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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 12

RIN 0578-AA17

Highly Erodible Land and Wetland Conservation

AGENCY: Office of the Secretary, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: The United States Department of Agriculture (USDA) is issuing an interim final rule for the Highly Erodible Land and Wetland Conservation provisions of the Food Security Act of 1985, as amended. This interim final rule incorporates specific changes required by the Federal Agriculture Improvement and Reform Act of 1996 and makes other changes to improve the administration of these provisions. USDA is seeking comments from the public which will be considered prior to issuing a final rule. **DATES:** *Effective Dates:* September 6, 1996.

Comments must be received by November 5, 1996.

ADDRESSES: All comments concerning this interim final rule should be addressed to Lloyd E. Wright, Director, Conservation Ecosystems Assistance Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, D.C. 20013-2890. Attention: HELWC. Fax: 202-720-1838. This rule may also be accessed, and comments submitted, via Internet. Users can access the NRCS Federal Register homepage and submit comments at <http://astro.itc.nrcs.usda.gov:6500>.

FOR FURTHER INFORMATION CONTACT: Sandra N. Penn, Conservation Ecosystems Assistance Division, Natural Resources Conservation Service, 202-720-1845.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be significant and was reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. Pursuant to § 6(a)(3) of Executive Order 12866, CCC and NRCS have conducted an economic analysis of the potential impacts associated with this interim final rule. The economic analysis concluded that the past ten years of experience in implementing these provisions demonstrates that the provisions are an effective incentive to implementing conservation practices. Changes in the 1985 Act and the implementing regulations will help to increase that incentive by making compliance achievable by more producers, providing more liberal technical assistance, and increasing flexibility in farm operations that deterred some producers from participation in USDA programs in the past. A copy of this cost-benefit analysis is available upon request from Sandra N. Penn, Conservation Ecosystems Assistance Division, Natural Resources Conservation Service, P.O. Box 1890, Washington, D.C. 20013-1890.

Regulatory Flexibility Act

The Regulatory Flexibility Act is not applicable to this rule because USDA is not required by 5 U.S.C. 533 or any other provisions of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Environmental Evaluation

It has been determined through an environmental assessment that the issuance of this interim final rule will not have a significant impact upon the human environment. Copies of the environmental assessment may be obtained from Sandra N. Penn, Conservation Ecosystems Assistance Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, D.C. 20013-2890.

Paperwork Reduction Act

No substantive changes have been made in this interim final rule that affect the recordkeeping requirements and estimated burdens previously reviewed and approved under OMB control number 0560-0004.

Executive Order 12788

This interim final rule has been reviewed in accordance with Executive Order 12778. The provisions of this interim final rule are not retroactive except for § 12.5(b)(4)-(8) in relation to certain actions or determinations that occurred after December 23, 1985, relative to the conversion of wetlands or the production of an agricultural commodity upon a converted wetland. Furthermore, the provisions of this final interim rule preempt State and local laws to the extent such laws are inconsistent with this interim final rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at CFR parts 11,614,780 and 1900 Subpart B of this title, as appropriate, must be exercised and exhausted.

Unfunded Mandates Reform Act of 1995

Pursuant to Title II of the unfunded Mandates Reform Act of 1995, Pub. L. 104-4, the effects of this rulemaking action on State, local, and tribal governments, and the public have been assessed. This action does not compel the expenditure of \$100 million or more by any State, local, or tribal governments, or anyone in the private sector; therefore a statement under § 202 of the Unfunded Mandates Reform Act of 1995 is not required.

Discussion of Provisions

Title XII of the Food Security Act of 1985, as amended (the 1985 Act), encourages participants in United States Department of Agriculture (USDA) programs to adopt land management measures by linking eligibility for USDA program benefits to farming practices on highly erodible land and converted wetlands. In particular, the highly erodible land provisions (HEL) of the 1985 Act provide that after December 23, 1985, a program participant is ineligible for certain USDA program benefits for the production of an agricultural commodity on a field in which highly erodible land is predominant. Additionally, the wetland conservation (WC) provisions of the 1985 Act provide that after December 23, 1985, a program participant is ineligible for certain USDA program benefits for the production of an agricultural commodity on a converted



wetland, or after November 28, 1990, for the conversion of a wetland that makes the production of an agriculture commodity possible. The 1985 Act, however, affords relief to program participants who meet certain conditions identified under the 1985 Act by exempting such actions from the ineligibility provisions.

The USDA issued a final rule implementing the HEL and WC provisions of the 1985 Act on September 17, 1987. These regulations, found at 7 CFR part 12, provided the terms of program ineligibility, described the several exemptions from ineligibility, outlined the responsibilities of the several USDA agencies involved in implementing the provisions, and generally established the framework for administration of the provisions.

The Food, Agriculture, Conservation, and Trade Act of 1990 (the 1990 Act), amended the 1985 Act and made some significant modifications to the HEL and WC conservation provisions. These statutory changes were incorporated into part 12 through amendments issued April 23, 1991, and May 23, 1991.

The implementing regulations mirror the 1985 Act's structure by listing the activities that will cause a person to lose program benefits, the program benefits that are at risk, and the conditions under which these activities can occur without losing program eligibility. The current regulations are divided into three subparts. Subpart A describes the terms of ineligibility, USDA programs encompassed by its terms, the list of exemptions from ineligibility, the agency responsibilities, and the appeal provisions for persons adversely affected by an agency determination. Subpart B describes in greater detail the technical aspects of the highly erodible land provisions, including the criteria for identification of highly erodible lands, criteria for highly erodible field determinations, and requirements for the development of conservation plans and conservation systems. Subpart C describes in greater detail the technical aspects of the wetland conservation provisions, including the criteria for determining a wetland, the criteria for determining a converted wetland, and the uses of wetlands and converted wetlands that can be made without losing program eligibility.

Since December 23, 1985, program participants have farmed in a more sustainable manner, resulting in more soil remaining on the field and more wetlands remaining available to wildlife and migratory fowl. Meeting the objectives of the HEL and WC provisions, however, has been difficult

for some producers. Wherever possible, USDA helps individual program participants address their unique resources concerns in a manner that meets the requirements of the HEL and WC provisions. The Federal Agriculture Improvement and Reform Act (the 1996 Act), enacted April 4, 1996, made several modifications to the HEL and WC provisions which will increase USDA's ability to meet these individual situations in a more flexible manner.

The Federal Agriculture Improvement and Reform Act

The 1996 Act amendments to the HEL and WC provisions became effective 90 days after the date of enactment, *i.e.*, July 3, 1996. Accordingly, delaying implementation of this rule would be contrary to the public interest and it has been determined that this rule should, therefore, be effective when issued but subject to further review based on comments submitted in response to this interim final rule.

