

**Final Rule**

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**Thursday  
September 17, 1987**

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**Part III**

**Department of  
Agriculture**

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**Office of the Secretary**

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**7 CFR Part 12**

**Highly Erodible Land and Wetland  
Conservation; Final Rule and Notice of  
Finding of No Significant Impact**

**EXHIBIT**

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**DEPARTMENT OF AGRICULTURE****Office of the Secretary****7 CFR Part 12****Highly Erodible Land and Wetland Conservation****AGENCY:** Office of the Secretary, USDA.**ACTION:** Final rule and notice of finding of no significant impact.

**SUMMARY:** The purpose of this final rule is to amend an interim rule which sets forth the terms and conditions under which a person who has produced an agricultural commodity on highly erodible land or newly converted wetland shall be declared ineligible for certain benefits provided by the United States Department of Agriculture, i.e., commodity price support or production adjustment payments, farm storage facility loans, disaster payments, payments for storage of CCC grain, Federal crop insurance, and farm loans administered by the Farmers Home Administration, as required by Subtitles B and C of Title XII of the Food Security Act of 1985 (Pub. L. 99-198).

**DATES:** Effective September 17, 1987.

The incorporation by reference of certain publications listed in the regulations has been approved by the Director of the Federal Register as of June 24, 1986.

**FOR FURTHER INFORMATION CONTACT:**

Mr. Alex King, Program Specialist, Cotton, Grain, and Rice Price Support Division, Agricultural Stabilization and Conservation Service (ASCS), United States Department of Agriculture (USDA), P.O. Box 2415, Washington, DC 20013, telephone: (202) 447-4542. Copies of the combined environmental assessment and finding of no significant impact, regulatory impact analysis, and regulatory flexibility analysis are available through this office.

**SUPPLEMENTARY INFORMATION:** This rule has been reviewed under United States Department of Agriculture (the "Department" or "USDA") procedures established in accordance with provisions of Departmental Regulation 1512-1 and Executive Order 12291 and has been classified as "major." It has been determined that an annual effect on the economy of \$100 million or more may result from implementation of the provisions of this rule. Copies of the regulatory impact analysis are available upon request from the previously mentioned contact.

The paperwork requirements imposed by this rule have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980.

The Office of Management and Budget assigned number for those requirements is OMB No. 0550-0004.

It has been determined that this action may have a significant economic impact on a substantial number of small entities. The analysis prepared for this action includes a regulatory flexibility analysis.

The titles and numbers of the Federal assistance programs to which this rule applies are: Commodity Loans and Purchases—10.051; Cotton Production Stabilization—10.052; Emergency Conservation Program—10.054; Emergency Loans—10.404; Farm Operating Loans—10.406; Farm Ownership Loans—10.407; Feed Grain Production Stabilization—10.055; Storage Facilities Equipment Loans—10.056; Wheat Production Stabilization—10.058; National Wool Act Payment—10.059; Beekeeper Indemnity Payments—10.060; Rice Production Stabilization—10.065; Federal Crop Insurance—10.450; Soil and Water Loans—10.416; Loans to Indian Tribes and Tribal Corporations—10.421; as found in the Catalog of Federal Domestic Assistance.

This rule is not subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. See Notice related to 7 CFR 3015, Subpart V, published at 48 FR 29115 (June 24, 1983).

It has been determined that this rule does not constitute a major federal action significantly affecting the quality of the human environment. An environmental assessment, dated June 1986, was prepared with regard to development of the interim rule. Notice of the availability of the environmental assessment was provided in the publication of the interim rule.

With regard to the highly erodible land conservation provisions of this rule, the environmental assessment contains a consideration of the range of environmental effects that may result from implementation of the rule. The range of environmental effects considered recognizes the uncertainty which exists regarding the extent of compliance with the requirements of the rule, the actual erosion control measures that persons will adopt to maintain eligibility for USDA program benefits, and the actual erosion reduction that may result from those control measures. As to wetland conservation, the final rule merely clarifies the extent of the regulations' coverage.

Accordingly, based on review of the environmental assessment prepared for the interim rule, it has been determined that implementation of this final rule

will not significantly affect the quality of the human environment. A copy of the finding of no significant impact and environmental assessment is available from the information contact office previously mentioned.

**Statutory Authority**

This rule is required pursuant to Subtitles B and C of Title XII of the Food Security Act of 1985 (the Act), 16 U.S.C. 3801 *et seq.* Those provisions of the Act remove the incentive that certain benefits provided by the Department could give persons to cultivate highly erodible land or to convert wetlands for the purpose of producing an agricultural commodity. Sections 1211 and 1221 of the Act provide, generally, that any person who, in any crop year, produces an agricultural commodity, without an approved conservation system, on a field in which highly erodible land is predominant or produces an agricultural commodity on any wetland converted after December 23, 1985, will be ineligible for commodity price support or production adjustment payments, farm storage facility loans, disaster payments, payments for storage of Commodity Credit Corporation grain, or Federal crop insurance. Also, any such person will be ineligible for loans made, insured, or guaranteed under any provision of law administered by the Farmers Home Administration if it is determined that the proceeds of such loan will be used for a purpose that will contribute to excessive erosion of highly erodible lands or to the conversion of wetland for agricultural commodity production.

This final rule amends the interim rule published at 51 FR 23496 (June 27, 1986) and applies to crops planted after the effective date of this rule and to all determinations made after or pending on the effective date of this rule. Generally, this rule sets forth (1) the definitions of highly erodible land, wetland, and converted wetland; (2) the activities which would cause a producer to be ineligible for benefits; (3) the exemptions from ineligibility; (4) the responsibilities of each administering agency; and (5) the administrative appeal rights of any person denied eligibility for benefits. This final rule will be implemented by the Agricultural Stabilization and Conservation Service (ASCS), the Commodity Credit Corporation (CCC), the Farmers Home Administration (FmHA), the Federal Crop Insurance Corporation (FCIC), the Soil Conservation Service (SCS) and the Extension Service (ES).

### Discussion of Comments and Changes

USDA received 2696 letters containing 8400 comments concerning the interim rule issued on June 27, 1986. Entities responding included individuals, corporations, environmental groups, state and local governments, federal agencies, farm commodity groups, water districts, financial institutions, members of Congress, and others. Comments came from all states, except Alaska and Hawaii.

Changes in this final rule that modify the interim rule of June 27, 1986 are based upon USDA's experience in administering the interim rule, a USDA pilot test of the wetland conservation provision of the interim rule conducted from July 7 to July 25, 1986 in six states, public comments to the interim rule and consultation with the Fish and Wildlife Service of the United States Department of the Interior. Numerous minor editorial changes have been made in the text and order of the regulations for clarity and to facilitate the application of the regulations.

The discussion that follows is organized in the same sequence as the final rule.

#### Section 12.1 General.

One hundred and three comments were received concerning the general provisions of the interim rule. Many respondents suggested that the regulations be relaxed or rescinded. They cited a wide variety of reasons such as economic difficulties, undue government interference, overly severe penalties for noncompliance, lack of information activities, and difficulty of implementation.

Some respondents suggested that compliance should be based on the availability of cost-share assistance, and that persons should receive payment for complying with the regulations. Several suggested administrative flexibility to allow the shifting of commodity bases on farms to allow and encourage conservation oriented crop rotations. Others suggested that permanent conservation practices that are established in a permanent cover of grasses or legumes should be eligible for consideration as set aside acreage. These comments pertain to specific compliance requirements and are addressed in the final rule under § 12.23, Conservation Plans and Conservation Systems.

These regulations and the conditions they impose are required by the Food Security Act of 1985. USDA does not have the legislative authority to rescind or relax these conservation provisions or to make compliance contingent on the

availability of cost share funds. However, the Department has sought to implement and administer the Act's requirements in a reasonable manner.

Furthermore, to the extent ongoing program cost share funds are available, cost share programs such as Agricultural Conservation Program (ACP), and Great Plains Conservation Program (GPCP) may be utilized to apply required conservation treatment on highly erodible cropland. Persons may also have the option to use the Conservation Reserve Program (CRP) to convert highly erodible cropland to grass, trees or wildlife cover for 10 years in return for annual "rental" payments and cost share payments to establish permanent covers. Under the legislation, the incentive for complying with the provisions of these regulations is the retention of eligibility to participate in and receive benefits from certain USDA programs.

The Secretary of Agriculture (the "Secretary") has established USDA information and education task forces at the national and state levels to increase the availability of information relating to the Act and these regulations. These task forces have developed fact sheets, brochures, displays, radio and television spots, news releases and other media material which are being used to better inform landowners and operators of the conservation provisions of the Act.

Also, this rule amends the regulations to provide that the regulations apply to all lands within States, *i.e.*, private lands, Federal, State or local government lands, and Indian tribal lands.

#### Section 12.2 Definitions

Many comments proposed modifications or additions to the existing definitions. Several comments requested a clarification of the term "normal circumstances" and numerous comments suggested that the definition of "person" should be revised to include agents of landowners or agencies. Other comments proposed broadening the definitions of a "conservation plan" and "conservation system" to include water quality, wetland preservation and other conservation purposes. Comments were also received which proposed changing the definition of "highly erodible land" to include land with streambank erosion.

In response to these comments and for purposes of clarity, several of the definitions have been revised in the final rule. Also, in conformance with section 3 of Pub. L. 100-28 (April 24, 1987), the definition of "conservation plan" was revised to reflect the wording of an amendment to section 1212(a)(2) of

the Act, which provides more specific information on the content of a conservation plan. Furthermore, the definition of "highly erodible land" has been revised to indicate that highly erodible land is land that has an "erodibility index" of 8 or more, and a definition of erodibility index was added to more clearly describe the basis for determining the erodibility of land.

Also, it was determined that, for purpose of clarity, the term "normal circumstances" should be defined in context with its customary usage in determining whether land is wetland or not. This definition now appears in § 12.31(b)(2)(i).

