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Res Team  
JUN 06 1996

**SUBJECT:** NRCS Policy for Determining HEL

**TO:** Regional Conservationists  
State Conservationists

As you know, passage of the Food Security Act (FSA) in December of 1985, began an intensive period across the country during which Highly Erodible Land (HEL) was mapped. The technology that was selected for use in determining which land would be HEL was the best technology that was available at the time. That technology is set forth in the regulations published in 7 CFR Part 12. Part 12 provides that the Universal Soil Loss Equation (USLE) formula which was explained in the U.S. Department of Agriculture Handbook 537 and the Wind Erosion Equation (WEQ) which was explained in a paper by "Woodruff, N.P and F.H. Siddaway, 1965, and factors in the field office technical guide (FOTG) are the basis for determining HEL.

The Natural Resources Conservation Service (NRCS) has applied the rules set forth in 7 CFR Part 12 by instructing the field that all HEL determinations be based on USLE and the factors in the FOTG as of January 1, 1990. As new Highly Erodible Soil Map Unit Lists are prepared in areas where new soil surveys are completed, the determinations should also be made using USLE technology. The Federal Agriculture Improvement and Reform Act of 1996 (FAIRA) provided that the Secretary shall publish the equations used by the Department of Agriculture not later than 60 days after the date of enactment of the FAIRA and that the Secretary may not change the equations used without publishing a document in the Federal Register and receiving comment on the proposed change. A new regulation is being developed that will set forth the equations, the differences between the USLE and RUSLE, and will specify the rules for using each of the equations. However, as the equations used to determine HEL are currently published in 7 CFR Part 12, we do not have the authority to use any other technology for making HEL determinations until such time as another regulation is proposed, commented on, and published in final in the Federal Register.

There have been some concerns expressed related to the NRCS decision to maintain the current "frozen" HEL lists that National Appeals Division (NAD) may reverse NRCS decisions which are appealed or that NRCS may be forced by court order or by Congress to change the agency's decision.

By statute, NAD is restricted from ruling on issues of general applicability, therefore, NAD has no jurisdiction to change a policy decision made by NRCS that is consistently applied throughout the country. As long as the agency specifies that ALL HEL is determined using USLE and the factors in the FOTG as of January 1, 1990, NAD is restricted by statute from ruling on the issue. Allowing the use of technology that is not

provided for in 7 CFR Part 12 or the NFSAM implies that the rule is no longer generally applicable to all producers.

Concern has been expressed that the agency could "lose in court" if we did not use new technology. However, we currently have regulations promulgated that specify that NRCS shall use USLE for making HEL determinations. In fact, if HEL determinations are being made anywhere in the country using other than USLE and the factors in the FOTG that were referred to when the regulation was published, NRCS has the risk of losing that case in court. Generally, agencies do not "lose in court" when they are complying with the regulations that they promulgated.

As always, Congress has the authority to change the laws under which we operate. However, the 1995/1996 Farm Bill deliberations were an optimal time for mandating any changes, and yet, Congress chose not to direct that specific change through legislation.

Although we have determined that it is in the best interest of all clients and the agency to continue to use the USLE technology for determining HEL, we are providing clients the benefit of use of RUSLE technology for plan revisions, new conservation plans and in any case where they have been determined not actively applying a conservation system. This ensures that clients have access to the latest technology changes

The HELC farm bill team will also explore this issue and recommend policy changes and time schedules to the agency leadership.



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