The 1996 Act made the following changes to the implementation of the HEL and WC provisions:

- Adds new programs to the list of USDA program benefits covered.
- Deletes some programs from the list of USDA program benefits covered.
- Under certain conditions, allows a person who is determined to be ineligible for USDA program benefits because of failure to apply a conservation system up to 1 year to implement the necessary practices without loss of benefits.
- Provides for expedited variances related to weather, pest, and disease problems and establishes a time period to render a decision on whether to grant those variances.
- Requires a measurement of soil erosion on a highly erodible field prior to the implementation of a conservation system, based on estimated average annual soil erosion rates.
- Provides for self-certification of compliance for HEL and authorizes the Natural Resources Conservation Service (NRCS) to exclude that person from status review on the basis of that certification of compliance.
- Provides for revision or modification of a conservation plan by a person if the same level of treatment is maintained.
- Permits a person to use, on a field-trial basis, conservation practices other than those currently approved if NRCS determines in advance that the practices have a reasonable likelihood of success.
- Provides for a review, and relief to a person, by the local county committee if applying a conservation system would

cause the person undue economic hardship.

- Requires that an employee of USDA who notices a conservation compliance deficiency on a person's farm while providing technical assistance on other land inform the person of the deficiency and actions necessary to come into compliance, and allow up to 1 year for the person to fully implement corrective action before reporting the observation as a compliance violation.

- Requires that highly erodible land exiting the Conservation Reserve Program not be held to a higher conservation compliance standard than similar cropland in the same area.

- Permits a person to cease using farmed wetlands, or farmed-wetland pastures, as identified by NRCS, for cropping or forage production, and allows the lands to return to wetland conditions, and subsequently bring these lands back into agricultural production after any length of time without loss of eligibility for USDA program benefits, given certain conditions.

- Allows flexibility in determining the programs for which a person who violates wetland conservation provisions will become ineligible.

- Ensures that persons the right to request and appeal a certified wetland determination.

- Provides that a certified wetland delineation will remain in effect until the person requests a new determination and certification.

- Ensures that wetlands that were certified as prior-converted cropland will continue to be considered prior-converted cropland even if wetland characteristics return as a result of lack of maintenance of the land or other circumstances beyond the person's control provided the prior-converted cropland continues to be used for agricultural purposes.

- Requires USDA to identify on a regional basis which categories of activities constitute a minimal effect on wetland functions and values.

- Provides persons who convert a wetland greater flexibility to mitigate the loss of wetland functions and values through restoration, enhancement, or creation of wetlands.

- Allows the Farm Service Agency (FSA) to waive a person's ineligibility for benefits if FSA believes the person acted in good faith and without intent to violate the wetland provisions.

- Provides for a pilot program for wetland mitigation banking.

- Repeals the requirements for consultation with the Fish and Wildlife Service (FWS).

- Provides that benefits of affiliates of a business enterprise who violate HEL or WC provisions will be reduced in proportion to the interest held by the affiliate in the business enterprise.

- Defines “agricultural lands” for the purpose of implementing the January 6, 1994, interagency memorandum of agreement on Federal wetland delineations on agricultural lands.

Public Listing Forums

In April 1996, USDA held nine forums to provide opportunities for public comment in advance of this rulemaking action. These forums were held at Sacramento, California; Longmont, Colorado; Columbus, Georgia; Springfield, Illinois; Wyomissing, Pennsylvania; Sioux Falls, South Dakota; Abilene, Texas, Spokane, Washington; and, Washington, D.C. More than 850 people, including 206 speakers, attended these forums. In addition, USDA accepted written comments. The USDA considered the public comments provided at these forums in the preparation of this interim final rule. The documents relating to these forums are available for public inspection at Room 6029 South Building, USDA, 14th and Independence Ave. SW, Washington, D.C. The following discussion is a brief summary of how USDA responded to the issues generated by the comments:

USDA received seven comments related to the granting of variance for persons who fail to meet the highly erodible land conservation requirements. Section 12.5(a)(6)(ii) addresses procedures for granting variances for weather, pest, and disease problems, and the factors that NRCS will consider in granting those variances.

USDA received three comments related to procedures for determining whether a conservation system results in a substantial reduction in erosion. Section 12.23 addresses procedures for evaluating conservation systems for land with and without cropping history.

USDA received 25 comments related to policies regarding when a violation is in good faith. Sections 12.5(a)(5) and (b)(5) address procedures for determining when a violation is in good faith.

USDA received 16 comments related to procedures for conducting status reviews. Although procedures for conducting status reviews are not addressed in the rule, the NRCS will consider these comments in preparing its internal operating procedures.

USDA received 46 comments related to procedures on wetland mitigation; these included the suggestion that

mitigation always be in the same watershed; that mitigation should place priority on restoration or enhancement rather than creation of wetlands; that mitigation should be flexible; and, that mitigation should meet the requirements of the WC provision. Section 12.5(b)(4) sets forth procedures to be used for wetland mitigation, and adds that the State Conservationist may determine that mitigation for certain types or classes of wetlands will not be considered because it is not possible to achieve equivalent replacement of wetland functions and values within a reasonable time frame. USDA received another 28 comments related to mitigation banking.

USDA received 68 comments related to certification of wetland determinations. Some commenters favored reviewing all wetland determinations and correcting errors; other commenters favored not reviewing existing wetland determinations. Some commenters suggested that landowners should be formally notified of the certification of wetland determinations. Some commenters suggested that NRCS should be the lead agency for wetland determinations. Section 12.30(c) describes the proposed approach to certification of wetland determinations. It also specifies that a certified wetland determination will remain valid and in effect until the person affected by the certification requests review of the certification by NRCS.

USDA received 17 comments related to the role of FWS in carrying out the wetland conservation provisions. Of these, four commenters expressed support for FWS involvement and eight commenters favored decreasing the role of the FWS. Five commenters made no specific recommendation. The 1996 Act removed the requirement for consultation with FWS, and that requirement has been removed from the rule. In addition, § 12.30 defines the role of the FWS in carrying out the wetland conservation provisions.

USDA received 36 comments related to prior-converted cropland issues and abandonment of wetlands. Of these, 19 commenters expressed support for the “once a PC, always a PC” change made by the 1996 Act; three commenters expressed concern over that change. Section 12.33 incorporates changes made by the 1996 Act amendments.