The definitions of "conservation plan," "conservation system," or "highly erodible land" were not expanded to include water quality, wetland preservation and other conservation purposes, because considerations of water quality, wetland preservation, or other conservation purposes are not necessary to implement the highly erodible land conservation provisions of the Act to which those definitions relate. Likewise, streambank erosion, which is not the result of sheet, rill or wind erosion as required by the Act, cannot be used in defining or determining "highly erodible land."

The definition of "person" was not changed as suggested because the change is not needed. The person requesting USDA program benefits is the person who must comply with the Act and these regulations. To the extent that the program under which the person requests benefits recognizes agents for the person, agents may, in fact, represent the person for the purposes of these regulations. USDA did delete the term "producer" from the regulation after determining that the term was not essential to the rule.

The definition of "wetland" has been changed to exclude from the definition lands in Alaska identified as having high potential for agricultural development which have a predominance of permafrost soils. This change is required by the amendment to the Act's definition of "wetland" made by the Urgent Supplemental Appropriations Act of 1986, Pub. L. 99-349, 100 Stat. 710,714.

#### Section 12.4 Determination of Ineligibility

Seven hundred identical comments were received concerning determinations of ineligibility with regard to converted wetlands. All the respondents suggested the "rules should provide that in event the landowners crop or otherwise farm land classified as

wetlands, the action should only affect that particular farm unit and not other farm units the landowner and/or tenant has an interest in or is farming or operating."

Under the Act, however, ineligibility applies as to any commodity produced by a person, who has violated program provisions, during the crop year. Accordingly, the scope of § 12.4 is unchanged.

#### *Section 12.5 Exemptions*

Five comments were received concerning the extension of time for compliance with the highly erodible land conservation provisions in situations where soil survey maps are not available.

All five respondents expressed the concern that the references to an available soil survey in § 12.5(a) and (b)(1) were not clear as to whether the soil survey must be completed as to an entire farm or just for the existing cropland portion of a farm.

Sections 12.5(a) and (b)(1) have been changed to make clear that the referenced soil survey applies only to the cropland portion of the tract or farm. In order to carry out the highly erodible land and wetland conservation provisions of this rule, SCS must complete, as a minimum, a soil survey of all existing cropland on the tract or farm. However, it is SCS policy to complete a soil survey of the entire farm whenever resources permit, since a soil survey of the entire farm will allow SCS to identify those noncropland fields that contain highly erodible or hydric soil map units in order to inform landowners and operators of potential problems with eligibility if these areas are converted to cropland in the future.

One hundred and forty-nine comments were received suggesting that alfalfa, when used in a crop rotation, be considered an agricultural commodity so as to qualify for exemption under § 12.5(a) and (b)(1). The Act, however, specifically defines an agricultural commodity as any agricultural commodity that is planted and produced by the annual tilling of the soil.

Alfalfa, other legumes or grasses are not tilled annually and thus do not meet the definition of an agricultural commodity. Therefore, if a crop field was in alfalfa, other legume or grasses during the period 1981 to 1985, and was broken up to plant an annually tilled crop in 1986 or later years, the person may lose eligibility for program benefits. However, where alfalfa, other legumes or grass are used as a high residue crop in a crop rotation, as distinguished from permanent hayland or grassland, the existing crop rotation and management

techniques may be considered to constitute an acceptable conservation system for the field. In such cases, a person may only need to have SCS determine that the existing conservation system meets the requirements of the local SCS field office technical guide, and obtain the approval for the conservation system from the local conservation district or SCS to maintain eligibility.

On April 24, 1987, section 1212(b) of the Act (16 U.S.C. 3812(b)) was amended by Pub. L. 100-28. The amendment authorized a one year extension of time for full implementation of conservation plans where alfalfa has been used in crop rotations (but not where alfalfa has been used for permanent hayland or pasture). Accordingly, a new § 12.5(b)(2) has been added to implement the time extension granted by the amendment. Essentially, persons who had alfalfa in a crop rotation on highly erodible land during each of the 1981 through 1985 crop years based on a conservation plan have until June 1, 1988 to fully apply the conservation system. The provisions contained in § 12.5(b)(2) of the interim rule have been moved to a new section (§ 12.32) of the final rule and are discussed later.

Four comments were received concerning the renovation of existing pastures. These comments noted that it is common, in many areas, to use a rotation of conventional crops for periods of two to three years before returning the land to permanent pasture. This cropping period is necessary to eliminate undesirable plant species that may have invaded the pasture and to prevent the recurrence of pasture plant diseases. The respondents requested that an exemption for renovation of pasture be added to the highly erodible land provisions to specifically allow rotation crops to be planted and harvested, and to allow soil loss to exceed tolerance levels during the period when rotation crops are grown.

It has been determined that no changes will be made in the final rule to categorically allow exceptions for breaking out highly erodible land for the production of annual crops in these situations. The production of annual crops on highly erodible land, even though done for purposes of permanent pasture renovation, falls within the scope of the highly erodible land conservation provisions of the Act and would require an approved conservation system. However, it should be noted that since erosion rates are computed over the full rotation period, additional erosion control practices may not be required if the average annual rate of erosion is acceptable, even though

excessive erosion occurs in some individual years until permanent pasture is reestablished. Conversely, if the average annual erosion rate is excessive, a conservation system would specify the necessary erosion control practices and any allowable rotation crops, on a case by case basis, that could be produced for pasture renovation.

Another comment sought an exemption for situations where brushland is converted to grassland. Conversions from brush to grass are not subject to the highly erodible land provisions because grass is not an agricultural commodity for purposes of the Act. Therefore, the rule does not require modification in this regard.

#### **Exemption Based on Economic Impact and Feasibility**

Eight hundred and ninety comments were received concerning the economic impacts of § 12.5(b)(2) and (3) of the interim rule, which required that conservation systems and plans be developed to reduce soil erosion to an established soil loss tolerance level (T), with twice that level (2T) being allowed in specific circumstances. Seven hundred and thirty-four comments stated that these requirements would unduly affect the economy by forcing farmers out of business and causing adverse impacts on local agribusiness. Thirty-four comments were received concerning the economic hardship exemption of allowable soil loss tolerance (2T). Twelve respondents supported the exemption; twenty-two respondents opposed the provision of the interim rule allowing up to 2T soil loss upon a determination by SCS that further reduction is impractical. Three respondents suggested that exemption should be more than 2T. Ninety-two comments were concerned that farmers would be forced to apply expensive conservation measures that they could not afford.

Based upon the public comments and the Act's legislative history, USDA has determined that the "T" and "2T" limitations for conservation plans and conservation systems are too restrictive. For that reason § 12.5(b) (2) and (3) of the interim rule were amended on June 29, 1987, 52 FR 24132. The purpose, scope and effect of this change is more fully discussed in that rule. These provisions of the amended rule are currently in effect, are the subject of public comment, and are not made final by this rule. Although it has been incorporated in this final rule, relevant comments are encouraged and may be submitted in response to the June 29



amended interim rule and a final rule with respect to these provisions will be issued at a later date.

In this final rule this part of the interim rule has been moved to § 12.23, Conservation Plans and Systems, and expanded for a more comprehensive discussion of the requirements for conservation plans and systems.

*Section 12.5(d) Exemptions for wetland.*

Section 12.5(d)(1)(i) has been revised to clarify that the production of agricultural commodities on converted wetlands is exempt if the conversion was commenced or completed prior to December 23, 1985. This change implements the intent of Congress to exempt the production of agricultural commodities on converted wetlands if conversion was completed prior to December 23, 1985, as well as on converted wetlands where the conversion was commenced prior to December 23, 1985.

Four hundred and sixty comments were received on the "third party exemption" in § 12.32 of the interim rule. This exemption protected persons who produce agricultural commodities on wetlands converted by the actions of persons unassociated with the person requesting benefits. All of these respondents suggested that any person who produces an agricultural commodity on wetlands converted after December 23, 1985 should be determined to be ineligible for program benefits regardless of who caused the conversion.

The provisions regarding "third party exemptions" have been moved from § 12.32 to § 12.5(d)(1)(vi) in the final rule because this subject relates to exemptions more so than to the criteria for identifying converted wetlands, which continues to be the subject of § 12.32. The third party conversion provisions were amended after considering the public comments and consulting with the Fish and Wildlife Service. Under this final rule, converted wetlands are presumed to have been converted by the person applying for USDA program benefits unless the person can show that the conversion was by an independent third party and the person can show that there has been no involvement in a scheme or device to avoid compliance with this rule. Furthermore, such person may continue to produce agricultural commodities on such converted wetland and retain eligibility only as long as there is no further improvements to the drainage of such converted wetland or if a minimal effect determination is made by SCS with regard to any further drainage

improvement. Conversely, if there was acquiescence in, approval of, or assistance to acts of a third party in regard to the conversion of the wetland, the person is subject to the scheme or device provisions of § 12.10 and may lose eligibility for program benefits. This approach allows persons who had no control whatsoever over the incidental conversion of wetland to use such lands for the production of agricultural commodities but at the same time prevents schemes or devices from being used to circumvent the rule and avoids undue windfall benefits to landowners or operators at the expense of wetland conversion.

With regard to wetlands converted prior to the effective date of the Act, § 12.5(d)(2) was added to the final rule to make clear that determinations regarding whether the conversion of wetland was completed prior to December 23, 1985 will be based upon consideration of the types of activities set forth in the definition of what constitutes a "converted wetland."

Fifty-one comments on the interim rule were concerned that the definition of converted wetland would allow additional drainage to occur to these lands after December 23, 1985. Section 12.5(d)(1)(i) of the final rule makes it clear that wetlands converted prior to December 23, 1985 are exempted from the rule by the law. Therefore, those converted wetlands may be improved by additional drainage, provided that no additional wetland or abandoned converted wetland is brought into production of an agricultural commodity. Also see § 12.33(b) of the final rule. However, under § 12.32(a)(3) of the final rule, potholes and playas and other wetlands that are flooded or ponded for extended periods, especially during the early growing season, will not be considered converted based upon activities that occurred prior to December 23, 1985, and further conversions will result in the loss of program benefits unless the conversion is determined to have a minimal effect, as determined pursuant to § 12.5(d)(1)(v).

