity on land that was not in production during 1981 through 1985?
 - b. Will the farmer produce any agricultural commodity on land that was a wet area, but was improved, drained, or modified or converted after December 25, 1985?
 - c. Does the farmer plan to convert any wet areas for the production of agricultural commodities this year?

If the answer to any of these questions is yes, the farmer is required to certify with SCS that the land conversion will be made pursuant to a conversion plan and that no conservation compliance violations will occur.

4. FmHA loan agreements include a promise to comply with these conservation enforcement provisions. FmHA also has authority under the Act to accept conservation easements on mortgaged property in exchange for debt relief; and the agency has the authority to place conservation easements on property which comes into inventory through debt collection. 7 U.S.C. § 1997.
5. The Agricultural Conservation Program (ACP) provides grants to farmers who are implementing a conservation plan. ACP is a cost-share assistance program. When a farmer accepts federal cost-sharing money, he/she signs a statement that includes the following provision:

If cost sharing is approved for the practice requested, I agree to refund all or part of the cost-share assistance paid to me as determined by the

local county committee, if, before the expiration of the specified practice life span, I

(a) destroy the approved practice, or

(b) voluntarily relinquish control or title to the land on which the approved practice has been established and the new owner and/or operator of the land does not agree in writing to properly maintain the practice for the remainder of its life span.

7 C.F.R. § 701.20.

- F. The farmer can ask the SCS for a highly erodible land or wetland determination by making a written request to the agency on Form AD1026. This allows the farmer to get information about HEL and wetlands prior to taking any significant actions that would jeopardize the farmer's eligibility or program benefits.
1. SCS must make its determination in writing and provide it to the farmer.
 2. Decisions will be based on information and farm records contained in the SCS office or on the basis of an on-site determination. Decisions are initially made by the district conservationist.
 3. The determination will be made if practicable within 15 days of the farmer's request.
 4. On-site determinations are required in two situations:
 - a. if the farmer disagrees with the determination made on the basis of office records; or
 - b. if adequate information is not otherwise available to the district conservationist.
 5. On-site determinations will be made as soon as possible but not later than 60 days following the request (unless site conditions are unfavorable).
- G. Farmers can appeal adverse determinations about conservation compliance.
1. The Act includes a provision that gives administrative appeal rights to any person who is adversely affected by any determination about compliance with the conservation provisions of the Act. 7 U.S.C. § 3843(a).
 2. USDA regulations provide that any person who has been or would be denied program benefits as a result of any determination by a USDA agency may

obtain a review of such determination in accordance with the appeals procedure of the agency which rendered such a determination. 7 C.F.R. § 12.12.

3. SCS and ASCS each have their own separate appeals regulations.
 - a. SCS appeals procedures are set out in 7 C.F.R. Part 614.
 - Note that USDA regulations allow farmers to appeal “any determination by SCS.” 7 C.F.R. § 12.6(c)(5). This regulation conflicts with limitations on appealable issues in 7 C.F.R. § 614.1.
 - b. ASCS appeals procedures are set out in 7 C.F.R. Part 780. Refer to materials on “Using the ASCS Appeal System” and A Lawyer’s Guide to ASCS Administrative Appeals and Judicial Review of ASCS Decisions for a detailed analysis of the ASCS appeal process.
 - c. Although there are some important differences in SCS and ASCS appeals procedures, for the most part the appeals rules and procedures are very similar.

H. How the SCS appeal system works.

1. SCS appeals regulations limit the issues that are reviewable. 7 C.F.R. § 614.1. SCS appeals regulations provide that:

Requests for reconsideration or appeals under these procedures are limited to the following determinations:

(1) Highly erodible land determinations:

- (i) the land capability classification of a field or portion thereof;
- (ii) the predicted average annual rate or erosion for a field or a portion thereof;
- (iii) the potential average annual rate of erosion for a field or a portion thereof.

(2) Wetland determinations:

- (i) the determination that a certain land is a “wetland,” as defined by the Act;
- (ii) the determination that certain land is a “converted wetland,” as defined by the Act;

(iii) the determination of whether the conversion of wetland for the production of an agricultural commodity on such converted wetland will have a minimal effect on the hydrological and biological aspects of wetland;

(iv) the determination by a conservation district, or by a designated conservationist in those areas where no conservation district exists, that a conservation system or a conservation plan should not be approved.