USDA received four comments stating that NRCS should withdraw from the Interagency Memorandum of Agreement on Wetlands (MOA) with FWS, Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers (Corps). This comment is outside the scope of this rule, but as

discussed in greater detail below, NRCS is dedicated to continued coordination with the other Federal agencies with wetland responsibilities. Currently, the MOA provides a useful and available framework for this coordination.

Description of Amendments

As the summary of the forum comments indicates, the statutory changes affect provisions throughout 7 CFR part 12. Because of these numerous changes, USDA will republish part 12 in its entirety to help the public form opinions and offer comments. When USDA reviews the comments received from the public, those comments concerning new regulatory provisions will receive greater consideration.

In addition to revisions necessary to accommodate changes in the Act, USDA makes several changes to interpret, clarify, or specify procedures followed in the implementation for the HEL and WC provisions. USDA invites public comment on these changes.

Amendments to the HEL Provisions

USDA finds that the following regulatory changes will improve the quality of implementation of the HEL provisions of the 1985 Act:

- Section 12.5(a)(6)(ii) is amended to list factors that NRCS will consider when a landowner requests a variance related to weather, pest, or disease problems.

- Section 12.22(c) is added to clarify that when fields are combined, the part of the new field that was previously a highly erodible field shall continue to be subject to the highly erodible land requirements.

- Section 12.23(a) is amended to clarify that the adequacy of a conservation system will be evaluated according to whether it conforms to the NRCS field office technical guide in use at the time that the plan or system is developed or revised.

- Section 12.23(b) is added to clarify procedures to be used to evaluate the adequacy of conservation systems for achieving substantial reduction in soil erosion on land with and without cropping history.

- Section 12.23(c) is added to specify that conservation field trials included in a person’s conservation plan must have prior approval by NRCS and must be documented in the person’s conservation plan specifying the limited time period during which the field trial is in effect.

- Section 12.23(j) sets forth the factors to be considered by the FSA State Committee in determining whether to grant a person’s request for relief based on undue economic

hardship in implementing a conservation system.

Amendments to the WC Provisions

USDA finds that the following changes will improve the implementation of the WC provisions of the 1985 Act (WC provisions):

Identification of wetland types: The WC provisions clearly limit the conversion of wetlands and the planting of an agricultural commodity on a converted wetland, yet the technical identification of when these provisions are triggered can prove complex. Even though the 1985 Act implicitly identifies three distinct land types (wetlands, converted wetlands, and non-wetlands), the inherent complexity of natural systems and the diversity of land management methods available to an agricultural producer require that greater sophistication be used in application of broad national standards to local conditions. Some areas of land have been planted to an agricultural commodity but still exhibit the characteristic of a natural wetland if cropping ceases for even a short period of time. Likewise, areas managed for hay or pasture can exhibit the characteristics of a natural wetland if the management of the area ceases. Some activities can permanently remove most of the water from an area without making the production of an agricultural commodity possible while natural events can make the production of an agricultural commodity possible without permanently removing water from an area.

Since 1987, USDA has identified in policy the threshold characteristics that define when: a wetland has been manipulated sufficiently to make the production of an agricultural commodity possible; a wetland is "converted;" conditions meet a particular exemption identified under the 1985 Act; and a producer has expanded the drainage system beyond what existed prior to December 23, 1985. The USDA is adding definitions to § 12.2 to state more precisely the variety of wetland types found in the agricultural landscape. Section 12.5 and §§ 12.30–12.33 are amended to describe how these wetland types relate to particular exemptions from ineligibility. In this manner, agricultural producers are provided the maximum flexibility to manage their lands in a manner that will not trigger the ineligibility provisions of the 1985 Act.

Coordination with other Federal agencies: Consistent with the intent expressed in the Manager's Report accompanying the 1996 Act amendments, the changes made in this

rule "do not supersede the wetland protection authorities and responsibilities of the Environmental Protection Agency [EPA] or the Corps of Engineers [the Corps] under Section 404 of the Clean Water Act." This rule is promulgated under the authority of the 1985 Act, as amended, and therefore does not affect the obligations of any person under other Federal statutes, or the legal authorities of any other Federal agency including, for example, EPA's authority to determine the geographic scope of Clean Water Act jurisdiction. Nonetheless, NRCS, the Corps, and EPA place a high priority on adopting procedures and policies that minimize duplication and inconsistencies between the wetland conservation provisions of the 1985 Act and the Clean Water Act section 404 programs. To help achieve these important policy objectives, on January 6, 1994, four Federal agencies with wetland responsibilities (USDA, EPA, the Department of the Interior, the Department of the Army) entered into a Memorandum of Agreement (MOA), regarding the delineation of wetlands for purposes of section 404 of the Clean Water Act and the WC provisions. This MOA provides a framework for continuing coordination between the Federal agencies regarding the administration of Federal wetland laws. Consistent with the objectives of the MOA, the NRCS will continue to coordinate with the other Federal agencies in the development of its policies and procedures related to the implementation of these regulations.

More specifically, the agencies will coordinate to develop policies and procedures for evaluating the accuracy of existing non-certified wetland determinations made by NRCS. The necessary first step in these procedures will be to make an assessment of the quality of previous determinations. After completing the quality assessment, in order to provide certainty for the agricultural community, the Federal agencies will complete the process of validating prior determinations in an expeditious manner.

It is also the goal of the agencies to minimize duplication and inconsistencies between the WC provisions and the Clean Water Act. The agencies will coordinate to develop policies and procedures to minimize duplication and inconsistencies between the WC provisions and the Clean Water Act programs regarding other issues; in particular, conversion for non-agricultural use, minimal effects determinations (including categorical minimal effects exemptions), mitigation determination, or other written

agreements between persons and NRCS, the re-establishment of agriculture use on abandoned farmed wetlands and farmed-wetland pasture, conversions due to NRCS wetland determination errors, and drainage maintenance. As part of this effort, the Corps intends to develop a new Clean Water Act nationwide permit that addresses NRCS minimal effects determinations, NRCS mitigation requirements, and modify the existing nationwide permit that addresses voluntary wetland restoration (See 61 FR part VII (June 17, 1996)).

In the MOA, the agencies agreed to follow certain guidelines for delineating wetlands. The MOA agencies currently use the 1987 Corps of Engineers Wetland Delineation Manual (1987 Corps Manual) for delineating wetlands on areas where the native vegetation is intact (*i.e.*, non-agricultural lands) and use the National Food Security Act Manual, Third ed. (NFSAM), for delineating wetlands on areas where the native vegetation has been removed due to ongoing agricultural activities (*i.e.*, agricultural lands).