Eight hundred and eighty-three comments were received concerning the exemption in § 12.5(d) (1) and (2) of the interim rule regarding converted wetlands for which conversion was commenced before December 23, 1985. Seven hundred respondents suggested that the exemption should include projects and drainage which have been planned but not installed as of December 23, 1985. These respondents further suggested that ongoing projects should not be unduly restricted. One hundred eighty-three respondents

supported the commenced exemption as set forth in the interim rule.

After consideration of the comments and consultation with the Fish and Wildlife Service, USDA has revised the definition of "commenced" in § 12.5(d) (3) and (4) of the final rule to clarify what constitutes commencement of conversion prior to December 23, 1985 and to assure that commencement of conversion determinations are based on one or more of the following criteria: (1) the conversion activity was actually started before December 23, 1985; or (2) the person expended or committed substantial funds by entering into a contract for the installation of a drainage activity or for construction supplies and materials for the conversion prior to December 23, 1985.

The final rule also provides that a person seeking a determination of conversion commendment under this exemption must request the determination within one year following publication of this rule, must demonstrate that the conversion of the wetland has been actively pursued and must complete the conversion by January 1, 1995.

A new § 12.5(d)(4) has been added to specifically address the activities of drainage districts or entities that relate to the conversion of wetland. It imposes all of the criteria discussed above and, in addition, requires the drainage districts or similar entities to have had on file prior to December 23, 1985, an approved plan for installation of the district drainage project. Further, only those portions of the drainage project for which a substantial commitment of funds has been made or legally obligated prior to December 23, 1985 will be considered for exemption under § 12.5(d)(4). Finally, a person who wants to use the conversion commencement exemption in this situation must show that the drainage of the person's wetland was part of the project drainage plan.

*Section 12.12 Appeals.*

Seven comments were received concerning administrative appeals.

Four comments supported the administration appeal procedures as referenced in § 12.10 of the interim rule. Three comments recommended a change that would allow interested third parties to appeal any determination made under these regulations.

Under the Act, only the person or persons who face the loss of eligibility for USDA program benefits are adversely affected and have the right to an administrative appeal. The appeal procedures generally allow agencies to

request other interested persons to present information that directly relates to the determination under appeal. However, the interested party is not a party to the appeal.

Additionally, three hundred and ninety-six comments were received concerning the reporting of violations of the Act and these regulations. All of the respondents suggested that private citizens be allowed to report violations. Several respondents suggested that a toll free number be set up for this purpose.

The Department responds to reports of program violations when received from private citizens. There is presently a USDA toll-free number for use in reporting violations of USDA programs: 1-800-424-9121. Additionally, persons may report suspected violations by calling or writing the county office of ASCS, FmHA, or FCIC, as applicable.

For reference, the Code of Federal Regulation citations for the appeal procedures of all the USDA agencies involved in implementing the rule have been added to § 12.12.

#### *Section 12.21 Criteria for Identifying Highly Erodible Lands.*

One hundred and eighty-two comments were received concerning the criteria for identifying highly erodible lands. One hundred and thirty-seven comments made suggestions concerning the use of the erodibility index value for identifying highly erodible lands.

Twenty-four comments were concerned about the use of assigned "I" values for determining the Wind Erosion Erodibility Index (CI/T) rather than "I" values which have been adjusted to reflect tillage practices. The "I" value is the degree to which soil resists wind erosion. Twenty one comments were concerned about the consistency of the criteria and the breakpoint level used for identifying highly erodible lands, as set forth in the interim rule, with similar criteria existing for the Conservation Reserve Program (7 CFR Part 704).

It has been determined that the Erodibility Index (EI) criteria will be retained in the final rule, including the present break point value of "8 or more." At this value level, a majority of the lands that have a serious erosion problem if cropped without adequate erosion protection will be covered. Thus, the criteria set forth in this rule and the criteria that are applicable to the Conservation Reserve Program will be consistent. The Department recognizes that having a breakpoint discriminates between lands that fall on opposite sides of the breakpoint, but any criteria used (e.g., land capability classes, erodibility index or actual erosion rates)

would encounter the same problem. In order to implement that Act in a reasonable and practical manner, some cut-off point which is consistent with the Act's purposes must be used. The breakpoint value of "8 or more" has been determined to be the level which is most consistent with these purposes.

Furthermore, it has been determined that the EI values for wind erosion and water erosion should not be combined. While both wind and water erosion may occur on the same field, both erosion types do not necessarily occur on the same acre nor do both types of erosion occur at the same time of year. Thus, whichever is the most prevalent type of erosion, either wind or water, will be used to establish the EI value. If that value exceeds 8 or more, the soil unit is classified as a "highly erodible unit." About 1.4 million acres of the Nation's croplands have EI values between 5 and 8 for both wind and water erosion combined, which is less than 1.3 percent of all of the highly erodible cropland in the United States.

Also, it has been determined that only assigned "I" values, without adjustments to reflect tillage and other management practices, will be used to calculate the EI value in determining whether land is highly erodible due to the wind erosion hazard, since the EI represents the potential erodibility of the soil and not the actual rate of erosion. Adjusted "I" values may be used, where applicable, in determining whether an adequate conservation system is being followed, since the land management factors considered in the adjustment are relevant to that type of determination.

#### *Section 12.23 Conservation plans and conservation systems.*

A new section has been added in the final rule concerning conservation plans and conservation system requirements. Section 12.23(a) contains the wording set forth in the amendment to the interim rule which was published in the **Federal Register** on June 29, 1987, as previously mentioned.

Additionally, this section in the final rule contains four new provisions, § 12.23 (b), (c), (d), and (e), to clarify some minor misunderstandings regarding the interim rule that became apparent from the comments and during implementation of the interim rule. These revisions provide that:

1. Persons are encouraged to request SCS assistance for the development of a conservation plan or implementation of a conservation system well in advance of deadline dates to avoid delays and difficulties in maintaining eligibility for program benefits.

2. SCS will handle the approval or disapproval of conservation plans and systems in those situations where a conservation district does not provide such a determination within 45 days, unless there is good cause for delay.

3. Section 12.23(d) describes what constitutes "actively applying a conservation plan" so that a person may determine whether a plan is being actively applied by the person so as to meet the requirements of the Act.

4. Persons who believe the requirements for conservation plans and systems were misapplied with regard to them may appeal to SCS.

Fifty-nine comments were received concerning the requirements for conservation plans and the role of conservation districts in plan approval. Forty-eight comments favored the conservation district role provided in the interim rule and the requirements for conservation plan development but suggested some modification of these requirements. These suggestions included (1) providing more flexibility in the planning process, (2) allowing farmers to prepare their own plans, (3) placing a 5-year life span on conservation plans, and (4) requiring that conservation plans address all resource concerns. It has been determined that the rule adequately reflects the legislative intent concerning the development of the required conservation plan. Land owners and operators are responsible for making land use and conservation treatment decisions concerning their land and for compliance with the Act. The function of the soil conservationist is to identify acceptable conservation (treatment) system alternatives and to provide this and other relevant information of the landowner or operator. This process provides maximum flexibility in terms of format and content of the plan, the conditions under which a plan is to be revised, the types of resource concerns that can be addressed in the plan, and how the plan is prepared. A plan may be prepared solely by the person, or with assistance of SCS, or with assistance of a private consultant. When a conservation plan is prepared by parties other than SCS, the person must obtain SCS certification that the plan meets SCS standards and obtain the approval of the conservation district.

It has been determined that persons will be allowed to exchange, subject to restrictions, certain crop acreage bases for crops that have a high residue base if the high residue crop is recommended by SCS as being essential for the conservation plan and the recommendation is approved by ASCS.

See § 12.6(b)(3)(iv). The ability to exchange certain crop acreage bases for high residue crops will give persons more flexibility in the selection of acceptable conservation systems for highly erodible cropland.

Determinations governing such exchanges will be administered pursuant to other relevant parts of Title 7 of the Code of Federal Regulations.

#### *Section 12.31 Hydric soil criteria.*

Eighty-six comments were received concerning the hydric soil criteria used to identify wetland. Most of these comments were concerned about the method used to identify hydric soils in the interim rule. Some respondents supported the method, while others believed the method would include too much land as wetland, and still others believed the method would not include enough land. A few comments suggested that the on-site procedures be used in all situations. Some comments recommended that soil map units which were not hydric but which contained hydric soil inclusions be deleted from hydric soil lists. A couple of comments recommended that only organic soils should be included in the lists of hydric soils and others recommended that SCS publish hydric soil criteria in the Federal Register.

Changes have not been made to the technical criteria for determining hydric soils as a result of these comments; however, changes were made in § 12.32 regarding converted wetland identification criteria. The method used for wetland identification was developed to provide the resource data necessary to determine predominance of hydric soils and prevalence of hydrophytic vegetation in order to make wetland determinations in accord with the Act's wetland definition. With regard to on-site determinations, USDA does not believe that it is necessary to make an on-site determination in all cases. The rule does provide for on-site determinations in those cases where an office determination cannot be made on the information available. Additionally, a person may request reconsideration of a wetland determination, which would then require an on-site determination. This procedure will allow SCS to allocate resources in an effective and efficient manner, while assuring that determinations are based on accurate information.

The rule does not exclude soil map units that have inclusions because many inclusions in a map unit consist of potholes or other wet areas that are clearly wetlands and have significant wetland values. To eliminate those soil map units that contain these inclusions

from the list of hydric soils would not be consistent with the Act's objective of encouraging the conservation of wetland values.

The hydric soils criteria have been developed by an interagency committee of professionals in soils and wetlands independently of the Food Security Act of 1985. The legislative history of the Act recognizes this independent list and indicates that these criteria are to be used to identify wetlands. Comments concerning a proposed change in the criteria along with supporting data may be sent to: Chairman, National Technical Committee for Hydric Soils, USDA, Soil Conservation Service, P.O. Box 2890, Washington, DC 20013. If a change in the list or the criteria is made, a notice will be published in the Federal Register.

