



ENFORCEMENT OF CONSERVATION COMPLIANCE FOR HIGHLY ERODIBLE LANDS

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ABSTRACT:

Taxpayers provide billions of dollars to producers each year to subsidize a variety of farm bill programs, including commodity programs and crop insurance and revenue protection programs; and in exchange, participating producers are required to take certain basic steps to conserve soil and wetlands. These expectations are codified in law through what is known as “conservation compliance,” which requires farmers, in exchange for taxpayer subsidies, to protect wetlands on their land and to implement a conservation plan to limit soil erosion. Conservation compliance is critical to ensuring a very basic level of conservation for these precious natural resources that provide multiple environmental benefits. Unfortunately, recent reports and enforcement data from the U.S. Department of Agriculture (USDA), which is tasked with implementing farm programs and conservation compliance, expose serious deficiencies in conservation compliance implementation, a failure to enforce conservation compliance in many states, and problems with how USDA verifies that farmers are taking the necessary steps to comply. Steps must be taken to both expand the scope of conservation compliance and to strengthen its enforcement. This report focuses on the Highly Erodible Land compliance (HELC) and provides specific proposals to address the serious failings in order to better protect natural resources and the public’s investment in the farm bill safety net.

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INTRODUCTION:

Congress authorized conservation compliance in the 1985 Farm Bill (Food Security Act of 1985), based on the principle that taxpayers should receive basic soil health, water quality, and wildlife habitat benefits in return for federal agricultural subsidies. Specifically, under the Food Security Act of 1985, all producers receiving commodity, crop insurance and other subsidies, farm loans, and conservation program payments were required to comply with minimum soil and wetland conservation requirements in order to retain their eligibility for subsidies. In the 1996 Farm Bill, conservation compliance was decoupled from crop insurance subsidies, but that linkage was restored in the 2014 Farm Bill.

Conservation compliance is comprised of two prongs: reducing soil erosion from highly erodible soils and preventing wetland conversion on agricultural landscapes for the purpose of producing agricultural commodities. It prohibits producers from draining or filling a wetland and requires the implementation of a soil conservation plan when farming highly erodible land.

Highly Erodible Lands (HEL) Conservation

Under highly erodible lands (HEL) conservation, any farmer that produces an annually tilled crop on highly erodible land must implement a USDA-approved conservation plan for that land. Covered farmers work with USDA's Natural Resources Conservation Service (NRCS) to develop and implement a conservation plan tailored to the specific natural resource conditions of the producer's land.

To measure soil erosion, USDA uses a metric known as "soil loss tolerance," also known in its abbreviated form as "T," which [according to USDA](#), represents the maximum annual rate of soil erosion that could occur without causing a decline in long-term productivity.

USDA uses a soil erodibility index (EI) to provide a numerical expression of the potential for a soil to erode, considering the physical and chemical properties of the soil and the climatic conditions where it is located. For water erosion, the amount of rainfall, the slope and steepness of the land, and the soil's capacity for resisting water erosion is divided by T to derive the EI. For wind erosion, a measure wind speed, soil moisture, and the soil's capacity for resisting wind erosion is divided by T to derive the EI. The higher the index, the greater the investment needed to maintain the sustainability of the soil resource base if intensively cropped. USDA defines land as HEL if the EI is 8 or higher.

On HEL that is already in production, the conservation plan must result in a "substantial reduction" in soil erosion. Whereas, on native vegetation (non-cropland) that is being brought into production, the conservation plan must prevent a "substantial increase" in erosion.

- For HEL that was cropped prior to December 23, 1985, and had a conservation plan applied prior to July 3, 1996, USDA considers the land to have already met the "[substantial reduction](#)" requirement so long as the initial plan is maintained or improved.
- For HEL that was cropped prior to December 23, 1985, but did not have a conservation plan approved until after July 3, 1996, USDA defines "substantial reduction" as: a 75 percent

reduction of the potential erodibility (PE) *or* not more than two times the soil loss tolerance level, whichever is less.

- For land that has no history of crop production prior to December 23, 1985, soil erosion must not exceed the soil loss tolerance.