Copies of the NFSAM and the MOA are available from the NRCS, P.O. Box 2890, Washington, D.C., 20013. Copies of the 1987 Corps Manual are available from the National Technical Information Service (NTIS), 5285 Port Royal Road, Attn: Order Department, Springfield, Virginia, 22171. Copies of the Supplemental guidance issued by the Corps concerning use of the 1987 Manual (*i.e.*, the October 7, 1991, Questions and Answers, and the March 6, 1992, Clarification and Interpretation Memorandum) may be obtained by contacting the Regulatory Branch of the local Corps district, the EPA Wetlands Hotline at (800) 832-7828, or the Regulatory Branch of Corps headquarters (Office of the Chief of Engineers) at (202) 272-0199. NRCS will publish notice in the Federal Register concerning a change in the Federal wetland delineation criteria that may be used in implementation of the WC provisions.

This interim final rule, however, only applies to administration of Title XII of the 1985 Act. As discussed earlier, the four agencies have identified a need to expand and revise the MOA to assure consistency and fairness in the implementation of these acts. The current MOA will remain in effect until it is amended or rescinded by the four agencies.

A goal of the Administration's 1993 Wetlands Plan is to harmonize the WC provisions and the Clean Water Act to the extent practicable. These regulations are modified in several ways to further the President's Wetlands Plan. In

particular, § 12.5(b)(5) provides that when a person requests relief on the basis that an action was conducted in good faith, USDA may consider whether the person has a record of violating the wetland provisions of these regulations or other Federal, State, or local wetland provisions.

Additionally, § 12.6(e) is added to state that NRCS may accept the assistance of other Federal agencies to carry out the wetland responsibilities of these regulations. Sections 12.30(a) and (b) provide that NRCS will consult with FWS at the State level to develop a process for implementation of the WC provisions.

Section 12.30(c) describes the procedure for certification of wetland determinations and specifies that certified wetland determinations will meet current Federal mapping conventions.

A certified wetland determination will remain in effect unless the person affected by the certification requests a review under certain circumstances or the wetland characteristics are changed as a result of human activities.

Section 12.31(b)(3) is amended to provide that the determination of prevalence of hydrophytic vegetation will be made in accordance with the current Federal wetland delineation methodology in use at the time of the determination. This change assures that the four agencies will utilize consistent and up-to-date technical standards and criteria.

Summary of Rule Modifications

Based on the changes in the 1996 Act and the other considerations set forth above, the changes to 7 CFR part 12 adopted in this notice are as follows:

Subpart A

This interim final rule adds several new definitions to § 12.2. The Department of Agriculture Reorganization Act of 1994 abolished several agencies and established new agencies to assume Department responsibilities. Therefore, § 12.2 is amended to reflect the new agencies with responsibilities for implementation of these regulations.

Section 12.2: This interim final rule adds new definitions for “conservation plan,” “conservation system,” and “field” as stated in the statute. It also adds several new definitions related to types of wetlands and management actions related to wetlands that have previously only been identified in policy. Definitions for “prior-converted cropland,” “farmed wetland,” “farmed-wetland pasture,” and “commenced-conversion wetland” have been added.

Other provisions of the rule have been amended, including § 12.5 and §§ 12.31–.33, to incorporate these new definitions where applicable.

The 1996 Act amendments provide that a person who converts a wetland may remain eligible for USDA program benefits if the loss of wetland functions and values are mitigated through the restoration, enhancement, or creation of a wetland. Therefore, definitions for “creation,” “enhancement,” and “restoration,” have been added to clarify this new flexibility.

Section 12.3: This interim final rule applies to all actions taken after July 3, 1996, and to determinations made after, or pending on, July 3, 1996, the date on which the HEL and WC statutory amendments become effective. This section is amended to reflect the passage of the 1996 Act and the scope of these new provisions.

Section 12.4: Section 12.4 describes the actions that will cause a person to lose eligibility for USDA program benefits and the program benefits that are subject to reduction or loss. The 1996 Act treats HEL and WC differently regarding the programs encompassed by each provision and the extent of the sanctions if the provisions are violated. Section 12.4 deletes applicability to some programs, such as crop insurance and obsolete programs. A person who violates the WC provisions may lose all or only a portion of certain USDA benefits, but a person who violates HEL could lose all of these same benefits and additional program benefits. Sections 12.4(c) is amended to include an interpretation of which crop year’s benefits are affected by a violation decision, and sets forth the factors that FSA will consider in determining the extent of benefits to be lost based on the seriousness of the violation.

Section 12.5: The 1996 Act amendments modify the provisions of § 12.5 regarding the exemptions from ineligibility for USDA program benefits. Section 12.5(a) addresses the exemptions that apply to HEL and § 12.5(b) addresses the exemptions that apply to WC.

Section 12.5(a)(5) specifies that HEL violations that are determined to have been made in good-faith are eligible for graduated sanctions if they were on land that was converted from native vegetation, *i.e.*, rangeland or woodland, to crop production after December 23, 1985. For good faith violations on land that was converted from native vegetation, *i.e.*, rangeland or woodland, to crop production before December 23, 1985, the person will be allowed up to one year to correct the problem before being found ineligible. After one year, if

the problem is not corrected, the ineligibility provisions of § 12.4 will apply. Section 12.5(a)(6) grants an automatic variance if within 30 days NRCS fails to respond to a persons request for a variance because of weather, pest, or disease. It describes criteria that NRCS will consider when determining whether to grant a variance for a natural disaster such as weather, pest, or disease. NRCS is especially soliciting comments on how these criteria may be specified to ensure that variances are granted where appropriate.

Under § 12.5(b), the exemptions from ineligibility relative to wetland conservation, there exists a new exemption for land that was certified as having been converted prior to December 23, 1985, (prior-converted croplands), but had returned to wetland characteristics after that date. This exemption provides that if certain requirements are met, a prior-converted cropland will not be considered abandoned for purposes of implementation of these regulations. Likewise, there exists another new exemption for areas that NRCS determined were manipulated but were not completely converted prior to December 23, 1985, (farmed wetlands and farmed-wetland pastures), but may revert to wetland status through a voluntary restoration, enhancement, or creation action. This exemption provides that if certain requirements are met, the area will not be considered abandoned for purposes of implementation of these regulations.

These exemptions do not address how the Corps may treat these wetland types for purposes of section 404 of the Clean Water Act. The Corps has a notice in 61 FR part VII (June 17, 1996) to issue, reissue, and modify the nationwide permits for section 404 of the Clean Water Act that addresses these issues.