#### *Section 12.31(b) Prevalence of hydrophytic vegetation.*

Thirty-four comments were received concerning the determination of a prevalence of hydrophytic vegetation. Twelve respondents felt too much land would be included as wetland by using the method described in the interim rule, and six felt too little land would be included. Sixteen comments suggested that the list of hydrophytic plants, and any changes in it, be circulated for review prior to adoption.

No change has been made in the method for determining prevalence of hydrophytic vegetation. However, changes have been made in § 12.32, regarding converted wetland identification criteria. The method used to determine prevalence of hydrophytic vegetation employs the National List of Plant Species That Occur in Wetlands (NLPSON) and a weighted average technique, which uses plant indicator designations for the prevalence determination. The use of the NLPSON is based on the Act's legislative history and interagency acceptance of the national list. The weighted average technique is an effective way to quantify prevalence based on data from previously sampled plant communities. The method was chosen because it is accurate, relatively simple to perform, yields a numerical value which can be used to quantify determinations, and lends itself to analysis of plant data using different plant data collection techniques. Related studies suggest that the NLPSON value of 3.0 is the logical separation point between wetland and nonwetland. Under the final rule, the test for the prevalence of hydrophytic vegetation is applied after a determination has been made that an area is composed of hydric soils that are inundated or saturated.

The NPSLOW represents the best available technical knowledge in this field. The plant list is an interagency effort which is assembled by the Fish and Wildlife Service, Soil Conservation Service, the Army Corps of Engineers, and the Environmental Protection Agency. The NLPSON contains a procedure for listing, delisting, or changing the indicator status of plant species. Copies of the NLPSON may be obtained from the U.S. Fish and Wildlife Service, National Wetland Inventory, Monroe Building Suite 101, 9720 Executive Center Drive, Saint Petersburg, Florida 33702. Persons having data that supports a change of a listed plant species may submit their change request and data according to the procedures outlined in the NPSLOW.

#### *Section 12.31(c)(1) Artificial wetland.*

Section 12.31(c)(1) has been clarified by specifying that artificial wetland is identified as land that was formerly nonwetland or converted wetland but now is wetland due to manipulation.

#### *Section 12.32(b) Farming under natural conditions.*

Comments were received concerning the exemption for the production of agricultural commodities on wetland during a period of drought. The comments suggested that wetland that can be cultivated for a lengthy period of time should not come within this exemption and that restrictions be placed on the use of herbicides with regard to agricultural commodity production under this provision.

No changes have been made as a result of these comments. The Act expressly allows farming of wetland during dry years and the number of years that the natural conditions are dry enough to permit farming is not an appropriate consideration in determining whether a wetland has been converted. As to the suggested restrictions on herbicides, the use of approved herbicides is a part of normal, environmentally acceptable farming practices and so, the final rule does not categorically impose any specific restrictions.

#### *Section 12.31(d) Minimal effect.*

Seven hundred and seventy-four comments were received concerning the determination of the effect of converting wetland, as set forth in the interim rule. All of the comments suggested that the rule specifically allow the mitigation of fish and wildlife values to provide the basis for exemption. Most of the comments suggested that the final rule permit water resource districts to work



with the Fish and Wildlife Service to develop drainage projects that provide replacement benefits to wildlife. The concern expressed was that the interim rule did not permit water resource districts to improve conditions for wildlife and thus replace wetland losses in order to allow their individual constituents to remain eligible for program benefits.

After consideration of these comments, the rule has not been changed to allow the production of agricultural commodities on converted wetland to be exempted categorically through the mitigation of the loss of fish and wildlife values. The wetland conservation provisions of the Act encourage the preservation and protection of natural wetlands, rather than the replacement of natural wetlands with artificial wetlands that may have similar fish and wildlife values. Further, if mitigation were allowed on a broad scale, extensive monitoring efforts would be required to ensure that mitigation is carried out and maintained.

Also, the increased use of converted wetland for agricultural commodity production would not be discouraged if mitigation were used for a categorical exemption. The final rule does not preclude the possibility of considering the merits of mitigation on a case by case basis in the course of making a "minimal effects" determination. In these specific situations, mitigation would be considered as a limited exception, rather than the rule, as the legislative intent for the minimal effect determination is that it should rarely be used.

Of course, this does not preclude mitigation from being used in conjunction with project-type activities that have objectives other than the conversion of wetland for the production of agricultural commodities.

In response to comments and after consultation with the Fish and Wildlife Service, new wording has been added to § 12.31(d) that precludes the further alteration of converted wetlands which were the subject of a minimal effects determination. In this situation, a person is required to advise SCS of any proposed action that may change the hydrological or biological aspects of a converted wetland after the original minimal effect determination has been made so that the effects of the subsequent alterations may be considered to determine if those effects are so different as to no longer be minimal.

#### *Section 12.32 Converted wetland identification criteria.*

This section has been revised to provide that the land and water alteration activities described in the definition of "converted wetland" (see § 12.2(a)(6)) are criteria used to determine if a wetland has been converted. If evidence of these activities is not clearly discernable at the time of the determination, SCS will compare the hydric soils on the subject site with the same hydric soils on another nearby natural (undrained) site to determine if a crop can be produced without manipulating the water regime. If a crop could not be produced on the comparison wetland site without manipulation of the water regime, the subject area will be considered to be converted wetland. If a crop could be produced on the comparison site without manipulating of the water regime, the subject area will be determined to be a wetland that has not been converted. The production of an agricultural commodity may continue on the subject wetland as long as no conversion activity is carried out.

Seven hundred comments were received concerning the maintenance of existing drains on converted wetlands that are exempt from the Act's coverage. All of the respondents suggested that the rule should be clear as to whether maintenance of such drains is permissible. The final rule makes clear that for most converted wetlands, maintenance and improvement of drainage systems is appropriate, as long as additional wetlands are not converted and brought into commodity production. However, it has been determined that certain wetlands, *i.e.*, topographical depressions, such as potholes and playas and other seasonally flooded or ponded wetlands, retain significant wetland functions even if the water regime was modified before December 23, 1985. If these areas continue to meet the wetland criteria they will be identified as wetlands rather than converted wetlands, despite the prior manipulations, to protect the remaining wetland values. Persons may continue to farm these areas as they did prior to December 23, 1985 and remain eligible for program benefits; however, no further actions can be taken to increase effects on the water regime of these areas unless SCS makes a minimal effects determination.

A new paragraph (g) has been added in § 12.5 which places the burden of proof on the person seeking exemption on the basis of conversion prior to December 23, 1985, to show when a

wetland was converted or when conversion was commenced.

Seven hundred comments were received concerning land that has been farmed three out of five years prior to passage of the Act. All of the respondents suggested that land in this category should be exempt from program restrictions.

It has been determined that crop history alone will not be used in the final rule as an indicator of wetland conversion. Wetlands that are farmed 3 out of 5 years prior to December 23, 1985 will not be considered to have been converted on that basis alone. This does not preclude such wetlands from being farmed in the same manner as they have been in the past. This does restrict what can be done in terms of drainage improvement on these wetlands, unless they are determined, on the basis of other factors, to have been converted before December 23, 1985. Crop history may be used in converted wetland determinations to analyze the extent of conversion and the purposes for which conversion was undertaken.

#### **List of Subjects in 7 CFR Part 12**

Highly erodible land, Wetland, Conservation, Price support programs, Federal crop insurance, Farmers Home Administration loans, Incorporation by reference, Loan programs—Agriculture, Environmental protection.

Accordingly, Title 7 of the Code of Federal Regulations is amended by revising Part 12 as follows:

### **PART 12—HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION**

#### **Subpart A—General Provisions**

- |       |   |
|-------|---|
| Sec.  |   |
| 12.1  | General.  |
| 12.2  | Definitions.                                      |
| 12.3  | Applicability.                                    |
| 12.4  | Determination of ineligibility.                   |
| 12.5  | Exemptions.                                       |
| 12.6  | Administration.                                   |
| 12.7  | Certification.                                    |
| 12.8  | Affiliated persons.                               |
| 12.9  | Landlords and tenants.                            |
| 12.10 | Scheme or Device.                                 |
| 12.11 | Action based upon advice or action of Department. |
| 12.12 | Appeals.  |

#### **Subpart B—Highly Erodible Land Conservation**

- |       |  |
|-------|--|
| 12.20 | SCS responsibilities regarding highly erodible land. |
| 12.21 | Identification of highly erodible lands criteria.    |
| 12.22 | Highly erodible field determination criteria.        |
| 12.23 | Conservation plans and conservation systems.         |



**Subpart C—Wetland Conservation**

- 12.30 SCS responsibilities regarding wetlands.
- 12.31 Wetland identification criteria.
- 12.32 Converted wetland identification criteria.
- 12.33 Use of wetland and converted wetland.

Authority: 16 U.S.C. 3801–3823, 3841–3844.

**Subpart A—General Provisions****§ 12.1 General.**

(a) This part sets forth the terms and conditions under which a person, who, after December 23, 1985, produces an agricultural commodity on highly erodible land or converted wetland, shall be determined to be ineligible for certain benefits provided by the United States Department of Agriculture and agencies and instrumentalities of the Department.

(b) The purpose of the provisions of this part are to remove certain incentives for persons to produce agricultural commodities on highly erodible land or converted wetland and to thereby—

- (1) Reduce soil loss due to wind and water erosion,
- (2) Protect the Nation's long term capability to produce food and fiber,
- (3) Produce sedimentation and improve water quality,
- (4) Assist in preserving the Nation's wetlands, and
- (5) Curb production of surplus commodities.