NRCS is responsible for determining whether or not land is highly erodible, and works with the Farm Service Agency (FSA) to respond to producer requests for a determination. If NRCS finds a farmer to be out of compliance (either through a review of program application materials or through spot checks), the producer is supposed to be ineligible for USDA program benefits during the period of violation. However, farmers have a one-year grace period to get back into compliance. In addition, for both HELC and wetland compliance, there is a “good faith” exemption for farmers who violate conservation compliance requirements but did not intend to do so. The result is that the vast majority of farm bill benefits are restored.

How does Conservation Compliance work?

USDA’s FSA and NRCS jointly administer conservation compliance and coordinate with USDA’s Risk Management Agency (RMA), which administers the federal crop insurance program. NRCS makes wetland and HEL determinations and evaluations, works with farmers to develop and implement conservation plans, and conducts spot checks to determine whether farmers are complying.

FSA is the clearinghouse for records related to conservation compliance, including the form that all producers must file to certify compliance. FSA also determines whether a “good faith” or similar exemption should apply in a given situation. For farmers who are seeking or receiving crop insurance subsidies, individual crop insurance agents can offer guidance regarding whether a producer needs to submit new documentation to their local FSA office.

HOW CONSERVATION COMPLIANCE IS FALLING SHORT:

In 2016, USDA’s Office of Inspector General (OIG) published two reports on USDA’s implementation on conservation compliance. The [first report](#) addressed problems with USDA’s sampling methods for conducting spot checks, while the [second report](#) gave more attention to failings related to the treatment of gully erosion.

Data Management

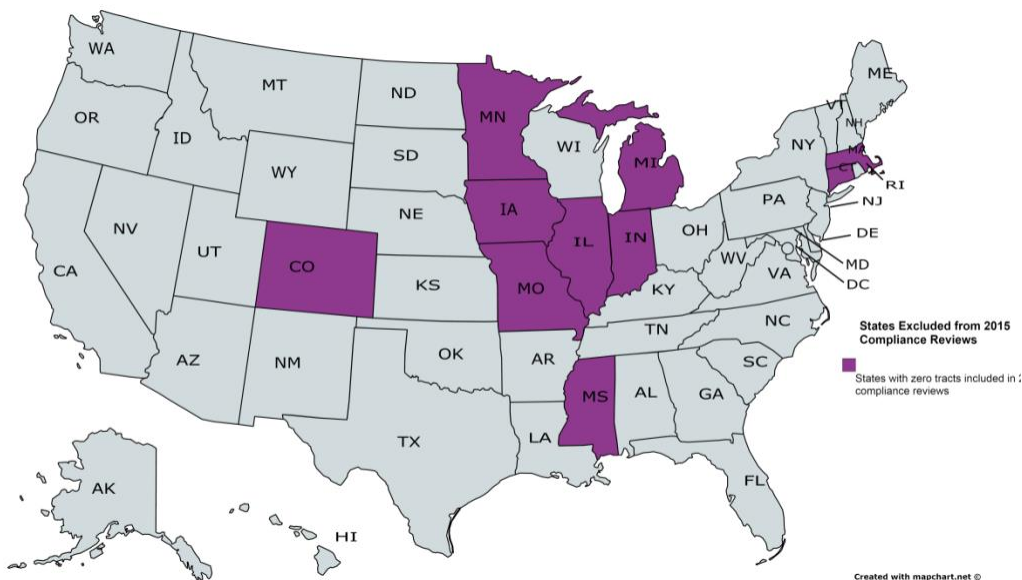
In the first report, OIG found that for fiscal years (FY) 2012-2015 NRCS did not use a random sample to conduct its spot checks; and for FY 2015 in particular, FSA used a dataset that omitted 10 states entirely. OIG recommended that NRCS, FSA, and RMA establish a formal coordinated process to generate and share complete data and random samples.

For 2012-2014 compliance checks, NRCS requested data for just one FSA program covered under conservation compliance: the Direct and Counter Cyclical Program (DCP). Although DCP payments were heavily utilized at the time, using only DCP enrollees to serve as the data universe for compliance reviews excludes a host of programs also covered by conservation requirements. Producers who did not participate in DCP but received farm loan support or conservation program

payments were never included in the data universe and were therefore never subject to audits verifying their compliance with HEL or wetlands conservation requirements between 2012 and 2014.

