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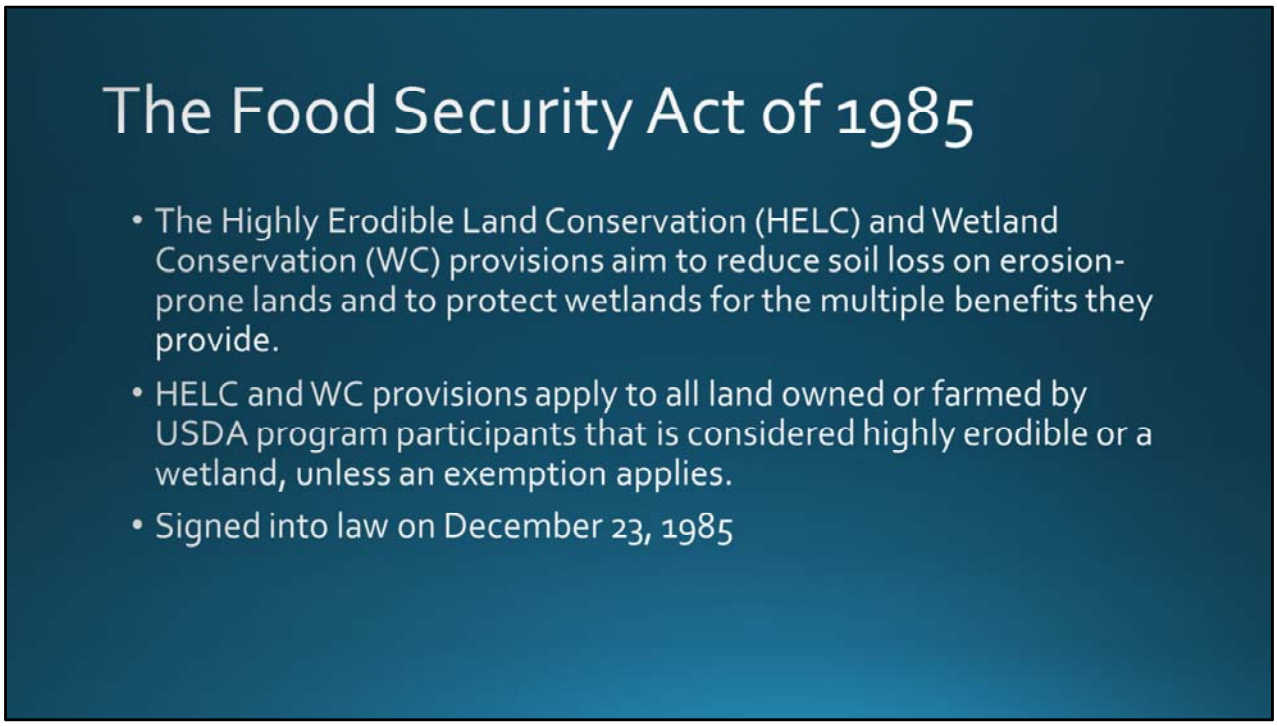
Wetland Labels for Food Security Act

Here's an overview of the webinar. First I'll provide some background information about The Food Security Act (FSA) of 1985, what it means to be in compliance with the Highly Erodible Lands and Wetland Conservation (HELC/WC) provisions of the Act, and NRCS' responsibilities under the Act. Next I'll discuss briefly the things that make up a certified wetland determination. Definitions of key terms will be provided throughout. We'll take a quick look at the definitions of all the FSA wetland labels, then look more in depth at the documentation requirements for the most frequently used and confused wetland labels. We'll wrap up the webinar by presenting some wetland determination scenarios so you can test your knowledge. I hope there will be time for some Q&A at the end, but if not, we'll respond to questions by email after the webinar.

Note that the focus of this webinar is to assist NRCS staff and others to understand what the various FSA wetland labels mean. **There will not be time to go over all of the supporting documentation or procedures for identifying all of the labels. There will also not be time to go over authorized uses and maintenance. The National Food Security Act Manual (NFSAM) and the Appeals and Mediation Part 510 of the Programs Manual are the official resources for policy guidance related to Food Security Act administration. NRCS staff with HELC and WC responsibilities should also be familiar with the regulations at 7 CFR Part 12 (HELC/WC) and 7 CFR Part 614 (Appeals).**

Background

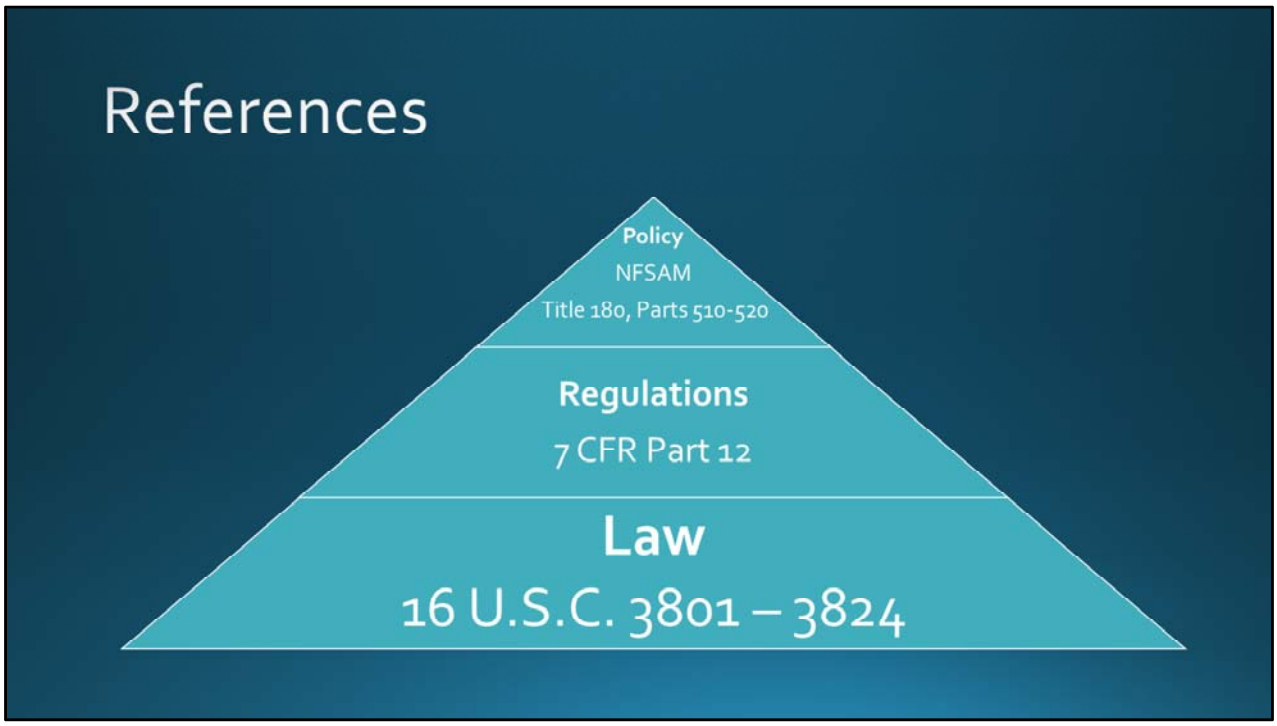
This section contains background information about the conservation compliance provisions of the Food Security Act of 1985, as amended.