**§ 12.2 Definitions.**

(a) The following definitions shall be applicable for the purposes of this part:

- (1) "Agricultural commodity" means any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters or sugarcane.
- (2) "ASCS" means the Agricultural Stabilization and Conservation Service, an agency of the United States Department of Agriculture which is generally responsible for administering commodity production adjustment and certain conservation programs of the Department.
- (3) "Conservation District" (CD) means a subdivision of a State or local government organized pursuant to the applicable law to develop and implement soil and water conservation activities or programs.
- (4) "Conservation plan" means the document containing the decisions of a person with respect to the location, land use, tillage systems and conservation treatment measures and schedule which, if approved, must be or have been established on highly erodible cropland in order to control erosion on such land.

(5) "Conservation system" means the part of a cropland resource management system applied to a field or group of fields that provides for cost effective and practical erosion reduction based upon the standards contained in the SCS field office technical guide. A conservation system may include a single practice or a combination of practices.

(6) "Converted wetland" means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) that makes possible the production of an agricultural commodity without further application of the manipulations described herein if (i) such production would not have been possible but for such action; and (ii), before such action such land was wetland and was neither highly erodible land nor highly erodible cropland.

(7) "CCC" means the Commodity Credit Corporation, a wholly-owned government corporation within the United States Department of Agriculture organized under the provisions of 15 U.S.C. 714 *et seq.*

(8) "Department" means the United States Department of Agriculture.

(9) "Erodibility index" means a numerical value that expresses the potential erodibility of a soil in relation to its soil loss tolerance value without consideration of applied conservation practices or management.

(10) "ES" means the Extension Service, an agency of the United States Department of Agriculture which is generally responsible for coordinating the information and educational programs of the Department.

(11) "FmHA" means the Farmers Home Administration, an agency of the United States Department of Agriculture which is generally responsible for providing farm loans and loan guarantees under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*) and other laws.

(12) "FCIC" means the Federal Crop Insurance Corporation, a wholly-owned government corporation within the United States Department of Agriculture organized under the provision of 7 U.S.C. 1501 *et seq.*

(13) "Field" means a part of a farm which is separated from the balance of the farm by permanent boundaries such as fences, roads, permanent waterways, woodlands, croplines (in cases where farming practices make it probable that such cropline is not subject to change) or other similar features.

(14) "Highly erodible land" means land that has an erodibility index of 8 or more.

(15) "Hydric soils" means soils that, in an undrained condition, are saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation.

(16) "Hydrophytic vegetation" means plants growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(17) "Landlord" means a person who rents or leases farmland to another person.

(18) "Local ASCS office" means the county office of the Agriculture Stabilization and Conservation Service serving the county or a combination of counties in the area in which a person's land is located for administrative purposes.

(19) "Operator" means the person who is in general control of the farming operations on the farm during the crop year.

(20) "Owner" means a person who is determined to have legal ownership of farmland and shall include a person who is purchasing farmland under contract.

(21) "Person" means an individual, partnership, association, corporation, cooperative, estate, trust, joint venture, joint operation, or other business enterprise or other legal entity and, whenever applicable, a State, a political subdivision of a State, or any agency thereof and such person's affiliates as provided in § 12.8 of this part.

(22) "Secretary" means the Secretary of the United States Department of Agriculture.

(23) "Sharecropper" means a person who performs work in connection with the production of a crop under the supervision of the operator and who receives a share of such crop for such labor.

(24) "SCS" means the Soil Conservation Service, and agency within the United States Department of Agriculture which is generally responsible for providing technical assistance in matters of soil and water conservation and for administering certain conservation programs of the Department.

(25) "Soil map unit" means an area of the landscape shown on a soil map which consists of one or more soils.

(26) "State" means each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, the Commonwealth of

the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(27) "Tenant" means a person usually called a "cash tenant", "fixed-rent tenant", or "standing rent tenant" who rents land from another for a fixed amount of cash or a fixed amount of a commodity to be paid as rent; or a person (other than a sharecropper) usually called a "share tenant" who rents land from another person and pays are rent a share of the crops or proceeds therefrom. A tenant shall not be considered the farm operator unless the tenant is determined to be the operator pursuant to this part and 7 CFR Part 719.

(28) "Wetland", except when such term is part of the term "converted wetland", means land that has a predominance of hydric soil and that is inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions, except that this term does not include lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soils.

(b) In the regulations in this part and in all instructions, forms, and documents in connection therewith, all other words and phrases specifically relating to ASCS operations shall, unless the context of subject matter or the specific provisions of this part otherwise requires, have the meanings assigned to them in the regulations governing reconstitutions of farms, allotments and bases (7 CFR Part 719).

### § 12.3 Applicability.

(a) The provisions of this part shall apply to all land, including Indian tribal land, in the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(b) The provisions of this part apply to all agricultural commodities planted after, and to determinations made after or pending or September 17, 1987. For those agricultural commodities planted prior to such date and for all determinations made prior to such date, the regulations published at 51 FR 23496, June 27, 1986, as amended on June 29, 1987 (52 FR 24132) shall apply.

### § 12.4 Determination of ineligibility.

(a) Except as provided in § 12.5, any person who, after December 23, 1985, produces an agricultural commodity on a field in which highly erodible land is

predominant or on converted wetland shall be ineligible:

(1) As to any commodity produced during that crop year by such person:

(i) For any type of price support or payment made available under the Agricultural Act of 1949, the CCC Charter Act, or any other Act;

(ii) For a farm storage facility loan made under Section 4(h) of the CCC Charter Act;

(iii) For any disaster payments made under the Agricultural Act of 1949;

(iv) For crop insurance under the Federal Crop Insurance Act;

(v) For a farm loan made, insured, or guaranteed by the FmHA, if FmHA determines that the proceeds of such loan will be used for a purpose that will contribute to excessive erosion of highly erodible land (i.e., production of an agricultural commodity on highly erodible land without a conservation plan or conservation system as required by this part) or to conversion of wetland for agricultural commodity production; or

(2) For a payment made under section 4 or 5 of the CCC Charter Act during such crop year for the storage of an agricultural commodity owned by CCC.

(b) A person shall be determined to have produced an agricultural commodity on a field in which highly erodible land is predominant or on converted wetland if:

(1) SCS has determined that—

(i) Highly erodible land is predominant in such field or

(ii) All or a portion of the field is converted wetland;

(2) ASCS has determined that the person is or was entitled to share in the crops available from the land, or in the proceeds thereof; and

(3) ASCS has determined that the land is or was planted to an agricultural commodity or was planted to an agricultural commodity during the year for which the person is requesting benefits.

(c) Persons who produce agricultural commodities and wish to participate in any of the USDA programs described in paragraph (a) of this section are responsible for contacting the appropriate agency of the Department well in advance of intended participation date so that Form AD 1026 can be completed. This contact will help assure that the appropriate determinations regarding highly erodible land or wetland, and conservation plans or conservation systems are scheduled in a timely manner. A late contact may not allow sufficient time for USDA to service the request and could result in a substantial delay in receiving a USDA

determination of eligibility or ineligibility.

### § 12.5 Exemptions.

(a) *Highly erodible cropland in production or in Department programs during 1981 through 1985 crop years.* During the period beginning on December 23, 1985, and ending on the later of January 1, 1990, or the date that is two years after the date the cropland on which an agricultural commodity is produced was surveyed by the SCS to determine if such land is highly erodible, no person shall be determined to be ineligible for benefits as provided in § 12.4(a) as the result of the production of a crop of an agricultural commodity on any highly erodible land:

(1) That was planted to an agricultural commodity in any year 1981 through 1985; or

(2) That was set aside, diverted or otherwise not cultivated in any such crop years under a program administered by the Secretary for any such crops to reduce production of an agricultural commodity.

(b) *Compliance with a conservation plan or conservation system.* As further specified in this part, no person shall be ineligible for the program benefits described in § 12.4(a) as the result of production of an agricultural commodity on highly erodible land if such production is in compliance with an approved conservation plan or conservation system.

(1) With respect to the production of an agricultural commodity on any land identified under paragraph (a) of this section, if, as of January 1, 1990, or the date that is 2 years after the date SCS has completed a soil survey of the cropland on the tract or farm, whichever is later, a person is actively applying a conservation plan based on the local SCS field office technical guide and approved by the CD, in consultation with the local ASC committees and SCS, such person shall have until January 1, 1995, to fully comply with the plan without being determined to be ineligible for benefits under § 12.4.

(2) Persons who had, during each of the 1981 to 1985 crop years, alfalfa on highly erodible land in a crop rotation determined by SCS to be adequate for the protection of highly erodible land shall have until June 1, 1988 to fully implement an approved conservation system without being subject to program ineligibility under § 12.4. Failure to fully implement an approved conservation system by June 1, 1988 shall cause a person to be determined to have been ineligible for program benefits for the 1988 crop year, and to be ineligible for

each following crop year that an agricultural commodity is produced on such land without an approved conservation system.

(3) A person shall not be ineligible for program benefits under § 12.4(a) as the result of the production of an agricultural commodity which was produced on highly erodible land in an area:

(i) Under a conservation system that has been approved by the CD after the CD determined that the conservation system is in conformity with technical standards set forth in the SCS field office technical guide for such district; or

(ii) Not within a CD, under a conservation system that has been approved by SCS, to be adequate for the production of such agricultural commodity on highly erodible land.

(c) *Reliance upon SCS determination for highly erodible land.* A person shall not be ineligible for program benefits as the result of the production of an agricultural commodity which was produced on highly erodible land in reliance on a determination by SCS that such land was not highly erodible land, except that this paragraph (b)(3) of this section shall not apply to any agricultural commodity that was planted on any land after SCS determines that such land is highly erodible land, and the person is notified of such determinations.

(d) *Exemptions for wetland.* (1) A person shall not be determined to be ineligible for program benefits under § 12.4 as the result of the production of an agricultural commodity on:

(i) Converted wetland if the conversion of such wetland was commenced or completed before December 23, 1985; or

(ii) An artificial lake, pond or wetland created by excavating or diking non-wetland to collect and retain water for purposes such as water for livestock, fish production, irrigation (including subsurface irrigation), a settling basin, cooling, rice production, or flood control; or

(iii) A wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation; or

(iv) Wetland on which production of an agricultural commodity is possible as a result of a natural condition, such as drought, and is possible without action by the person that destroys a natural wetland characteristic; or

(v) Converted wetland if SCS has determined that the actions of the person with respect to the production of an agricultural commodity on the converted wetland, individually and in connection with all other similar actions

authorized by SCS in the area, would have only a minimal impact on the hydrological and biological aspect of wetlands.