The report highlighted even more enforcement challenges the following year. In 2015, NRCS once again requested DCP data from FSA for compliance review purposes. The 2014 Farm Bill, however, eliminated DCP payments; meaning FSA could not generate the requested dataset. Instead, the agency attempted to generate a dataset including those receiving payments from all FSA programs. In theory, this data universe would better reflect the full extent of payments covered by conservation compliance provisions. Unfortunately, the dataset generated by FSA for NRCS compliance reviews included numerous duplicates, as well as tracts with invalid tract numbers. Once OIG corrected the data in their investigation, the dataset used for compliance reviews was cut in half. As mentioned above, ten states—including states with a historically large number of tracts subject to compliance reviews, like Iowa, Illinois, Indiana, Minnesota, and Missouri—had no tracts subject to random compliance reviews. Effectively, conservation compliance enforcement did not occur in these states in 2015.

Figure 1. States Excluded from Compliance Reviews, FY 2015



In addition to incorrect data and the exclusion of 10 states from compliance reviews, a data processing error failed to recognize a significant number of counties and ultimately excluded another 325,000 tracts of land from random sampling for compliance reviews. In states like North Dakota, Wisconsin, and Montana, the number of tracts reviewed for conservation compliance dropped to less than 15 percent of what it had been in previous years.

The three USDA agencies have since agreed with and begun to take action on OIG's recommendations related to sampling and data sharing.

Gully Erosion

Gully erosion is estimated to account for approximately 40 percent of soil loss in the U.S. In the second report, OIG found that NRCS headquarters had not provided adequate guidance to state NRCS offices regarding how to classify, track, and report compliance violations related to gully erosion. As a result, the report states, rules related to the identification and treatment of ephemeral gully erosion varied greatly across states. Ephemeral gullies are generally defined as shallow channels that can be temporarily and relatively easily smoothed or filled by tillage.

The investigation also revealed that NRCS does not consider *classical* gully erosion to be subject to HELC, because the land is technically not being used for agricultural production. Classical gullies are deeper and well-defined, and cannot be crossed with field equipment. OIG states in its report: “Despite the impact to producers and the agency’s conservation mission, the officials in the State offices we visited do not consider classical gullies when making compliance determinations, and do not supply guidance for controlling or correcting classical gullies.”

In early 2017, NRCS issued a national directive to state NRCS offices in order to address the issues raised in the second OIG report. The directive immediately canceled all existing state-level guidance, and provided new national guidance, on the identification and treatment of ephemeral gully erosion.

Gaps in Enforcement

Since 2016, USDA has taken important steps to improve its data management process, its spot check process, and to clarify requirements around the identification and treatment of gully erosion. However, the bigger problem is that conservation compliance enforcement varies greatly by state. As explained below, in some states, enforcement seems to be entirely or mostly lacking.

Despite improvements being made to the mechanics of spot checks, serious concerns remain with both their rate and defensibility across the country. NRCS reviews a national average of one percent of tracts subject to conservation compliance. However, the percentage of tracts sampled varies across states. As one NRCS employee simply put it: “the one percent is a rough target nationally, so some states may be over or under that percentage.”

Beyond the OIG reports, data secured through Freedom of Information Act (FOIA) requests sheds more light on problematic reporting trends. Perhaps most concerning is that, even though all states are conducting some level of spot checks, many of those states consistently fail to identify any violations. Between 2003 and 2015, 19 states reported zero HELC violations. This list includes states with significant amounts of HEL, such as Maryland and Michigan.

