

Farmers' Guide to Disaster Assistance

Volume 1: Emergency Conservation Program

June 2019



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Farmers' Guide to Disaster Assistance

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Volume 1: Emergency Conservation Program (ECP)

June 2019

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Emergency Conservation Program (ECP)

I. Introduction

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

ECP is a cost-share program. That means that if the farmer qualifies, he or she will be paid part of the cost of the conservation measures that are part of ECP. FSA calls these conservation measures conservation practices.

A. Two Types of Help

ECP is designed to help farmers do two types of things after a disaster.¹ First, ECP can be used to restore farmland and conservation structures that were damaged by wind and water erosion, floods, hurricanes, or other natural disasters. Second, ECP can be used to install water conservation measures during severe drought to supply water for livestock and for irrigation systems.

B. Rules that Govern the Emergency Conservation Program

The rules that govern ECP come from several places. This Guide relies on the following sources that set out the rules that control ECP and how FSA understands those rules.

First, a short federal statute authorizes the Emergency Conservation Program.²

Second, a set of FSA regulations that govern the program are found in the Code of Federal Regulations.³

Third, the FSA has a lengthy handbook that sets out details of the rules that govern the program.⁴

Fourth, FSA sometimes issues what it calls Notices that describe how ECP is to be implemented.⁵

¹ 7 C.F.R. § 701.103(a) (2019).

² See 16 U.S.C. §§ 2201-2205.

³ See 7 C.F.R. pt. 701 (2019). These rules have mainly been the same for a number of years. The last changes in the regulations came in 2010. See 75 Fed. Reg. 70,083 (2010).

⁴ The full title is FSA Handbook: Emergency Conservation Program, 1-ECP (Revision 5). This revision of the Handbook was issued on September 10, 2015. It can be found on the USDA website at: https://www.fsa.usda.gov/Internet/FSA_File/1-ecp.pdf. FSA revises parts of the Handbook from time to time. This is the fifth revision of the original ECP Handbook.

⁵ See, for example, FSA Notice ECP-79, ECP Payment Limitation and Cost-Share (C/S) Levels (May 24, 2019; expires Jan. 1, 2020).

Fifth, state FSA offices may issue handbook instructions for ECP.⁶ Those state handbook instructions may not, however, be more restrictive than the national FSA Handbook. State offices should implement ECP within national FSA policy and make sure that ECP is carried out the same way throughout the state.⁷

C. 2018 Farm Bill and ECP

The 2018 Farm Bill—technically the Agriculture Improvement Act of 2018—became law on December 20, 2018.⁸ It made some changes to the ECP program. These changes are included in this Guide. In some cases, the changes have not yet appeared in the Code of Federal Regulations or FSA Handbooks.

In general, five changes are of note.

First, Congress specifically included wildfires into the types of disasters that can trigger ECP.⁹ However, the federal regulations and the most recent USDA Handbook for ECP already included wildfires, so there should be no change in the way ECP works due to this aspect of the 2018 Farm Bill.¹⁰

Second, if a farmer is repairing or replacing fencing with ECP, the farmer may be able to receive 25 percent of the cost-share in advance.¹¹

Third, as has been the case in the past, the general rule is that ECP payments cannot be more than 75 percent of what FSA calls the farm's allowable cost.¹² The new Farm Bill, however, says that up to 90 percent of the cost can be covered for some socially disadvantaged farmers or ranchers, limited resource farmers or ranchers, or beginning farmers or ranchers.¹³ FSA has implemented this change, in part, in a recent Notice.¹⁴

Fourth, the ECP payment for a single event cannot be more than 50 percent of the agricultural value of the land.¹⁵

⁶ ECP Handbook, page 1-6, para. 11.C (Sept. 10, 2015).

⁷ ECP Handbook, page 1-28, para. 22.A (Sept. 10, 2015).

⁸ Agriculture Improvement Act of 2018, Pub. L. No. 115-334 (2018).

⁹ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(a)(1)(A) (2018) (to be codified at 16 U.S.C. § 2201(a)).

¹⁰ 7 C.F.R. § 701.2(b), "Natural disaster" (2019); ECP Handbook, Exhibit 2, page 4, "Natural Disaster" (Sept. 10, 2015).

¹¹ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(a)(1)(C) (2018) (to be codified at 16 U.S.C. § 2201(b)(1)).

¹² Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(b) (2018) (to be codified at 16 U.S.C. § 2202(a)).

¹³ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(b) (2018) (to be codified at 16 U.S.C. § 2202(b)).

¹⁴ FSA Notice ECP-79, ECP Payment Limitation and Cost-Share (C/S) Levels (May 24, 2019; expires Jan. 1, 2020).

¹⁵ 7 U.S.C. § 2279(e)(1)-(2); Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(b) (2018) (to be codified at 16 U.S.C. § 2202(c)).

Fifth, a farmer cannot receive more than \$500,000 from ECP.¹⁶ FSA has implemented this change, in part, in a recent Notice.¹⁷

II. ECP Funding Availability—and Possible Unavailability

If a natural disaster strikes, chances are good that ECP will be available to farmers once an official disaster declaration is made for the area. If a disaster declaration has been made, and ECP is not available, it will be due to one of two possibilities. First, Congress may not have provided enough money to fund the program. Second, even if Congress has provided money, FSA may have decided not to implement the program in that county.

A. Congress and Money for ECP

ECP availability depends on Congress to set aside funds for the program.¹⁸ In 2018, for example, Congress appropriated 400 million dollars for ECP for 2017 hurricane and fire disasters.¹⁹ Sometimes, however, it could be the case that there is a disaster in the farmer's county, and the farmer meets all of the requirements for the program, but Congress has not approved the money needed.²⁰ Or, it could be that the money runs low and the farmer will receive less money than would otherwise have been the case.²¹

B. Deciding to Make ECP Available

ECP is offered and run through local FSA offices, and it is the local office that must make ECP available in that county.²² The local FSA office is responsible for assessing the damage caused by a disaster, reviewing the losses, and creating a map with damaged areas shown.²³ It will also decide which ECP practices will be needed to address the damage. The state and national office of FSA then approve the availability of ECP.²⁴ If funds are

¹⁶ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(c) (2018) (to be codified at 16 U.S.C. § 2202b).

¹⁷ FSA Notice ECP-79, ECP Payment Limitation and Cost-Share (C/S) Levels (May 24, 2019; expires Jan. 1, 2020).

¹⁸ This point is made many times in the rules. See 7 C.F.R. §§ 701.1(a), 701.103(a) (2019).

¹⁹ See William L. Painter, Congressional Research Services, 2017 Disaster Supplemental Appropriations: Overview, page 5 (March 20, 2018), available at: <https://fas.org/sgp/crs/homesec/R45084.pdf>.

²⁰ 7 C.F.R. § 701.16(b)(1) (2019); ECP Handbook, page 1-2, para. 2.C (Sept. 10, 2015).

²¹ ECP Handbook, page 1-2, para. 2.C (Sept. 10, 2015).

²² 7 C.F.R. § 701.1(b) (2019). Significant authority in running the program remains with the national FSA office. See 7 C.F.R. § 701.1(e), (g) (2019).

²³ ECP Handbook, pages 6-2 and 6-3, para. 151.A, Exhibit 2, page 2, "Emergency designation" (Sept. 10, 2015).

²⁴ ECP Handbook, pages 6-4 to 6-6, para. 151.C-G (Sept. 10, 2015). For disasters that damage farmland, FSA will be looking to see if new conservation problems created by the disaster result in damage that will be unusual in character and must not be the type of damage that would occur often in the same areas. FSA will want to make certain that the disaster affects the productive capacity of the land or water, that the damage will impair or endanger the land if not treated, and be so costly to rehabilitate that federal aid is required to return the land to productive use. The type and extent of individual farm damage is the primary consideration for ECP eligibility. The number of farms affected is not the primary question. ECP may be implemented on a single farm

available for ECP they will be allocated accordingly, but it may be that there are no funds available.²⁵

III. Sign-Up Period

If the availability of ECP is approved, FSA will set a sign-up period. FSA must inform and educate farmers about ECP using press releases, radio, newspapers, and flyers.²⁶ The sign-up must be at least thirty calendar days but may not be more than sixty calendar days.²⁷

Extension of sign-up periods are possible.²⁸ FSA must believe that there is “adequate justification” of an extension. FSA does not define adequate justification, but it gives two examples.

First, it would be adequate justification to extend the application period if the county remains in a D3 drought condition when ECP is implemented for a drought.²⁹

Second, it would be adequate justification to extend the deadline if the extent of the damage in the county was so widespread that the length of the sign-up period was not enough for FSA to accommodate all potential applicants.³⁰ The local FSA office must have a reasonable expectation that there will be additional sign-ups.

IV. Natural Disaster Required

A natural disaster is required before ECP can be made available to farmers. A natural disaster, for the purposes of ECP, includes most things people would think of as natural disasters—wildfires, hurricanes or excessive winds, drought, ice storms, blizzards, floods, and other naturally-occurring resource impacting events as determined by FSA.³¹

How a disaster is declared and how ECP becomes available in a county is discussed below.

if the FSA decides it is justified. For droughts, FSA will look to see that a severe drought has occurred. If available, FSA will use other funds before it uses ECP fund.

²⁵ ECP Handbook, page 6-3, para. 151.A (Sept. 10, 2015).

²⁶ ECP Handbook, page 6-1, para. 150.B, Exhibit 13, pages 1-2 (Sept. 10, 2015).

²⁷ ECP Handbook, page 6-9, para. 153.A (Sept. 10, 2015).

²⁸ ECP Handbook, page 6-9, para. 153.A (Sept. 10, 2015).

²⁹ ECP Handbook, page 6-9, para. 153.A (Sept. 10, 2015).

³⁰ ECP Handbook, page 6-9, para. 153.A (Sept. 10, 2015).

³¹ 7 C.F.R. § 701.2 “Natural disaster” (2019). According to the FSA Handbook, natural disasters are disasters “that are naturally caused.” They include hurricanes and typhoons; high winds, including microbursts; storms, including ice storms; floods; high water; wind-driven water; tidal waves; earthquakes; volcanic eruptions; landslides; mudslides; severe snowstorms; drought; wildfire by lightning; explosions; and “other natural phenomena.” ECP Handbook, Exhibit 2, page 4, “Natural disaster” (Sept. 10, 2015). The 2018 Farm Bill added wildfires to the list of ECP-eligible natural disasters. The federal statute now says that ECP can be used on farmland damaged by wind erosion, floods, hurricanes, wildfires, or other natural disasters. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(a)(1) (2018) (to be codified at 16 U.S.C. § 2201(a)).

V. Conservation Problems that Qualify for ECP

Two types of conservation problems qualify for ECP assistance. FSA can implement ECP when either: (1) a disaster or wind erosion creates new farmland conservation problems, or (2) severe drought requires emergency water conservation and enhancement measures.³²

These two possibilities are discussed below.

A. New Conservation Problems Created by Disaster or Wind Erosion

FSA may implement ECP when a natural disaster or wind erosion creates new conservation problems on farmland.³³ There are several factors that go into determining whether the conservation problem was created by a disaster or wind erosion. These factors are described below.

1. Conservation Problem Must Be New

FSA regulations emphasize that the conservation problems must be new.³⁴ Problems that existed before the disaster are not eligible.³⁵

2. Conservation Problem Caused by Disaster

The conservation problem must have been caused as a result of the natural disaster or wind erosion.³⁶

3. Must Impair or Endanger Land

ECP is available only when the conservation problem, if not treated, will impair or endanger the land.³⁷

4. Must Materially Affect Productive Capacity

In order to trigger eligibility for ECP, a conservation problem must “materially” affect the productive capacity of the land.³⁸

5. Must Be of Unusual Character—Except Wind Erosion

ECP is only available to address damage from conservation problems that are unusual in character.³⁹ In general, this means the conservation problem must be of the type

³² 7 C.F.R. § 701.103(a) (2019); ECP Handbook, page 1-2, para. 2.B (Sept. 10, 2015).

³³ 7 C.F.R. § 701.103(a) (2019); ECP Handbook, page 2-21, para. 42.A (Sept. 10, 2015).

³⁴ 7 C.F.R. § 701.105(a)(1) (2019).

³⁵ 7 C.F.R. § 701.105(a)(1)(iv) (2019).

³⁶ 7 C.F.R. § 701.105(a)(1) (2019); ECP Handbook, page 6-4, para. 151.C (Sept. 10, 2015).

³⁷ 7 C.F.R. § 701.105(a)(1)(i) (2019); ECP Handbook, page 6-4, para. 151.C (Sept. 10, 2015).

³⁸ 7 C.F.R. § 701.105(a)(1)(ii) (2019); ECP Handbook, page 6-4, para. 151.C (Sept. 10, 2015).

“Materially” is not defined by FSA, but should probably be taken to mean that it has an influence or effect on the productivity of the land. See Black’s Law Dictionary, “Material” (4th ed. 1951).

³⁹ 7 C.F.R. § 701.105(a)(1)(iii) (2019); ECP Handbook, page 6-4, para. 151.C (Sept. 10, 2015).

that would not occur frequently in the same area. However, there is an exception for wind erosion, and problems caused by wind erosion can be eligible even if the wind erosion is likely to occur frequently.

6. Assistance Must Be Needed to Restore the Land

To be eligible for ECP, the damage must be so severe that it would be too costly for the farmer to rehabilitate without federal assistance.⁴⁰ The ECP resources must be needed to return the land to productive agricultural use or to provide emergency water for livestock.⁴¹

B. Water Measures During Severe Drought

FSA may authorize the use of ECP during “severe drought” to carry out emergency water conservation and water enhancement measures.⁴² Severe drought is defined by FSA for this purpose.⁴³ The definition has two parts. First, in order to have a severe drought, “available water from current sources being used for livestock or orchards and vineyard irrigation” must have been “reduced below normal.” Second, survival of the livestock, orchards, or vineyard must be “unlikely without additional water.”

In general, for a drought to qualify for ECP, a county will need to have levels of precipitation at least 40 percent less than normal for the last four months, as well as for all days in the current month.⁴⁴ If, however, the county has been designated as having a level “D3 Drought Extreme” by the U.S. Drought Monitor, the precipitation data is not needed.

VI. Conservation Practices That May be Funded with ECP—General Rules

ECP regulations and policies limit the scope and, to a certain extent, type of conservation practice that will be authorized.⁴⁵

A. Only the Minimum Needed to Address Need

To be eligible for ECP, the conservation practice specifications must represent the minimum levels of performance required to address the qualifying need.⁴⁶

⁴⁰ 7 C.F.R. § 701.105(a)(1)(iv) (2019); ECP Handbook, page 1-2, para. 2.C (Sept. 10, 2015).

⁴¹ 7 C.F.R. §§ 701.105(a)(1)(iv), 701.110(a) (2019); ECP Handbook, page 6-4, para. 151.C (Sept. 10, 2015).

⁴² 7 C.F.R. § 701.103(c)(1) (2019). 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. ECP Handbook, page 6-6, para. 151.F (Sept. 10, 2015).

⁴³ ECP Handbook, page 6-6, para. 151.F, Exhibit 2, page 4, “Severe drought” (Sept. 10, 2015).

⁴⁴ ECP Handbook, page 6-6, para. 151.F (Sept. 10, 2015).

⁴⁵ 7 C.F.R. § 701.112 (2019).

⁴⁶ 7 C.F.R. § 701.112(d) (2019); ECP Handbook, page 2-22, para. 42.C (Sept. 10, 2015).

B. Restore to Pre-disaster Condition and Function

ECP cost-share funds can be used to replace or restore farmland, fences, or conservation structures to the condition and function similar to that existing before being damaged or destroyed by the natural disaster.⁴⁷

C. NRCS Standards and Specifications

The conservation practices funded by ECP must meet minimum performance “standards and specifications” set by the Natural Resources Conservation Service (NRCS).⁴⁸ This places two kinds of limits on the use of cost-share funds. First, the practice must meet the minimum performance needed to resolve the problem. Second, the cost-share funds are limited to restoring the structure and other installations to NRCS technical standards and specifications.⁴⁹

In general, ECP participants must pay the additional cost incurred to improve land and structures beyond the minimum NRCS technical standards and specifications.⁵⁰

D. Safety of Structure

In some cases, restoring a structure to its pre-disaster condition would not meet current NRCS standards and specifications.⁵¹ The structure then might present a hazard to human habitation downstream or be unable to withstand a similar, future disaster event. As a result, structures must be restored to meet minimum NRCS standards and specifications.

VII. Conservation Practices are Authorized By ECP: Eight Types of Practices

In general, eight different types of conservation practices are allowed for ECP cost share. They are: (1) debris removal; (2) grading, shaping, or leveling land; (3) restoring permanent fences; (4) restoring structures and installations; (5) emergency wind control; (6) drought emergency measures; (7) windbreaks and shelterbelts; and (8) other emergency conservation measures.

Approved conservation practices vary somewhat with the type of disaster. The following sections discuss those practices and what is required for each of them.