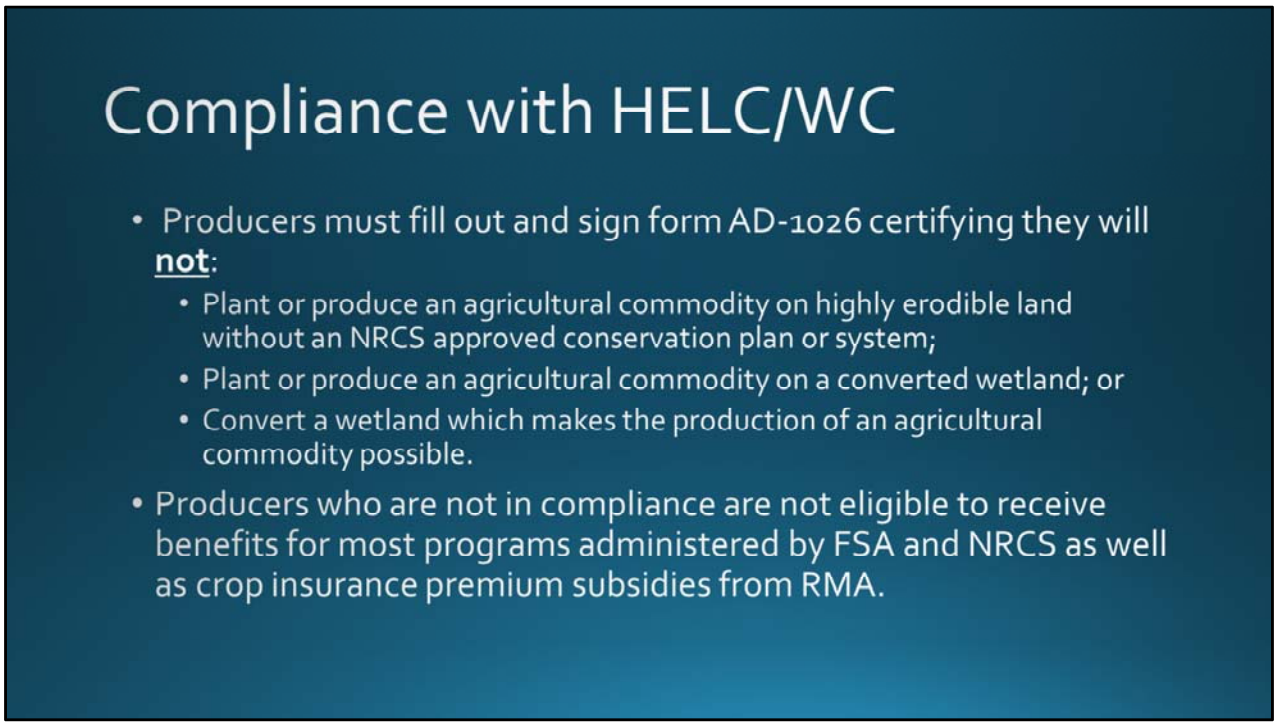
The Food Security Act of 1985 was the first Farm Bill to contain the HELC/WC provisions. These provisions were included in part because past farm policy had the unintended consequence of encouraging farmers to break out every possible piece of ground and put it into crop production. Increased production resulted in large surpluses of commodity crops, which caused crop prices to crash, and increased reliance on price support programs for agricultural commodities. From here on through the webinar, I'll refer to The Food Security Act of 1985 as the 85 Farm Bill, the Act, or the Statute.

The Food Security Act was signed into law on December 23, 1985. Remember that date because it will be important later.

The Act is codified into law in Title 16 of the US Code Parts 3801 – 3824 (16 U.S.C. 3801-3824).



After laws are enacted, they are codified in the United States Code. Laws both authorize and limit what federal agencies can do. The Food Security Act of 1985, as amended by subsequent Farm Bills, authorizes the Secretary of Agriculture to administer the HELC and WC provisions. The Secretary delegates authority to agencies, in this case, NRCS, Farm Service Agency (FSA), and Risk Management Agency (RMA), which then issue regulations that spell out in more detail how the law will be implemented. Agencies then issue policy to provide more detailed guidance to their staff. The NFSAM contains the policy for making wetland determinations and assigning labels. Wetland determinations are considered technical determinations, and information on appealing technical determinations is in NRCS' Programs policy at Title 440, Part 510. FSA policy on administering their responsibilities under the Food Security Act is in FSA Handbook 6-CP - Highly Erodible Land Conservation and Wetland Conservation Provisions .



Producers self-certify they will comply with the HELC/WC provisions when they sign an AD-1026 form at a Farm Service Agency office and they are responsible for knowing the requirements. A copy of this form must be on file with FSA in order to participate in USDA programs. If producers indicate on the AD-1026 that they will plant or produce an ag commodity on land without an HEL determination, or have or plan to conduct activities that may result in the conversion of wetlands to agricultural commodity production, FSA will refer the AD-1026 to NRCS to complete a determination.

AGRICULTURAL COMMODITY

- Any crop planted and produced by annual tilling of the soil, including one-trip planters or sugarcane.

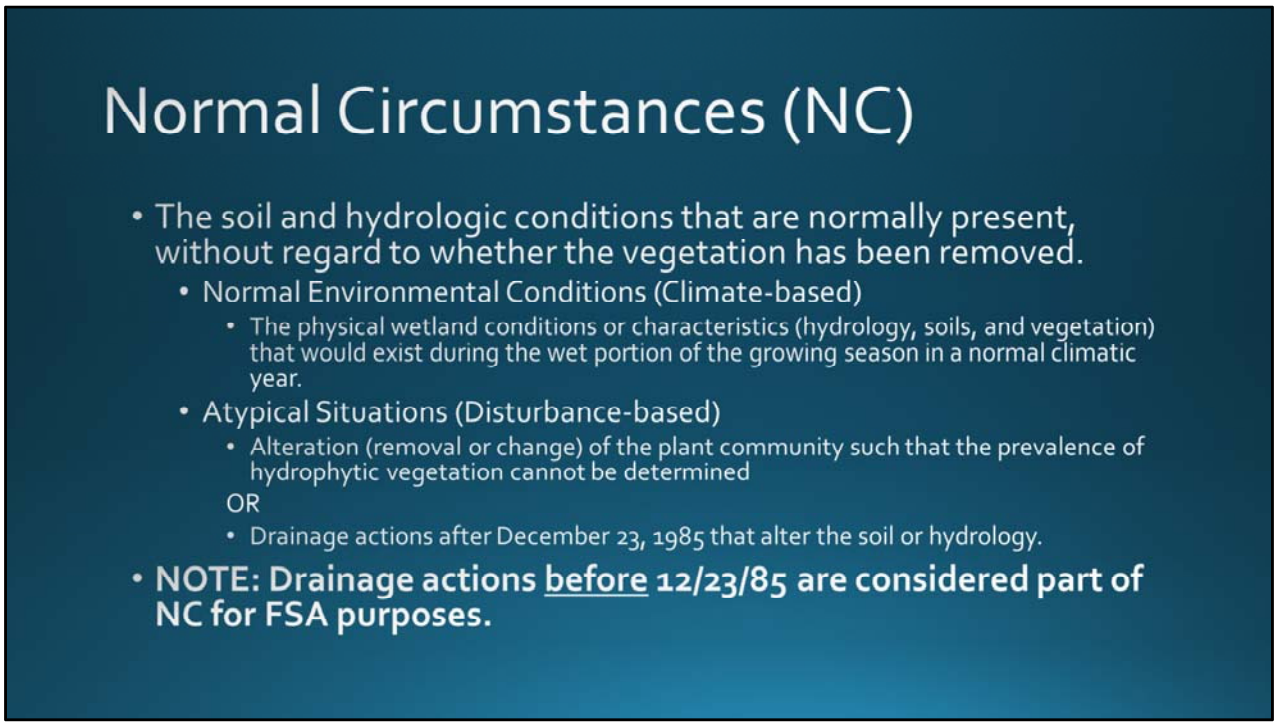
Here's the definition of agricultural commodity from the Statute. Remember one intent of the HELC/WC provisions was to correct the unintended consequences of past Farm Bills that led to marginal lands being put into production, resulting in surpluses of and low prices for commodity crops. Permanent crops, like orchards and vineyards, are not subject to the HELC/WC provisions.

WETLAND

- An area that:
  - Has a predominance of hydric soils;
  - Is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic (water tolerant) vegetation typically adapted for life in saturated soil conditions; and
  - Under normal circumstances supports a prevalence of such vegetation.

Exception: This term does not include lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soils.

This definition of wetland is unique to the Act, as are the definitions of hydric soil and hydrophytic vegetation. These unique definitions are necessary because NRCS often must complete determinations for wetlands that have been disturbed by agricultural uses or during dry times of the year, and we have to try to figure out what they would look like under normal circumstances.



Which leads us to the definition of normal circumstances. This definition is in the regulations implementing the HELC/WC provisions at 7 CFR Part 12. It includes both climate-based and disturbance-based concepts of "normal." It is important because NRCS Agency Experts must determine the soil and hydrologic conditions that existed on a site as of or prior to 12/23/85 when the WC provisions took effect, in order to assign the correct wetland label. Actions before that date are "grandfathered" in.

These are the WC requirements, that spell out what agricultural producers must **not** do if they want to maintain eligibility for most USDA programs under the Act. It's important to know that FSA has responsibility for determining eligibility. Because producers continued converting wetlands after 12/23/85, Congress tightened up the requirements in the 1990 Farm Bill. After 11/28/90, if a producer makes production of an annual crop possible in a wetland, they are out of compliance even if they never plant an annual crop.

We'll discuss some exemptions today as we go through the labels. The 2014 Farm Bill added another compliance date for crop insurance premium subsidies. Producers are eligible for those as long as they completed conversion of wetlands prior to February 7, 2014.

NRCS Responsibility

- NRCS makes technical determinations for WC compliance that include:
  - Whether land is a wetland and if certain technical exemptions apply
  - Whether a wetland conversion has occurred that makes the production of an agricultural commodity possible

Making technical determinations is an NRCS responsibility under the law. By regulation, only NRCS may make or approve certified wetland determinations (7 CFR 12.30(3)).

