

## Making Better Decisions – EQIP

It is important to remember that a contract is a legally binding document. It is not just binding on the program participant. There are certain obligations and promises that NRCS must conform with in order to correctly administer a contract. Program contracts are bilateral agreements – that is, NRCS offers the provision of both technical and financial assistance in return for the contract holder’s performance of certain conservation practices to the land.

Contract administration should be held at a level above the level where the responsibility for direct provision of assistance is located. In other words, the NRCS field office should not be vested with a responsibility for administering a legally binding contractual document without the requisite training, knowledge and support regarding the special needs of contracting.

This guidance is designed to provide a “template” for making better, legally adequate, decision with regard to contract implementation responsibilities.

1. **Define the Issue(s)** – As an example, a common issue facing District Conservationists who have responsibility for administration of EQIP contracts will be:

*“Has the contract holder begun implementation of at least one financially assisted cost-share practice during the first 12-month period of the contract? If not, what are the consequences of that violation?”*

2. **Specify the rule(s)** – These are the legal requirements that control how the agency and the contract holder must act in order to be in compliance with the terms of the contract. These rules are found in the program regulation, and for this specific example, the rules are as follows: 7 CFR 1466.21(c) – (EQIP Final Rule – May 30,2003)

“The participant **must start** *at least one financially assisted practice within the first 12 months* of signing the contract. If a participant, for reasons beyond their control, is unable to start a practice within the first year of the contract, they can request a waiver from the State Conservationist.”

This provision is also a part of the CCC1200 Appendix, §3C.

Further, if the finding of facts leads to an ultimate conclusion that the contract holder is in violation of his/her contract, the NRCS District Conservationist must adhere to the following rule of procedure, stated at 7 CFR 1466.26(a)(1):

“If NRCS determines that a participant is in violation of the terms of a contract or documents incorporated by reference into the contract, NRCS *shall give the participant a **reasonable time, as determined by NRCS***, to correct the violation and comply with the terms of the contract and attachments thereto. If a participant continues in violation, NRCS may terminate the EQIP contract.”

Contract violations are set forth in the CCC1200 Appendix in §9.

Finally, if there has been a demonstrated violation, there are additional consequences.

Additionally, the program regulation provides the following assessments for termination due to violation or breach, as set forth in the program regulation at 7 CFR 1466.26(b)(2), “If NRCS terminates a contract due to breach of contract or the participant voluntarily terminated the contract, the participant will forfeit all rights for further payments under the contract and ***shall pay such liquidated damages as are prescribed in the contract.*** NRCS will have the option to waive the liquidated damages, depending upon the circumstances of the case.”

Liquidated damages are set forth in the CCC1200 Appendix in §10.

There are several points that must be asked and facts gathered and investigated in order for NRCS to fulfill their contractual obligations to the contract holder: These are as follows:

1. Are the practices included in the contract those practices that meet the objectives for the identified natural resource concern? If not, why not?
  - a. If the practices are considered appropriate for the concern identified, what are the types and amounts of the practices scheduled for implementation within the first 12 months of the contract?
  - b. Must any of these practices be established prior to any of the other scheduled practices in order for those subsequent practices to function? If so, list those practices and state the logical sequence of application for the series of practices to be established.
  - c. If the practices scheduled for the first 12 months are cost-prohibitive, can the practices scheduled for implementation within the first 12 months be re-scheduled and those practices that require less of a financial input be implemented first? If so, modify the contract.
  - d. If the contract provides sufficient flexibility and the practices included in the contract are proper, scheduled in a manner that reflects the best order; determine whether or not the participant is in violation of the provision as required by the rule at 7 CFR 1466.21(c).
2. If the practices are those appropriate for the identified concern, has the contract holder experienced a hardship or other problem that is prohibiting his implementing the contract?
  - a. What is the identified hardship to implementation? If so, what was it. Is there sufficient documentation of the hardship to support a waiver?
  - b. If there is a hardship or some problem that is prohibiting his implementation, has the participant requested a waiver of the 12-month requirement from the State Conservationist? If not, suggest that the participant do so.
  - c. If the participant has no hardship, provide notification to the contract holder following the program rule at 7 CFR 1466.26(a)(1). (Contract violation – opportunity to correct the violation).
  - d. Further, if the participant has violated the terms of the contract, but has either failed to fully comply while making a good faith effort or violated the contract due to detrimental reliance on advice from an NRCS employee, provide information regarding the NRCS Equitable Relief provisions available in 7 CFR 635 and CPM Part 509.

3. Document the findings with regard to the violation and develop the “Preliminary Technical Determination” on which any further program decisions will be based. The preliminary technical determination must include the following items, by regulation (7 CFR 614) in order to meet the notification requirements:
  - a. Factual basis for the preliminary technical determination
  - b. Regulatory or statutory basis for the preliminary technical determination
  - c. Issues raised and addressed by the preliminary technical determination
  - d. The facts found during the investigation
  - e. A complete analysis of the facts
  - f. What the facts, as analyzed represent when compared to the rules governing the program
  - g. Appeal rights – field review at the local level; request for reconsideration by the STC
  - h. Rights to mediation
  - i. Rights to request an expedited final review
4. When the preliminary technical determination becomes a final NRCS technical determination, either through field review, reconsideration, mediation, or an expedited final review, the following appeal rights must be provided:
  - a. Informal appeal to either the FSA-COC or the NRCS STC, but not both
  - b. Formal appeal to the National Appeals Division (NAD)
5. If the determination issued is not an appealable issue, NRCS must issue the participant the rights to a review of appealability. Most technical determinations will be considered to be individually adverse, and therefore appealable. A majority of program decisions will not be considered to be individually adverse due to being generally applicable to all like situated persons.
6. When the final technical determination becomes a final USDA decision, then NRCS can use the final USDA technical determination as the basis for any further program decisions, such as termination of the contract and/or assessment of liquidated damages.