(vi) Wetlands converted by actions of persons other than the person applying for USDA program benefits or any of the person's predecessors in interest after December 23, 1985, if such conversion was not the result of a scheme or device to avoid compliance with this part.

Further drainage improvement on such lands is not permitted without loss of eligibility for USDA program benefits, unless the SCS determines under paragraph (d)(1)(v) of this section that further drainage activities applied to such lands would have minimal effect on any remaining wetland values. In applying this paragraph, converted wetlands shall be presumed to have been converted by the person applying for USDA program benefits unless the person can show that the conversion was caused by a third party with whom the person was not associated through a scheme or device as described under § 12.10. In this regard, activities of a water resource district, drainage district or similar entity will be attributed to all persons within the jurisdiction of the district or other entity who are assessed for the activities of the district or entity. Accordingly, where a person's wetlands are converted due to the actions of the district or entity, the person shall be considered to have caused or permitted the drainage.

(2) The conversion of a wetland, for purposes of this section, is considered to have been completed before December 23, 1985 if before that date, the draining, dredging, leveling, filling or other manipulation, (including any activity that resulted in the impairing or reducing the flow, circulation, or reach of water) was applied to the wetland and made the production of an agricultural commodity possible without further manipulation described herein where such production on the wetland would not otherwise have been possible.

(3) Except as provided under paragraph (d)(4) of this section, the conversion of a wetland is considered to have been commenced before December 23, 1985 if before such date:

(i) Any of the activities described in § 12.2(a)(6) were actually started on the wetland; or

(ii) The person applying for benefits has expended or legally committed substantial funds either by entering into a contract for the installation of any of the activities described in § 12.2(a)(6) or by purchasing construction supplies or materials for the primary and direct purpose of converting the wetland; and

(4) Notwithstanding paragraph (d)(3) of this section, for lands which are within the boundaries of a drainage district or similar entity which has the authority to levy an assessment for any of the activities described in § 12.2(a)(6) on wetlands, the conversion of a wetland in conjunction with the activities of such district or other entity is considered to have been commenced before December 23, 1985, if before such date:

(i) A project drainage plan setting forth in detail the planned drainage measures or other works of improvement had been officially adopted by the district or other entity; and

(ii) The district or other entity started installation of the drainage measures, or legally committed substantial funds toward the conversion of wetlands by entering into a contract for the installation of any of the activities described in § 12.2(a)(6) or by purchasing construction supplies and materials for the primary and direct purpose of converting wetland; and

(iii) The person applying for benefits can show that the wetland conversion with which the person is associated was the basis of a financial obligation to the district or other entity prior to December 23, 1985, and that a specific assessment for the project construction or a legal obligation to pay a specific assessment was made as to the person's wetlands prior to December 23, 1985.

(5) The purpose of the determination of conversion commencement made under paragraphs (d)(3) and (d)(4) of this section is to implement the legislative intent that those persons who had actually started conversion of wetland or obligated funds for conversion prior to the effective date of the Act (December 23, 1985) would be allowed to complete the conversion so as to avoid unnecessary economic hardship. Accordingly, the following requirements shall apply to all determinations of commencement made under paragraphs (d)(3) or (d)(4).

(i) All persons who believe they have a wetland or converted wetland for which conversion began but was not completed prior to December 23, 1985, must, before September 19, 1988, request ASCS to make a determination of commencement in order to be considered for exemption under § 12.4(d)(1)(i).

(ii) A person must show that the commenced activity has been actively pursued or the conversion will not be exempt under this section. In this context, "actively pursued" means that efforts toward the completion of the



conversion activity have continued on a regular basis since initiation of the conversion, except for delays due to circumstances beyond the person's control. With regard to wetland conversion by a person that is related to the project activities of a drainage district or other similar entity, the application of "actively pursued" begins when the project works are functional for connection and use by the person.

(iii) Any conversion activity considered to be commenced under this section shall lose its exempt status if not completed on or before January 1, 1995.

(iv) Only those wetlands for which the construction has begun or to which the contract or purchased supplies and materials relate may qualify for a determination of commencement. However, in those circumstances where the conversion of wetland does not meet the specific requirements of this paragraph, the person may request a commencement of conversion determination from the Deputy Administrator, State and County Operations, ASCS (the "Deputy Administrator"), upon a showing that undue economic hardship will result because of substantial financial obligations incurred prior to December 23, 1985, for the primary and direct purpose of converting the wetland.

(e) The provisions of § 12.4 shall not apply to any loan as described in § 12.4(a) that was made before December 23, 1985.

(f) A person shall not be determined to be ineligible in accordance with the provisions of this part for any benefits listed in § 12.4(a) with respect to the production of an agricultural commodity on highly erodible land which was planted before or in any crop year that began before December 23, 1985.

(g) It is the responsibility of the person seeking an exemption under paragraph (d)(1)(i) of this section to provide evidence, such as receipts, crop history data, drawings, plans or similar information, that the conversion was started or completed before December 23, 1985, for purposes of determining whether the conversion is exempt in accordance with this section.

#### § 12.6 Administration.

(a) *General.* A determination of ineligibility for benefits in accordance with the provisions of this part shall be made by the agency of the Department to which the person has applied for benefits. All determinations required to be made under the provisions of this part shall be made by the agency responsible for making such determinations, as provided in this section.

(b) *Administration by ASCS.* (1) The provisions of this part which are applicable to ASCS will be administered under the general supervision of the Administrator, ASCS, and shall be carried out in the field in part by State ASC committees (STC) and county ASC committees (COC).

(2) The Deputy Administrator may determine any question arising under the provisions of this part which are applicable to ASCS and may reverse or modify any determination of eligibility with respect to programs administered by ASCS made by an STC or COC or any other ASCS office or ASCS official (except the Administrator) in connection with the provisions of this part.

(3) ASCS shall make the following determination which are required to be made in accordance with this part:

(i) Whether a person produced an agricultural commodity on a particular field as determined under § 12.4(b);

(ii) The establishment of field boundaries as described in § 12.2(a)(13);

(iii) Whether land was planted to an agricultural commodity in any of the years, 1981 through 1985, for the purposes of § 12.5(a)(1);

(iv) Whether to allow a person to exchange certain crop acreage bases (CAB) between CAB's with crops that leave a high residue, if recommended by SCS for inclusion in the conservation plan.

(v) Whether land was set aside, diverted or otherwise not cultivated under a program administered by the Secretary for any crop to reduce production of an agricultural commodity under § 12.5(a)(2);

(vi) Whether the agricultural commodity planted on a particular field was planted before December 23, 1985, or during any crop year which began before December 23, 1985, in accordance with § 12.5(f);

(vii) Whether for the purposes of § 12.9, the production of an agricultural commodity on highly erodible land or converted wetland by a landlord's tenant or sharecropper is required under the terms and conditions of the agreement between the landlord and such tenant or sharecropper and

(viii) Whether the conversion of a particular wetland was commenced before December 23, 1985, for the purposes of § 12.5(d) (3) or (4).

(ix) Whether the conversion of a wetland was caused by a third party under § 12.5(d)(1)(vi).

(4) A representative number of farms selected in accordance with instructions issued by the Deputy Administrator shall be inspected by an authorized representative of ASCS to determine compliance with any requirement

specified in this part as a prerequisite for obtaining program benefits.

(5) ASCS will consult with U.S. Fish and Wildlife Service on pending commenced or third party determinations.

(c) *Administration by SCS.* (1) The provisions of this part that are applicable to SCS shall be administered under the general supervision of the Chief of the SCS and carried out in the field by the state conservationist, area conservationist, and district conservationist.

(2) SCS shall make the following determinations which are required to be made in accordance with this part:

(i) Whether land is highly erodible or is a wetland or a converted wetland in accordance with the provisions of this part;

(ii) Whether highly erodible land is predominant on a particular field under § 12.4(b);

(iii) Whether the conservation plan that a person is actively applying is based on the local SCS field office technical guide and is approved by—

(A) The CD, in consultation with local ASC committees and SCS, or

(B) By SCS;

(iv) Whether the conservation system that a person is using has been approved by the CD under § 12.5(b)(3) or, in an area not within a CD, a conservation system approved by the SCS to be adequate for the production of an agricultural commodity on highly erodible land;

(v) Whether production of an agricultural commodity on a wetland is possible as a result of natural conditions and is possible without action by the producer that destroys a natural wetland characteristic; and

(vi) Whether the actions of a person with respect to the production of an agricultural commodity on converted wetland would have only a minimal impact on the hydrological and biological aspects of wetland.

(3) SCS will provide such other technical assistance for implementation of the provisions of this part as is determined to be necessary.

(4) A person may obtain a highly erodible land or wetland determination by making a written request on Form AD 1026. The determination will be made in writing, and a copy will be provided to the person.

(i) A determination of whether or not an area meets the highly erodible land or wetland criteria may be made by the district conservationist based upon existing records or other information and without the need for an on-site determination. This determination will

be made, if practicable, within 15 calendar days after receipt of the written request.

(ii) An on-site determination as to whether an area meets the applicable criteria shall be made by the district conservationist if the person has disagreed with the determination made under paragraph (c)(4)(i) of this section, or if adequate information is not otherwise available to the district conservationist on which to make a determination.

(iii) An on-site determination, where applicable, will be made as soon as possible, but no later than 60 calendar days following a request for such a determination unless site conditions are unfavorable for the evaluation of soils or vegetation in which case the time period may be extended by the district conservationist until site conditions permit an adequate evaluation.

(iv) With regard to wetland determinations, if an area is continuously inundated or saturated for long periods of time during the growing season to such an extent that access by foot to make a determination of predominance of hydric soils or prevalence of hydrophytic vegetation is not feasible, the area will be determined to be a wetland.