The 1996 Act provides that certain wetland conversion activities that were conducted pursuant to a permit issued under section 404 of the Clean Water Act may be exempt from ineligibility under the WC provisions, if the conversion activity was adequately mitigated for purposes of these provisions. This rule provides that a person who received an individual permit under section 404 of the Clean Water Act after December 23, 1985, and met certain sequencing requirements, is exempt from the ineligibility provisions of these regulations.

This rule, however, provides that a person whose conversion activity is encompassed by a nationwide or regional general permit issued pursuant to section 404 of the Clean Water Act

may not be exempt under these regulations. USDA will evaluate whether any mitigation was required, and whether the wetland functions and values lost by the conversion activity were adequately replaced before USDA decides whether the conversion activity is exempt from ineligibility under these regulations.

The regulations that existed prior to this interim final rule described a detailed procedure by which a person could receive a commenced conversion determination from FSA. Persons who believed that they qualified for such a determination had to request one from FSA by September 19, 1988. The purpose of the determination was to minimize any unnecessary economic hardship to someone who had incurred substantial financial obligations related to the conversion of a wetland prior to December 23, 1985, but had not actually converted the wetland by that date. Any person who received a commenced-conversion wetland determination had to complete the conversion activity by January 1, 1995, to retain the exemption status. Because the commenced conversion determination had to be received by 1988 and the conversion had to be completed by the end of 1994, the references in the rule related to the process to obtain a determination have been removed. If a person completed conversion activity by January 1, 1995, the land will qualify for the same exemptions from ineligibility as prior-converted cropland. If, however, a person did not complete the conversion activity by that date, the land will be subject to the same requirements under this rule as farmed wetlands.

The 1996 Act provides that a person may remain eligible for an action resulting in the conversion of a wetland if the wetland functions and values are adequately mitigated through the restoration of a converted wetland, the enhancement of an existing wetland, or the creation of a new wetland. Section 12.5(b)(4) provides that this exemption applies if the mitigation is completed in accordance with several requirements, including that the person implement a mitigation plan approved by NRCS. The mitigation plan may be a single document or it may be a component of a larger conservation plan created voluntarily by the program participant. The requirements for this exemption are similar to the requirements for restoration of a converted wetland under the current regulations, such as the granting of an easement to USDA, recording an easement on the public land records, and that such mitigation not be at the expense of the Federal government.

The 1996 Act provides that USDA may expend Federal funds for the establishment of a pilot program for mitigation banking. USDA has not yet decided whether it will establish such a pilot program or what the particulars of such a program would be. During the public comment period, USDA is especially soliciting comments from the public regarding this subject.

The 1996 Act removes the requirement for graduated sanctions if the FSA determines that a wetland violation was committed in good faith. Central to the determination about whether a person acted in good faith is the knowledge available to the person concerning the existence of a wetland on the subject land. This knowledge can either be direct, such as information received from NRCS in the form of a wetland determination, or can be inferred from a person's past experience with violating wetland laws or regulations. This interim final rule provides that if a person is considered to have acted in good faith and the person agrees to implement a mitigation plan, then USDA may waive applying the ineligibility provisions of § 12.4.

Section 12.6: Section 12.6 concerns the respective responsibilities of USDA agencies; the new responsibilities created by the 1996 Act have been added. Section 12.6(b) is amended to specify that FSA is responsible for determining the extent of reduction in benefits for wetland violations based on the seriousness of the violation, and for determining whether a person should receive relief because application of a conservation system would result in undue economic hardship. Section 12.6(c) is amended to reflect that NRCS is responsible for providing information to FSA relating to the seriousness of a violation.

In response to the need to coordinate with the MOA agencies regarding wetland determinations, a new paragraph has been added to § 12.6 New paragraph (f) provides that NRCS may accept the assistance of the MOA agencies in implementing these regulations. This paragraph also confirms that NRCS will continue to seek the coordination of the other agencies on wetland matters to increase the public's understanding of the importance of wetland functions and values and the objectives of the WC provisions and the Clean Water Act.

Section 12.7: Section 12.7 addresses certification by a program participant that such participant is in compliance with the HEL and WC provisions. Section 12.7 is amended to allow a person to certify application of practices

in a plan or measurement of residue required by a plan.

Section 12.8: Section 12.8 is amended to revise the definition of affiliated persons for the purpose of determining whose benefits may be affected by a decision and to what extent. In particular, § 12.8(b) is amended to provide that spouses who provide sufficient evidence of separate operations shall not be considered affiliates, and partnerships, trusts, and joint ventures are not considered affiliates if the interest is held indirectly through another business enterprise. Section 12.8(d) limits the reduction in payments for partnerships, joint ventures, trust, or other enterprises to the extent of interest held by the person responsible for the violation. Section 12.8(e) states that limitations on affiliations if action has been taken to avoid payment reductions for partnerships, joint ventures, trusts, or the application of the sanctions provided for in the regulations.

Subpart B

Section 12.21: Section 12.21 is amended to include a reference to publication of soil loss equations at 7 CFR part 610.

Section 12.22: Section 12.22 is amended to allow combining HEL and non-HEL fields, but the requirements of these regulations continue to apply to the previous HEL portion only.

Section 12.23: Section 12.23 is amended to specify that: conservation systems shall be technically and economically feasible (based on local resource conditions and available technology), cost effective, and shall not cause undue economic hardship; the standard for determining whether a plan provides a substantial reduction in erosion is the estimated annual level of erosion compared to the level before the system is applied; for new land brought into production, in no case will the required conservation system permit a substantial increase in erosion; procedures for conducting field trials as on-farm research; and procedures and criteria used by FSA when a person requests relief based on undue economic hardship.

Subpart C

Subpart C addresses the technical responsibilities of NRCS and the technical criteria used to make the necessary determinations for wetland conservation under these regulations.

Section 12.30: Section 12.30 is amended to reflect that NRCS will continue to work with the Corps, EPA, and FWS to improve the quality of wetland determinations and other

processes that affect the implementation of the WC provisions.

The 1996 Act repealed the requirement for consultation with FWS, thus allowing the Secretary to determine under what circumstances FWS should be utilized in the implementation of the WC provisions. Section 12.30 is amended to reflect that NRCS will develop a process at the State level, in coordination with FWS, for implementing the WC provisions and review such implementation on an annual basis. The technical expertise of FWS may be utilized whenever NRCS determines that such expertise is needed to address adequately the requirements of the WC provisions or to enhance the quality of implementation.

Under the new mitigation flexibility provided by the 1996 Act, the expertise of FWS will be valuable for conducting wetland functional assessments associated with minimal effects determinations and formulation of mitigation plans. The State-level process is intended, in part, to identify any geographic or programmatic areas where NRCS may need additional technical expertise to assess biological impacts of proposed wetland conversions.