FSA responsibilities including determining eligibility, based on NRCS' technical determinations.

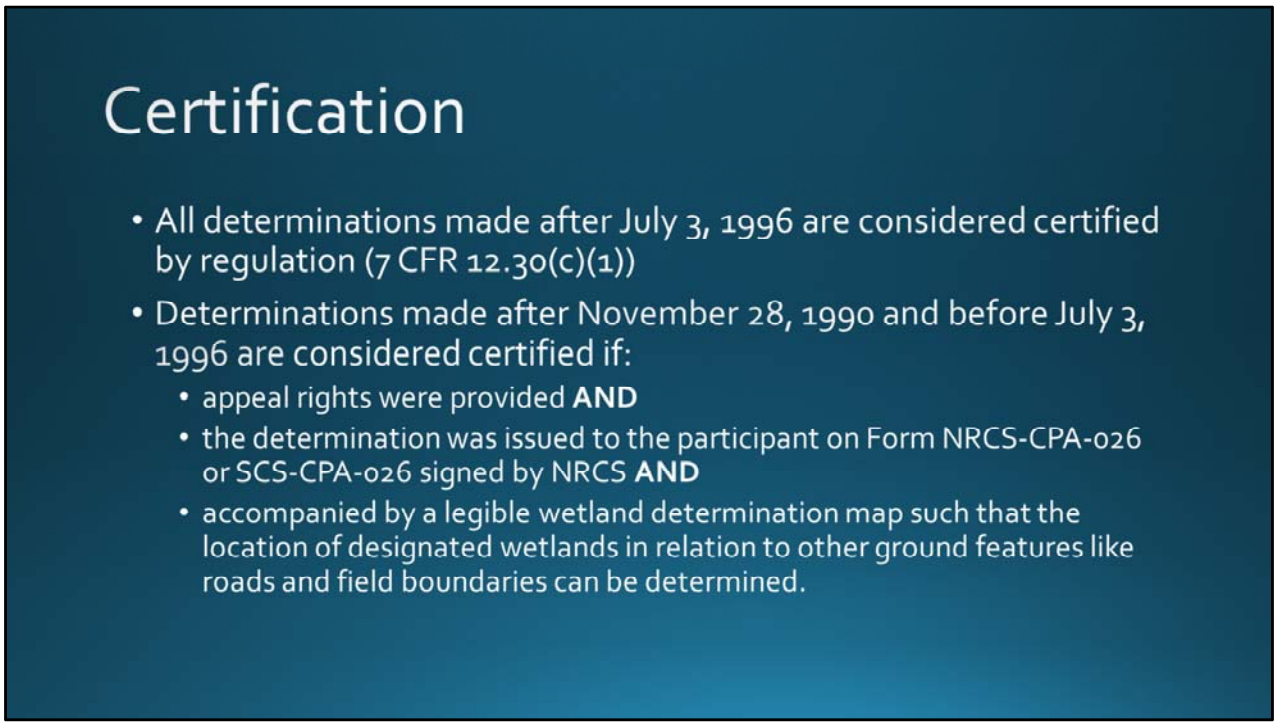
This webinar does not cover how these determinations are made. That training is provided in courses available from NRCS' National Employee Development Center, *Wetland Identification for National Food Security Act Purposes: Phases 1 and 2.* A Phase 3 course that will cover administrative aspects of the WC provisions is currently in development.

This section briefly describes the elements of certified wetland determinations and how the wetland labels are used in them.

Certified Wetland Determinations (CWDs)

- The Food Security Act of 1985, as amended, requires NRCS to delineate, determine, and certify wetlands located on land on a farm or ranch subject to wetland conservation (WC) provisions in order to establish a producer's eligibility for USDA program benefits.
- The wetland determination is of sufficient quality (NFSAM 514.1) to make a determination of ineligibility for USDA program benefits.

Certification criteria are detailed in NFSAM 514.1 B.



The SCS-CPA-026 version dated June 1991 and later versions of the NRCS-CPA-026 contain a valid producer notification statement and appeal rights were provided on the back of the "Person Copy."

Certification criteria are detailed in NFSAM 514.1 B.

Job Approval Authority for CWD

- Must be completed by a qualified NRCS employee, as determined by the State Conservationist (STC.)
- STCs are responsible for maintaining a roster of agency experts with Job Approval Authority for various aspects of CWDs.
- Rosters are filed in Section III of the Field Office Technical Guide, under "Legislated Programs, Job Approval Authority."

NFSAM 514.1 E. has details on JAA policy for CWDs.

Preparing the CWD

- All wetlands subject to the WC provisions are outlined (delineated) on aerial photography, digital imagery, or other graphic representation
  - Using GPS/GIS if possible
  - Refer to NFSAM 514 Subparts B-E to determine appropriate **labels** to apply
- Complete boundaries and size of all fields that were delineated and identified are shown on the map, including NW.
- **Label** and acreage information from the map are used to prepare NRCS-CPA-026
- NRCS-CPA-026 and map are provided to participant with appropriate appeal rights, with copies to FSA and retained in the NRCS case file

Food Security Act Wetland labels are important components of certified wetland determinations. Policy is in NFSAM 514.1 H.

The determination of whether an area meets the definition of wetland or not is a separate process from the assignment of the appropriate wetland label for each wetland area delineated. When NRCS Agency Experts make a wetland determination, they start with a base map that identifies areas on a field that would meet wetland criteria under normal circumstances and those that would not. That information helps them determine the correct label to assign to these areas later.

FSA Wetland ID Procedures

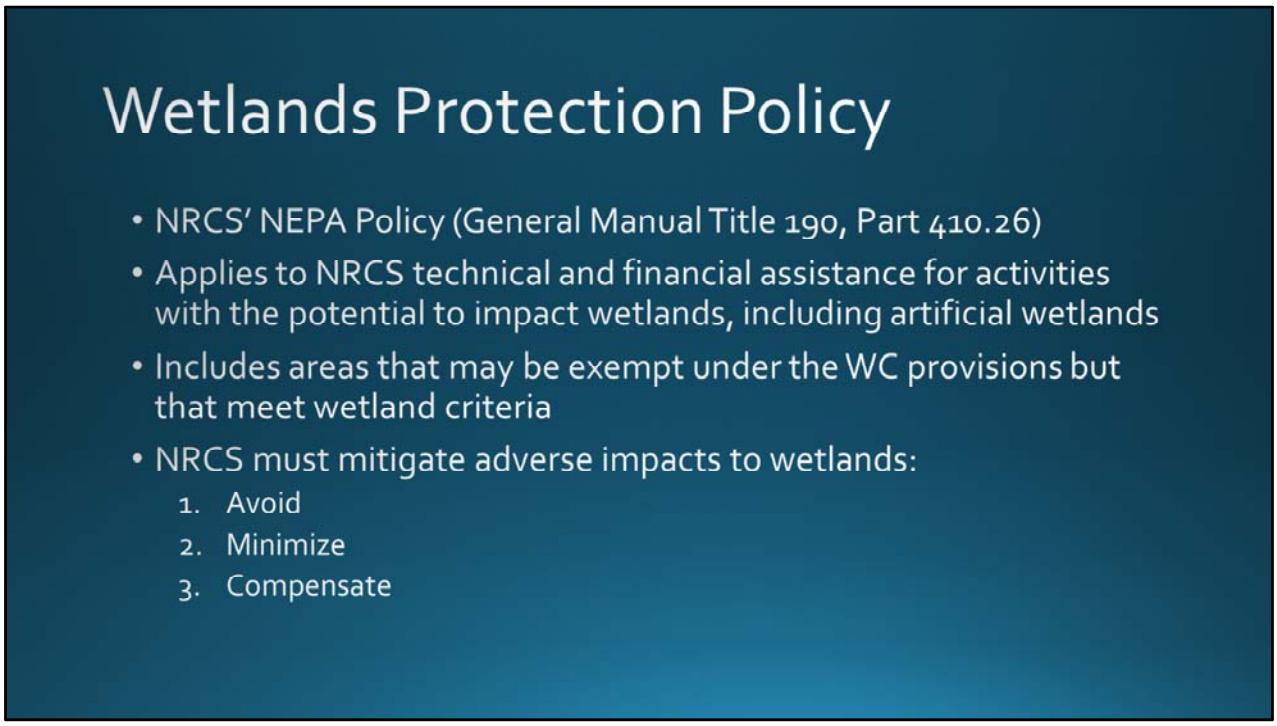
- NFSAM 514.8 A.
- National Employee Development Center
  - *Wetland Identification for Food Security Act Purposes*

Training on FSA Wetland ID Procedures is provided through a series of NEDC courses call *Wetland Identification for Food Security Act Purposes*. Phases 1 and 2 of the series are currently available and Phase 3 is in development. Discuss adding this training to your IDP with your supervisor.