(5) Persons who are adversely affected by a determination made under this section and believe that the requirements of this part were improperly applied may appeal, under § 12.12 of this part, any determination by SCS.

(d) *Administration by FmHA.* (1) The provisions of this part which are applicable to FmHA will be administered under the general supervision of the FmHA Administrator through FmHA's State, district, and county offices.

(2) FmHA shall determine whether the proceeds of a farm loan made, insured or guaranteed by FmHA will be used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetland.

(e) *Administration by FCIC.* The provisions of this part which are applicable to FCIC will be administered under the general supervision of the Manager, FCIC.

(f) *Administration by ES.* The Extension Service shall coordinate the related information and education program for the Department concerning implementation of this rule.

#### § 12.7 Certification.

(a) In order for a person to be determined to be eligible for any of the benefits specified in § 12.4:

(1) It must be determined by SCS whether any farm in which the person applying for the benefits has an interest contains highly erodible land, wetland or converted wetland;

(2) The person applying for the benefits must certify in writing on Form AD-1026 that such person will not produce an agricultural commodity on highly erodible land or converted wetland during the crop year in which the person is seeking such benefits, unless such production is exempt, under § 12.5, from the provisions of § 12.4 of this part;

(3) The person applying for a FmHA insured or guaranteed farm loan must certify that such person shall not use the proceeds of the loan for a purpose that will contribute to excessive erosion on highly erodible land or to conversion of wetlands to produce an agricultural commodity; and

(4) The person applying for the benefits must authorize and provide representatives of the Department access to all land in which such person has an interest for the purpose of verifying any such certification.

(b) Each agency of the Department shall make all certifications received by such agency and the results of investigations concerning such certifications available to other agencies.

(c) A certification made in accordance with this section does not relieve any person from compliance with the provisions of this part.

#### § 12.8 Affiliated persons.

(a) For purposes of this part, the following persons are considered to be "affiliated" and, in addition, the actions of such persons will be considered for the purposes specified in this part to be the actions of the person who has requested benefits from the Department:

(1) The spouse and minor child of such person and/or guardian of such child;

(2) Any corporation in which the person is a stockholder, shareholder, or owner of more than 20 percent interest in such corporation;

(3) Any partnership, joint venture, or other enterprise in which the person has an ownership interest or financial interest; and

(4) Any trust in which the person or any person listed in paragraphs (a)(1) through (a)(3) of this section is a beneficiary or has a financial interest.

(b) If the person who has requested benefits from the Department is a corporation, partnership, or other joint venture, then, for purposes of applying paragraph (a) of this section, any participant or stockholder therein, except for persons with a 20 percent or

less share in a corporation, shall also be considered to be the person applying for benefits from the Department.

#### § 12.9 Landlords and tenants.

(a) Except as provided in paragraph (b) of this section, the ineligibility of a tenant or sharecropper, for benefits (as determined under § 12.4) shall not cause a landlord to be ineligible for benefits for which the landlord would otherwise be eligible with respect to commodities produced on lands other than those in which the tenant or sharecropper has an interest.

(b) Paragraph (a) of this section shall not be applicable to a landlord if the production of an agricultural commodity on highly erodible land or converted wetland by the landlord's tenant or sharecropper is required under the terms and conditions of the agreement between the landlord and such tenant or sharecropper and such agreement was entered into after December 23, 1985 or if the landlord has acquiesced in such activities by the tenant or sharecropper.

#### § 12.10 Scheme or device.

All or any part of the benefits listed in § 12.4 otherwise due a person from the Department may be withheld or required to be refunded if the person adopts or participates in adopting any scheme or device designed to evade, or which has the effect of evading, the provisions of this part. Such acts shall include, but are not limited to, concealing from the Department any information having a bearing on the application of the provisions of this part or submitting false information to the Department or creating entities for the purpose of concealing the interest of a person in a farming operation or to otherwise avoid compliance with the provisions of this part. Such acts shall also include acquiescence in, approval of or assistance to acts which have the effect of, or the purpose of, circumventing these regulations for the production of an agricultural commodity.

#### § 12.11 Action based upon advice or action of Department.

The provisions of Part 790 of this Title, as amended, relating to performance based upon the action or advice of a County Committee (COC) or State Committee (STC) shall be applicable to the provisions of this part.

#### § 12.12 Appeals.

Any person who has been or would be denied program benefits in accordance with § 12.4 as the result of any determination made in accordance with the provisions of this part may obtain a review of such determination in

accordance with the administrative appeal procedures of the agency which rendered such determination. Agency appeal procedures are contained in the Code of Federal Regulations as follows: ASCS, 7 CFR Part 780; SCS, 7 CFR Part 614; FmHA, 7 CFR Part 1900, Subpart B; and FCIC, 7 CFR 400.90.

### Subpart B—Highly Erodible Land Conservation

#### § 12.20 SCS responsibilities regarding highly erodible land.

In implementing the provisions of this part, SCS shall, to the extent practicable:

- (a) Develop and maintain criteria for identifying highly erodible lands;
- (b) Prepare and make available to the public lists of highly erodible soil map units;
- (c) Make soil surveys for purposes of identifying highly erodible land; and
- (d) Provide technical guidance to conservation districts which approve conservation plans and systems, in consultation with local county ASC committees and SCS, for the purposes of this part.

#### § 12.21 Identification of highly erodible lands criteria.

(a) Soil map units and an erodibility index will be used as the basis for identifying highly erodible land. The erodibility index for a soil is determined by dividing the potential average annual rate of erosion for each soil by its predetermined soil loss tolerance (T) value. The T value represents the maximum annual rate of soil erosion that could occur without causing a decline in long-term productivity.

(1) The potential average annual rate of sheet and rill erosion is estimated by multiplying the following factors of the Universal Soil Loss Equation (USLE):

- (i) Rainfall and runoff (R),
- (ii) The degree to which the soil resists water erosion (K), and
- (iii) The function (LS), which includes the effects of slope length (L) and steepness (S).

(2) The potential average annual rate of wind erosion is estimated by multiplying the following factors of the Wind Erosion Equation (WEQ): Climatic characterization of windspeed and surface soil moisture (C) and the degree to which soil resists wind erosion (I).

(3) The USLE is explained in the U.S. Department of Agriculture Handbook 537, "Predicting Rainfall Erosion Losses." The WEQ is explained in the paper by "Woodruff, N.P. and F.H. Siddaway, 1965. "A Wind Erosion Equation." Soil Science Society of America Proceedings, Vol. 29, No. 5,

Pages 602–608. Values for all the factors used in these equations are contained in the SCS field office technical guide and the references which are a part of the guide.

(b) A soil map unit subject to significant erosion by either water or by wind shall be determined to be highly erodible if either the RKLS/T or the CI/T value for the map unit equals or exceeds 8.

(c) Whenever a soil map unit description contains a range of a slope length and steepness characteristics that produce a range of LS values which result in RKLS/T quotients both above and below 8, the soil map unit will be entered on the list of highly erodible soil map units as "potentially highly erodible." The final determination of erodibility for an individual field containing these soil map unit delineations will be made by an on-site investigation.

#### § 12.22 Highly erodible field determination criteria.

(a) Highly erodible land shall be considered to be predominant on a field if either:

- (1) 33.33 percent or more of the total field acreage is identified as soil map units which are highly erodible; or
- (2) 50 or more acres in such field are identified as soil map units which are highly erodible.

(b) A person may request the modification of field boundaries for the purpose of excluding highly erodible land from a field. Such a request must be submitted to, and is subject to the approval of, ASCS.

(c) Small areas of noncropland within or adjacent to the boundaries of existing highly erodible crop fields such as abandoned farmsteads, areas around filled or capped wells, rock piles, trees or brush which are converted to cropland are considered to meet the requirement of § 12.5(c) if they are included in an approved conservation plan for the entire highly erodible field.

#### § 12.23 Conservation plans and conservation systems.

(a) A conservation plan or a conservation system developed for the purposes of § 12.5(b) will be based upon the SCS field office technical guide, addressing considerations of economic and technical feasibility and other related factors.

(b) Persons who require SCS assistance for the development of a conservation plan or the installation of a conservation system are encouraged to request this assistance well in advance of deadline dates for compliance; otherwise the person may not be able to

comply with these provisions and maintain eligibility for USDA program benefits.

(c) Conservation districts approve or disapprove conservation plans or conservation systems after SCS determines that the plans or systems conform to the SCS field office technical guide. If a conservation district fails, without due cause, to act on a request for conservation plan or conservation system approval within 45 days, or if no conservation district exists, SCS will approve or disapprove, as appropriate, the conservation plan or system in question.

(d) A person is considered to be actively applying a conservation plan for purposes of § 12.5(b) if the plan is being applied according to the schedule specified in the plan and the applied practices are properly operated and maintained. It is the responsibility of the person to:

(1) Annually certify that the conservation plan is being actively applied after January 1, 1990 and

(2) Arrange for a revision of the conservation plan with SCS, if changes are made in land use, crop rotation or management, conservation practices, or in the original schedule of practice installation.

(e) Persons who are adversely affected by the determinations made under this subpart and believe that the requirements of this subpart were improperly applied may appeal the decision to SCS under § 12.12.

### Subpart C—Wetland Conservation

#### § 12.30 SCS responsibilities regarding wetlands.

In carrying out the provisions of this part, SCS shall:

(a) Make available to the public an approved county list of hydric soil map units, which is based upon the National List of Hydric Soils;

(b) Maintain a list of hydrophytic vegetation derived from the National List of Plant Species That Occur in Wetlands;

(c) Consult with the Fish and Wildlife Service on determinations of exemptions made under § 12.5(d)(1) and (d)(2) and on matters relating to the identification of wetland,

(d) Oversee the development and application of criteria to identify hydric soils in consultation with the National Technical Committee for Hydric Soils, and

(e) Consult with the Fish and Wildlife Service and others in developing the National List of Plant Species that Occur in Wetlands and in providing guidance



in applying the lists of hydric soils and plant species to matters concerning wetland and converted wetland.