A. Debris Removal from Farmland

Debris removal is a possible use of ECP funds.⁵² In general, this means removing debris from farmland that was deposited by a natural disaster. Several rules apply to debris removal.

⁴⁷ 7 C.F.R. § 701.112(a) (2019); ECP Handbook, page 2-21, para. 42.A (Sept. 10, 2015).

⁴⁸ ECP Handbook, page 2-21, para. 42.A (Sept. 10, 2015).

⁴⁹ ECP Handbook, page 2-21, para. 42.A (Sept. 10, 2015).

⁵⁰ ECP Handbook, page 2-21, para. 42.A (Sept. 10, 2015).

⁵¹ ECP Handbook, page 2-21, para. 42.B (Sept. 10, 2015).

⁵² ECP Handbook, Exhibit 12, EC1, page 4 (Sept. 10, 2015).

1. What Kind of Debris

The debris left by the natural disaster can include woody material, sand, rock, trash, and personal property.⁵³ The debris may have been left by either wind or water.

2. Debris Deposited by Disaster

ECP funds may be used to remove debris only if that debris was deposited by the disaster.⁵⁴

3. Debris Interferes with Farming

The debris must interfere with normal farming operations.⁵⁵ It must also “materially affect” the productive capacity of the land.⁵⁶ And the debris must prevent the land from returning to productive agricultural use. The debris must also prevent the farmer from carrying out effective conservation measures.⁵⁷

4. Need Labor and Equipment Beyond Normal

The debris must be significant enough that labor—either hired or the farmer’s—is required for its removal.⁵⁸ The additional labor must not be needed in the normal operation of the farm or ranch, and any equipment needed to remove the debris must not normally be needed in operating of the farm or ranch.

5. Removed from Various Land and Roadways

Debris may be removed from farmland, farmsteads, and access roadways on the farm when it could significantly interfere with normal farming operations.⁵⁹ By farmland, FSA means both cropland and noncropland.⁶⁰

6. Removal Returns to Agricultural Use

Removing the debris must return the land to agricultural use.⁶¹

⁵³ ECP Handbook, Exhibit 12, EC1.A, page 2 (Sept. 10, 2015).

⁵⁴ ECP Handbook, Exhibit 12, EC1.A, page 2 (Sept. 10, 2015).

⁵⁵ ECP Handbook, Exhibit 12, EC1.C, page 3, and page 5-29, para. 112.D (Sept. 10, 2015). Removing debris that will not interfere with normal farming operations is not allowed as a use of cost-share funds.

⁵⁶ ECP Handbook, exhibit 12, EC1.C, page 3 (Sept. 10, 2015).

⁵⁷ ECP Handbook, Exhibit 12, EC1.C, page 3 (Sept. 10, 2015). This rule is somewhat unclear. It may be the case that if the debris affects production on the land but does not affect conservation measures, the land is still eligible.

⁵⁸ ECP Handbook, Exhibit 12, EC1.C, page 3 (Sept. 10, 2015).

⁵⁹ ECP Handbook, Exhibit 12, EC1.B, C, pages 2-3 (Sept. 10, 2015).

⁶⁰ ECP Handbook, Exhibit 2, page 2, “Farmland” (Sept. 10, 2015). Farmland is land devoted to agricultural production. This can include aquaculture. 7 C.F.R. § 701.2, “Farmland” (2019).

⁶¹ ECP Handbook, Exhibit 12, EC1.A, page 2 (Sept. 10, 2015).

7. Method of Removal

A variety of removal methods are allowed by FSA and they generally fit with what most people would do to remove debris.⁶² Methods can include, for example, carrying debris by hand and dragging it with light equipment. Excavation, burning, chipping, shredding, hauling, and burying at approved locations are also allowed.

8. Debris Disposal

Debris must be disposed of in a way that will not interfere with existing conservation facilities, nor create a health hazard or an environmental problem, whether on or off-site.⁶³

Recycling or reuse of materials should be considered “as a first option” for disposing of material.⁶⁴ For example, it may be that woody debris can be recycled into mulch.

9. Environmental and Other Possible Specifications

An environmental evaluation is required for debris removal.⁶⁵ In addition, when FSA approves of debris removal as a conservation practice, it may add other details to the requirements. FSA might say only certain kinds of debris can be removed, for example, or add rules about how to dispose of the debris.⁶⁶

10. Maintained for One Year

Debris removal must be maintained for at least one year after the removal is completed.⁶⁷

11. Payment Rates

The ECP payment rate will be expressed as a certain percentage of the actual total cost and will say the cost cannot be more than a certain dollar amount per unit of measure.⁶⁸

B. Grading, Shaping, or Leveling Land

ECP funds may be used to grade, shape, or level land.⁶⁹ Similar measures may also qualify for ECP funds. Several rules apply to grading, shaping, or leveling land.

⁶² ECP Handbook, Exhibit 12, EC1.A, page 2 (Sept. 10, 2015).

⁶³ ECP Handbook, Exhibit 12, EC1.C, page 3 (Sept. 10, 2015).

⁶⁴ ECP Handbook, Exhibit 12, EC1.A, page 2 (Sept. 10, 2015).

⁶⁵ ECP Handbook, page 6-34, para. 162.B, Exhibit 12, EC1.B, page 2 (Sept. 10, 2015).

⁶⁶ ECP Handbook, Exhibit 12, EC1.F, page 4 (Sept. 10, 2015).

⁶⁷ ECP Handbook, Exhibit 12, EC1.E, page 4 (Sept. 10, 2015).

⁶⁸ ECP Handbook, Exhibit 12, EC1.D, page 4 (Sept. 10, 2015). Specifically, the payment rate looks as follows: “_____percent of actual cost not to exceed \$_____ per unit of measure.”

⁶⁹ ECP Handbook, Exhibit 12, EC2.A, page 5 (Sept. 10, 2015).

1. For Land Damaged by Disaster

The land must have been damaged by flood, hurricane, or other eligible natural disasters.⁷⁰

2. Return Land to Agricultural Use

The grading, shaping, or leveling must return the land to agricultural use.⁷¹

3. Lifespan—Ten Years

The practice must be maintained for at least ten years after the calendar year in which it is installed.⁷² Over that period, FSA may spot check to be sure that the practice is maintained and being used for its designed purpose.⁷³

4. Examples of Things Covered and Not Covered

FSA gives a number of examples of things that might be funded.⁷⁴

a. Gullies—Covered for Grading, Shaping, Filling

Gullies created by the disaster may be graded, shaped, and filled with ECP cost-share funds.⁷⁵

b. Relevel Irrigated Land—Sometimes Covered

Releveling of previously level irrigated farmland can sometimes be covered under ECP.⁷⁶ Releveling of irrigated land does not qualify if it counts as “floating” or “land planning.”⁷⁷

c. Ponding Caused by Disaster—Covered

Humps, ridges, and depressions that cause water to pond on the surface may be removed with ECP cost-share funding.⁷⁸

⁷⁰ ECP Handbook, Exhibit 12, EC2.A, page 5 (Sept. 10, 2015).

⁷¹ ECP Handbook, Exhibit 12, EC2.A, page 5 (Sept. 10, 2015).

⁷² ECP Handbook, Exhibit 12, EC2.E, page 6 (Sept. 10, 2015).

⁷³ ECP Handbook, Exhibit 2, page 2, “Lifespan of a Practice” (Sept. 10, 2015). A lifespan begins January 1 after the calendar year in which the practice is installed.

⁷⁴ ECP Handbook, Exhibit 12, EC2.C, page 5 (Sept. 10, 2015).

⁷⁵ ECP Handbook, Exhibit 12, EC2.C, page 5 (Sept. 10, 2015).

⁷⁶ ECP Handbook, Exhibit 12, EC2.C, pages 5-6 (Sept. 10, 2015).

⁷⁷ These terms are not defined. In general, land planning is smoothing the land surface with a land plane to remove minor irregularities without changing the general topography. Land floating is a practice that is designed to conserve water in irrigation.

⁷⁸ ECP Handbook, Exhibit 12, EC2.C, page 5 (Sept. 10, 2015).

d. Sand and Silt Incorporation—Covered

Sand and silt that was deposited on the land by the disaster may be incorporated into the soil with ECP cost-sharing funds.⁷⁹

e. Reestablish Permanent Vegetative Cover – Sometimes Covered

ECP funds may be used to reestablish vegetative cover in some cases.⁸⁰ The following three things must be true, however. First, the grading and shaping must be required for rehabilitation of the area. Second, preexisting permanent vegetative cover must have been destroyed by the disaster. Third, if the cover were not reestablished, it must be true that the area involved would be subject to critical wind or water erosion.

Vegetative cover, however, is not covered if there was no vegetative cover on the land before the disaster.⁸¹

f. Normal Farming Operations—Not Covered

Measures that are performed in connection with normal farming operations are not covered under ECP.⁸²

g. Roadways and Field Roads—Not Covered

Repairing and restoring roads, including field roads, is not covered by ECP, even if such actions are required to correct damage to the land.⁸³

5. Payment Rates

The ECP payment rate will be expressed as a certain percentage of the actual total cost and will say the cost cannot be more than a certain dollar amount per unit of measure.⁸⁴

C. Restoring Permanent Fences

ECP funds may be used to restore permanent fences that were damaged by natural disasters.⁸⁵ The following rules apply.

⁷⁹ ECP Handbook, Exhibit 12, EC2.C, page 5 (Sept. 10, 2015).

⁸⁰ ECP Handbook, Exhibit 12, EC2.C, page 5 (Sept. 10, 2015).

⁸¹ ECP Handbook, Exhibit 12, EC2.C, page 6 (Sept. 10, 2015). This is true even if grading and shaping is required to correct damage to the same land.

⁸² ECP Handbook, Exhibit 12, EC2.C, page 6 (Sept. 10, 2015).

⁸³ ECP Handbook, Exhibit 12, EC2.C, page 6 (Sept. 10, 2015).

⁸⁴ ECP Handbook, Exhibit 12, EC2.D, page 6 (Sept. 10, 2015). Specifically, the payment rate looks as follows: “_____ percent of actual cost not to exceed \$_____ per unit of measure.”

⁸⁵ ECP Handbook, Exhibit 12, EC3, page 7 (Sept. 10, 2015).

1. Only Permanent Fences

Only permanent fences may be repaired or replaced with ECP cost-share funds. FSA defines “eligible permanent farm fencing” as a “permanent barrier recognized within the county as a farm fence built to control livestock.”⁸⁶

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 under the ECP definition. This argument should be especially compelling since rotational grazing has conservation benefits as a production method.

2. Fence has Agricultural Purpose

Fences must be used for agricultural purposes.⁸⁷ For FSA, this appears to mean that the fence must be for the purpose of keeping livestock in or out or keeping wildlife out of agricultural land. The alternative, what FSA calls “ornamental fences,” are not eligible.

3. Destroyed or Seriously Damaged

To be eligible for ECP cost-share assistance, the farm fence must have been destroyed or seriously damaged by the disaster.⁸⁸ Simple reconstruction of a fence with minor damage, when materials from the previous fence are used, is also allowed.⁸⁹

4. Must Restore Fence to Previous Condition and Function

Cost-share funds must be used to restore the fence to a condition and function that is similar to that of the fence before the disaster.⁹⁰ The function, according to FSA, is more important than the type of fence. So, it is more important that the fence have the same function (such as keeping cattle in a pasture), than be of the same type (such as barbed wire). Accordingly, a barbed wire fence may be replaced by a different kind of fence, such as high tensile wire or woven wire.

5. Standards and Specifications

The fence must meet NRCS standards and specifications.⁹¹ These could include requirements for size and type of posts and wire, spacing, bracing, and placement.

⁸⁶ ECP Handbook, Exhibit 2, page 2, “Eligible permanent farm fence” (Sept. 10, 2015).

⁸⁷ ECP Handbook, Exhibit 12, EC2.B, C, pages 7-8 (Sept. 10, 2015).

⁸⁸ ECP Handbook, Exhibit 12, EC2.B, page 7 (Sept. 10, 2015).

⁸⁹ ECP Handbook, Exhibit 12, EC3.C, page 8 (Sept. 10, 2015). The value of material that can be reused from the damaged fence is not an ECP cost-share item that is allowed.

⁹⁰ ECP Handbook, Exhibit 12, EC3.B, page 7 (Sept. 10, 2015).

⁹¹ ECP Handbook, Exhibit 12, EC3.B, page 7, EC3.F, page 10 (Sept. 10, 2015).

6. Factors FSA will Consider When Approving Fence Restoration

FSA must consider the following when deciding whether to approve fence restoration under ECP.⁹²

a. Livestock Fence?

Was the fence used to exclude or enclose livestock?⁹³ It appears that these fences will receive a priority.

b. Exclude Wildlife?

Was the fence used to exclude wildlife from agricultural land?⁹⁴ It appears these fences will receive a priority.

c. Type of Fence?

What was the type of fence before the disaster?⁹⁵ Although not explained by FSA, this probably refers to whether the fence was made of barbed wire, or was made of woven wire, and so forth. The rule probably means that FSA would prefer that the type of fence remain the same. As noted above, however, FSA rules put more emphasis on the use of the fence than how it is made.

d. Agricultural Function?

What was the agricultural function of the fence before the disaster?⁹⁶ This seems to suggest that some agricultural functions will be more important to FSA than others, but it is not clear how or why. FSA may also be trying to get at any differences between the use of the fence before and after the disaster.

e. Extent of Damage?

What was the extent of damage to the fence?⁹⁷ It seems likely that the more the damage, the more likely it is that FSA will offer ECP cost-share assistance.

7. Lifespan—Ten Years

The fence must be maintained for at least ten years after the calendar year in which it is installed.⁹⁸ Over that period, FSA may spot check to be sure the practice is maintained and being used for its designed purpose.⁹⁹

⁹² ECP Handbook, Exhibit 12, EC2.B, page 7 (Sept. 10, 2015).

⁹³ ECP Handbook, Exhibit 12, EC2.B, page 7 (Sept. 10, 2015).

⁹⁴ ECP Handbook, Exhibit 12, EC2.B, page 7 (Sept. 10, 2015).

⁹⁵ ECP Handbook, Exhibit 12, EC2.B, page 7 (Sept. 10, 2015).

⁹⁶ ECP Handbook, Exhibit 12, EC2.B, page 7 (Sept. 10, 2015).

⁹⁷ ECP Handbook, Exhibit 12, EC2.B, page 7 (Sept. 10, 2015).

⁹⁸ ECP Handbook, Exhibit 12, EC3.E, page 9 (Sept. 10, 2015).

⁹⁹ ECP Handbook, Exhibit 2, page 2, "Lifespan of a Practice" (Sept. 10, 2015). A lifespan being January 1 after the calendar year in which the practice is installed.

8. Examples of Eligible Fences

Examples of fences that FSA says would be eligible include: fencing used to keep livestock in or wildlife out; cross fences; boundary fences; and cattle gates.¹⁰⁰ A fence may be eligible if it is needed to return the land to productive agricultural use.¹⁰¹

9. Payment Rate

The ECP payment rate will be expressed as a certain percentage of the actual total cost and will say the cost cannot be more than a certain dollar amount per unit of measure.¹⁰²

10. Possible 25 Percent of Cost Up Front—New With 2018 Farm Bill

In general, ECP provides a cost-share payment after the farmer completes the conservation practice.

The 2018 Farm Bill, however, says that for repairing or replacing fences it is possible for the farmer to receive 25 percent of the cost-share payment up front.¹⁰³ The 25 percent is based on the fair market value of the expected cost of the repair or replacement. USDA makes this estimate.

If cost-share funds are advanced to the farmer, they must be spent within sixty days after the farmer receives the funds.¹⁰⁴ If not, the funds must be returned.¹⁰⁵

This change has not yet been implemented by FSA in the Code of Federal Regulations, a Handbook, or a Notice.

D. Restoring Conservation Structures and Installations

ECP funds may be used to restore conservation structures and other installations.¹⁰⁶ As described below, several rules apply.

1. Seriously Damaged

Conservation measures and other installations must have been “seriously damaged” by the approved disaster to receive cost-share assistance.¹⁰⁷

¹⁰⁰ ECP Handbook, Exhibit 12, EC3.C, page 8 (Sept. 10, 2015).

¹⁰¹ ECP Handbook, Exhibit 12, EC3.C, page 8 (Sept. 10, 2015).

¹⁰² ECP Handbook, Exhibit 12, EC3.D, page 9 (Sept. 10, 2015). Specifically, the payment rate looks as follows: “_____ percent of actual cost not to exceed \$_____ per unit of measure.”

¹⁰³ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(a)(1)(C) (2018) (to be codified at 16 U.S.C. § 2201(b)(1)).

¹⁰⁴ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(a)(1)(C) (2018) (to be codified at 16 U.S.C. § 2201(b)(2)).

¹⁰⁵ They must be returned within a “reasonable timeframe” that will be set by FSA. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(a)(1)(C) (2018) (to be codified at 16 U.S.C. § 2201(b)(2)).

¹⁰⁶ ECP Handbook, Exhibit 12, EC4.A, page 11 (Sept. 10, 2015).