Clean Water Act

- Certified wetland determinations performed by NRCS are based on Food Security Act definitions, and may not be valid for COE Clean Water Act (CWA) jurisdiction and permitting requirements.

Wetland delineations are also needed to obtain Clean Water Act permits. NRCS uses methodology developed by the Corps of Engineers, with variances provided in the Procedures (NFSAM 514.8.) The variances are necessary because the 2 laws have different statutory and regulatory requirements. Therefore, NRCS' wetland maps may or may not be accepted by the Corps for CWA purposes. Also, wetlands exempt from the WC provisions may be jurisdictional under the CWA.



During Step 3 (Inventory Resources) of the Conservation Planning Process, it's necessary to determine if wetlands are present in order to comply with NRCS' NEPA policy. CWDs are ***not*** needed in Step 3, unless the preferred alternative could make production of agricultural commodity possible. If that is the case, participants should complete a new AD-1026 indicating the work proposed in wetlands.

The WC provisions of the Food Security Act of 1985 limit actions in wetlands by USDA program participants, not NRCS.

NEPA regulations specifically identify wetlands as a required consideration in determining the significance of impacts and NRCS regulations implementing NEPA describe wetlands as a critical environmental concern.

In this section, we will look briefly at all of the wetland labels in the NFSAM and define each. Then we will go into more detail about the most frequently used labels, including the information resources used to document the labels in the case file. In the last section we discuss various CWD scenarios and have you test your knowledge by trying to apply the correct wetland labels to each CWD scenario description.

We won't have time to go into the authorized uses and maintenance allowed for each wetland label. See NFSAM 514.60 for a list of almost all of the current labels and their authorized uses and maintenance.

Non-Wetlands (NW)

1. Land that under normal conditions does not meet wetland criteria.
2. Also includes wetlands that were converted to the extent that wetland criteria were not present on December 23, 1985, but an agricultural commodity was not produced and wetland criteria have not returned.
3. Deepwater habitat, which does not meet wetland criteria, may be labeled NW if it is necessary to make a determination of eligibility for these areas.
4. "Other waters of the U.S." as defined in Section 404 of the Clean Water Act, may occur on a tract. Other waters include streams, lakes, ponds, rivers, and ditches that are not wetlands. Other waters are not subject to the WC provisions and are not labeled as such on certified wetland determinations. They may be labeled NW.

Deepwater habitat and other waters of the US do not support hydrophytic vegetation due to the depth or velocity of water flow and therefore do not meet the definition of wetlands. Usually these areas are not part of fields as delineated by FSA on the CLU layer and therefore do not require a label.

Natural and Artificial Wetlands

- Wetlands (W)
- Manipulated Wetlands (WX)
- Artificial Wetland (AW)

Wetlands (W) are areas that meet the criteria for the three wetland factors and typically have not been manipulated by altering hydrology and/or removing woody vegetation, including stumps. Includes wetlands farmed under natural conditions.

Manipulated Wetlands (WX) have had hydrologic alterations and/or woody vegetation removed but the purpose of the manipulation was not to produce an agricultural commodity and the manipulation did not make production of an annually tilled crop possible. Manipulations for fish production, trees, vineyards, shrubs, cranberries, agricultural waste management structures, livestock ponds, fire control, or building and road construction are some examples where the WX label is used.

Artificial wetland (AW) is land that was formerly non-wetland under natural conditions but now exhibits wetland characteristics because of the influence of human activities. Although AWs are exempt from the WC provisions, they may be jurisdictional wetlands under the Clean Water Act and NRCS' policy on Protection of Wetlands (General Manual Title 190, Part 410.26) may also apply. Also, increasing the hydrology on a wetland does not make the wetland an AW.

Manipulation

- Alteration of the hydrology or the removal of woody vegetation, including stumps, on a wetland.
- Hydrologic alterations may result from:
  - Dams
  - Dikes
  - Ditches
  - Diversions
  - Subsurface drains
  - Pumps
  - Terraces
  - Dredge and fill, including land-leveling
  - Other activities that impair or reduce the flow and circulation of water
- These measures may alter hydrology even if installed offsite from the affected wetlands.

Manipulation is defined in the NFSAM, Part 514.2.

Wetlands Converted to Agricultural Use Before December 23, 1985

- Prior Converted Cropland (PC)
- Farmed Wetlands (FW)
- Farmed Wetland Pasture or Hayland (FWP)

Prior converted cropland (PC) is a converted wetland where the conversion occurred before December 23, 1985; an agricultural commodity was produced at least once before December 23, 1985; and as of December 23, 1985, the area was capable of producing an agricultural commodity (i.e., did not support woody vegetation and was sufficiently drained to support production of an annual crop). In addition, PC meets the following hydrologic criteria:
(i) If the area is not a pothole, playa, or pocosin, inundation is less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more).
(ii) If the area is a pothole, playa, or pocosin, inundation is less than 7 consecutive days and saturation is less than 14 consecutive days during the growing season in most years (50 percent chance or more).

Farmed Wetland (FW) is wetland that was drained, dredged, filled, leveled, or otherwise manipulated and used for producing an agricultural commodity before December 23, 1985, and that meet all of the following criteria:
(i) If the area is not a pothole, playa or pocosin, it is inundated for at least 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more).
(ii) If the area is a pothole, playa, or pocosin, it is inundated for at least 7 consecutive days

or saturated for at least 14 consecutive days during the growing season in most years (50 percent chance or more).
(iii) Production was made possible or enhanced by the manipulation.
(iv) The area has not been abandoned.

A farmed wetland pasture or hayland (FWP) is a wetland that was drained, dredged, filled, leveled, or otherwise manipulated and used for pasture or hayland (includes native pasture or hayland) as of December 23, 1985, and meets both of the following criteria:
(i) The area is inundated for at least 7 consecutive days during the growing season or saturated for at least 14 consecutive days during the growing season in most years (50 percent chance or more); and
(ii) The area has not been abandoned.

Potholes, Playas, Pocosins

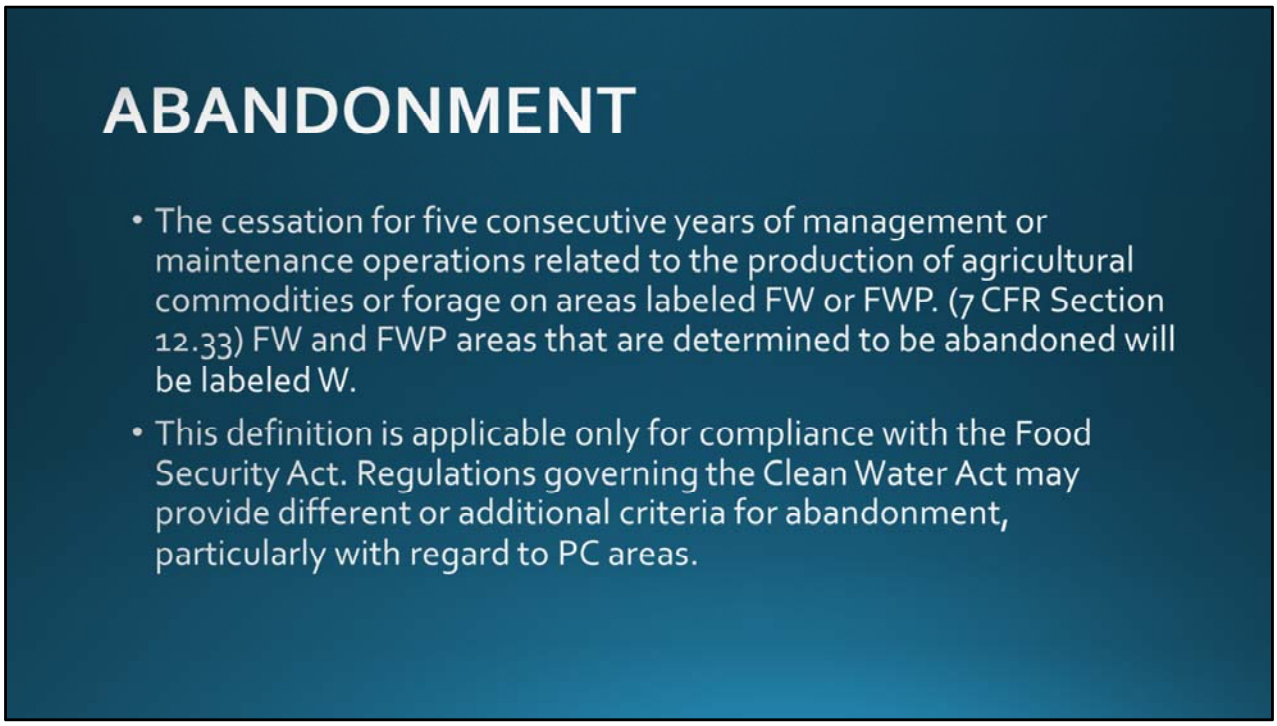
- The presence and extent of pothole, playa, and pocosin wetlands in each State will be determined by the State Conservationist with advice from the State Technical Committee. (7 CFR 12.2)

Potholes, playas, and pocosins are all ecologically significant types of seasonal, depressional wetlands. Generally speaking, potholes occur in the Northern Plains, playas in the Southern High Plains, and pocosins in Coastal Plains in the Southeast Region. The hydrology requirements for the PC and FW labels are different for these types of wetlands. Check with your Area or State Office Compliance Specialist if you're unsure whether these wetland types are in your State.

