

USDA NRCS Farm Bill: Mitigation Exemption with Easement

The Food Security Act of 1985, as amended indicates that no person may 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. Sections 3822(f)).

Mitigation Requirements

If the Landowner chooses not to complete restoration of the converted wetland or use a Corps Permit Exemption (NFSAM 515.10 F), a mitigation exemption with an easement is required. Mitigation should be completed in advance of, or concurrent with, the wetland conversion. If mitigation is not completed in advance of, or concurrent with, the wetland conversion, the Landowner may be ineligible for benefits until the mitigation is completed (7 CFR Section 12.5(b)(4)(i)(B)).

The Landowner must develop an NRCS approved wetland mitigation plan, agreement, or both. A wetland mitigation plan and/or agreement must fully document the actions that are required to replace the wetland functions and acres lost as a result of the wetland conversion (7 CFR Section 12.5(b)(4)(i)(A)) which is based upon a wetland functional assessment. **The NRCS approved plan and/or agreement must be signed by the person requesting the exemption, NRCS, and any applicable third parties.**

A ratio of no less than 1 acre mitigated for 1 acre converted is the minimum replacement ratio. Mitigation may not be funded at the expense of the Federal Government (7 CFR Section 12.5 (b)(4)(i)(C)) for either the direct or indirect costs. Mitigation should occur on lands in the same 8-digit hydrologic unit code (HUC) as the converted wetland unless NRCS determines it ecologically preferable outside of the 8-digit HUC.

NRCS does not certify or make assumptions regarding what the U. S. Army Corps of Engineers (USACOE) or any state government agency will or will not accept for compensatory mitigation.

The Mitigation Exemption becomes effective when the NRCS approved wetland mitigation plan and/or agreement is signed by both NRCS and the Landowner. NRCS will then update the wetland determination map and generate a new CPA-026e labeling the converted wetland site MIW and the wetland mitigation site MWM. Along with specific measurable results in the plan and/or agreement that demonstrate mitigation success, a wetland functional assessment will be used to document the mitigation wetland fully compensates for the wetland functions of the converted wetland. If the plan is not implemented, an FSA-569 is requested and

Compliance with the Mitigation Plan or Agreement

If terms of the wetland mitigation plan or agreement are violated, NRCS will request Form FSA-569 from FSA. The mitigation exemption will be invalidated and the converted wetlands for which it applied will be relabeled CW+year.

If the mitigation site does not meet the success criteria in the plan or agreement, the USDA participant will be offered the opportunity to conduct remedial actions to ensure that it will meet success criteria.

Warranty Easement Deed

A Landowner is required to provide USDA with a warranty easement deed (WED) for offsite wetland (16 U.S.C. Section 3822(f)(4)). An example WED is provided as an exhibit in section 515.14 of the National Food Security Act Manual (NFSAM) ([WC Easement Deed Template](#)).

General Provisions:

- The warranty easement deed is subject to review by the USDA Office of General Council.
- The warranty easement deed must be recorded in the public records, which is visible by a title search.
- The landowner must pay recording fees and survey costs.
- The landowner must certify that there are no liens on the land.
- If the land is mortgaged, the mortgage holder must agree to subordinate his or her interest to the CCC easement.

Length of Easement

The easement will be in effect for the length of time the converted wetland is in agricultural use or until the converted wetland is restored. Agricultural use refers to land planted to an agricultural crop, used for the production of food, fiber, or horticultural crops, used for haying or grazing, left idle in accordance with USDA program requirements, or diverted from crop production to an approved cultural practice that prevents erosion or other degradation.

Obligations of the Landowner

The Landowner will comply with all the terms and conditions of the easement. The Landowner will pay any and all real property and other taxes and assessments, if any, which may be levied against the land. The Landowner will report to NRCS any conditions or events which may adversely affect the wetland values and functions of the easement area. The Landowner agrees to restore and maintain the easement area in accordance with the terms of the NRCS approved wetland mitigation plan, agreement, or both.

Rights of the United States

The United States has a right of reasonable ingress and egress to the easement area, for the exercise of any of the rights of the United States under this easement deed. If there is a failure of the Landowner to comply with any of the provisions of this easement deed, the United States shall have any legal or equitable remedy provided by law and the right:

- To enter upon the easement area to perform necessary work for prevention of, or remediation of, damage to the wetlands and associated uplands; and
- To assess all expenses incurred by the United States against the Landowner, to be owed immediately to the United States.

For more information on mitigation exemption with easement, please see NFSAM 515.10

(<https://directives.sc.egov.usda.gov/RollupViewer.aspx?hid=29340>).

NRCS is not a regulatory permitting agency. NRCS implements its Wetlands Compliance responsibilities using the National Food Security Act.