¹⁰⁷ ECP Handbook, Exhibit 12, EC4.B, page 11 (Sept. 10, 2015).

2. Lifespan

The conservation structure and other installations, including permanent vegetative cover when restored to specification, must be maintained for at least ten years.¹⁰⁸ Over that period, FSA may spot check to be sure that the practice is maintained and being used for its designed purpose.¹⁰⁹

3. Poor Maintenance

FSA may deduct the cost of restoration work that was caused by lack of maintenance.¹¹⁰ This can include, for example, failure to clean or failure to maintain the structure or installation before the disaster.

4. Possibly Other Specifications

The practice must meet any other specifications that FSA may require.¹¹¹

5. Types of Structures and Installations

FSA examples of authorized practices for restoration with ECP funds include the following. Several activities or structures are not eligible even though they seem close to the sort of things that are approved.

a. Springs, Dams, Ponds, Wells

In general, dams, ponds, and other water impoundments for agricultural uses can be restored with ECP funds.¹¹² Wells and springs are also eligible.

Irrigation wells, however, are not eligible.¹¹³

b. Means of Moving Water

A variety of water-moving mechanisms may be restored with ECP funds.¹¹⁴ These include: sod waterways, installed open or closed drainage systems, diversions or spreader ditches, structures for protecting water channels, pipelines, buried mainlines, and ditches and other permanently installed systems.

Some water-moving systems—such as wheel move systems, hand move systems, and center pivot systems—are not eligible.¹¹⁵

¹⁰⁸ ECP Handbook, Exhibit 12, EC4.E, page 12 (Sept. 10, 2015).

¹⁰⁹ ECP Handbook, Exhibit 2, page 2, “Lifespan of a Practice” (Sept. 10, 2015). A lifespan begins January 1 after the calendar year in which the practice is installed.

¹¹⁰ ECP Handbook, Exhibit 12, EC4.A, page 11 (Sept. 10, 2015).

¹¹¹ ECP Handbook, Exhibit 12, EC4.F, page 12 (Sept. 10, 2015).

¹¹² ECP Handbook, Exhibit 12, EC4.C, page 11 (Sept. 10, 2015).

¹¹³ ECP Handbook, Exhibit 12, EC4.C, page 12 (Sept. 10, 2015).

¹¹⁴ ECP Handbook, Exhibit 12, EC4.C, page 11 (Sept. 10, 2015).

¹¹⁵ ECP Handbook, Exhibit 12, EC4.C, page 12 (Sept. 10, 2015).

c. Terraces

Terrace systems can be restored or repaired with ECP funds.¹¹⁶

d. Windmill and Solar for Livestock Water

Windmills or solar units that provide water for livestock, and which were damaged by wildfire, may be restored or repaired with cost-share funds.¹¹⁷

e. Vegetative Cover

Permanent vegetative cover can be eligible for restoration.¹¹⁸ Restoration of vegetative cover may be in conjunction with the re-establishment of other eligible structures or installations needed to prevent critical erosion or siltation.

f. Lagoons

Lagoons that collect animal waste may be repaired or replaced if they are outside the 100-year floodplain.¹¹⁹ Lagoons within a 100-year flood plain are not eligible.¹²⁰

g. Silt Removal—Not Covered

Silt removal is not eligible as a restoration of a structure or installation.¹²¹

h. Motors, Portable Pumps, and Portable Pipes—Not Covered

Restoration of motors, portable pumps, and portable pipes are not covered for restoration or repair with ECP cost share.¹²²

i. Roadways —Not Covered

Restoration of roadways, including field roads, is not an eligible use of cost-share funds.¹²³

¹¹⁶ ECP Handbook, Exhibit 12, EC4.C, page 11 (Sept. 10, 2015).

¹¹⁷ ECP Handbook, Exhibit 12, EC4.C, page 11 (Sept. 10, 2015).

¹¹⁸ ECP Handbook, Exhibit 12, EC4.C, page 11 (Sept. 10, 2015).

¹¹⁹ ECP Handbook, Exhibit 12, EC4.C, page 11 (Sept. 10, 2015).

¹²⁰ ECP Handbook, Exhibit 12, EC4.C, page 12 (Sept. 10, 2015).

¹²¹ ECP Handbook, Exhibit 12, EC4.C, page 12 (Sept. 10, 2015).

¹²² ECP Handbook, Exhibit 12, EC4.C, page 12 (Sept. 10, 2015).

¹²³ ECP Handbook, Exhibit 12, EC4.C, page 12 (Sept. 10, 2015).

6. Payment Rates

The ECP payment rate will be expressed as a certain percentage of the actual total cost and will say the cost cannot be more than a certain dollar amount per unit of measure.¹²⁴

E. Emergency Wind Erosion Control

ECP funds may be used for emergency wind erosion control measures.¹²⁵ The following rules apply.

1. Serious Wind Erosion Required

ECP funds are possible for emergency wind erosion control when farmland is subjected to serious wind erosion.¹²⁶ The erosion must have been caused by either an extended period of insufficient moisture, or crop residue or stubble that is not adequate to protect the land.

2. Conservations Practices Possible

Contour or cross slope chiseling is a possible conservation practice for controlling wind erosion.¹²⁷ If chiseling is not practical to perform on the contour or on the cross slope, deep plowing or other similar measures that bring subsoil clods to the surface are allowed.

ECP cost-share support is not available for measures that would be considered part of normal farming operations.¹²⁸ For example, the preparation of a seedbed for the next crop is not an allowed use for cost-share funds.

3. Specifications

FSA specifications for the practice are likely to include things like the implement the farmer must use, the depth and spacing of the tillage, and whether other tillage measures will be required.¹²⁹

¹²⁴ ECP Handbook, Exhibit 12, EC4.D, page 12 (Sept. 10, 2015). Specifically, the payment rate looks as follows: “_____percent of actual cost not to exceed \$_____ per unit of measure.” This will be based on the average cost of performing the unit of measure.

¹²⁵ ECP Handbook, Exhibit 12, EC5.B, page 13 (Sept. 10, 2015).

¹²⁶ ECP Handbook, Exhibit 12, EC5.B, page 13 (Sept. 10, 2015).

¹²⁷ ECP Handbook, Exhibit 12, EC5.C, page 13 (Sept. 10, 2015).

¹²⁸ ECP Handbook, Exhibit 12, EC5.C, page 13 (Sept. 10, 2015).

¹²⁹ ECP Handbook, Exhibit 12, EC5.E, page 14 (Sept. 10, 2015).

4. Payment Rates

The ECP payment rate will be expressed as a certain percentage of the actual total cost and will say the cost cannot be more than a certain dollar amount per unit of measure.¹³⁰

F. Drought Emergency Measures

ECP funds may be used for drought emergency measures. In general, for ECP purposes, this means a conservation practice that provides water conservation and water enhancement measures.¹³¹

1. Severe Drought Required

Drought emergency measures are allowed for farmland suffering a severe drought.¹³² The drought must be caused by an extended period of insufficient moisture.

2. ECP Measure Must Address Drought-Related Problem

To be eligible for cost-share assistance, the farm or ranch must be experiencing a drought-related problem, and the ECP conservation practice must be installed primarily to deal with that problem.¹³³

3. Three Types of Emergency Measures Covered

Three types of activities are allowed as drought emergency measures.¹³⁴

a. Permit Grazing

Emergency measures that are needed to permit livestock grazing of range, pasture, and forage is a drought emergency measure eligible for ECP funding.¹³⁵ The livestock water facilities should contribute to better distribution of grazing.¹³⁶

In order to qualify, there must be adequate range and pasture residue for livestock in the area to be served by the proposed water facility at the time of the request.¹³⁷ However, the water facilities cannot be used in order to make it possible for livestock to graze crop residue, on field borders, or on temporary or supplemental pasture crops.¹³⁸

¹³⁰ ECP Handbook, Exhibit 12, EC5.D, page 14 (Sept. 10, 2015). Specifically, the payment rate looks as follows: “_____percent of actual cost not to exceed \$_____ per unit of measure.” This will be based on the average cost of performing the unit of measure.

¹³¹ ECP Handbook, Exhibit 12, EC6.A, page 15 (Sept. 10, 2015).

¹³² ECP Handbook, Exhibit 12, EC6.B, page 15 (Sept. 10, 2015).

¹³³ ECP Handbook, Exhibit 12, EC6.D, page 16 (Sept. 10, 2015).

¹³⁴ ECP Handbook, Exhibit 12, EC6.A, page 15 (Sept. 10, 2015).

¹³⁵ ECP Handbook, Exhibit 12, EC6.A, D, page 15 (Sept. 10, 2015).

¹³⁶ ECP Handbook, Exhibit 12, EC6.D, page 16 (Sept. 10, 2015).

¹³⁷ ECP Handbook, Exhibit 12, EC6.D, page 16 (Sept. 10, 2015).

¹³⁸ ECP Handbook, Exhibit 12, EC6.E, page 18 (Sept. 10, 2015).

b. Emergency Water for Orchards and Vineyards

ECP cost-share funds may be used for a drought emergency measure that supplies emergency water for existing irrigation systems that serve orchards and vineyards.¹³⁹ To be eligible, the farm must have had an adequate irrigation system for the orchard or vineyard before the drought.¹⁴⁰

c. Emergency Water for Confined Livestock

ECP funds may be allowed for providing emergency water for confined livestock operations.¹⁴¹ The livestock must have been confined before the drought in order to qualify for cost-share assistance.¹⁴²

4. For Livestock Operations—Preexisting Watering Systems Required

Only farms or ranches that had adequate livestock watering systems or facilities before the drought are eligible for ECP cost-share assistance.¹⁴³

5. If Drought Situation Changes

FSA will monitor the situation to see if the severe drought conditions end.¹⁴⁴ If FSA decides the program is no longer needed, FSA will stop approving new practices.

6. Lifespan

The drought emergency measures, including the technical standards and specifications required, must be maintained for at least ten years if the measure is permanent, and one year if it is temporary.¹⁴⁵ Over that period, FSA may spot check to be sure that the practice is maintained and being used for its designed purpose.¹⁴⁶

7. Examples of Covered Practices

Examples of authorized and not authorized practices for drought emergencies include the following.

¹³⁹ ECP Handbook, Exhibit 12, EC6.A, D, page 15 (Sept. 10, 2015).

¹⁴⁰ ECP Handbook, Exhibit 12, EC6.A, D, page 16 (Sept. 10, 2015).

¹⁴¹ ECP Handbook, Exhibit 12, EC6.A, page 15 (Sept. 10, 2015).

¹⁴² ECP Handbook, Exhibit 12, EC6.E, page 17 (Sept. 10, 2015).

¹⁴³ ECP Handbook, Exhibit 12, EC6.D, page 16 (Sept. 10, 2015).

¹⁴⁴ ECP Handbook, Exhibit 12, EC6.D, page 16 (Sept. 10, 2015).

¹⁴⁵ ECP Handbook, Exhibit 12, EC6.F, page 18 (Sept. 10, 2015).

¹⁴⁶ ECP Handbook, Exhibit 2, page 2, "Lifespan of a Practice" (Sept. 10, 2015). A lifespan begins January 1 after the calendar year in which the practice is installed.

a. Installing Pipes for Water

Installing a pipe to an existing or newly developed source of water because the primary water source is not adequate is an accepted ECP drought emergency practice.¹⁴⁷ One-time connection fees may be eligible.¹⁴⁸

Constructing pipelines to supply water for vegetable or other short-term crops, however, is not allowed.¹⁴⁹

b. Water Storage Facilities

Providing water storage facilities can be an accepted drought emergency practice.¹⁵⁰ This can include tanks that become a part of a new or existing water distribution system. Troughs above ground can be approved if they are needed to supply water for immediate needs for livestock.

c. Wells

Wells can be eligible for ECP cost-share assistance for drought emergencies. For example, constructing and deepening wells for livestock water sources is allowed.¹⁵¹ Wells can also be funded when there is no other source of emergency water available that could be developed at a lesser cost. When wells are installed as a conservation practice, pump equipment and adequate storage facilities must be provided.¹⁵²

Work on dry wells, however, is not eligible.¹⁵³ In addition, pumps or motors for wells are not allowed if the pumps and motors are not to be permanently installed.

d. Water Recovery Pits

Tail water recovery pit construction, when the pits are for an irrigation system to orchards and vineyards, is allowed for drought emergencies under ECP.¹⁵⁴

¹⁴⁷ ECP Handbook, Exhibit 12, EC6.E, page 17 (Sept. 10, 2015).

¹⁴⁸ ECP Handbook, Exhibit 12, EC6.E, page 17 (Sept. 10, 2015). The fees must be for a connection to a public rural water utility line, and the fee is charged by the water service authority, and is limited to labor, equipment and materials. Charges for the water service itself must be paid by the farmer.

¹⁴⁹ ECP Handbook, Exhibit 12, EC6.E, page 18 (Sept. 10, 2015).

¹⁵⁰ ECP Handbook, Exhibit 12, EC6.E, page 17 (Sept. 10, 2015).

¹⁵¹ ECP Handbook, Exhibit 12, EC6.E, page 17 (Sept. 10, 2015).

¹⁵² ECP Handbook, Exhibit 12, EC6.D, page 16 (Sept. 10, 2015).

¹⁵³ ECP Handbook, Exhibit 12, EC6.E, page 18 (Sept. 10, 2015).

¹⁵⁴ ECP Handbook, Exhibit 12, EC6.E, page 17 (Sept. 10, 2015). Tailwater is the runoff from irrigation.

e. Springs or Seeps

The development of a spring or a seep for livestock water is permitted for drought emergencies under ECP.¹⁵⁵

f. Water Pumps and Solar Panels to Power Them

The permanent installation of a submersible pump is eligible for drought emergency ECP assistance if the pump would address the water needs of livestock on hand at the time of the disaster.¹⁵⁶ In addition, solar panels that provide power to pump water for livestock are permitted.¹⁵⁷

8. Examples of Practices NOT Covered

A number of water efforts that one might think are eligible under ECP are not allowed as a drought emergency measure.

a. Water Hauling and Water Impoundments

ECP funds may not be used to haul water, and may not be used to remove silt from water impoundments.¹⁵⁸

b. When Primary Use is Headquarters, Barns, Corrals, Recreation, or Wildlife

Water facilities installed as a drought emergency practice cannot be primarily for the headquarters of the farm.¹⁵⁹ In addition, livestock water facilities are not allowed if the facilities are primarily used as barns, corrals, for recreation, or for wildlife—unless, as noted above, they are for livestock that are already confined.¹⁶⁰

c. Cover Crops

Establishing permanent or temporary vegetative cover is not eligible.¹⁶¹ In addition, ECP funds may not be used for livestock water facilities if the water will be used on land that has a cover crop used for hay, silage, or when the crop is field chopped and hauled to headquarters for feeding.¹⁶²

¹⁵⁵ ECP Handbook, Exhibit 12, EC6.E, page 17 (Sept. 10, 2015).

¹⁵⁶ ECP Handbook, Exhibit 12, EC6.E, page 17 (Sept. 10, 2015).

¹⁵⁷ ECP Handbook, Exhibit 12, EC6.E, page 17 (Sept. 10, 2015). The wording for the solar provision is a bit confusing.

¹⁵⁸ ECP Handbook, Exhibit 12, EC6.E, page 18 (Sept. 10, 2015).

¹⁵⁹ ECP Handbook, Exhibit 12, EC6.E, page 18 (Sept. 10, 2015). The incidental use of water at headquarters is permitted if it does not lessen the effectiveness of the emergency water facility in serving its primary purpose.

¹⁶⁰ ECP Handbook, Exhibit 12, EC6.E, page 18 (Sept. 10, 2015).

¹⁶¹ ECP Handbook, Exhibit 12, EC6.E, page 18 (Sept. 10, 2015).

¹⁶² ECP Handbook, Exhibit 12, EC6.E, page 18 (Sept. 10, 2015).

d. For Grazing on Certain Lands

ECP funds may not be used for livestock water facilities that will make it possible for livestock to graze crop residue, to graze on field borders, or to graze on temporary or supplemental pasture crops.¹⁶³

9. Specifications

When FSA approves drought emergency measures, it may add other details or technical specifications to the requirements.¹⁶⁴

10. Payment Rates

For drought emergency measures, the payment rate varies depending on whether the practice is temporary or permanent.¹⁶⁵ The payment rate is 50 percent of the actual cost for all temporary practices, and 75 percent of the actual cost for all permanent practices.

The payment rate will be expressed as a certain percentage of the actual total cost and will say the cost cannot be more than a certain dollar amount per unit of measure.¹⁶⁶

11. Temporary vs. Permanent Structures

As noted above, payments for drought emergency measures vary depending on whether the practice is temporary or permanent. However, permanent practices may be installed only if FSA decides they are more practicable and cost effective than temporary measures.¹⁶⁷

FSA does not define temporary and permanent, but it does give some examples.¹⁶⁸

Permanent measures include buried pipelines, irrigation tailwater recovery systems for orchard and vineyards, construction and deepening of wells, and livestock fountains, waterers, and troughs when they are mounted on a concrete platform, or something similar.¹⁶⁹

Temporary measures include temporary pipelines, spring or seep developments, and portable water troughs, stock tanks, or tubes.¹⁷⁰

¹⁶³ ECP Handbook, Exhibit 12, EC6.E, page 18 (Sept. 10, 2015).