Growing Season

- The season of the year when climatic conditions are suitable for the growth and regeneration of plants.
- Dates may be approximated by using WETS tables available from the NRCS National Water and Climate Center to determine the median dates of 28°F air temperatures in spring and fall based on long-term records gathered at the nearest appropriate National Weather Service meteorological station.

Growing season is defined in the NFSAM, Part 514.2 and details for determining the dates of the growing season are provided in the Procedures.



Abandonment is described in the regulations at 7 CFR Part 12. It only applies to FW and FWP. If the area is abandoned for agricultural use - that is, if drainage is not maintained or woody vegetation is allowed to return to areas that had or would have had those labels, the label becomes W.

There are exceptions for areas enrolled in conservation programs or other areas where NRCS documented hydrologic and vegetative baseline conditions and restoration activities before active maintenance and management ceased.

Areas labeled PC, CW, or CW+year are not subject to abandonment.

Wetlands Converted After December 23, 1985

- Converted Wetlands (CW or CW+Year)
- Converted Wetland Technical Error (CWTE)
- Third-Party Conversion Exemption (TP)

A converted wetland (CW or CW+Year) is an area that was formerly wetland (e.g., W, FW, FWP, WX) and meets both of the following criteria:
(i) After December 23, 1985, has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose, or to have the effect of making the production of, an agricultural commodity possible.
(ii) Such production would not have been possible but for such action.

CW label applies to conversions that occurred between December 23, 1985 and November 28, 1990.
CW+Year (i.e. the year of conversion) applies to conversions that occurred after November 28, 1990.

Converted wetland technical error (CWTE) is used if NRCS makes a wetland determination that is incorrect and results in a person taking action that would place this person in noncompliance with WC provisions. Failure of NRCS to make a determination does not constitute a CWTE. CWTE cannot be used to exempt the person from actions taken while waiting for NRCS to respond to Form AD-1026. The incorrect determination must be documented on Forms NRCS-CPA-026 or NRCS-CPA-026e, have preceded the action, and have been relied upon by the person in the decision to take the action. CWTE can only be

approved at the State level and does not apply to obvious wetlands.

Third-Party Conversion Exemptions (TP) may apply to wetland converted by actions of persons unassociated or unaffiliated with the USDA program participant, or any of the person's predecessors in interest, such as a prior landowner, when the wetland conversion is an indirect effect of an action occurring off the tract whose purpose is other than to convert that particular wetland, such as drainage on an adjacent property, by a person other than the participant. The TP exemption can only be approved by FSA and cannot be used to exempt a person due to the actions of a previous landowner or local government entities such as drainage districts, county road departments, etc.

NRCS may grant a USDA participant an exemption when he or she converts a wetland through an action that has a minimal effect on the functions and values of the wetlands in the area [7 CFR Section 12.5(b)(1)(v)], including the value to waterfowl and wildlife. States are to develop Minimal Effect Procedures to determine when the MW exemption applies.

According to the Food Security Act, no person shall be determined to be ineligible for USDA benefits for converting a wetland or producing an agricultural commodity on a converted wetland if NRCS determines that the person has adequately mitigated for the lost wetland **acreage**, **value**, and **functions** through the restoration of a converted wetland, the restoration or enhancement of a degraded wetland, or the creation of a new wetland [16 U.S.C. 3822(f) & (h)]. NRCS will label the converted wetland MIW. The wetland mitigation site will be labeled MWM.

In accordance with 16 U.S.C. 3822(f)(4), no person will be ineligible for program loans or USDA payments if the wetland conversion subject to the WC provisions was authorized by a permit issued under Section 404 of the CWA (33 U.S.C. 1344) **AND the acreage and functions of the converted wetland have been adequately mitigated.** The converted wetland is labeled CPD (Corps Permit Decision).

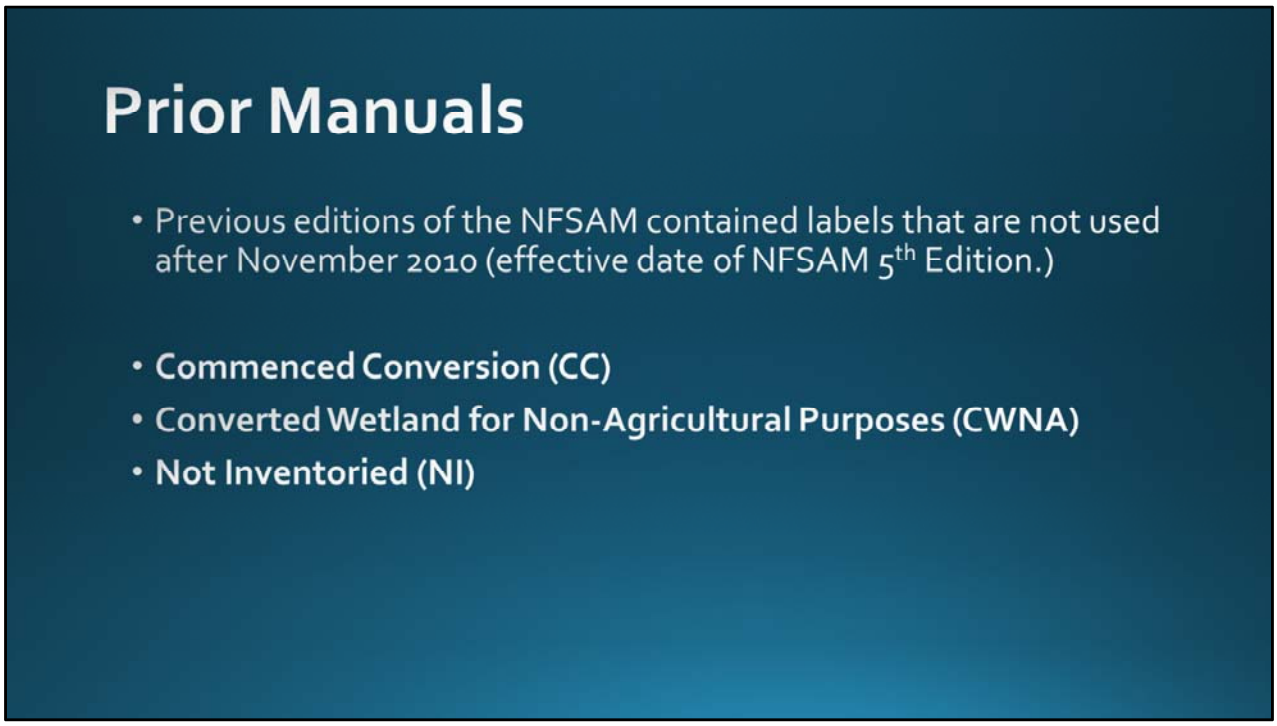
CWTA and CWIL are 2 new exemptions provided in the 2014 Farm Bill due to the relinking

of eligibility for Federal crop insurance premium subsidies to compliance and they apply only to eligibility for those crop insurance program benefits.

CWTA is a permanent exemption from WC compliance that Federal crop insurance program participants can request if: 1) they filed an AD-1026 form indicating they intended to conduct an activity that can cause conversion of wetlands and 2) NRCS did not make a preliminary technical determination within 12 months of the date the AD-1026 was referred by FSA.

CWIL allows for wetland conversions when a participant agrees to make a "payment in lieu" of wetland mitigation. This exemption is limited to conversions less than 5 acres of an entire farm (a single FSA farm number). The exemption requires an in-lieu-fee payment of 150 percent of the cost of an NRCS approved
mitigation.

You can read more about these exemptions in NFSAM 514.70 and 515.