Section 12.30 is also amended to address the process for certification of wetland determinations for the implementation of the WC provisions of the 1985 Act. If NRCS certified a wetland determination prior to July 3, 1996, the certification will remain valid. Upon request, a person may obtain certification of a wetland determination. A certified wetland determination means that the determination is of sufficient quality to make a determination of ineligibility for program benefits under these regulations. As indicated above, NRCS will continue to work with the other MOA agencies to coordinate the identification and certification of wetlands for the purposes of these regulations and for the Clean Water Act. The agencies recognize the importance of providing certainty for the agricultural community as to the status of their wetland determinations which have not been certified. The Federal agencies are therefore considering establishing a specific time frame for completing the evaluation of existing wetland determinations. During this time frame, an evaluation would be made as to the accuracy of wetland determinations within a given geographic area or of a specific type of wetland. Based on the evaluation, landowners would be notified whether their current wetland determinations are acceptable for both the WC provisions and the Clean Water Act. USDA is

especially seeking comments regarding implementation of this process.

Section 12.31: Section 12.31 is amended to reflect that NRCS will utilize the 1987 Corps Manual for determining the prevalence of hydrophytic vegetation. Section 12.31 is also amended to add the criteria for determining "categorical minimal effect exemptions." If NRCS identifies any categories of conversion activities and conditions which would only have a minimal effect on wetland functions and values, then such activities and conditions will be placed on a list of "categorical minimal effect exemptions" and such conversion activities and conditions will be considered exempt from the ineligibility provisions of these regulations. NRCS will incorporate such activities and conditions in the provisions of these regulations USDA is especially seeking comments regarding implementation of this new exemption. For purposes of the Clean Water Act, the Corps intends to address this provision as part of its reissuance of the Clean Water Act section 404 nationwide permits (See 61 FR part VII (June 17, 1996)).

Sections 12.32 and 12.33: Sections 12.32 and 12.33 have been amended to incorporate the definitions for farmed wetland, farmed-wetland pasture, commenced-conversion wetland, and prior-converted cropland, where appropriate.

Section 12.33: Section 12.33 has also been amended to modify the conditions under which NRCS will consider a particular site to be abandoned for purposes of these regulations. A person who wishes to allow a particular site to revert to wetland conditions should contact NRCS to ascertain what documentation is necessary to prevent such land from being considered abandoned for purposes of the WC provisions of these regulations. For purposes of the Clean Water Act, the Corps intends to address this provision as part of its re-issuance of the Clean Water Act section 404 nationwide permits (See 61 FR part VII (June 17, 1996)).

The amendments to part 12 do not affect the recordkeeping requirements and estimated burdens previously reviewed and approved under Office of Management and Budget control number 0560-0004.

List of Subjects in 7 CFR Part 12

Administrative practices and procedures, Soil Conservation, Wetlands.

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 of compliance.
- 12.8 Affiliated persons.
- 12.9 Landlords and tenants.
- 12.10 Scheme or device.
- 12.11 Action based upon advice or action of USDA.
- 12.12 Appeals.

Subpart B—Highly Erodible Land Conservation

- 12.20 NRCS 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 NRCS responsibilities regarding wetlands.
- 12.31 Onn-site wetland identification criteria.
- 12.32 Converted wetland identification criteria.
- 12.33 Use of wetland and converted wetland.
- 12.34 Paperwork Reduction Act assigned number.

Authority: 16 U.S.C. 3801 *et seq.*

Subpart A—General Provisions

§ 12.1 General.

(a) *Scope.* This part sets forth the terms and conditions under which a person who produces an agricultural commodity on highly erodible land or designates such land for conservation use, plants an agricultural commodity on a converted wetland, or converts a wetland shall be determined to be ineligible for certain benefits provided by the United States Department of Agriculture (USDA) and agencies and instrumentalities of USDA.

(b) *Purpose.* 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) Reduce sedimentation and improve water quality; and
- (4) Assist in preserving the functions and values of the Nation's wetlands.

§ 12.2 Definitions.

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

Agricultural commodity means any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters, or sugarcane.

CCC means the Commodity Credit Corporation, wholly-owned government corporation within USDA organized under the provisions of 15 U.S.C. 714 *et seq.*

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.

Conservation plan means the document that—

(1) Applies to highly erodible cropland;

(2) Describes the conservation system applicable to the highly erodible cropland and describes the decisions of the person with respect to location, land use, tillage systems, and conservation treatment measures and schedules; and

(3) Is approved by the local soil conservation district in consultation with the local committees established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)(5)) and the Natural Resources Conservation Service (NRCS) for purposes of compliance with this part.

Conservation system means a combination of one or more conservation measures or management practices that are—

(1) Based on local resource conditions, available conservation technology, and the standards and guidelines contained in the NRCS field office technical guides (available from NRCS State offices); and

(2) Designed for purposes of this part to achieve, in a cost-effective and technically practicable manner, a substantial reduction in soil erosion or a substantial improvement in soil conditions on a field or group of fields containing highly erodible cropland when compared to the level of erosion or soil conditions that existed before the application of the conservation measures and management practices.

Conservation use or set aside means cropland that is designated as conservation-use acreage, set aside, or other similar designation for the purpose of fulfilling provisions under any acreage-limitation or land-diversion program administered by the Secretary of Agriculture requiring that the producer devote a specified acreage to

conservation or other non-crop production uses.

Creation of a wetland means the development of the hydrologic, geochemical, and biological components necessary to support and maintain a wetland where a wetland did not previously exist. Any wetland established on a non-hydric soil will be considered a created wetland.

CSREES means the Cooperative State Research, Education, and Extension Service, an agency of USDA which is generally responsible for coordinating the information and educational programs of USDA.

Department means the United States Department of Agriculture (USDA).

Enhancement of a wetland means the alteration of an existing wetland to increase its specific functions and values. Enhancement actions include new capabilities, management options, structures, or other actions to influence one or several functions and values.

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.

FSA means the Farm Service Agency, an agency of USDA which is generally responsible for administering commodity production adjustment and certain conservation programs of USDA.

Field means a part of a farm that is separated from the balance of the farm by permanent boundaries such as fences, roads, permanent waterways, or other similar features. At the option of the owner or operator of the farm, croplines may also be used to delineate a field if farming practices make it probable that the croplines are not subject to change. Any highly erodible land on which an agricultural commodity is produced after December 23, 1985, and is not exempt under § 12.5(a), shall be considered part of the field in which the land was included on December 23, 1985, unless, to carry out this title, the owner and FSA agree to modify the boundaries of the field.