¹⁶⁴ ECP Handbook, Exhibit 12, EC6.H, page 19 (Sept. 10, 2015).

¹⁶⁵ ECP Handbook, Exhibit 12, EC6.G, page 19 (Sept. 10, 2015).

¹⁶⁶ ECP Handbook, Exhibit 12, EC6.G, page 19 (Sept. 10, 2015). The payment rate calculation will look like as follows: “_____ percent of the actual cost not to exceed \$____ per unit of measure.”

¹⁶⁷ ECP Handbook, Exhibit 12, EC6.D, page 15 (Sept. 10, 2015).

¹⁶⁸ ECP Handbook, Exhibit 12, EC6.I, page 19 (Sept. 10, 2015).

¹⁶⁹ ECP Handbook, Exhibit 12, EC6.I, page 19 (Sept. 10, 2015).

¹⁷⁰ ECP Handbook, Exhibit 12, EC6.I, page 19 (Sept. 10, 2015).

G. Windbreaks and Shelterbelts

ECP funds may be used to restore or replace field windbreaks and farmstead shelterbelts as an emergency measure.¹⁷¹ These measures must be taken in order to stop wind erosion or provide energy conservation.

FSA does not define windbreaks or shelterbelts. It does state, however, that planting orchard trees and ornamental plantings is not considered planting a windbreak or shelterbelt.¹⁷²

1. Must Be Seriously Damaged

Field windbreaks and farmstead shelterbelts must have been “seriously damaged” by a natural disaster.¹⁷³ If not damaged by the disaster they do not qualify.¹⁷⁴

2. Actions Allowed

FSA allows a number of measures to restore or replace windbreaks or shelterbelts. They include the following.

a. Debris Removal

Removing debris from field windbreaks or farmstead shelterbelts is allowed as an ECP emergency practice.¹⁷⁵

b. Replace or Plant

Replacing or planting field windbreaks or farmstead shelterbelts is allowed as an emergency practice.¹⁷⁶ To qualify, the windbreaks or shelterbelts must have existed before the disaster.

c. Purchase Seedlings and Young Shrubs

Purchasing tree seedlings or young shrubs used for field windbreaks or farmstead shelterbelts is allowed as an emergency practice.¹⁷⁷

d. Vegetative Cover

Establishing vegetative cover where needed to prevent serious erosion until trees or shrubs are established is allowed as an emergency practice.¹⁷⁸

¹⁷¹ ECP Handbook, Exhibit 12, EC8.A, page 21 (Sept. 10, 2015).

¹⁷² ECP Handbook, Exhibit 12, EC8.C, page 21 (Sept. 10, 2015).

¹⁷³ ECP Handbook, Exhibit 12, EC8.B, page 21 (Sept. 10, 2015).

¹⁷⁴ ECP Handbook, Exhibit 12, EC8.C, page 21 (Sept. 10, 2015).

¹⁷⁵ ECP Handbook, Exhibit 12, EC8.C, page 21 (Sept. 10, 2015).

¹⁷⁶ ECP Handbook, Exhibit 12, EC8.C, page 21 (Sept. 10, 2015).

¹⁷⁷ ECP Handbook, Exhibit 12, EC8.C, page 21 (Sept. 10, 2015).

¹⁷⁸ ECP Handbook, Exhibit 12, EC8.C, page 21 (Sept. 10, 2015).

e. Weed Control

Chemical or mechanical weed control measures, where needed to establish trees for the windbreak, are allowed as an emergency practice.¹⁷⁹ This may only be done during the first twenty-four months after planting.

3. No CRP Land

ECP funds may not be used to restore or replace windbreaks or shelterbelts when the windbreaks or shelterbelts are on land in the Conservation Reserve Program (CRP).¹⁸⁰

4. Lifespan

The emergency practice must be maintained for at least ten years.¹⁸¹ Over that period, FSA may spot check to be sure that the practice is maintained and being used for its designed purpose.¹⁸²

5. Specifications

Additional technical standards and specifications may be required.¹⁸³

6. Payment Rates

The ECP payment rate will be expressed as a certain percentage of the actual total cost and will say the cost cannot be more than a certain dollar amount per unit of measure.¹⁸⁴

H. Other Emergency Conservation Measures

ECP funds may be used for other emergency conservation measures.¹⁸⁵

1. Possible Uses of Other Emergency Conservation Measures

It is hard to know what might be allowed as an “other” emergency conservation measure. Some clues can be found in a few examples of things that FSA says could be authorized. The rules seem to allow farmers and local FSA offices to be creative in developing measures that are not otherwise allowed. In other words, if the land would be eligible under ECP, but the practices do not fit those described in other sections, they could still be approved.

¹⁷⁹ ECP Handbook, Exhibit 12, EC8.C, page 21 (Sept. 10, 2015).

¹⁸⁰ ECP Handbook, Exhibit 12, EC8.C, page 21 (Sept. 10, 2015).

¹⁸¹ ECP Handbook, Exhibit 12, EC8.C, page 21 (Sept. 10, 2015).

¹⁸² ECP Handbook, Exhibit 2, page 2, “Lifespan of a Practice” (Sept. 10, 2015). A lifespan begins January 1 after the calendar year in which the practice is installed.

¹⁸³ ECP Handbook, Exhibit 12, EC8.F, page 22 (Sept. 10, 2015).

¹⁸⁴ ECP Handbook, Exhibit 12, EC8.E, page 22 (Sept. 10, 2015). Specifically, the payment rate looks as follows: “_____ percent of actual cost not to exceed \$_____ per unit of measure.” This will be based on the average cost of performing the unit of measure.

¹⁸⁵ ECP Handbook, Exhibit 12, EC7, page 20 (Sept. 10, 2015).

a. Conservation or Pollution Abatement Practice Damaged by Disaster

One possible use of ECP cost-share assistance is to replace or restore pollution abatement practices that are damaged by a natural disaster.¹⁸⁶ This suggests that conservation practices or pollution abatement practices that are damaged by the natural disaster, but that are not mentioned in the other categories, may be eligible. Pollution abatement practice is not defined, but abate generally means to reduce.

b. Restore Land to Normal Capacity

It is possible to use ECP funds to restore eligible land to its normal production capacity.¹⁸⁷

c. Restore Land to Productive Agricultural Use

It is possible to use ECP funds to return eligible land to productive agricultural use as a result of damage directly related to a natural disaster.¹⁸⁸

d. Conserving and Enhancing Water Resources

Conserving and enhancing water resources is an eligible use of ECP assistance.¹⁸⁹

2. Uses NOT Allowed for Other Emergency Conservations Measure

FSA rules make clear two types of actions that cannot fit into the catchall category of other emergency conservation measures.

First, ECP funds in this category cannot be used to solve a conservation or environmental problem that existed before the disaster.¹⁹⁰

Second, ECP funds in the category of other emergency conservation measures may not be used to fund an activity normally performed by farmers independently of ECP support.¹⁹¹

3. Cost-Share Lifespans

Other emergency conservation measures funded by ECP must have minimum lifespans, although it is not possible to say what they will be until the measures are

¹⁸⁶ ECP Handbook, Exhibit 12, EC7.C, page 20 (Sept 10, 2015).

¹⁸⁷ ECP Handbook, Exhibit 12, EC7.C, page 20 (Sept 10, 2015).

¹⁸⁸ ECP Handbook, Exhibit 12, EC7.C, page 20 (Sept. 10, 2015).

¹⁸⁹ ECP Handbook, Exhibit 12, EC7.C, page 20 (Sept. 10, 2015).

¹⁹⁰ ECP Handbook, Exhibit 12, EC7.C, page 20 (Sept. 10, 2015).

¹⁹¹ ECP Handbook, Exhibit 12, EC7.C, page 20 (Sept. 10, 2015).

identified.¹⁹² Regardless of the lifespan period, over that time FSA may spot check to be sure that the practice is maintained and being used for its designed purpose.¹⁹³

4. Payment Rates

The ECP payment rate will be expressed as a certain percentage of the actual total cost and will say the cost cannot be more than a certain dollar amount per unit of measure.¹⁹⁴

VIII. Farmer Eligibility for ECP

Several eligibility rules apply to people that apply for ECP. They are described below.

A. Agricultural Producer

Only agricultural producers with an interest in the land affected by the natural disaster may receive ECP cost-share assistance.¹⁹⁵

An agricultural producer is defined in the ECP regulations.¹⁹⁶ “Agricultural,” for this purpose, includes what most everyone would agree as being agricultural.¹⁹⁷ The definition has two parts. First, the producer must be an owner, landlord, tenant, or sharecropper of a farm or ranch.¹⁹⁸ Second, the farm or ranch must be used to annually produce commercial agricultural commodities. That means grains, row crops, seed crops, vegetables, hay, pasture, orchard, vineyard, flowers, bulbs, trees, field-grown ornaments, livestock, naval stores, or “other agricultural commodities.”

A livestock producer is an agricultural producer.¹⁹⁹ In general, by “livestock” FSA means livestock that are used for food or fiber.²⁰⁰ This includes what people would most commonly think of as livestock.²⁰¹ Raising animals only for recreational purposes,

¹⁹² ECP Handbook, Exhibit 12, EC7.D, page 20 (Sept. 10, 2015).

¹⁹³ ECP Handbook, Exhibit 2, page 2, “Lifespan of a Practice” (Sept. 10, 2015). A lifespan being January 1 after the calendar year in which the practice is installed.

¹⁹⁴ ECP Handbook, Exhibit 12, EC7(E), page 20 (Sept. 10, 2015). Specifically, the payment rate looks as follows: “_____ percent of actual cost not to exceed \$_____ per unit of measure.” This will be based on the average cost of performing the unit of measure.

¹⁹⁵ 16 U.S.C. §§ 2201, 2202.

¹⁹⁶ 7 C.F.R. § 701.2(b), “Agricultural producer” (2019).

¹⁹⁷ 7 C.F.R. § 701.2(b), “Agricultural producer” (2019). Under this definition, an agricultural producer can produce crops such as grains, row crops, seed crops, vegetables, fruits, hay forage or pasture, orchards and vineyards, flowers and bulbs, and field grown ornamentals. 7 C.F.R. § 701.2(b), “Agricultural producer” (2019). 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), “Agricultural producer” (2019).

¹⁹⁸ ECP Handbook, page 5-4, para. 92.B (Sept. 10, 2015).

¹⁹⁹ 7 C.F.R. § 701.2(b), “Agricultural producer” (2019); ECP Handbook, page 5-4, para. 92.B (Sept. 10, 2015).

²⁰⁰ ECP Handbook, Exhibit 2, page 3, “Livestock” (2019).

²⁰¹ ECP Handbook, Exhibit 2, page 3, “Livestock” (2019). Examples include beef and dairy cows; buffalo or beefalo not running wild or uncontrolled on the range; goats for food or milk production; poultry for food including domesticated chickens, ducks, geese, and turkey, and

however, is not allowed.²⁰² Those who raise livestock solely for recreational uses, therefore, are not considered agricultural producers for purposes of ECP.²⁰³

Three additional points about livestock eligibility are notable. The first concerns horses, mules, and donkeys, which count as livestock if they are used for commercial food, for human consumption, or kept for producing food or fiber.²⁰⁴ Draft horses and cow ponies, for example, count as livestock. Animals that are not eligible would include those used for recreational activities or recreational business. So, not eligible as livestock under ECP would be race horses, pack animals, rodeo stock, and polo ponies. Horse breeding operations in the business of producing horse breeding stock for commercial use as a part of the farming operation may qualify.²⁰⁵

Second, animals running wild or uncontrolled on the range are not livestock for the purposes of ECP.²⁰⁶

Third, animals maintained for slaughter—but not for human consumption—are not livestock for the purposes of ECP.²⁰⁷

B. Liable for Expenses

The farmer must be liable for the expense to be reimbursed through ECP.²⁰⁸

C. Person or Legal Entity

Individual people can apply for ECP.²⁰⁹ Legal entities—such as a partnership or a corporation—can also apply for ECP.²¹⁰

D. Landlord or Tenant

Rented land can be eligible for ECP funds. FSA will pay the cost share to the person who pays the cost of performing the practice.²¹¹ This may mean that the cost-share funds are split between two parties.

those kept for egg production; sheep for food or wool production; wine for food; fish for food; and other animals raised exclusively for commercial food or fiber.

²⁰² ECP Handbook, page 5-4, para. 92.B (Sept. 10, 2015).

²⁰³ 7 C.F.R. § 701.2(b), “Agricultural producer” (2019).

²⁰⁴ ECP Handbook, Exhibit 2, page 3, “Livestock” (Sept. 10, 2015).

²⁰⁵ To be eligible, the farmer must the claim horse breeding stock for tax purposes with the IRS.

²⁰⁶ ECP Handbook, Exhibit 2, page 3, “Livestock” (Sept. 10, 2015).

²⁰⁷ ECP Handbook, Exhibit 2, page 3, “Livestock” (Sept. 10, 2015).

²⁰⁸ 7 C.F.R. § 701.104(a) (2019).

²⁰⁹ 7 C.F.R. § 701.104(a) (2019); ECP Handbook, page 5-1, para. 91 (Sept. 10, 2015).

²¹⁰ 7 C.F.R. § 701.104(a) (2019); ECP Handbook, page 5-1, para. 91 (Sept. 10, 2015). An individual, a partnership member, an association, a corporation an estate, a trust, a business enterprise or other legal entity may be eligible if they are an agricultural producer. ECP Handbook, page 5-3, para. 92.A (Sept. 10, 2015). A minor may be eligible if he or she participates independently in the operation of a farm.

²¹¹ ECP Handbook, page 7-52, para. 333.A (Sept. 10, 2015).

E. Other Organizations

Other organizations that control farmland are sometimes eligible for ECP, but sometimes they are not.

1. Pooling Agreements—Possibly Eligible

Under a “pooling arrangement,” two or more eligible persons on two or more farms agree in writing to jointly solve shared conservation problems.²¹² They must do so voluntarily. If the agreement is approved by FSA, the group will be eligible for ECP funds.

2. Cooperative Grazing Associations—Eligible

Cooperative grazing associations and districts are eligible for ECP cost-share assistance.²¹³ They must meet the general eligibility requirements. An individual member of a grazing association or district who has a legal right to graze land owned or leased by the association or district is considered a tenant under ECP and therefore can get cost-share assistance.²¹⁴ If the land is grazed by an individual, the individual and association or district cannot both receive cost-share assistance for the same land.

3. Clubs and Organizations—Possibly Eligible

Clubs and organizations, such as 4-H clubs, FFA, and so forth, may be eligible for ECP cost-share funds.²¹⁵

4. Districts and Other Organizations with Taxing Authority—Generally Not Eligible

A somewhat confusing set of rules applies for the eligibility of what FSA calls organized districts.²¹⁶ In general, irrigation, drainage, and other district organizations with taxing authority for conservation purposes are not eligible.²¹⁷ However, a district may qualify for ECP if it does not have taxing authority and if it qualifies as an eligible person or

²¹² ECP Handbook, page 5-2, para. 91.F (Sept. 10, 2015).

²¹³ ECP Handbook, page 5-5, para. 94.A (Sept. 10, 2015). If the association or district is only a permittee or licensee with respect to the land it is not eligible.

²¹⁴ ECP Handbook, page 5-5, para. 94.B (Sept 10, 2015).

²¹⁵ ECP Handbook, page 5-6, para. 95.A (Sept. 10, 2015).

²¹⁶ ECP Handbook, page 5-7, para. 97.B, page 5-2, para. 91.E (Sept. 10, 2015). By district, FSA means organized districts, mutual water companies, and associations. They can be either formal or informal, and are formed to solve a mutual problem, such as flood control or carry out a mutual purpose, such as distributing irrigation water. They have the authority to tax or assess individual members, and can encumber a member’s land, water rights, or other property through unpaid liens. ECP Handbook, Exhibit 2, page 1, “Districts” (Sept. 10, 2015).

²¹⁷ ECP Handbook, page 5-7, para. 97.A (Sept 10, 2015). In particular, organizations are not eligible when district has both the legal obligation to carry out the conservation improvement measures and the authority to levy taxes or assessment on the member’s land, water, rights, or other property, which if not paid may become a lien. ECP Handbook, page 5-7, para. 97.A (Sept 10, 2015).

legal entity through the regular rules.²¹⁸ Exceptions to this rule may be possible if there are legal limits on the taxing authority.²¹⁹

Farmers who participate individually in an organized district or have land in the district can be eligible so long as the restoration of damage is not the responsibility of the district.²²⁰ Farmers may hire a district or other vendor as a contractor to do the work for performing practices.²²¹

5. Government Entities—Not Eligible

State and local governments are not eligible for ECP.²²² State governments and agencies, state supported colleges and universities, local governments, and school districts are also not eligible for ECP.²²³

6. Adequate Resources to Rehabilitate Without Assistance

FSA is authorized to assist in “truly emergency situations.”²²⁴ The damage must be of sufficient magnitude that it would be too costly for the farmer to rehabilitate without assistance from ECP. If the applicant “clearly” has adequate financial resources, FSA will not approve ECP funds. FSA will look to see if the applicant can repair the damage without assistance and without causing a financial hardship.