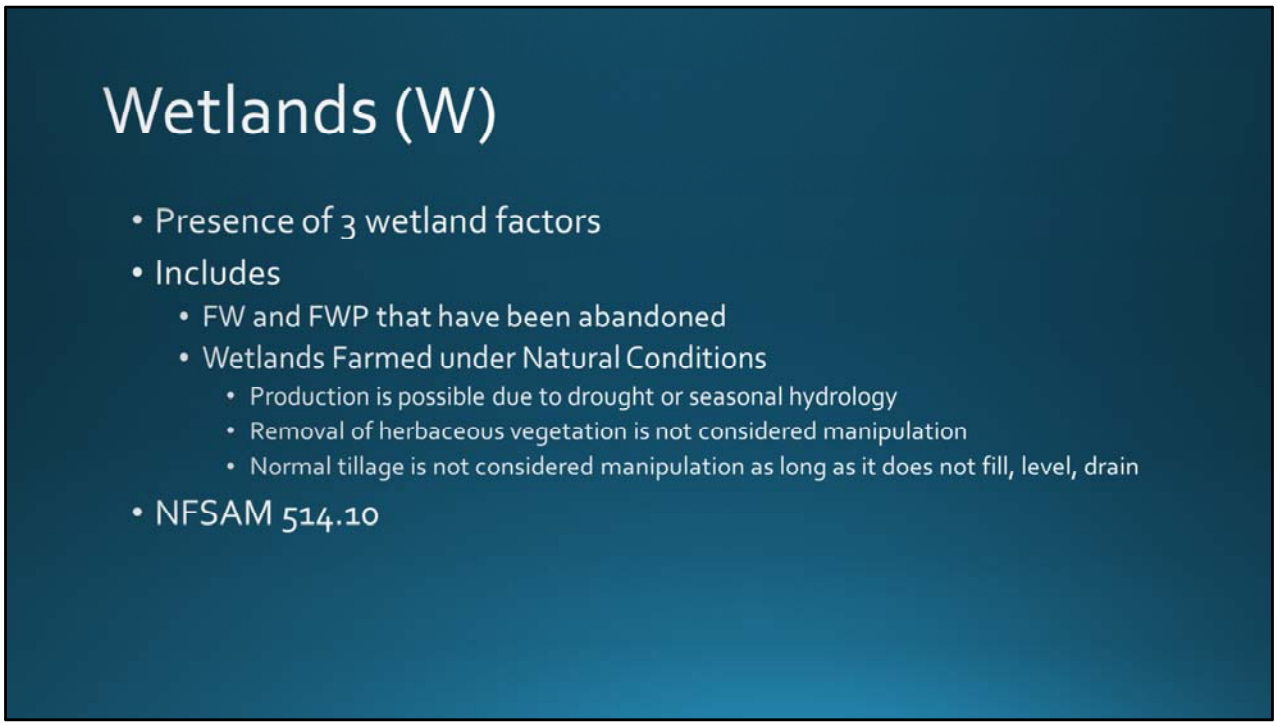
The Commenced Conversion (CC) label was used for wetlands on which conversion began but was not completed before December 23, 1985. (7CFR Section 12.20) A commenced conversion determination was an exemption granted by FSA that allowed persons who had expended or legally committed substantial funds for the primary and direct purpose of converting wetlands before December 23, 1985, to complete the conversion without jeopardizing USDA program benefits. Conversion had to be completed by January 1, 1995.

The CWNA label was used to denote areas of wetlands that were converted after November 28, 1990, that would not be in violation of WC provisions if the conversion activities were for purposes other than for making production of an agricultural commodity possible, for example planting an orchard or vineyard or constructing a pond or barn. Now we use the WX label for these types of areas.

The Not Inventoried label was used to denote areas on a tract on which a certified determination had not been completed. This label became obsolete with a policy change in 2007 that allowed determinations to be completed on a field, rather than a tract basis.

Identification

Common Labels



Recall from the discussion on definitions that areas labeled W meet the criteria for the 3 wetland factors and typically have not been manipulated by altering hydrology and/or removing woody vegetation and stumps. Wetland includes areas that would have been FW or FWP but drainage was not maintained or woody vegetation was allowed to grow back. It also includes wetlands farmed under natural conditions.

Prior Converted Cropland (PC)

- Wetlands converted to produce an ag commodity before 12/23/85
- Criteria determined by aerial photos, crop records, soils maps, etc.
  - Hydric soils
  - Hydrology manipulated and/or woody veg and stumps removed before December 23, 1985
  - Capable of producing and ag commodity produced at least once before December 23, 1985
  - Inundation is less than 15 consecutive days during the growing season or 10% of the growing season, whichever is less, in most years (50% chance or more)
  - If a pothole, playa, or pocosin, inundation is less than 7 consecutive days and saturation is less than 14 consecutive days during the growing season in most years (50% chance or more).
- NFSAM 514.30

PC is used to label wetlands converted to agricultural use prior to 12/23/85. To use the PC label, there must be evidence of manipulation of hydrology and/or woody vegetation and stumps and commodity crop production on hydric soils prior to 12/23/85. The manipulation of hydrology and woody vegetation prior to 12/23/85 become part of the normal circumstances. Such evidence is usually provided by soil surveys, aerial photos taken during the growing season in 1985 or earlier, and crop records if available.

Farmed Wetland (FW)

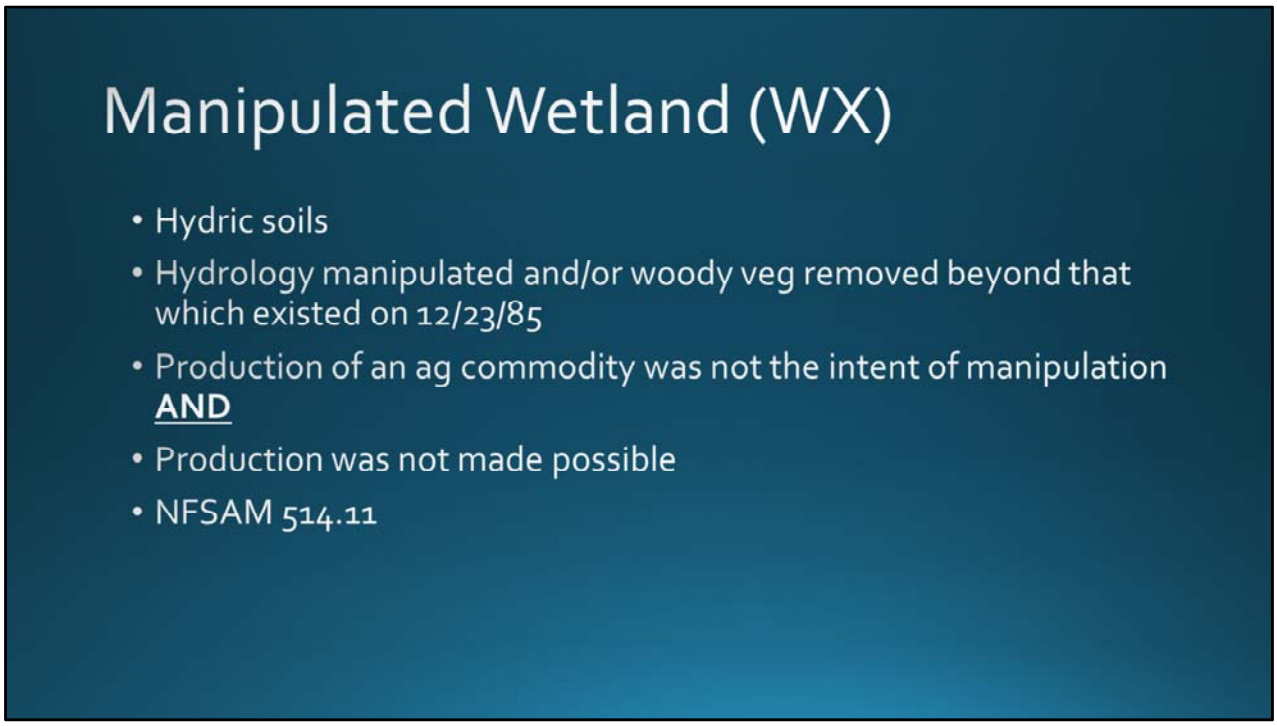
- Wetlands converted to commodity crop production prior to 12/23/85, but not manipulated as much as PC.
- Criteria determined by aerial photos, crop records, soils maps, etc.
  - Hydric soils
  - Hydrology manipulated and/or woody veg and stumps removed before December 23, 1985
  - Capable of producing and ag commodity produced at least once before December 23, 1985
  - Inundation is at least 15 consecutive days during the growing season or 10% of the growing season, whichever is less, in most years (50% chance or more)
  - If a pothole, playa, or pocosin, inundation is at least 7 consecutive days or saturation is at least 14 consecutive days during the growing season in most years (50% chance or more).
- Has not been abandoned
- NFSAM 514.31

FW is much like PC, except more hydrology remains.