Table 1. States reporting zero HELC violations, FY 2003-FY 2015

ADMINISTERING STATE	TOTAL REPORTED HELC VIOLATIONS
Alaska	0
Arizona	0
California	0
Connecticut	0
Delaware	0
Florida	0
Louisiana	0

Maine	0
Maryland	0
Massachusetts	0
Michigan	0
Nevada	0
New Hampshire	0
New Jersey	0
New Mexico	0
Rhode Island	0
South Carolina	0
Utah	0
West Virginia	0

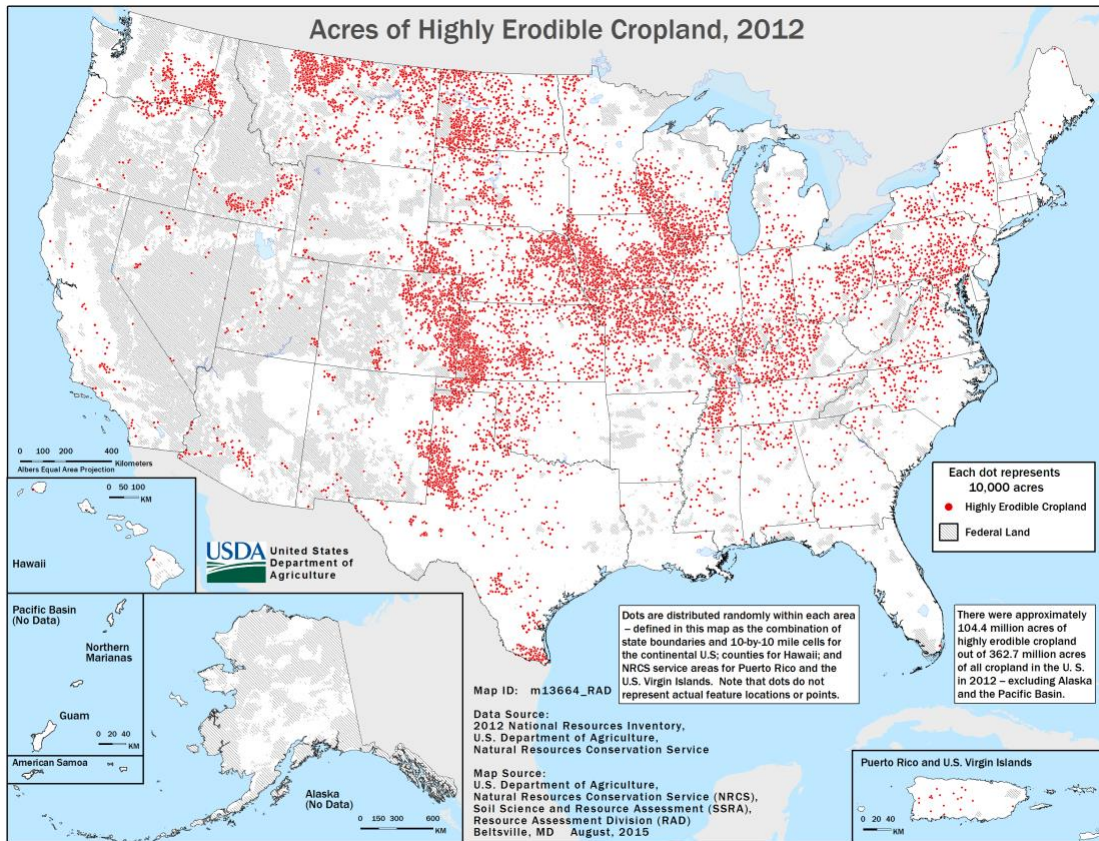
An additional 18 states reported 10 or fewer violations over the same 13-year period. This second list includes many of the states with the greatest number of HEL acres, including Washington, Texas, Colorado, Kentucky, Oklahoma, and South Dakota. Other states on this list with a significant number of HEL acres include Virginia, Idaho, Tennessee, and New York.

Table 2. States reporting between 1 and 10 HELC violations, FY 2003-FY 2015

ADMINISTERING STATE	TOTAL REPORTED HELC VIOLATIONS
Arkansas	1
Georgia	1
Oregon	1
Vermont	1
Virginia	1
Washington	1
Hawaii	2
Wyoming	2
Idaho	3
Colorado	4
Kentucky	6
Oklahoma	6
South Dakota	7
Tennessee	7
Alabama	8
Mississippi	8
New York	8
Texas	10

Of the 31 states that reported at least one HELC violation, nine have not done so since 2008. The likelihood that no or very few violations occurred in over half of all states between 2003 and 2015 is slim, especially where there is a significant amount of HEL.