Highly erodible land means land that has an erodibility index of 8 or more.

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.

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.

Landlord means a person who rents or leases farmland to another person.

Local FSA office means the county office of the Farm Service Agency serving the county or a combination of counties in the area in which a person's land is located for administrative purposes.

NRCS means the Natural Resources Conservation Service, an agency within USDA which is generally responsible for providing technical assistance in matters of natural resources conservation and for administering certain conservation programs of USDA.

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

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

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.

Restoration of a wetland means the re-establishment of wetland conditions, including hydrologic condition or native hydrophytic vegetation, to an area where a wetland had previously existed.

Secretary means the Secretary of USDA.

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.

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

State means each of the 50 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.

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 as 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 718.

Wetland, except when such term is a part of the term "converted wetland", means land that—

(1) Has predominance of hydric soils;

(2) Is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and

(3) Under normal circumstances does not support a prevalence of such vegetation, 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.

Wetland determination means a decision regarding whether or not an area is a wetland, including identification of wetland type and size. A wetland determination may include identification of an area as one of the following types of wetland—

(1) *Artificial wetland* is an area that was formerly non-wetland, but now meets wetland criteria due to human activities, such as:

(i) An artificial lake or pond created by excavating or diking land that is not a wetland to collect and retain water that is used primarily for livestock, fish production, irrigation, wildlife, fire control, flood control, cranberry growing, or rice production, or as a settling pond; or

(ii) A wetland that is temporarily or incidentally created as a result of adjacent development activity;

(2) *Commenced-conversion wetland* is a wetland, farmed wetland, farmed-wetland pasture, or a converted wetland on which conversion began, but was not completed, prior to December 23, 1985.

(3) *Converted wetland* is a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose of or to have the effect of making 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, farmed wetland, or farmed-wetland pasture and was neither highly erodible land nor highly erodible cropland;

(4) *Farmed wetland* is a wetland that prior to December 23, 1985, was manipulated and used to produce an agricultural commodity, and on

December 23, 1985, did not support woody vegetation and met the following hydrologic criteria:

(i) Is inundated for 15 consecutive days or more during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more), or

(ii) If a pothole, playa, or pocosion, is ponded for 7 or more consecutive days during the growing season in most years (50 percent chance or more) or is saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more);

(5) *Farmed-wetland pasture* is wetland that was manipulated and managed for pasture or hayland prior to December 23, 1985, and on December 23, 1985, met the following hydrologic criteria:

(i) Inundated or ponded for 7 or more consecutive days during the growing season in most years (5) percent chance or more), or

(ii) Saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more);

(6) *Not-inventoried land*, is an area for which no evaluation of soils, vegetation, or hydrology has been conducted to determine if wetland criteria are met;

(7) *Non-wetland* is;

(i) Land that under natural conditions does not meet wetland criteria, or

(ii) Is converted wetland the conversion of which occurred prior to December 23, 1985, and on that date, the land did not meet wetland criteria but an agricultural commodity was not produced and the area was not managed for pasture or hay;

(8) *Prior-converted cropland* is a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:

(i) Inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); and

(ii) If a pothole, playa or pocosion, ponding was less than 7 consecutive days during the growing season in most years (50 percent chance or more) and saturation was less than 14 consecutive days during the growing season most years (50 percent chance or more); or

(9) *Wetland*, as defined above in this section.

Wetland delineation means outlining the boundaries of a wetland determination on aerial photography,

digital imagery, other graphic representation of the area, or on the land.

(b) *Terms for FSA operations*. In the regulations in this part, and in all instructions, forms, and documents in connection therewith, all other words and phrases specifically relating to FSA operations shall, unless required by the subject matter or the specific provisions of this part, have the meanings assigned to them in the regulations at part 718 of this title that govern reconstitutions of farms, allotments, and bases and any subsequent amendment thereto.

§ 12.3 Applicability.

(a) *Geographic scope*. 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 Island of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Federated States of Micronesia, the Republic of Palau, and the Republic of the Marshall Islands.

(b) *Effective date*. The provisions of this part apply to all actions taken after July 3, 1996, and to determinations made after or pending on July 3, 1996, except to the extent that § 12.5(a)(5) and 12.5 (b)(4) through (b)(8) specify retroactive application on December 23, 1985, and November 28, 1990, for certain actions and determinations regarding wetlands and converted wetlands. Actions taken and determinations made prior to July 3, 1996, are subject to regulations set forth in this part as of July 2, 1996, except as otherwise provided in this part. Further, to the extent that a person may be eligible for an exemption for an action taken before July 3, 1996, the action is subject to the provisions of this part.

§ 12.4 Determination of ineligibility.

(a) *Actions*. Except as provided in § 12.5, a person shall be ineligible for all or a portion of USDA program benefits listed in this section if:

(1) The person produces an agricultural commodity on a field in which highly erodible land is predominant, or designates such a field for conservation use;

(2) The person produces an agricultural commodity on wetland that was converted after December 23, 1995; or

(3) After November 28, 1990, the person converts a wetland by draining, dredging, filling, leveling, removing woody vegetation, or other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible.

(b) *Highly erodible land.* A person determined to be ineligible under paragraph (a)(1) of this section may be ineligible for all program benefits listed in (d) and (e) of this section.

(c) *Wetland conservation.* A person determined to be ineligible under paragraph (a)(2) of this section shall be ineligible for all or a portion of the USDA program benefits listed in paragraph (d) of this section for which the person otherwise would have been eligible during the crop year of the commodity that was planted on the converted wetland. A person determined to be ineligible under paragraph (a)(3) of this section for the conversion of a wetland shall be ineligible for all or a portion of the USDA program benefits listed in paragraph (d) of this section for which the person otherwise would have been eligible during the crop year which is equal to the calendar year during which the violation occurred and each subsequent crop year until the converted wetland is restored or the loss of wetland functions and values have been mitigated prior to the beginning of such calendar year in accordance with § 12.5(b)(4)(i) (A) and (C) through (F) of this part. Ineligibility under paragraph (a)(2) or (a)(3) of this section may be reduced, in lieu of the loss of all benefits specified under paragraph (d) of this section for such crop year, based on the seriousness of the violation, as determined by the FSA Deputy Administrator for Farm Programs or designee upon recommendation by the FSA County Committee. Factors such as the information that was available to the affected person prior to the violation, previous land use patterns, the existence of previous wetland violations under this part or under other Federal, State, or local wetland provisions, the wetland functions and values affected, the recovery time for full mitigation of the wetland functions and values, and the impact that a reduction in payments would have on the person's ability to repay a USDA farm loan shall be considered to making this determination.