2. The limitations on the issues that can be review under the SCS appeals regulations may be in conflict with the conservation enforcement regulations that say any determination about the conservation compliance provisions are reviewable. 7 U.S.C. § 3843(a).
 - a. If a farmer encounters a problem with this conflict in the regulations, the farmer should argue for the broader interpretation in the regulations that any determination about conservation compliance is reviewable. (See 7 C.F.R. § 12.6(c)(5).)
 - b. This issue may have to be resolved in a judicial review action.
3. The following rules and procedures are included in the SCS appeals regulations:
 - a. SCS must notify a farmer in writing when SCS makes a determination affecting the farmer. The written determination must include the basis for making the determination, including all factors, technical criteria, or facts relied upon in making the determination. 7 C.F.R. § 614.3(a).
 - b. Any landowner or farmer who is adversely affected by a determination may request a reconsideration by the initial decision maker (usually the county conservationist). 7 C.F.R. § 614.4.
 - c. Requests for reconsideration must be made in writing and must be supported by a written statement of facts. 7 C.F.R. § 614.7(a).
 - d. Requests for reconsideration or appeals must be made within 15 days of receiving notice of the adverse determination. 7 C.F.R. § 614.6(a).
 - (1) Since the 15 days start to run when the farmer receives notice, the farmer should keep postmarked envelopes as evidence to show when the 15-day deadline started to run.
 - (2) Although it has been reported that SCS does not rigidly enforce the 15-day deadline, the farmer should not risk problems by failing to submit his/her request within the 15-day deadline.

- e. After a decision has been reconsidered by the initial decision maker at the request of the farmer, the farmer can appeal the reconsideration decision if he/she is not satisfied with it. 7 C.F.R. § 614.5.
 - (1) The request for the appeal must be written and signed and must be accompanied by a statement of facts.
 - (2) The farmer must submit the written request for an appeal within 15 days of receiving notice of the adverse reconsideration decision.
 - (3) The farmer has a right to request an informal hearing, but the farmer must expressly make this request.
- f. There are four levels of reviewability in the SCS appeals procedures.
 - (1) Redetermination of the initial decision by the initial decision maker (usually the county conservationist).
 - (2) Review of the decision by the area conservationist.
 - (3) Review of the determination by the state conservationist.
 - (4) Review of the decision by the Chief of the SCS in Washington, D.C.7 C.F.R. § 614.5.
- g. It is important to note that the appellant does not have a right to an informal hearing if the determination is appealed to the Chief of SCS in Washington, D.C. This is one of the important differences between the SCS appeals procedures and the ASCS appeals procedures (ASCS provides an informal hearing before DASCO, which is the final appeal level).
 - (1) Since the farmer will not have a face-to-face opportunity to make his case to the Chief of SCS, it is critical that the written record adequately state his case.
 - (2) It is also important to carefully put together the written record at this stage because fact determinations made by SCS may not be reviewable in a judicial review case. Therefore, it is in the interest of the farmer to present his facts in the clearest, most convincing way possible.
- h. SCS hearings are conducted informally, and the regulations state that the "hearing shall be conducted by the reviewing authority in the manner deemed most likely to obtain the facts relevant to the matter at issue." 7 C.F.R. § 614.8(b).

- (1) The regulations provide that the appellant "shall be given full opportunity to present facts and information relevant to the matter in issue and may present oral or documentary evidence." 7 C.F.R. § 614.8(b).
 - (2) The hearing officer has the discretion to permit or request testimony or evidence from other parties, and may permit the appellant to question those other parties. 7 C.F.R. § 614.8(c).
- i. At every stage of an appeal, the reviewing authority must put his/her decision in writing and include a "clear, concise statement of facts as asserted by the owner or operator and the material facts found by the reviewing authority. 7 C.F.R. § 614.8(d).
 - (1) The appellant can request a transcript of the hearing, but the appellant must pay for the cost of the transcript.
 - (2) It may be necessary for the appellant to pay for a court reporter to make a written record of the hearing.
 - j. The hearing officer can affirm, modify, or reverse any determination or remand the matter to a lower authority for further consideration. 7 C.F.R. § 614.9(b).
 - (1) The hearing officer must notify the appellant in writing of the determination and clearly set forth the basis for the determination. 7 C.F.R. § 614.9(c) and (d).
 - (2) The appellant has a right to review any evidence or documents on which the determination is based. 7 C.F.R. § 614.9(e).
 - k. The USDA has taken the position that only the person or persons who face the loss of eligibility for USDA program benefits are adversely affected and, therefore, have a right to an administrative appeal. If the USDA enforces this restriction, this issue may come to a head because many third parties are affected by conservation compliance determinations.
 - Note that National Wildlife Federation v. Agricultural Stabilization and Conservation Service is a case that dealt with the rights of third parties to appeal wetland determinations. The U.S. Court of Appeals, Eighth Circuit, determined that the National Wildlife Federation does have standing to appeal a wetlands determination.