7. Drought Changes—Reevaluate

If the drought conditions change, FSA can reevaluate the applicant's eligibility.²²⁵

F. Individual Determinations

FSA will look at ECP eligibility on an individual basis considering the type and extent of the damage involved.²²⁶

IX. Land Eligibility for ECP

ECP funds can only be used on land that is eligible for the program. The following rules apply.

²¹⁸ ECP Handbook, page 5-7, para. 97.C, (Sept. 10, 2015).

²¹⁹ ECP Handbook, page 5-8, para. 97.E, page 5-2, para. 91.F, page 5-7, para. 97.A (Sept 10, 2015). They may be granted when state law or similar statute limits the amount that districts can tax or assess its members to the point that the district cannot derive enough funds to carry out eligible conservation measures.

²²⁰ ECP Handbook, page 5-2, para. 91.F (Sept. 10, 2015).

²²¹ ECP Handbook, page 5-8, para. 97.D (Sept. 10, 2015).

²²² ECP Handbook, page 5-6, para. 96.A, page 5-3, para. 92.A (Sept. 10, 2015).

²²³ ECP Handbook, page 5-6, para. 96.A (Sept. 10, 2015).

²²⁴ ECP Handbook, page 5-1, para. 91.C (Sept. 10, 2015).

²²⁵ ECP Handbook, page 5-1, para. 91.D (Sept. 10, 2015).

²²⁶ ECP Handbook, page 5-1, para. 91.B (Sept. 10, 2015).

A. Only Certain Counties

ECP is available county by county.²²⁷ The land in question therefore must be physically located in a county for which ECP is available.

B. Who Owns the Land

The question of who owns the land can be important for ECP eligibility, and in the case of government-owned land the rules can be confusing.

1. State Owned Land

If land is owned by a state, the land may be eligible for ECP if the land is likely to remain in farm production and the farmer will benefit from the conservation practice.²²⁸ If, however, the practice mainly benefits a state, or the farmer is not allowed to accept cost shares by a lease, ECP is not available.

2. Federally Owned Land

In many cases, but not all, federally owned land can be eligible for ECP.²²⁹ In order to be eligible: (1) the farmer must be farming the land; (2) the conservation practice must primarily benefit nearby or adjacent privately-owned farmland of the farmer; (3) the farmer must have permission to install and maintain the practice; and (4) the federal land must be the most practical place for the practice. In addition, if the disaster is a drought, the conservation practice must primarily benefit the livestock owned or managed by the farmer. If the practice benefits land owned by a federal agency, ECP is not available. The above rules apply even if the land is only temporarily owned by the federal government.²³⁰

Easements and rights of way complicate this question somewhat.²³¹

3. Native American Lands

In general, land owned by Native Americans or a Native American tribe is eligible for ECP.²³² Tribes that own eligible land are eligible for ECP cost-share assistance.²³³ Individual Native Americans operating on tribal lands are eligible for ECP if they qualify as tenants or sharecroppers on the land.²³⁴ Individual Native Americans on nontribal lands are eligible, but must meet the general eligibility requirements for

²²⁷ 7 C.F.R. § 701.105(a)(2) (2019); ECP Handbook, page 5-23, para. 111.A, page 5-31, para. 113.A (Sept. 10, 2015). Because a state is defined for ECP purposes as including Puerto Rico, the Virgin Islands, Guam, or Commonwealth of the Northern Mariana Islands, ECP is available in those places. ECP Handbook, Exhibit 2, page 4, “State” (Sept. 10, 2015).

²²⁸ ECP Handbook, page 5-31, para. 115.A (Sept. 10, 2015).

²²⁹ ECP Handbook, page 5-32, para. 115.B (Sept. 10, 2015). In addition, the farmer’s lease must not prohibit cost-share assistance.

²³⁰ ECP Handbook, page 5-32, para. 115.C (Sept. 10, 2015). The same rule applies for corporations that are owned by the federal government.

²³¹ ECP Handbook, pages 2-23 to 2-24, para. 45 (Sept. 10, 2015).

²³² ECP Handbook, page 5-31, para. 114.A (Sept. 10, 2015).

²³³ ECP Handbook, page 5-5, para. 93.A (Sept. 10, 2015).

²³⁴ ECP Handbook, page 5-5, para. 93.B (Sept. 10, 2015).

farmers applying for ECP.²³⁵ 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.²³⁶

C. Land Used for Certain Purposes—Agriculture, Windbreaks, Shelterbelts, and Some Roads

In general, ECP is only available for land that is used in one of three different ways: (1) for agriculture; (2) for windbreaks or shelterbelts; or (3) in some cases as a road.²³⁷

Not all damaged areas or structures on a farm, therefore, will be eligible.²³⁸

1. Land in Agricultural Production

ECP is available for land that is expected to have annual agricultural production.²³⁹

a. Land Expected to Have Annual Agricultural Production

FSA defines annual agricultural production. It means production of crops for food or fiber in a commercial operation that occurs on an annual basis under normal conditions.²⁴⁰ FSA also says the land must “normally” be used for farming or ranching.²⁴¹ This suggests that if the land is usually used for agriculture, but was not being used that way at the time of the disaster, it might still be eligible.

b. Agricultural Production Means Producing Commodities

The land must be used for the production of agricultural commodities.²⁴²

c. Uses that are NOT Agricultural Production

Land that is not in agricultural production is generally not eligible for ECP cost share. There are a broad range of uses of land on a farm that will not be considered to be agricultural production by FSA.

FSA gives the following examples of land uses that are not eligible land uses for purposes of ECP: (1) stream banks; (2) channels, levees, and dikes; (3) native woodland areas; and (4) land used for recreational purposes.²⁴³ Roads are not eligible since they are thought not to be in agricultural production.²⁴⁴ An exception is allowed for debris removal from roads.

²³⁵ ECP Handbook, page 5-5, para. 93.C (Sept. 10, 2015).

²³⁶ ECP Handbook, page 5-5, para. 93.D (Sept. 10, 2015).

²³⁷ ECP Handbook, pages 5-23 and 5-24, para. 111.A (Sept. 10, 2015).

²³⁸ ECP Handbook, page 5-25, para. 111.B (Sept. 10, 2015).

²³⁹ 7 C.F.R. § 701.105(a)(3)(i) (2019); ECP Handbook, page 5-24, para. 111.A (Sept. 10, 2015).

²⁴⁰ 7 C.F.R. § 701.2(b), “Annual agricultural production” (2019).

²⁴¹ ECP Handbook, page 5-23, para. 111.A (Sept. 10, 2015).

²⁴² ECP Handbook, page 5-23, para. 111.A (Sept. 10, 2015).

²⁴³ ECP Handbook, pages 5-28 and 5-29, para. 112.A, D (Sept. 10, 2015).

²⁴⁴ ECP Handbook, page 5-28, para. 112.A (Sept. 10, 2015).

2. Windbreak or Shelterbelt

Land may be eligible for ECP if it is used as a field windbreak or a farmstead shelterbelt.²⁴⁵ This land is only eligible for ECP if the ECP practice to be funded involves either removing debris that interferes with the normal farming operation on the farm or the correction of damage caused by a natural disaster. A windbreak or shelterbelt is eligible for ECP cost share even if no agricultural production is occurring on the same spot at the same time.

3. Farm Access Road

Land may be eligible for ECP if it serves as a farm access road on which debris interferes with the normal operation of the farm and needs to be removed.²⁴⁶

D. Examples of Eligible Land Uses

FSA rules give guidance about a number of possible land uses that are eligible for ECP. These eligible land uses are described below.

1. Field Road and Farm Lanes

Field roads and farm lanes can be eligible land if there is debris on the road or lane and the debris interferes with normal farming operations.²⁴⁷

2. Fencing

Fencing can be an eligible land use if the fence involves livestock and the fence is damaged by the disaster.²⁴⁸

3. Waterways

Waterways can be an eligible land use.²⁴⁹

4. Terraces

Terraces can be an eligible land use.²⁵⁰

5. Fields

Fields can be an eligible land use for ECP.²⁵¹ The field must not be subject to frequent damage, and it must not have been damaged three or more times in the last ten years by the same type of disaster.

²⁴⁵ 7 C.F.R. § 701.105(a)(3)(ii) (2019); ECP Handbook, page 5-24, para. 111.A (Sept. 10, 2015).

²⁴⁶ 7 C.F.R. § 701.105(a)(3)(iii) (2019); ECP Handbook, page 5-24, para. 111.A (Sept. 10, 2015).

²⁴⁷ ECP Handbook, page 5-26, para. 111.B (Sept. 10, 2015).

²⁴⁸ ECP Handbook, page 5-26, para. 111.B (Sept. 10, 2015).

²⁴⁹ ECP Handbook, page 5-26, para. 111.B (Sept. 10, 2015).

²⁵⁰ ECP Handbook, page 5-26, para. 111.B (Sept. 10, 2015).

²⁵¹ ECP Handbook, page 5-26, para. 111.B (Sept. 10, 2015).

6. Grazing Land

Land used for grazing for commercial livestock production is eligible for ECP.²⁵² This suggests that land used for grazing animals that are not commercial livestock will not be considered eligible land.

7. Aquaculture Facilities

Commercial aquaculture facilities are allowed.²⁵³ An aquaculture facility is defined as a commercial aquaculture operation conducted on private land.²⁵⁴ Aquaculture is defined as raising aquatic species for food from a commercial operation conducted on private land.²⁵⁵

8. Orchards

Land used for commercially producing orchards is eligible for ECP.²⁵⁶

9. Vegetative Cover

Land used as permanent or temporary vegetative cover is eligible for ECP.²⁵⁷

10. Christmas Trees

Christmas tree plantations are an allowed land use for ECP.²⁵⁸

11. Commercial Catfish Pond

A commercial catfish pond is an eligible land use for ECP.²⁵⁹ This includes a fence around the pond to protect it. A recreational fishpond is not eligible because it is not considered to be primarily agricultural or to have a conservation use.²⁶⁰

12. Land with Conservation Structures

Land where conservation structures are installed is eligible for ECP.²⁶¹ This can include, for example, waterways, terraces, sediment basins, diversions, and windbreaks.

²⁵² ECP Handbook, page 5-23, para. 111.A (Sept. 10. 2015).

²⁵³ ECP Handbook, page 5-23, para. 111.A (Sept. 10. 2015).

²⁵⁴ ECP Handbook, Exhibit. 2, page 1, "Aquaculture Facility" (Sept. 10. 2015).

²⁵⁵ ECP Handbook, Exhibit. 2, page 1, "Aquaculture Facility" (Sept. 10. 2015).

²⁵⁶ ECP Handbook, page 5-23, para. 111.A (Sept. 10. 2015).

²⁵⁷ ECP Handbook, page 5-23, para. 111.A (Sept. 10. 2015).

²⁵⁸ ECP Handbook, page 5-24, para. 111.A (Sept. 10. 2015).

²⁵⁹ ECP Handbook, page 5-25, para. 111.B (Sept. 10. 2015).

²⁶⁰ ECP Handbook, page 5-25, para. 111.B (Sept. 10. 2015). A fence around the recreational fishing pond is also ineligible.

²⁶¹ ECP Handbook, page 5-24, para. 111.A (Sept. 10. 2015).

13. Nurseries

Land devoted to container-grown nursery stock is eligible for ECP.²⁶² The nursery stock must be for commercial uses and must be grown on land in containers for at least one year.

14. Irrigation Lines

Main irrigation lines are covered.²⁶³ Center pivot irrigation is not covered.²⁶⁴ The logic here is that center pivot irrigation is “portable.”

15. Land Protected by Levees or Dikes – Some Included but Not All

Land that is protected by levees or dikes built to U.S. Army Corp of Engineers, NRCS, or similar standards are eligible so long as they were effectively functioning before the disaster.²⁶⁵

Land protected by a levee will sometimes be eligible and sometimes will not be.²⁶⁶ If the levee or dike was built to U.S. Army Corps of Engineers, NRCS, or similar standards and was not effectively and properly functioning before the disaster, it is not eligible.²⁶⁷ Also, if the land was protected by a levee not built to those standards it is not eligible.²⁶⁸ If the land is protected by a U.S. Army Corps of Engineers’ levee, FSA must believe that the levee will eventually be restored to Army Corps standards and specifications before approving it for ECP funds.²⁶⁹

E. Examples of Land Uses that are NOT Eligible

FSA rules give guidance about a number of possible land uses that are not eligible for ECP. These ineligible land uses are described below.

1. Poor Farming Practices

If “poor farming practices” have “materially contributed” to damaging the land, the land is not eligible for ECP.²⁷⁰

²⁶² ECP Handbook, page 5-24, para. 111.A (Sept. 10. 2015).

²⁶³ ECP Handbook, page 5-25, para. 111.B (Sept. 10. 2015).

²⁶⁴ ECP Handbook, page 5-25, para. 111.B (Sept. 10. 2015).

²⁶⁵ ECP Handbook, page 5-23, para. 111.A (Sept. 10. 2015). This is true regardless of the type of levee or dike.

²⁶⁶ ECP Handbook, page 5-26, para. 111.B (Sept. 10. 2015).

²⁶⁷ ECP Handbook, page 5-27, para. 111.B (Sept. 10. 2015).

²⁶⁸ ECP Handbook, page 5-27, para. 111.B (Sept. 10. 2015). FSA decides if the standards are met.

²⁶⁹ ECP Handbook, page 5-29, para. 112.C (2017). FSA may wait until the work actually starts to approve the ECP cost share and may require some special agreements with the farmer.

²⁷⁰ 7 C.F.R. § 701.105(b)(11) (2019); ECP Handbook, page 5-27, para. 112.A (Sept. 10, 2015).

2. Minor Damage

ECP funds are not be available for land with minor damage that the farmer can correct without ECP help.²⁷¹

3. Trees for Timber Production, Woodlands

Land devoted to trees for timber production are not eligible for ECP.²⁷² Woodlands are not considered to be an agricultural use for ECP, and therefore woodlands are not eligible.

4. Damaged by Wildfire that was Not Naturally Caused

Land damaged by wildfire that is started by other than natural causes is not eligible for ECP.²⁷³

5. On, In, or Near Levees, Streams, Reservoirs, Channels

Many land uses that are near water make the land not eligible for ECP. For example, land on which levees and dikes are built is not eligible.²⁷⁴ Land between levees and streams, or other bodies of water, is not eligible for ECP.²⁷⁵ Land next to a stream is not eligible—this is true whether the stream is perennial or intermittent.²⁷⁶ Land that is next to a water impoundment reservoir that is subject to inundation when the reservoir is filled is not eligible.²⁷⁷ Land that is subject to a flowage or flood easement is not eligible for cost-share assistance when water is released and inundates those easements with water during normal operations.²⁷⁸ Land located in old or new channels of a stream, creek, river, or other waterway is not eligible, though an exception to this rule applies if the land is located within or on the banks of an irrigation canal and the canal is not subjected to flooding.²⁷⁹

6. Land with Debris from a Collapsed Barn or Poultry House

Debris from a collapsed barn that is in the building's footprint or on the farmstead is not eligible.²⁸⁰ The logic here is that such structures are primarily capital investment and not agricultural land. This seems to imply, however, that if debris from a barn is strewn onto agricultural land, that debris removal could be covered. The same rule applies for debris from a collapsed poultry house.

²⁷¹ ECP Handbook, page 5-29, para. 112.D (Sept. 10, 2015).

²⁷² 7 C.F.R. § 701.105(b)(13) (2019); ECP Handbook, page 5-28, para. 112.A (Sept. 10, 2015).

²⁷³ ECP Handbook, page 5-28, para. 112.A (Sept. 10, 2015).

²⁷⁴ 7 C.F.R. § 701.105(b)(12) (2019); ECP Handbook, page 5-26, para. 111.B, page 5-27, para. 112.A (Sept. 10, 2015).

²⁷⁵ 7 C.F.R. § 701.105(b)(8) (2019); ECP Handbook, page 5-29, para. 112.D, page 5-26, para. 111.B, page 5-27, para. 112.A (Sept. 10, 2015).

²⁷⁶ ECP Handbook, page 5-25, para. 111.B (Sept. 10, 2015).

²⁷⁷ 7 C.F.R. § 701.105(b)(4) (2019); ECP Handbook, page 5-27, para. 112.A (Sept. 10, 2015).

²⁷⁸ 7 C.F.R. § 701.105(b)(7) (2019); ECP Handbook, page 5-27, para. 112.A (Sept. 10, 2015).

²⁷⁹ 7 C.F.R. § 701.105(b)(9) (2019); ECP Handbook, page 5-27, para. 112.A (Sept. 10, 2015).