**§ 12.31 Wetland identification criteria.**

(a) *Hydric soils.* (1) SCS shall identify hydric soils through the use of published soil maps which reflect soil surveys completed by SCS. If a published soil map is unavailable for a given area, SCS may use unpublished soil maps which were made according to the specifications of the National Cooperative Soil Survey or may conduct an on-site evaluation of the land.

(2) SCS shall determine whether an area of a field or other parcel of land has a predominance of hydric soils that are inundated or saturated as follows:

(i) If a soil map unit has hydric soil as all or part of its name, that soil map unit or portion of the map unit related to the hydric soil shall be determined to have a predominance of hydric soils;

(ii) If a soil map unit is named for a miscellaneous area that meets the criteria for hydric soils (i.e., riverwash, playas, beaches, or water) the soil map unit shall be determined to have a predominance of hydric soils; or

(iii) If a soil map unit contains inclusions of hydric soils, that portion of the soil map unit identified as hydric soil shall be determined to have a predominance of hydric soils.

(3) *List of hydric soils.* (i) Hydric soils are those soils which meet criteria set forth in the publication "Hydric Soils of the United States 1985" which was developed by the National Technical Committee for Hydric Soils and which is incorporated by reference. This publication may be obtained upon request by writing the Soil Conservation Service, U.S. Department of Agriculture, P.O. Box 2890, Washington, DC 20013, and is available for inspection at the Office of the Federal Register Information Center, Room 3801, 1100 L Street NW., Washington, DC 20408. Incorporation of this publication by reference was approved by the Director of the Federal Register on June 24, 1986. The materials are incorporated as they

exist on the date of the approval and a notice of any change in these materials will be published in the **Federal Register**.

(ii) An official list of hydric soil map units shall be maintained at the local SCS office and shall include—

(A) All soils from the National List of Hydric Soils that can be found in that field office area, and

(B) Any soil map units or areas which the State conservationist determines to meet such hydric soil criteria.

(iii) Any deletions of a hydric soil unit from the hydric soil map unit list must be made according to the established procedure contained in the publication "Hydric Soils of the United States, 1985" for adding or deleting soils from the National List of Hydric Soils.

(b) *Hydrophytic vegetation.*

Hydrophytic vegetation consists of plants growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(1) A plant shall be considered to be a plant species that occurs in wetland if such plant is listed in the National List of Plant Species that Occur in Wetlands. The publication may be obtained upon request from the U.S. Fish & Wildlife Service, National Wetland Inventory, Monroe Bldg. Suite 101, 9720 Executive Center Drive, Saint Petersburg, Florida 33702.

(2) For the purposes of the definition of "wetland" in § 12.2(a)(28) of this part, land shall be determined to have a prevalence of hydrophytic vegetation if:

(i) SCS determines through the use of the formula specified in paragraph (b)(3) of this section that under normal circumstances such land supports a prevalence of hydrophytic vegetation. The term "normal circumstances" refers to the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed; or

(ii) In the event the vegetation on such land has been altered or removed, SCS will determine if a prevalence of hydrophytic vegetation typically exists

$$PI = \frac{(1 \times F_1) + (2 \times F_2) + (3 \times F_3) + (4 \times F_4) + (5 \times F_5)}{(F_1 + F_2 + F_3 + F_4 + F_5)}$$

(B) A mean prevalence index (PI) value of less than 3.0 shall indicate that the area exhibits a prevalence of hydrophytic vegetation.

(c) *Artificial wetland.* (1) An area shall be considered to be an artificial wetland for the purposes of § 12.5(d)(1)(ii) and (iii) of this part if such area was formerly nonwetland or

in the local area on the same hydric soil under the same hydrological conditions.

(3) The determination of prevalence of hydrophytic vegetation will be made in accordance with the following provisions:

(i) *Plant classification.* The National List of Plant Species that Occur in Wetlands classifies vascular plant species found in the United States and Puerto Rico into five indicator groups based upon their expected occurrence in wetlands. Obligate species are expected to occur in wetlands more than 99 percent of the time; facultative wet species, 66–69 percent of the time; facultative species, 33–65 percent of the time; facultative upland species, 1–33 percent of the time; and upland species, less than 1 percent of the time.

(ii) *Ecological indices.* The following ecological index values have been assigned the plant indicator groups for use in the formula to determine prevalence:

Indicator group	Ecological index
Obligate.....	1.
Facultative wet.....	2.
Facultative.....	3.
Facultative Upland.....	4.
Upland.....	5 (all plants not on the National List of Plant Species That Occur in Wetlands).

(iii) *Specific criteria.* If the area in question has met the criteria for hydric soils that are inundated or saturated, SCS will either visually or through the use of line transects, estimate the frequency of occurrence of plants within the community identified by indicator group to arrive at a prevalence index to indicate whether or not a prevalence of hydrophytic vegetation exists.

(iv) (A) The following formula shall be used to calculate the prevalence index, where:

PI = Prevalence Index.

F = Frequency of Occurrence of Plant Species.

n(1–5) = Ecological Index Values for Indicator Groups.

wetland on which conversion was started or completed before December 23, 1985, but now meets wetland criteria due to the action of man.

(2) Notwithstanding the provisions of paragraph (c)(1) of this section, wetlands which are created in order to mitigate the loss of other wetlands as a result of irrigation, recreation, municipal water, flood control or other similar projects shall not be considered to be artificial wetland for the purposes of § 12.5(d)(1)(ii) and (iii) of this part.

(d) For the purposes of § 12.5(d)(1)(v) of this part, SCS, in consultation with the Fish and Wildlife Service, U.S. Department of the Interior, shall determine whether the effect of any action of a person associated with the production of an agricultural commodity on converted wetland has a minimal effect on the hydrological and biological aspect of wetlands. Such determination shall be based upon an environmental evaluation analyzing the effect of the action on the maintenance of wetland values of the particular wetland under consideration and other related wetlands, and will be made through an on-site evaluation. A request for such determination will be made prior to the beginning of activities that would convert the wetland. If a person has converted a wetland and then seeks a determination that the effect of such conversion on wetland was minimal, the burden will be upon the person to demonstrate to the satisfaction of SCS that the effect was minimal. The production of an agricultural commodity on any portion of a converted wetland in conformance with a minimal effect determination by SCS is exempt under § 12.5(d) of this part. However, any additional action of a person that will change the hydrological or biological characteristics of a wetland for which a minimal effect determination has been made shall be reported to SCS for a determination of whether the effect continues to be minimal. The loss of a minimal effect determination will cause a person who produces an agricultural commodity on the converted wetland after such change in status to be ineligible, under § 12.4, for program benefits.

**§ 12.32 Converted wetland identification criteria.**

(a) Converted wetland shall be identified by determining whether the wetland was altered so as to meet the definition of converted wetland set forth in § 12.2(a)(6). In making this

determination, the following factors are to be considered:

(1) Where hydric soils have been used for production of an agricultural commodity and the drainage or other altering activity is not clearly discernable, SCS will compare the site with other sites containing the same hydric soils in a natural condition to determine if the hydric soils can or cannot be used to produce an agricultural commodity under natural conditions. If the soil on the comparison site could not produce an agricultural commodity under natural conditions, the subject wetland will be considered to be converted wetland.

(2) Where woody hydrophytic vegetation has been removed from hydric soils which permits the production of an agricultural commodity, and wetland conditions have not returned as the result of abandonment under § 12.33(b), the area will be considered to be converted wetland.

(3) A pothole or a playa shall not be determined to be converted wetland despite manipulations that occurred prior to December 23, 1985, if that area continues to meet wetland criteria. Any other wetland area that is seasonally flooded or ponded (surface water is present for extended periods especially early in the growing season even though it may be absent by the end of the season in most years) which has been manipulated prior to December 23, 1985 but otherwise continues to meet wetland criteria, shall not be determined to be converted wetland.

(b) A wetland shall not be considered to be converted if:

(1) Production of an agricultural commodity on such land is possible as a result of a natural condition, such as drought, and

(2) It is determined that the actions of the person producing such agricultural commodity does not permanently alter or destroy natural wetland characteristics. Destruction of herbaceous hydrophytic vegetation, (*i.e.*, plants other than woody shrubs or trees) as a result of the production of an agricultural commodity shall not be considered as altering or destroying natural wetland characteristic if such vegetation could and has been allowed to return following cessation of the natural condition which made

production of the agricultural commodity possible.

**§ 12.33 Use of wetland and converted wetland.**

(a) The provisions of § 12.32(a)(3) are intended to protect remaining functional values of the wetlands described therein. Persons may continue to farm such wetlands under natural conditions or as they did prior to December 23, 1985. However, no action can be taken to increase effects on the water regime beyond that which existed on such lands on or before December 23, 1985 unless SCS determines the effect on remaining wetland values would be minimal under § 12.5(d)(1)(v).

(b) Unless otherwise provided in this part, the production of an agricultural commodity on wetlands that were converted before, or for which the conversion was commenced before, December 23, 1985 is exempted by law from these regulations for the area which was converted or the minimum area the commenced activity could convert. Maintenance or improvement of these converted wetlands for the production of agricultural commodities are not subject to this rule so long as such actions do not bring additional wetland into the production of an agricultural commodity. Additional wetland means any natural wetland or any converted wetland that has reverted to wetland as the result of abandonment of crop production. Abandonment is the cessation of cropping, management or maintenance operations related to the production of agricultural commodities on converted wetland. Where the cessation of such cropping, management or maintenance operations has occurred, converted wetland is considered to be abandoned unless it is shown that there was no intent to abandon; provided, however, that at the end of five successive years during which there was no crop production, such land shall be determined to be abandoned if the land meets the wetland criteria of § 12.31. Participation in a USDA set-aside, diverted acres, or similar programs shall not be deemed to constitute abandonment.

Signed at Washington, DC, on September 10, 1987.

Peter C. Myers,  
*Acting Secretary.*

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