Farmed Wetland Pasture (FWP)

- Wetlands converted to pasture or hay prior to 12/23/85.
- Criteria determined by aerial photos, crop records, soils maps, etc.
  - Hydric soils
  - Hydrology manipulated and/or woody veg and stumps removed before December 23, 1985
  - Commodity crop not planted before December 23, 1985
  - Inundation is at least 7 consecutive days OR saturation is at least 14 consecutive days during the growing season in most years (50% chance or more).
- Has not been abandoned
- NFSAM 514.32

FWP does not have to stay in pasture or hay. Commodity crop production is allowed, provided it can be done without further manipulation of hydrology or removal of woody vegetation and stumps.



As discussed previously, the WX label is used for non-commodity crop agricultural production, including permanent crops like orchards, vineyards, and berries; farm buildings, roads, or other structures; and ponds excavated in wetlands. It is also used to mark areas where further manipulation could make production of an annually planted crop possible and result in non-compliance. The 3rd and 4th bullets are both key to applying the WX label. Sometimes production of an ag commodity is possible between the time a person does the manipulation and the time they plant an orchard or build a barn, etc. In those cases, the WX label still applies, as long as the intent is not to produce an ag commodity, and the person demonstrates their intent in a reasonable amount of time by planting the non-commodity crop or building a structure, etc. At times, annual cover crops are used in orchards, vineyards, blueberry patches, and other non-agricultural commodity crop fields. In these cases, even though the production of an agricultural commodity is possible, as long as the cover crop is not allowed to mature and is not harvested, the WX label still applies. If in any crop year, an annually planted cover crop matures or is harvested, the manipulated area will become CW+year.

Both of these labels signify non-compliance with the WC provisions, which make the responsible person(s) ineligible for most USDA benefits.

When the Act was signed in 1985, it stated that persons shall be ineligible for USDA benefits if an agricultural commodity is planted on wetland that was converted after December 23, 1985. (7 CFR Section 12.4(a)(2)). But people were still draining wetlands and clearing trees to use the areas as pasture. So Congress made revisions in the 1990 Farm Bill, enacted on November 28, 1990, that made persons ineligible for USDA benefits if they convert wetlands for the purpose, or to have the effect, of making production of an agricultural commodity possible, even if an agricultural commodity is never planted or produced. (7 CFR Section 12.4(a)(3)) For this reason, NRCS must determine whether a wetland was converted before or after November 28, 1990. Non-exempted conversions made between December 23, 1985 and November 28, 1990 are labeled CW. Non-exempted conversions made after November 28, 1990, are labeled CW+year (the year the conversion
occurred).

CW is also used if the conversion occurred after December 23, 1985, and is the result of activity by a county, drainage district, or similar entity. (Section 5l4.42(C)). CWs do not have to be restored or mitigated to regain eligibility, but CW+Years do. Production of agricultural

commodity or forage for mechanical harvest or additional manipulation of CW areas will result in ineligibility.

Conversion

- Activities (manipulation) conducted after 12/23/1985:
  - For the purpose of making production of an annual crop possible or increased production possible

  OR
  - Had the effect of making production possible or increased production possible
- Examples:
  - Post 12/23/85 construction, grading, land leveling
  - Woody veg and stumps removed
  - Post 12/23/85 drainage or any action that reduces the flow and circulation of water

In the first bullet, “purpose” reflects the intent of the producer. In the second bullet, “effect” means the physical result of the action on the ground.

Converted Wetland (CW)

- Conversion occurred between 12/23/1985 and 11/28/1990
- Not a violation unless planted to an annual crop or forage for mechanical harvest
- May be maintained and used for grazing
- Aerial photos are used to determine conversion occurred between 12/23/1985 and 11/28/1990
- CW also the label used for conversion after 12/23/1985 as the result of activity by a county, drainage district, or similar entity

The CW label is used when the conversion occurred between the 1985 and 1990 Farm Bill enactment dates. The exact year of conversion does not have to be determined. Mitigation is not required. Planting an annual crop or mechanical forage harvest is a violation.

CW+Year

- Conversion occurred after 11/28/1990
- For the purpose, or that had the effect, of making production or increased production possible, that was not possible before
- Person is ineligible for USDA benefits unless/until the converted wetland is restored or mitigated
- Crop year of conversion must be determined using the best available data so that FSA can determine the years the person may be ineligible for USDA program benefits
  - Aerial photos
  - FSA records

Practice Scenarios

Disclaimer: The photos in the following slides were pulled from Google Earth and Google Maps for the purpose of illustrating a variety of agricultural wetland types around the country. Effort was made to not show roads or other landmarks that might allow people to identify specific landowners, who may or may not be USDA program participants. The details included in each scenario regarding hydric soils, hydrology, cropping history, timing of manipulations, etc. were invented for the purpose of leading to one of the more commonly used FSA wetland labels and should not be construed as actually applying to the land pictured.

Prairie pothole area in Iowa

- Soils mapped as hydric
- Corn/soybeans produced prior to 1985
- Drain tile installed prior to 1985
  - Patterned tile in green-outlined field to the west
  - Single drain in blue-outlined field
- Green-outlined field
  - Linear depressions pond water < 7 days during the growing season in most years
- Blue-outlined field
  - Depressions pond water > 7 days during the growing season in most years

Prairie pothole area in Iowa

- Green-outlined field
  - Linear depressions pond water < 7 days during the growing season in most years
  - Hydrology less than that required for FW
  - Patterned tile effectively drained pre-1985
- Blue-outlined field
  - Depressions pond water > 7 days during the growing season in most years
  - Meets hydrology for FW
  - Single drain did not reduce hydrology enough to meet PC

Livestock ponds in South Dakota

- "Blue" pond in NE corner
  - Constructed in 1970s
  - Soils mapped as hydric
  - Positive indicators of all 3 wetland criteria
- "Orange" pond in NW corner
  - Constructed in 1970s
  - Straddles lines between hydric and non-hydric soil map units
  - Positive indicators of all 3 wetland criteria
- Green outline area is a natural pothole
  - Positive indicators of all 3 wetland criteria
  - Never manipulated

Livestock ponds in South Dakota

- "Blue" pond in NE corner
  - 3 indicators met
  - Excavated in hydric soils
  - Not for purpose of production

  AND
  - Production not made possible
  - WX
- "Orange" pond in NW corner
  - 3 indicators met
  - Not for purpose of production

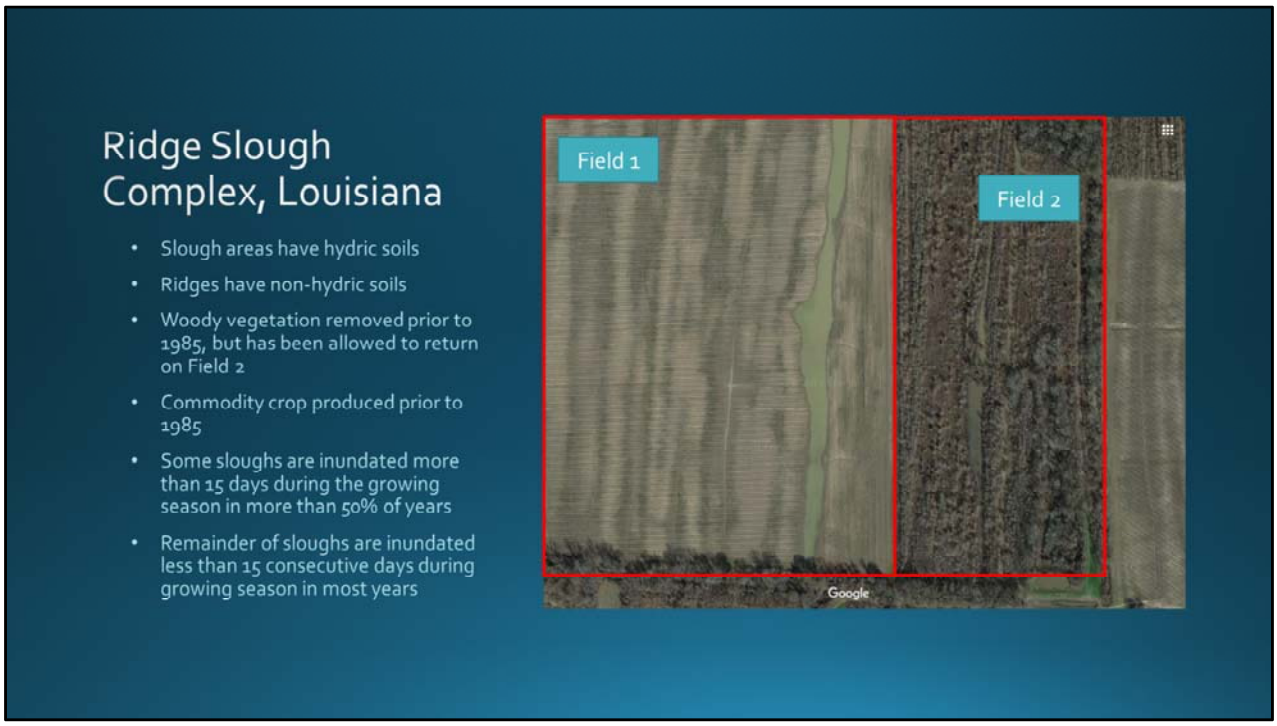
  AND
  - Production not made possible
  - Straddles lines between hydric and non-hydric soil map units
  - Portion in hydric soils = WX
  - Portion in non-hydric soils = AW