Figure 2. Acres of Highly Erodible Cropland, FY 2012



Conversely, a relatively small subset of states is reporting the bulk of HELC violations each year, indicating that different states are playing by different rules. At 760, Iowa reported more violations than all other states combined. Nebraska and Illinois followed in second and third, respectively.

Table 3. Top Five States for Sodbuster Violations, FY 2003-FY 2015

ADMINISTERING STATE	TOTAL REPORTED HELC VIOLATIONS
Iowa	804
Nebraska	212
Illinois	142
Wisconsin	58
Missouri	42

POLICY SOLUTIONS:

Establish an additional quality control process that kicks in for states that report 10 or fewer HELC violations in two out of three years.

Given the numbers reported above, it is highly likely that some states are simply choosing not to report HELC violations. To prevent this in the future, USDA should institute an automatic re-check process and additional oversight for states that report no or very few violations. This additional quality control should be focused first and foremost on qualifying states that have a large number of HEL acres subject to conservation compliance. The dedicated funding stream for enforcement referenced below will help overcome resource limitations.

Mandate annual collection and reporting of county-level data on acres in and out of compliance, benefits withheld, and HEL determinations, with adequate protection for producer anonymity.

To improve transparency and ensure that taxpayer dollars are being well spent, USDA should collect, aggregate, and publish conservation compliance data. Without data, the public has no way of knowing whether conservation compliance is working and how it might need to be improved. As outlined below, a dedicated mandatory stream of funding is needed in order to ensure USDA has the tools and resources it needs to implement, enforce, and report on the impact of conservation compliance.

Require NRCS to conduct spot checks on five percent of farms in each state. Establish a secure, dedicated, mandatory funding stream through the Commodity Credit Corporation (CCC) and/or Federal Crop Insurance Corporation (FCIC) for enforcement of HEL and wetland conservation compliance.

The current five percent spot check rate for conservation compliance maintained by NRCS is a national average. In order to make enforcement more uniform and accountable, the farm bill should require NRCS to conduct spot checks on five percent of farms in each state. A dedicated, mandatory funding stream for compliance implementation and enforcement would ensure that NRCS has the resources necessary to effectively fulfill its obligations.

Require that Highly Erodible Land Conservation Plans be designed to achieve a level of erosion not greater than the soil loss tolerance level (T), allowing for a five-year interval for full implementation for plans to achieve the tolerance level.

USDA defines T as “the maximum rate of annual soil loss that will permit crop productivity to be sustained economically and indefinitely on a given soil.” In other words, if soil on a farm field is eroding at a rate that exceeds T, then at some point that field will no longer be farmable. Yet, farms that were first cropped before 1986 are only required to limit soil erosion to *twice* the soil loss tolerance (2T). Farming is not sustainable at 2T. In order to preserve water quality and ensure that soil is retained for the next generation of farmers, the 2018 farm bill should require that HEL conservation plans be written to achieve a level of erosion not greater than the soil loss tolerance. Farmers should be given five years to implement the new requirement.

Require that all Highly Erodible Land Conservation Plans be designed or revised to effectively treat all gullies.

As mentioned above, in January 2017, USDA eliminated state-level variations in guidelines on how to identify and treat gullies, and required state NRCS offices to work with farmers to revise their

HEL conservation plans to treat any identified ephemeral gullies. To ensure that the conservation compliance system addresses the most significant causes of erosion, the farm bill should codify these recent actions by explicitly clarifying that ephemeral gullies must be identified and treated. In addition, the farm bill should require NRCS to work with farmers to identify and treat *classical* gullies as part of HEL conservation compliance. As the June 2016 OIG report confirmed, NRCS has never applied HEL conservation compliance to classical gully erosion because the agency does not consider classical gullies to be part of the farm operation. This should be corrected in the farm bill.

ADDITIONAL RESOURCES AND DATA:

Electronic Code of Federal Regulations. *Conservation Plans and Conservation Systems*. 2018. *Title 7: PART 12: Subpart B*. Web. 5 June 2018.

United States Dept. of Agriculture. Economic Research Service. *Conservation Compliance: How Farmer Incentives Are Changing in the Crop Insurance Era*. By Claassen, Roger, et al. 2017. *ERR-234*. Web. 5 June 2018.

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