²⁸⁰ ECP Handbook, page 5-25, para. 111.B (Sept. 10, 2015).

7. Land Around Farmstead

Damaged land that is around the farmstead is not eligible for ECP. The logic here is that this is nonagricultural land.²⁸¹ However, if there is debris that interferes with normal farming operations on this land, debris removal can be covered.

8. Greenhouses and Other Confined Areas

Land used for greenhouses or other confined areas, including corrals, milking parlors, barn lots, or feeding areas is not eligible for ECP.²⁸²

9. Frequent or Severe Damage

Land subject to frequent damage, or particularly susceptible to severe damage, is not eligible for ECP cost-share assistance.²⁸³ Severe damage is defined by FSA as damage that impairs or endangers the land or materially affects the productive capacity of the land.²⁸⁴ FSA may look at “all factors deemed relevant” when making this decision.²⁸⁵ These factors can include, but are not limited to: (1) the location of the land; (2) the history of damage to the land; and (3) whether the land is or could have been protected by a functioning levee or dike built to U.S. Army Corps of Engineers (Corps) or Natural Resources Conservation Service (NRCS) standards.²⁸⁶ Land is thought by FSA to be subjected to “frequent” damage if it is damaged by the disaster to the extent that it needed rehabilitation three or more times in the last ten years.²⁸⁷ FSA may also look to FEMA or other governmental information that describes flood susceptibility of the land, soil surveys, aerial photographs, or flood plain data.

10. Grade Stabilization Structure

A grade stabilization structure is not eligible.²⁸⁸ This includes any fencing protecting the grade stabilization structure.

X. How ECP Cost-Sharing Works

ECP provides funds through cost sharing. This means that FSA reimburses the farmer for part of the expense to install or implement the conservation practice. Key factors in setting the amount of an ECP award include the amount of eligible expenses and the ECP program limits.

²⁸¹ ECP Handbook, page 5-25, para. 111.B (Sept. 10, 2015).

²⁸² 7 C.F.R. § 701.105(b)(10) (2019); ECP Handbook, page 5-27, para. 112.A (Sept. 10, 2015).

²⁸³ 7 C.F.R. § 701.105(b)(6) (2019); ECP Handbook, page 5-27, para. 112.A (Sept. 10, 2015).

²⁸⁴ ECP Handbook, Exhibit 2, page 4, “Severe damage” (Sept. 10, 2015).

²⁸⁵ ECP Handbook, page 5-28, para. 112.B (Sept. 10, 2015).

²⁸⁶ 7 C.F.R. § 701.105(b)(6), (c) (2019); ECP Handbook, page 5-27, para. 112.A (Sept. 10, 2015).

²⁸⁷ ECP Handbook, page 5-28, para. 112.B (Sept. 10, 2015). The three years of damage includes the current year.

²⁸⁸ ECP Handbook, page 5-25, para. 111.B (Sept. 10, 2015).

A. Qualifying Minimum Cost Requirement

In general, ECP is only available when restoring the land or water resources would cost at least \$1,000.²⁸⁹

Limited resource producers must have sustained an estimated minimum of \$250 in damages to qualify for ECP.²⁹⁰ A limited resource producer is one who has gross farm sales under a certain amount.²⁹¹ This amount changes every year. A limited resource producer must also have a household income at or below the national poverty level for a family of four, or less than 50 percent of the county median household income for the last two years.

These amounts for farmers and limited resource producers are the national “qualifying minimum cost.”²⁹² Each state may set higher minimum qualifying costs.

Farmers may request a waiver of the minimum cost requirement.²⁹³ 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 that a waiver would accomplish the goals of ECP.

B. Eligible Expenses: Materials, Services, Labor, Equipment

In general, once FSA has decided that a farmer is eligible for ECP assistance, cost sharing is granted for reasonable expenses incurred in the completion of the approved conservation practice.²⁹⁴ Allowable costs are the cost of any direct and significant factors needed to rehabilitate or replace the damaged land or structures.²⁹⁵ This includes: (1) new or used materials, although if they are used they must meet NRCS standards; (2) services; (3) labor; (4) equipment; and (5) sales tax.

FSA regulations set some limits on the conservation practice expenses that may be eligible for ECP cost sharing. These are discussed below.

1. Personal Equipment is an Allowed Cost

Costs for use of personal equipment is allowed.²⁹⁶ These costs are limited in two ways. First, they must be limited to costs incurred that are beyond those required in the normal operation of the farm or ranch. Second, equipment expenses provided by the farmer must be less than what would be charged for the equipment by commercial contractors regularly employed in such work in the area who make a profit from their work.²⁹⁷

²⁸⁹ 7 C.F.R. § 701.110(b) (2019); ECP Handbook, page 2-22, para. 43.A, Exhibit 4, page 1 (Sept. 10, 2015).

²⁹⁰ ECP Handbook, page 2-22, para. 43.A, Exhibit 4, page 1 (Sept. 10, 2015).

²⁹¹ ECP Handbook, Exhibit 2, page 2, “Limited resource producer” (Sept 10, 2015).

²⁹² 7 C.F.R. § 701.110(b) (2019); ECP Handbook, page 2-22, para. 43.A (Sept. 10, 2015).

²⁹³ 7 C.F.R. § 701.110(c) (2019); ECP Handbook, page 2-22, para. 43.A (Sept. 10, 2015).

²⁹⁴ 7 C.F.R. § 701.23(a) (2019); ECP Handbook, page 2-22, para. 42.C (Sept. 10, 2015).

²⁹⁵ ECP Handbook, page 2-19, para. 41.A (Sept. 10, 2015).

²⁹⁶ 7 C.F.R. § 701.23(b)(1) (2019); ECP Handbook, page 2-22, para. 42.C (Sept. 10, 2015).

²⁹⁷ 7 C.F.R. § 701.23(b)(3) (2019); ECP Handbook, page 2-22, para. 42.C (Sept. 10, 2015).

2. Personal Labor is an Allowed Cost

Personal labor expenses are allowed.²⁹⁸ These costs are limited in two ways. First, costs for personal labor are limited to personal labor not normally required in the operation of the farm. Second, costs for personal labor provided by the farmer must be less than what would be charged for labor by commercial contractors who would be regularly employed and making profit in such work.²⁹⁹

3. Only Expenses of Meeting Minimum Performance Standards

Eligible expenses cannot be more than what is necessary to achieve the minimum performance required to resolve the problem that is being corrected by the practice.³⁰⁰ Costs for work above these levels are not eligible costs for the purposes of ECP. Similarly, ECP cost sharing is not authorized for normal upkeep or maintenance of conservation practices.³⁰¹

4. Bartering

Bartering can qualify as an eligible way for farmers to pay for work that is reimbursable as a cost share.³⁰² FSA defines bartering as the direct exchange of goods or services without using money, according to the rates of exchange or by bargaining by the parties.³⁰³ For example, a farmer is bartering if the farmer trades 100 straw bales produced on the farm for 250 hours of fence building labor.

FSA will need to approve any bartering cost.³⁰⁴ FSA will need to conclude that the bartering related directly to the ECP practice, and that the value of the bartered goods or services is “commensurate” with the services rendered or goods received. The bartered goods or services must be received or rendered before a cost-share payment will be made.³⁰⁵ The farmer must give FSA a written account of what was bartered along with details of the agreement.³⁰⁶

5. Compensated Expenses Are Not Included

The amount of any expenses that are reimbursed by a third party are not covered.³⁰⁷ This includes insurance indemnity payments.

²⁹⁸ 7 C.F.R. §701.23(b)(2) (2019); ECP Handbook, page 2-22, para. 42.C (Sept. 10, 2015). FSA decides if the labor would be normally required.

²⁹⁹ 7 C.F.R. § 701.23(b)(3) (2019); ECP Handbook, page 2-22, para. 42.C (Sept. 10, 2015).

³⁰⁰ ECP Handbook, page 2-22, para. 42.C (Sept. 10, 2015).

³⁰¹ ECP Handbook, page 6-37, para. 164.B (Sept. 10, 2015).

³⁰² ECP Handbook, page 2-24, para. 46.B (Sept. 10, 2015).

³⁰³ ECP Handbook, page 2-24, para. 46.B (Sept. 10, 2015).

³⁰⁴ ECP Handbook, page 2-24, para. 46.B (Sept. 10, 2015). Bartering cannot be used to evade other ECP rules and may not be a method to avoid payment limitations.

³⁰⁵ ECP Handbook, page 2-24, para. 46.B (Sept. 10, 2015).

³⁰⁶ ECP Handbook, page 2-24, para. 46.C (Sept. 10, 2015).

³⁰⁷ 7 C.F.R. § 701.111(2019); ECP Handbook, page 7-52, para. 333. (Sept. 10, 2015).

6. Not Covered: Costs that are Not Direct and Significant Factors Necessary for the Conservation Practice

The FSA Handbook lists several practices that are not allowed as cost-share expenses because they—in the estimation of FSA—are not direct and significant factors needed for performing the ECP practice.³⁰⁸ These ineligible expenses include the following.

a. Pest and Disease Control, Mowing and Weed Control

Measures that are not covered include measures to control insects or rodents and to treat plant diseases or nematodes.³⁰⁹ Also not included are chopping or shredding residues from crops for insect control and other measures to treat plant diseases or nematodes. In addition, the cost of mowing pasture or controlling weeds is not covered.³¹⁰

b. Land and Water Access

The cost of providing land, as well as rent and other costs of using land, are not eligible.³¹¹ In addition, the right to use land or water, and the cost of dry wells are not eligible. The cost of pumps and pumping accessories are also not covered, except for the cost of permanently installing submersible pumps in wells during drought emergencies.

c. Machinery and Equipment Repair or Maintenance

Maintenance or repair costs for machinery and equipment are not covered.³¹²

d. Donated Materials

The value of donated materials is not covered.³¹³

e. Transportation Costs

The transportation costs of the farmer are not covered.³¹⁴

f. Lost Revenue

The cost revenue that was lost because of the disaster is not a covered cost.³¹⁵

³⁰⁸ ECP Handbook, pages 2-19 to 2-20, para. 41.B (Sept. 10, 2015).

³⁰⁹ ECP Handbook, page 2-19, para. 41.B (Sept. 10, 2015).

³¹⁰ ECP Handbook, page 2-20, para. 41.B (Sept. 10, 2015).

³¹¹ ECP Handbook, page 2-20, para. 41.B (Sept. 10, 2015).

³¹² ECP Handbook, page 2-20, para. 41.B (Sept. 10, 2015).

³¹³ ECP Handbook, page 2-20, para. 41.B (Sept. 10, 2015).

³¹⁴ ECP Handbook, page 2-20, para. 41.B (Sept. 10, 2015).

³¹⁵ ECP Handbook, page 2-20, para. 41.B (Sept. 10, 2015).

g. Enhancing Acres or Structures Not Affected by Disaster

The cost to enhance acres or structures not affected by the natural disaster are not covered.³¹⁶

h. Power Sources or Fuel

In general, power sources and fuel are not covered costs.³¹⁷ Solar-based and wind-based power sources may be eligible if determined to be the least costly alternative for providing electric fence or water for livestock.

i. Engineering Charges or Permits

Engineering charges or permit fees, as well as project manager or consultation fees, are not allowed.³¹⁸

XI. ECP Cost-Share Assistance Dollar Limits

FSA rules set dollar limits on the cost-share assistance for a farmer.

A. In General, Maximum Award is 75 Percent of Cost

In general, a farmer may receive up to 75 percent of the cost to perform the conservation practice.³¹⁹ That means either 75 percent of the total actual cost, or 75 percent of the total allowable cost—whichever is less.

The allowable cost calculation is made on a statewide basis for each conservation practice and then applied to the farm.³²⁰ FSA sets a cost-share level for each conservation practice for the state. This percentage level cannot be more than 75 percent of the eligible cost of restoring the loss. So, if the total eligible cost for all practices on a farm caused by a disaster were \$210,000, the maximum cost share would be 75 percent of \$210,000, or \$157,500.³²¹

B. For Some Farmers, Maximum Award is 90 Percent of Costs

For some time, those farmers that FSA calls limited resource farmers and ranchers have been eligible for a maximum ECP payment of 90 percent of the farmer's costs. According to the 2018 Farm Bill, those that FSA calls socially disadvantaged farmers and ranchers and beginning farmers and ranchers are also eligible for ECP payments of up to 90 percent

³¹⁶ ECP Handbook, page 2-20, para. 41.B (Sept. 10, 2015).

³¹⁷ ECP Handbook, page 2-20, para. 41.B (Sept. 10, 2015).

³¹⁸ ECP Handbook, page 2-19, para. 41.B (Sept. 10, 2015).

³¹⁹ 7 C.F.R. § 701.126(a) (2019); ECP Handbook, page 2-1, para. 30.A (Sept. 10, 2015).

³²⁰ ECP Handbook, page 2-2, para. 30.C (Sept. 10, 2015).

³²¹ ECP Handbook, page 2-2, para. 30.D (Sept. 10, 2015).

of the farmer's or rancher's actual costs.³²² That means either 90 percent of the total actual cost, or 90 percent of the total allowable cost, whichever is less.³²³

This change has been at least partially implemented by FSA.³²⁴ However, FSA's understanding of the rule is confusing regarding socially disadvantaged farmers and ranchers and beginning farmers and ranchers.³²⁵

Definitions of limited resource producers, socially disadvantaged farmers and ranchers, and beginning farmers and ranchers are discussed below.³²⁶

1. Limited Resource Producer

A limited resource producer is defined by FSA. To qualify as a limited resource producer two things must be true.³²⁷

First, the producer must have direct or indirect farm income that is not more than a certain amount in each of two years.³²⁸ Those two years are the two calendar years that were before the tax year before the relevant program year. So, if the program year is 2018, the definition of a limited resource producer looks to the years 2015 and 2016 for direct and indirect farm income. The income for the two years is adjusted for inflation.

Second, the producer must have a total household income that was at or below the poverty level for a family of four in each of the two calendar years that come before the tax year that was before the relevant program year.³²⁹ So, if the program year is 2018, the definition of a limited resource producer looks to the years 2015 and 2016 for total household income. The income for the two years is adjusted for inflation.

³²² Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(b) (2018) (to be codified at 16 U.S.C. § 2202(b)).

³²³ 7 C.F.R. § 701.126(b) (2019); ECP Handbook, page 2-2, para. 31.B (Sept. 10, 2015).

³²⁴ FSA Notice ECP-79, ECP Payment Limitation and Cost-Share (C/S) Levels, page 2, para. 2.B (May 24, 2019; expires Jan. 1, 2020).

³²⁵ An FSA Notice reads as if FSA may think that beginning farmers and ranchers are a subset of socially disadvantaged farmers and ranchers, and the Notice seems to suggest that beginning farmers and ranchers may not be included in the 90 percent benefit. See FSA Notice ECP-79, ECP Payment Limitation and Cost-Share (C/S) Levels, page 2, para. 2.B (May 24, 2019; expires Jan. 1, 2020). If so, this interpretation would seem to be at odds with the 2018 Farm Bill. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(b) (2018) (to be codified at 16 U.S.C. § 2202(b)).

³²⁶ Often times, as is the case with the 2018 Farm Bill, the terms limited resource farmer and rancher, socially disadvantaged farmer and rancher, and beginning farmer and rancher are used. The ECP Handbook, however, uses the term limited resource producer instead. The meanings should be the same despite the slight differences in terminology.

³²⁷ ECP Handbook, page 2-2, para. 30.C to 30.D, Exhibit 2, page 2, "Limited resource producer" (Sept. 10, 2015); FSA, Common Management and Operating Provision Handbook, 1-CM (rev.3) Amend 2, Exhibit 2, page 3 (April 8, 2014).

³²⁸ FSA, Common Management and Operating Provision Handbook, 1-CM (rev.3) Amend 2, Exhibit 2, page 3 (April 8, 2014).

³²⁹ FSA, Common Management and Operating Provision Handbook, 1-CM (rev.3) Amend 2, Exhibit 2, page 3 (April 8, 2014).

The local FSA office must be prepared to help producers that want to qualify as limited resource.³³⁰ These numbers will vary by state, county, and year. A USDA tool to tell if someone is a limited resource farmer or rancher is available at: <https://lrftool.sc.egov.usda.gov/DeterminationTool.aspx?fyYear=2018>.

2. Socially Disadvantaged Farmer or Rancher

A socially disadvantaged farmer or rancher is defined by federal statute. In general, a socially disadvantaged group is a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group, without regard to their individual identities.³³¹

A socially disadvantaged farmer or rancher has been defined by USDA for other programs. For the FSA Farm Loan Programs, for example, socially disadvantaged farmers and ranchers are those that are—to use FSA’s terms—American Indians or Alaskan Natives, Asian, Blacks, or African Americans, native Hawaiians or other Pacific Islanders, Hispanic, or women.³³²

However, for ECP, it appears that FSA will define a socially disadvantaged farmer or rancher based on race and ethnicity. The definition would not include gender.³³³ If so, as noted above, that definition would be in contrast to the FSA definition used for Farm Loan Programs.