Playa in west Texas

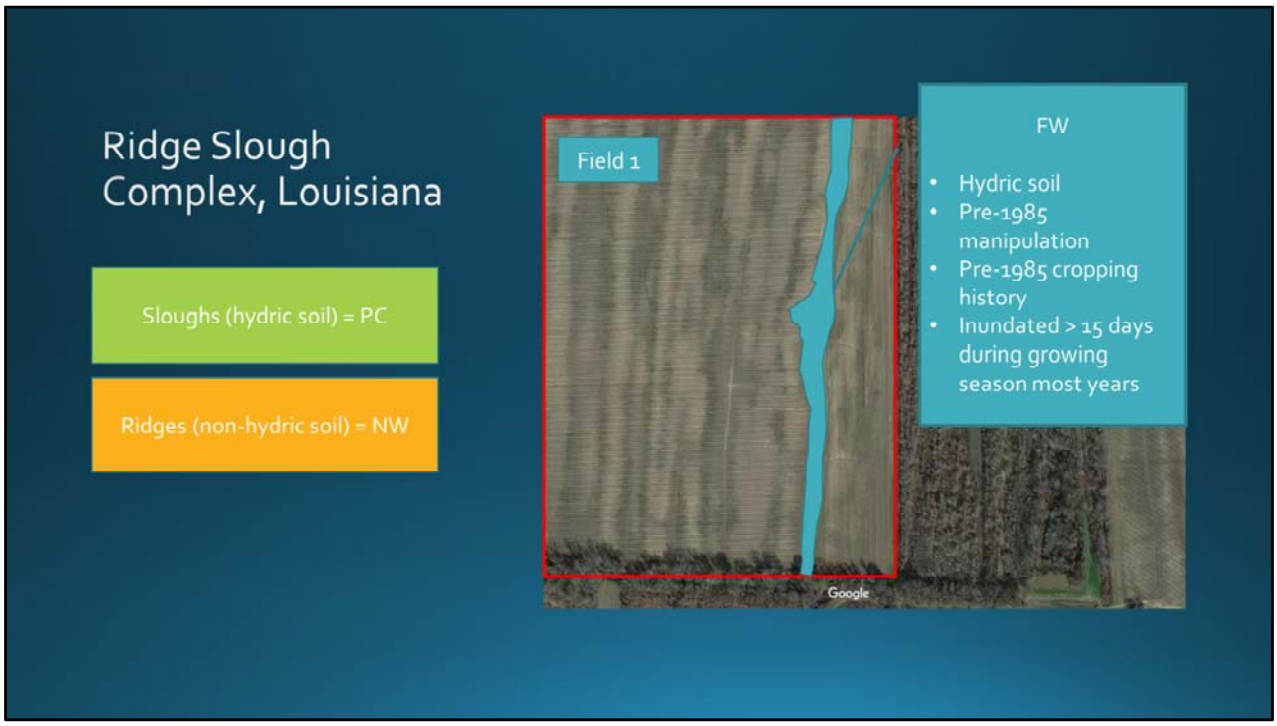
- Soils are hydric in the oval playa area, non-hydric in the surrounding area
- Crop records show commodity crops produced prior to 1985 in Field 1
- No cropping history in Field 2
- 1984 aerial photo shows:
  - terraces installed in Field 1
  - pit pond in Field 2 that removed wetland hydrology

Playa in west Texas

- Pit pond manipulated hydrology prior to 12/23/1985
  - Still meets 3 criteria
- Field 1 hydric soils area with pre-1985 cropping history = PC
- Field 1 area without hydric soils = NW
- Field 2 area with hydric soils, but hydrology removed and no cropping history pre-1985 = NW



The ridges (originally 2-3 feet higher in elevation, lighter colored areas in Field 1) are non-hydric, sloughs (lower-lying, darker colored areas) are hydric. Note the area of ponded water and small ditches in middle of photo.



Hydrology manipulated, woody veg removed, and commodities produced pre-1985. Only the blue area meets hydrology requirements for FW. The remainder of the sloughs would be delineated and labeled PC, and the ridges would be delineated and labeled NW. Forgive me for not doing that here, but it was too tedious as I used the drawing tools in PowerPoint, not GIS.

Ridge Slough Complex, Louisiana

- Slough areas have hydric soils
- Ridges have non-hydric soils
- Woody vegetation removed prior to 1985, but has been allowed to return.
- Commodity crop produced prior to 1985

Say the producer wanted to put the wooded area back into production.

Ridges are still NW.
Sloughs with < 15 consecutive days of inundation prior to 12/23/85 are still PC (not subject to abandonment.)
Sloughs with >15 consecutive days of inundation as of 12/23/85 are now W (abandoned FW) and drainage could not be improved nor could woody vegetation be removed without causing a CW+Year.

Carolina Bay, North Carolina

- Hydric soils
- Trees removed and ditch constructed in 2015
- Corn, wheat, soybeans reported to FSA; 2015 – 2017
- Wooded area still exhibits positive indicators for all three wetland criteria, although the ditch did impact hydrology.

You can see the outline of the historic Carolina Bay by the oval shape on the aerial photo. These are depressional wetlands on coastal plains in the East, always oriented in a northwest-southeast direction. This tract was chosen for a compliance status review, and in comparing pre-1985 aerial photos with more recent ones, the reviewer saw an area of trees had been cut and a ditch installed in 2015. A previous certified wetland determination was located that showed area northwest of the blue line was wooded, with a W label. The portion southeast of the blue line was cleared of woody veg and planted to commodity crops prior to 1985 and had a PC label. The compliance status was recorded as a potential violation and form FSA-569 was requested from FSA. Crop records were also requested from FSA which showed commodity crops reported the last 3 years in the outlined area, but no crops reported prior to 2015.

Carolina Bay, North Carolina

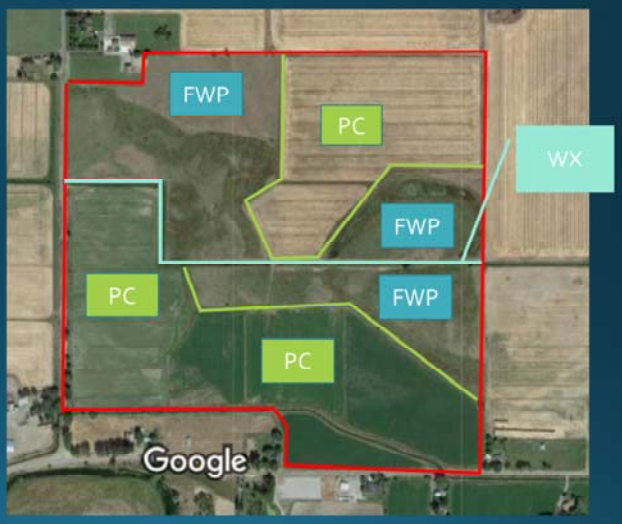
- Hydric soils
- Trees removed and ditch constructed in 2015
- Annual crops produced 2015 - 2017
- Field visit confirmed wooded area still exhibits positive indicators for all three wetland criteria, although the ditch did reduce hydrology.

Flood Irrigated farm in the Intermountain West

- Floodplain in valley bottom
- Soils are hydric
- Hydrology manipulated and crops planted beginning in the 1830s – 1840s
- Diches serve multiple purposes
  - Convey irrigation water from river
  - Intercept excess surface and shallow groundwater from fields
  - Convey intercepted surface and groundwater and irrigation return flows back to river
- No cropping history in fields with old meander scrolls
- Non-cropped areas used for pasture
- Some hydrology and hydrophytic veg indicators remain

Flood Irrigated farm in the Intermountain West

- Hydric soil
- Evidence of pre-1985 manipulations
- Evidence that hydrology not completely removed pre-1985
- Cropping history in some fields = PC
- Non-cropped areas used for pasture as of 12/23/85 = FWP



Questions?

- National
  - Jason Outlaw, National Wetlands and HEL Compliance Specialist
  - NHQ, Washington, DC
- East Region
  - Don Riley, Ecologist
  - ENTSC, Greensboro, NC
- Central Region
  - Lee Davis, Biologist
  - CNTSC, Fort Worth, TX
- West Region
  - Karen Fullen, Ecologist
  - WNTSC, Portland, OR