3. Beginning Farmer or Rancher

A beginning farmer or rancher is not defined in the 2018 Farm Bill. Other FSA programs, however, define a beginning farmer or rancher as someone who has not operated a farm for more than ten years.³³⁴

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

The 2018 Farm Bill provides that the total payment for a single disaster event may not be more than 50 percent of the agricultural value of the land.³³⁵ This change has not yet been implemented by FSA in the Code of Federal Regulations, a Handbook, or a Notice.

Even before the 2018 Farm Bill, an ECP payment could not be more than 50 percent of the agricultural market value of the affected land. FSA rules in place before the 2018 Farm Bill suggested that FSA might be able to waive the 50 percent rule.³³⁶ Now, however, that

³³⁰ ECP Handbook, page 6-58, para. 172.D, (Sept. 10, 2015).

³³¹ 7 U.S.C. § 2279(a)(5)-(6); Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(b) (2018) (to be codified at 16 U.S.C. § 2202(b)).

³³² FSA Direct Loanmaking Handbook, 3-FLP (Revision 2), Exhibit 2, page 20, “SDA group” (May 10, 2018).

³³³ FSA Notice ECP-79, ECP Payment Limitation and Cost-Share (C/S) Levels, page 2, para. 2.B (May 24, 2019; expires Jan. 1, 2020). FSA may be thinking that a socially disadvantaged farmer or rancher applies only to race and ethnicity. FSA Notice ECP-79, ECP Payment Limitation and Cost-Share (C/S) Levels, page 2, para. 2.C (May 24, 2019; expires Jan. 1, 2020).

³³⁴ See, for example, 7 C.F.R. § 761.2(b) (“Beginning farmer”) (2019) and 7 U.S.C. § 2279(a)(2).

³³⁵ 7 U.S.C. § 2279(e)(1)-(2); Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(b) (2018) (to be codified at 16 U.S.C. § 2202(c)). Agricultural value is set by FSA.

³³⁶ ECP Handbook, page 2-1, para. 30.B (Sept. 10, 2015).

likely will no longer be true. According to rules in place before the 2018 Farm Bill, FSA decided what the land is worth.³³⁷ The 50 percent calculation, according to the pre-Farm Bill Rules, was based on the acres served by the ECP cost share.³³⁸

D. Payment Limitation—Was \$200,000 and is Now \$500,000

According to the rules in place before the 2018 Farm Bill, the maximum ECP cost-share payment was \$200,000 per person or legal entity, and per disaster for all conservation practices.³³⁹

The 2018 Farm Bill provides that the maximum ECP payment for an agricultural producer is not more than \$500,000.³⁴⁰ FSA has implemented this change, in part, in a recent Notice.³⁴¹ The new payment limit applies to disaster events that occurred after December 20, 2018.

E. Total Payments Cannot Be More Than Total Expenses

Total cost-share payments from all sources cannot be more than the total eligible expenses of installing or implementing the conservation practice.³⁴²

XII. Applying for ECP

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

A. Deadlines and Deadline Extensions

The FSA Handbook states that the sign-up period for ECP must be at least thirty days and no more than sixty days.³⁴³

The sign-up period may be extended by FSA beyond sixty days.³⁴⁴ There are no clear rules as to when or why the deadline might be extended. FSA gives two examples, however, of when there might be “adequate justification” for an extension. First, if the disaster is a

³³⁷ 7 C.F.R. § 701.126(c) (2019); ECP Handbook, page 2-1, para. 30.B (Sept. 10, 2015). FSA must use NASS data or “other credible resources.” Other credible sources may include state universities, local land taxing authorities, and other sources. ECP Handbook, para. 30.B, page 2-1 (Sept. 10, 2015). The calculation is based on the land affected, not the number of participants in the operation.

³³⁸ ECP Handbook, page 2-1, para. 30.B (Sept. 10, 2015). So, for example, for removing debris from farmland, FSA should use the field average, even if only a portion of the field may require debris removal to return the land to its productive agricultural capacity. If ECP is used to restore permanent fences, the average value of the land refers to land acreage for which the fence restoration confines livestock or excludes wildlife.

³³⁹ 7 C.F.R. § 701.127 (2019); ECP Handbook, page 1-4, para. 6.A (Sept. 10, 2015).

³⁴⁰ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 2403(c) (2018) (to be codified at 16 U.S.C. § 2202b).

³⁴¹ FSA Notice ECP-79, ECP Payment Limitation and Cost-Share (C/S) Levels, page 1, para. 2.A (May 24, 2019; expires Jan. 1, 2020).

³⁴² 7 C.F.R. § 701.23(e) (2019).

³⁴³ ECP Handbook, page 6-9, para. 153.A (Sept. 10, 2015).

³⁴⁴ ECP Handbook, page 6-9, para. 153.A (Sept. 10, 2015).

drought, and the drought continues, that could be a reason to extend the deadline. Second, if the extent of the damage is so widespread that the sign-up period is not long enough for FSA to accommodate all farmers, that could be an adequate justification to extend the deadline.

B. Late Applications Accepted if FSA Thinks Lateness is “Justified”

FSA may accept applications that are late if it is “justified.”³⁴⁵ FSA rules do not explain when FSA might decide if a late application is justified.

The rules do list two considerations that may affect whether FSA decides the request is justified.³⁴⁶ First, in cases of physical damage to the farm, FSA would be more likely to accept a late application if the damage still exists and normal farming operations are still affected. This circumstance will be verified by a farm visitor and must be identifiable. Second, in case of drought, a justification for a late application can include that the area remains in drought.

C. If ECP Funds Not Available

It is possible that a farmer will apply for ECP at a time in which there are not funds available in that FSA county office.³⁴⁷ This could be because funds are approved but not yet sent to the county office. It could also be that the office had funds for that disaster but has already used them.

In either case, FSA should accept the farmer’s request for ECP assistance, and FSA should do an inspection and assessment of the farmer’s damage.³⁴⁸ When funds become available, FSA should then process the application.

FSA should also accept an application for ECP even if the county has not been approved for ECP for that disaster.³⁴⁹ FSA should then consider the application and decide if the request should lead FSA to implement ECP in that county. If FSA decides not to implement ECP, FSA should tell the farmer that funds are not available for the program.

FSA is allowed to accept applications for ECP before an official sign-up period starts.³⁵⁰

D. Assist the Farmer with Application

Once FSA agrees that ECP is an eligible solution to the farmer’s emergency, FSA must assist the farmer with filing the ECP request for cost-share assistance.³⁵¹ This includes, in particular, assisting the farmer in describing the disaster damage.³⁵²

³⁴⁵ ECP Handbook, page 6-12, para. 154.F (Sept. 10, 2015).

³⁴⁶ ECP Handbook, page 6-12, para. 154.F (Sept. 10, 2015).

³⁴⁷ ECP Handbook, page 6-13, para. 154.G (Sept. 10, 2015).

³⁴⁸ ECP Handbook, page 6-13, para. 154.G (Sept. 10, 2015).

³⁴⁹ ECP Handbook, page 6-13, para. 154.H (Sept. 10, 2015).

³⁵⁰ ECP Handbook, page 6-11, para. 154.B (Sept. 10, 2015).

³⁵¹ ECP Handbook, page 6-10, para. 154.A (Sept. 10, 2015).

³⁵² ECP Handbook, pages 6-10 and 6-12, para. 154.A, E (Sept. 10, 2015).

XIII. FSA Reviews ECP Applications

FSA will review the farmer's request for ECP cost-share assistance. In general, FSA's review process will involve the following steps.

A. Inspection

Usually FSA will do an onsite inspection.³⁵³ During the inspection, FSA will be looking for multiple things. First, FSA will want to determine if the disaster caused damage that is unusual or unlikely to reoccur in the area. Second, FSA will want to see if the damage is severe enough to justify ECP assistance. Third, FSA will check to make sure that the potential conservation practice does not affect endangered species, wetlands, or historic properties.³⁵⁴ Finally, FSA will also want to see if the farmer has already started restoration work.

If the farmer refuses to allow FSA entry onto the operation for its inspection, FSA will notify the farmer in writing that FSA considers the land to be not eligible for ECP.³⁵⁵ FSA will not try to enter the farm again unless the farmer notifies the FSA county office in writing that he or she has reconsidered the decision and will now allow the visit.

B. Prioritize Requests

FSA will prioritize the ECP requests. This will be based on priorities set by FSA and the amounts that will be provided for funded ECP cost shares.³⁵⁶ The factors used by FSA will include, but are not limited to, the following.

1. Safety

Safety is a factor that the county FSA office should take into account when prioritizing ECP cost-share requests.³⁵⁷ For safety, FSA has in mind things such as a dam that poses a threat to life or property.³⁵⁸

2. Type and Degree of Damage

The type and degree of damage to a farm will be included when the county office sets priorities and approval amounts.³⁵⁹ This would seem to mean that the greater the damage, the higher the priority.

³⁵³ 7 C.F.R. § 701.14(a) (2019); ECP Handbook, page 6-31, para. 161.A (Sept. 10, 2015). FSA may not do an onsite inspection if the likely payment is under \$5000. In addition, the requirement for an onsite inspection can be waived in what FSA calls dire circumstances. Such circumstance can include that the damage requires immediate action to prevent significant loss to the operation or presents an immediate threat to public safety or the environment. ECP Handbook, page 6-32, para. 161.A and B (Sept. 10, 2015).

³⁵⁴ ECP Handbook, page 6-34, para. 162.A, B (Sept. 10, 2015).

³⁵⁵ ECP Handbook, page 6-36, para. 163.B (Sept. 10, 2015).

³⁵⁶ 7 C.F.R. § 701.16(a) (2019); ECP Handbook, page 6-38, para. 165.A (Sept. 10, 2015).

³⁵⁷ 7 C.F.R. § 701.16(a)(6) (2019); ECP Handbook, page 6-38, para. 165.B (Sept. 10, 2015).

³⁵⁸ ECP Handbook, page 6-38, para. 165.B (Sept. 10, 2015).

³⁵⁹ 7 C.F.R. § 701.16(a)(1) (2019); ECP Handbook, page 6-38, para. 165.B (Sept. 10, 2015).

3. Type of Practice Needed to Address the Problem

The type of practices needed to address the problem is a factor that FSA will take into account.³⁶⁰ It is not clear from the FSA Handbook what type of practice would receive priority over another.

4. Availability of Funds

The availability of funds is a factor that FSA will consider.³⁶¹ It is unclear from the FSA Handbook how a relative shortage or relative abundance of funds would affect FSA priorities.

5. Availability of Technical Assistance

The availability of technical assistance is a factor should be taken into account in prioritizing funding.³⁶² The FSA Handbook does not say so directly, but this may mean that if technical assistance would be needed for the project, but none is available, the priority of the application could be hurt.

6. Environmental Concerns

Environmental concerns should be taken into count when FSA sets priorities.³⁶³ It is not clear what environmental concerns FSA has in mind with this factor.

7. Welfare of Eligible Livestock

The welfare of eligible livestock is a factor FSA will take into account.³⁶⁴ This would seem to mean that if a project helped the welfare of livestock more than other projects, it would be favored.

8. Limited Resource Producer

Whether the applicant is a limited resource producer is a factor that will be taken into account.³⁶⁵ A limited resource producer is defined by FSA. To qualify as a limited resource producer two things must be true.³⁶⁶

First, the producer must have direct or indirect farm income that is not more than a certain amount in each of two years.³⁶⁷ Those two years are the two calendar years that

³⁶⁰ 7 C.F.R. § 701.16(a)(2) (2019); ECP Handbook, page 6-38, para. 165.B (Sept. 10, 2015).

³⁶¹ 7 C.F.R. § 701.16(a)(3) (2019); ECP Handbook, page 6-38, para. 165.B (Sept. 10, 2015).

³⁶² 7 C.F.R. § 701.16(a)(4) (2019); ECP Handbook, page 6-38, para. 165.B (Sept. 10, 2015).

³⁶³ 7 C.F.R. § 701.16(a)(5) (2019); ECP Handbook, page 6-38, para. 165.B (Sept. 10, 2015).

³⁶⁴ 7 C.F.R. § 701.16(a)(7) (2019); ECP Handbook, page 6-38, para. 165.B (Sept. 10, 2015).

³⁶⁵ ECP Handbook, page 6-38, para. 165.B (Sept. 10, 2015).

³⁶⁶ ECP Handbook, Exhibit 2, page 2, "Limited resource producer" (Sept. 10, 2015); FSA, Common Management and Operating Provision Handbook, 1-CM (Rev. 3), Amend. 62, Exhibit 2, page 3 (April 8, 2014).

³⁶⁷ ECP Handbook, Exhibit 2, page 2, "Limited resource producer" (Sept. 10, 2015); FSA, Common Management and Operating Provision Handbook, 1-CM (Rev. 3), Amend. 62, Exhibit 2, page 3 (April 8, 2014).

were before the tax year that immediately precedes the relevant program year. So, if the program year is 2018, the definition of a limited resource producer looks to the years 2015 and 2016. The income for the two years is adjusted for inflation.

Second, the producer must have a total household income that was at or below the poverty level for a family of four in each of the two calendar years that come before the tax year that was before the relevant program year.³⁶⁸ So, if the program year is 2018, the definition of a limited resource producer looks to the years 2015 and 2016. The income for the two years is adjusted for inflation.

The local FSA office must be prepared to help producers that want to qualify as a limited resource producer.³⁶⁹ These number used by FSA for this purpose will vary by state, county, and year. A USDA tool to tell if someone is eligible as a limited resource producer is available at:

<https://lrftool.sc.egov.usda.gov/DeterminationTool.aspx?fyYear=2018>.

9. Lifespan of the Practice

The lifespan of the practice is something that FSA will consider.³⁷⁰ Practices with longer lifespans, as opposed to temporary practices, will receive a priority.

C. Approval Amounts

If a farmer's ECP application is to be approved, FSA must set an approval amount.³⁷¹ FSA rules set out a number of factors that FSA should use in deciding how much cost share should go to a farmer. The rules set out five factors that FSA should take into account.

1. Extent of Damage and Repair Costs

The extent of damage and the estimated eligible repair costs are factors that FSA should take into account.³⁷² The more the cost, the more money that is likely to be approved.

2. Amount of Cost Share Requested

FSA should take into account the amount of cost share that was requested in the application.³⁷³

³⁶⁸ ECP Handbook, Exhibit 2, page 2, "Limited resource producer" (Sept. 10, 2015); FSA, Common Management and Operating Provision Handbook, 1-CM (Rev. 3), Amend. 62, Exhibit 2, page 3 (April 8, 2014).

³⁶⁹ ECP Handbook, page 6-58, para. 172.D (Sept. 10, 2015).

³⁷⁰ ECP Handbook, page 6-38, para. 165.B (Sept. 10, 2015).

³⁷¹ ECP Handbook, page 6-62, para. 176.A (Sept. 10, 2015).

³⁷² ECP Handbook, page 6-62, para. 176.A (Sept. 10, 2015).

³⁷³ ECP Handbook, page 6-62, para. 176.A (Sept. 10, 2015).

3. Size of Farm

The size of farm should be taken into account.³⁷⁴ This includes a breakdown of the land by acres of cropland, irrigated land, pasture, and total acreage. Although the Handbook does not say so, it seems likely that FSA thinks larger farmers should receive more funds. It is not clear how the breakdown of types of land would matter in the calculation.

4. Type of Operation

The type of operation, including what the principal crops are, and the types and numbers of livestock, are to be taken into account.³⁷⁵ It is not clear from the Handbook how this should affect the cost-share amount.

5. Time Sensitive Request

FSA should take into account the time sensitive nature of the request.³⁷⁶ FSA seems to think that if the request is more time sensitive, more funds should be used as a cost share.

D. Decision in Writing

FSA must tell farmers that apply for ECP if they will receive ECP cost share in writing.³⁷⁷ If the cost-share request is not approved, FSA must explain, in writing, why not.³⁷⁸ The decision may be deferred if there are not funds available.³⁷⁹ FSA should tell the farmer if his or her application has been deferred. FSA is required to keep these pending requests on file in case more funds become available. If there are additional funds, FSA must tell the farmer.

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

ECP cost-share assistance is generally available only for conservation practices that are started after approval of an ECP request.³⁸⁰ 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.³⁸¹ FSA defines started for this purpose as including: (1) purchasing material for the practice; (2) signing a contract; or (3) the start of actual physical work.³⁸²

³⁷⁴ ECP Handbook, page 6-62, para. 176.A (Sept. 10, 2015).

³⁷⁵ ECP Handbook, page 6-62, para. 176.A (Sept. 10, 2015).

³⁷⁶ ECP Handbook, page 6-62, para. 176.A (Sept. 10, 2015).

³⁷⁷ ECP Handbook, page 6-55, para. 171.B, page 6-63, para. 177.C (Sept. 10, 2015).

³⁷⁸ ECP Handbook, page 6-59, para. 173.A (Sept. 10, 2015).

³⁷⁹ ECP Handbook, page 6-59, paras. 173.C, 174 (Sept. 10, 2015).

³⁸⁰ 7 C.F.R. § 701.15(a) (2019).

³⁸¹ 7 C.F.R. § 701.15(a) (2019); ECP Handbook, page 6-37, para. 164.B (Sept. 10, 2015).

³⁸² ECP Handbook, page 6-57, para. 171.C (Sept. 10, 2015).

B. Waiver Possible If Immediate Action Needed to Prevent Further Loss

In some instances, according to FSA, farmers need to take immediate action and initiate restoration measures after a disaster but before filing an ECP application.³⁸³ A waiver of this requirement is possible on a case-by-case basis.³⁸⁴ FSA should treat an application for ECP assistance that is submitted after starting the conservation practice as a request for relief from FSA's rule that applications must be submitted before starting the practice.³⁸⁵ No special request is required.

To be eligible for a waiver, all of the following requirements must be satisfied. First, the disaster must have caused a situation that required the farmer to take immediate action to prevent further losses.³⁸⁶ Such situations could include, for example, if a disaster forces the farmer to make an emergency repair of fences to contain livestock, or if a dam poses an immediate threat to life and property. Second, a waiver is possible only if the request to file for a cost share was taken within a "reasonable amount of time" after the start of the enrolment period for ECP, meaning that the application must be filed between the date of the disaster and the end of the sign-up period.³⁸⁷ Third, the practice must not have been started more than sixty days before the ECP disaster designation was approved by FSA.³⁸⁸

XV. Technical Assistance

Technical assistance may be available to ECP farmers as they plan and implement their ECP practices. This can mean that the farmer will receive technical expertise, information, and the tools needed to rehabilitate land damaged by the disaster.³⁸⁹ From FSA's point of view, the technical assistance is intended to help farmers apply conservation practices correctly.³⁹⁰ The assistance might include helping farmers decide if a practice is needed and feasible, selecting a site, or supervising the installation. Farmers do not have to pay for technical assistance provided by FSA or NRCS.³⁹¹ Farmers are not required to use FSA-provided technical assistance.³⁹²

XVI. Adjustments After Approval

FSA has the ability to either increase or decrease the cost share amount or the extent of the conservation practice that was originally approved. This can occur either before or after the cost share payment is made.

³⁸³ ECP Handbook, page 6-56, para. 171.C (Sept. 10, 2015).

³⁸⁴ 7 C.F.R. § 701.15(b)(1) (2019); ECP Handbook, page 5-56, para. 171.C (Sept. 10, 2015).

³⁸⁵ ECP Handbook, page 6-57, para. 171.C (Sept. 10, 2015).

³⁸⁶ 7 C.F.R. § 701.15(b)(2) (2019); ECP Handbook, page 6-56, para. 171.C (Sept. 10, 2015).

³⁸⁷ 7 C.F.R. § 701.15(b)(3) (2019); ECP Handbook, page 6-56, para. 171.C (Sept. 10, 2015).

³⁸⁸ 7 C.F.R. § 701.15(b)(4) (2019); ECP Handbook, page 6-57, para. 171.C (Sept. 10, 2015).

³⁸⁹ ECP Handbook, page 3-1, para. 50.A (Sept. 10, 2015).

³⁹⁰ ECP Handbook, page 3-8, para. 51.B (Sept. 10, 2015).

³⁹¹ ECP Handbook, page 3-9, para. 54.A (Sept. 10, 2015).

³⁹² ECP Handbook, page 3-9, para. 53.B (Sept. 10, 2015).

A. Changes to Cost Share or Practice Before Performance Completed

FSA may increase the cost share amount or the extent of the practice before performance is completed if FSA decides that the change is needed and funds are available.³⁹³

FSA will decrease the cost share amount and the extent of the practice before performance is completed if FSA determines a lesser extent of practice is needed.³⁹⁴

B. Changes to Cost Share or Practice After Performance but Before Payment

Under certain circumstances, FSA may increase the cost share amount or the extent of the practice after it is approved and completed, but before payment has been made. To do so, funds must be available and either of the following conditions must apply: (1) the original amount approved was based on an estimate that proved to be in error and the farmer could not reasonably have known in advance the amount needed to complete the practice; or (2) the cost share approved was based on an estimate of cost that was too low.³⁹⁵

FSA may decrease the cost share amount and extent of the practice after it is approved and completed, but before payment has been made, so long as FSA approves the lesser conservation practice.³⁹⁶

C. Changes to Cost Share or Practice After Performance and Payment

FSA may increase the cost share amount or the extent of the practice after it has been approved, completed, and the payment made, so long as one of the following is true: (1) FSA or another agency made an error in the original paperwork; (2) a measurement error was made; (3) the farmer had failed to bring in a receipt of invoice; or (4) a similar situation resulted in a lower payment or lesser conservation practice.³⁹⁷

XVII. Completing Conservation Practices

FSA has numerous rules relating to the completion of a conservation practice. These rules are described below.

³⁹³ ECP Handbook, page 6-143, para. 253.A (Sept. 10, 2015). However, if FSA did not approve the entire extent of practice originally requested, and the farmer performs an extent greater than what FSA approved, FSA will not cover the cost of the greater practice if it exceeds the originally cost share amount. ECP Handbook, page 6-145, para. 256.A (Sept. 10, 2015).

³⁹⁴ ECP Handbook, page 6-143, para. 253.B (Sept. 10, 2015).

³⁹⁵ ECP Handbook, page 6-144, para. 254.A (Sept. 10, 2015). However, if FSA did not approve the entire extent of practice originally requested, and the farmer performs an extent greater than what FSA approved, FSA will not cover the cost of the greater practice if it exceeds the originally cost share amount. ECP Handbook, page 6-145, para. 256.A (Sept. 10, 2015).

³⁹⁶ ECP Handbook, page 6-144, para. 254.B (Sept. 10, 2015).

³⁹⁷ ECP Handbook, page 6-145, para. 255.A (Sept. 10, 2015). However, if FSA did not approve the entire extent of practice originally requested, and the farmer performs an extent greater than what FSA approved, FSA will not cover the cost of the greater practice if it exceeds the originally cost share amount. ECP Handbook, page 6-145, para. 256.A (Sept. 10, 2015).

A. 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, not to exceed six months.³⁹⁸ The payment deadline for each practice will be in the agreement the farmer signed with FSA.³⁹⁹ Extensions of the expiration date are possible.⁴⁰⁰ A farmer can receive up to two extensions. The combined duration of these extensions can total no more than one year beyond the initial six-month period. Extensions of this length will only be granted in “unusual circumstances.” If the farmer is dealing with a drought, an extension request must include a new assessment of drought conditions and the current availability of water.⁴⁰¹

B. Certify Completion

After completing the practice, the farmer must certify that it has been completed and request payment by the payment request deadline.⁴⁰² FSA will have a performance report for farmers to fill out to request payment. Farmers must submit to FSA information that establishes the extent of the approved practices that were performed and compliance with the rules of the program.⁴⁰³ Performance reports must be submitted by the expiration date, or by the extension date if the farmer received an extension.⁴⁰⁴

The performance reports need to include information about the conservation practice work and other documents, such as copies of invoices, cancelled checks, and receipts.⁴⁰⁵ If the farmer used his or her own labor, equipment, or materials, the farmer must send in a statement that describes the dates of the work, the cost per hour for labor, the equipment used, and the charges for it and other information.

If FSA decides that the farmer did not do as much as was claimed on the performance report, the cost-share payment may be reduced.⁴⁰⁶ If the farmer did more than was needed, FSA may decide that any cost for that extra work is not eligible for an ECP cost share.⁴⁰⁷

Time limits may be extended when failure to submit required information within the time limits are due to reasons beyond the farmer's control.⁴⁰⁸

³⁹⁸ 7 C.F.R. § 701.21(c) (2019); ECP Handbook, page 6-64, para. 178.A (Sept. 10, 2015).

³⁹⁹ 7 C.F.R. § 701.21(c) (2019).

⁴⁰⁰ ECP Handbook, page 6-64, para. 178.B (Sept. 10, 2015).

⁴⁰¹ ECP Handbook, page 6-64, para. 178.C (Sept. 10, 2015).

⁴⁰² 7 C.F.R. § 701.21(a) (2019); ECP Handbook, pages 6-83 to 6-84, paras. 202 and 203 (Sept. 10, 2015).

⁴⁰³ 7 C.F.R. § 701.21(b) (2019); ECP Handbook, page 6-84, para. 203.A (Sept. 10, 2015).

⁴⁰⁴ ECP Handbook, page 6-83, para. 202.A (Sept. 10, 2015).

⁴⁰⁵ ECP Handbook, page 6-85, para. 205.A, B (Sept. 10, 2015). Farmers must keep records for at least one year after the end of the fiscal year in which the conservation practice was completed.

⁴⁰⁶ ECP Handbook, page 6-41, para. 251, and page 8-21, para. 411.E (Sept. 10, 2015).

⁴⁰⁷ ECP Handbook, page 6-41, para. 251 (Sept. 10, 2015).

⁴⁰⁸ 7 C.F.R. § 701.21(c) (2019).

C. Performance Must Meet Specifications or Requirements

FSA will check to see if the materials set out in the cost-share agreement were used as described in the agreement.⁴⁰⁹ In general, if the performance does not meet the specifications and requirements contained within the agreement, the cost-share payment will be reduced or not paid. There are a few exceptions to this rule.

First, the farmer may receive cost-share funds even though the performance does not meet the specifications or requirements if the farmer relied on official measurements that were in error and enough material was applied to meet minimum requirements of the incorrect measurements.⁴¹⁰ This exception does not apply if the farmer should have known the measurements were in error.

Second, the cost share may be paid for the full amount performed if FSA decides the practice solves the problem for which it was approved, the farmer made a reasonable effort to meet the requirements, and the farmer agrees to maintain the practice for its required lifespan.⁴¹¹

Cost-share payments will still be made if the conservation practice performed poorly but failed for reasons beyond the farmer's control.⁴¹²

FSA will do spot checks afterward to verify that the conservation practice is maintained, and to make sure farmers have reported correctly.⁴¹³

If the practice does not meet ECP requirements, and FSA finds that corrective action needs to be taken by the farmer, the farmer will be granted additional time to take such actions.⁴¹⁴

XVIII. 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.⁴¹⁵

FSA will count up the farmer's total costs based on labor, material, equipment used, sales tax, and value of used material to determine the total eligible cost of the conservation practice.⁴¹⁶ Expenses for personal labor and personal equipment should be less than that charged by contractors who are entitled to make a profit for their efforts.

⁴⁰⁹ ECP Handbook, page 6-162, paras. 273-274 (Sept. 10, 2015).

⁴¹⁰ ECP Handbook, page 6-161, para. 271.A (Sept. 10, 2015).

⁴¹¹ ECP Handbook, page 6-161, para. 271.A (Sept. 10, 2015).

⁴¹² ECP Handbook, page 6-161, para. 272.A (Sept. 10, 2015). FSA may require that the farmer do some additional work on the conservation practice. ECP Handbook, page 6-161, para. 272.B (Sept. 10, 2015).

⁴¹³ ECP Handbook, pages 8-2 to 8-4, paras. 401-403 (Sept. 10, 2015).

⁴¹⁴ ECP Handbook, page 8-4, para. 404.A (Sept. 10, 2015).

⁴¹⁵ ECP Handbook, page 7-19, para. 313.A (Sept. 10, 2015).

⁴¹⁶ ECP Handbook, page 7-18, para. 312.A (Sept. 10, 2015).

The cost share can only be calculated after the performance report has been submitted.⁴¹⁷ After the report and all information is submitted, an automatic calculation will be used to determine the amount of the cost share.

If the farmer's performance equals the extent approved, and contributions equal those estimated in the approval, the cost share will equal the amount earned.⁴¹⁸ If the farmer performs less or more than the extent approved, then the cost share approved may be changed.⁴¹⁹

Under FSA rules, partial payments are sometimes allowed when the farmer has completed part of the conservation practice.⁴²⁰ 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.⁴²¹

XIX. Long-Term Obligations

FSA will try to get the payments back from the farmer if there is a violation of the agreement.⁴²² FSA may seek the whole payment or may decide that only a partial refund is justified.

Responsibilities include the following.

A. Maintain and Properly Use Conservation Practice

In general, a conservation practice must be maintained and used throughout its normal lifespan for the purposes for which the cost share was approved.⁴²³ Farmers receiving ECP cost-share assistance are responsible for the maintenance and proper use of the conservation practice.⁴²⁴ 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.⁴²⁵ Included in the list of possible violations, according to FSA, are: (1) failure to do normal repair, upkeep, or maintenance on the conservation practice; (2) destruction or substantial damage to the practice; (3) stopping the use of the practice before its lifespan ends; and (4) other use or misuse of the practice so that it fails to meet its conservation purpose.⁴²⁶

⁴¹⁷ ECP Handbook, page 7-19, para. 313.A (Sept. 10, 2015).

⁴¹⁸ ECP Handbook, page 7-19, para. 313.C (Sept. 10, 2015).

⁴¹⁹ ECP Handbook, pages 7-20 and 7-21, para. 313.D-E (Sept. 10, 2015).

⁴²⁰ ECP Handbook, pages 7-35 and 7-36, paras. 321-322 (Sept. 10, 2015). If the conservation practice is not completed, the payment may need to be returned by the farmer.

⁴²¹ ECP Handbook, page 7-35, para. 321.B (Sept. 10, 2015). Other FSA rules also apply for partial payments.

⁴²² ECP Handbook, pages 8-19 and 8-20, para. 410.B-C (Sept. 10, 2015).

⁴²³ 7 C.F.R. § 701.31(a) (2019); ECP Handbook, page 8-19, para. 410.A (Sept. 10, 2015). This is true if the farmer keeps control of the land, and if a new farmer agrees in writing to maintain the practice.

⁴²⁴ 7 C.F.R. § 701.31(a) (2019).

⁴²⁵ 7 C.F.R. § 701.31(b) (2019).

⁴²⁶ ECP Handbook, page 8-19, para. 410.B (Sept. 10, 2015).

Exceptions to the rule that the farmer must maintain the conservation practice sometimes apply.⁴²⁷ FSA will not consider it a violation to stop maintaining the practice if: (1) the practice has served its purpose for its lifespan; (2) the failure to maintain and use the practice was because of a condition beyond the farmer's control; (3) the failure happened after the farmer involuntarily lost control of the land; (4) the failure happened either on land or with a practice that was not a part of the cost share; or (5) FSA decides that good farming practices no longer need the conservation practice to be maintained and used.

B. No Actions that Defeat the ECP Purpose

FSA believes that certain actions can defeat the purpose of the ECP cost share.⁴²⁸ If FSA believes a farmer engaged in such actions, FSA will seek the return of the cost-share money. Actions that FSA thinks defeat the purpose of the cost share include some unauthorized actions, such as failing to use a conservation practice for the purpose that was the basis of the cost share, or performing other willful acts that either violate reasonable conservation principles or offset conservation accomplishments.⁴²⁹

C. Lifespan of a Practice

For many conservation practices, FSA establishes a lifespan, or minimum period of time that the practice is expected to function with proper maintenance.⁴³⁰ The lifespan of a conservation practice is the time for which the practice is subject to spot checks to be sure that the practice is being maintained and used for its designated purpose.⁴³¹

D. Loss of Control of the Land

If the farmer voluntarily gives up control or title to the land on which the conservation practice has been established, the farmer must do one of two things.⁴³² First, the farmer can get a written statement from the new owner or operator, or both, agreeing to properly maintain the practice for the remainder of the lifespan. That would make the new owner responsible for maintaining the conservation practice. Second, if a written statement is not obtained from the new owner or operator, the farmer can keep the responsibility for maintaining the practice. In such a situation, if the practice is not maintained and used for its intended purpose, the original participant is responsible for the cost-share funds.

XX. ECP Appeals

Many adverse decisions made by FSA may be appealed. Therefore, decisions made under ECP are often appealable.⁴³³ 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.

⁴²⁷ ECP Handbook, pages 8-19 and 8-20, para. 410.A, D (Sept. 10, 2015).

⁴²⁸ ECP Handbook, page 8-21, para. 411.A (Sept. 10, 2015).

⁴²⁹ ECP Handbook, page 8-21, para. 411.B (Sept. 10, 2015).

⁴³⁰ 7 C.F.R. §701.31(a) (2019).

⁴³¹ ECP Handbook, page 8-1, para. 400.A, and Exhibit 2, page 2, "Lifespan of a Practice" (Sept. 10, 2015).

⁴³² ECP Handbook, page 8-87, para. 206.B (Sept. 10, 2015).

⁴³³ ECP Handbook, page 6-59, para. 173.A (Sept. 10, 2015).

XXI. 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/parental status, sexual orientation, gender identity, disability, political beliefs, or because all or part of an individual's income is derived from any public assistance program.⁴³⁴

⁴³⁴ 7 C.F.R. §15d.3(a) (2019); ECP Handbook, page 6-1, para. 150.C (Sept. 10, 2015).