(d) *Programs subject to either highly erodible land or wetland conservation.* USDA program benefits covered by a determination of ineligibility under this rule are:

(1) Contract payments under a production flexibility contract, marketing assistance loans, and any type of price support or payment made available under the Agricultural Market Transition Act, the Commodity Credit Corporation Charter Act (15 U.S.C. 714 et seq.), or any other Act;

(2) A farm credit program loan made or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*) or any other provision of law administered by FSA if the Secretary determines that the proceeds of such loan will be used for a purpose that contributes to the conversion of wetlands that would make production of an agricultural commodity possible or for a purpose that contributes to excessive erosion of highly erodible land (*i.e.*, production of an agricultural commodity or highly erodible land without a conservation plan or conservation system as required by this part);

(3) A payment made pursuant to a contract entered into under the Environmental Quality Incentives Program under chapter 4 of subtitle D of the Food Security Act of 1985, as amended; or a payment under any other provision of Subtitle D of that Act;

(4) A payment made under section 401 or 402 of the Agricultural Credit Act of 1978 (16 U.S.C. 2201 or 2202);

(5) A payment, loan, or other assistance under section 3 or 8 of the Watershed Protection and Flood Prevention Act (16 U.S.C. 1003 or 1006a).

(e) *Programs subject to highly erodible land only.* In addition to programs listed in paragraph (d) of this section, a person determined to be ineligible under paragraph (a)(1) of this section shall be ineligible as determined by FSA for the following USDA program benefits for which the person otherwise would have been eligible during the crop year for which the determination applies:

(1) A farm storage facility loan made under section 4(h) of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b(h));

(2) A disaster payment made under the Federal Agricultural Improvement and Reform Act, Pub. L. 104-127, or any other act; and

(3) A payment made under section 4 or 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b or 714c) for the storage of an agricultural commodity acquired by the Commodity Credit Corporation.

(f) *Prior loans.* The provisions of paragraphs (a), (b), and (c) of this section do not apply to any loan described in paragraphs (d) or (e) of this section that was made prior to December 23, 1985.

(g) *Determination of ineligibility.* For the purpose of paragraph (a) of this section, a person shall be determined to have produced an agricultural commodity on a field in which highly erodible land is predominant or to have designated such a field for conservation

use, to have produced an agricultural commodity on converted wetland, or to have converted a wetland if:

(1) NRCS has determined that—

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

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

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

(3) With regard to the provisions of paragraph (a)(1) and (a)(2) of this section, FSA has determined that the land is or was planted to an agricultural commodity or was designated as conversation use during the year for which the person is requesting benefits.

(h) *Intent to participate in USDA programs.* Persons who wish to participate in any of the USDA programs described in paragraph (d) or (e) of this section are responsible for contacting the appropriate agency of USDA well in advance of the intended participated 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 conversation plans or conversation 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 Exemption.

(a) *Exemptions regarding highly erodible land.*

(1) *Highly erodible cropland in production or in USDA 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 NRCS to determine if such land is highly erodible, no person shall be determined to be ineligible for benefits as provided in § 12.4 as the result of the production of an agricultural commodity on any highly erodible land:

(i) That was planted to an agricultural commodity in any year 1081 through 1985; or

(ii) 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.

(2) *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 as the result of production of an agricultural commodity on highly erodible land or the designation of such land for conservation use if such production or designation is in compliance with a conservation plan or conservation system approved under paragraph (a)(2)(i) or (a)(2)(ii) of this section. A person shall not be ineligible for program benefits under § 12.4 as the result of the production of an agricultural commodity on highly erodible land or as the result of designation of such land as conservation use if the production or designation is:

(i) In an area within a CD, under a conservation system that has been approved by the CD after the CD determines that the conservation system is in conformity with technical standards set forth in the NRCS field office technical guide for such district; or

(ii) In an area not within a CD, under a conservation system that has been approved by NRCS to be adequate for the production of such agricultural commodity on highly erodible land or for the designation of such land as conservation use.

(3) *Reliance upon NRCS determination for highly erodible land.* A person may be relieved from ineligibility for program benefits as the result of the production of an agricultural commodity which was produced on highly erodible land or for the designation of such land as conservation use in reliance on a determination by NRCS that such land was not highly erodible land, except that this paragraph shall not apply to any agricultural commodity that was planted on highly erodible land, or for the designation of highly erodible land as conservation use after NRCS determines that such land is highly erodible land, and the person is notified of such determinations.

(4) *Areas of 2 acres or less.* No person shall be determined to be ineligible under § 12.4 for noncommercial production of agricultural commodities on highly erodible land on an area of 2 acres or less if it is determined by FSA that such production is not intended to circumvent the conservation requirements otherwise applicable under this part.

(5) *Good faith.*

(i) No person shall become ineligible under § 12.4 as a result of the failure of such person to apply a conservation system on highly erodible land that was

converted from native vegetation, i.e. rangeland or woodland, to crop production before December 23, 1985, if FSA determines such person has acted in good faith and without the intent to violate the provisions of this part and if NRCS determines that the person complies with paragraph (a)(5)(ii) of this section.

(ii) A person who is determined to meet the requirements of paragraph (a)(5)(i) of this section shall be allowed a reasonable period of time, as determined by NRCS, but not to exceed one year, during which to implement the measures and practices necessary to be considered applying the person's conservation plan. If a person does not take the required corrective actions, the person may be determined to be ineligible for the crop year during which such actions were to be taken as well as any subsequent crop years. Notwithstanding the good-faith requirements of paragraph (a)(5)(i) of this section, if NRCS observes a possible compliance deficiency while providing on-site technical assistance, NRCS shall provide to the responsible person, not later than 45 days after observing the possible violation, information regarding actions needed to comply with the plan and this subtitle. NRCS shall provide this information in lieu of reporting the observation as a violation, if the responsible person attempts to correct the deficiencies as soon as practicable, as determined by NRCS, after receiving the information, and if the person takes corrective action as directed by NRCS not later than one year after receiving the information. If a person does not take the required corrective actions, the person may be determined to be ineligible for the crop year during which the compliance deficiencies occurred as well as any subsequent crop years.

(iii) No person shall become ineligible under § 12.4 as a result of failure to apply a conservation system with respect to highly erodible cropland that was converted from native vegetation, i.e., rangeland or woodland, to crop production after December 23, 1985, if such person has acted in good faith and without an intent to violate the provisions of this part. The person shall, in lieu of the loss of all benefits specified under § 12.4 (d) and (e) for such crop year, be subject to a reduction in benefits of not less than \$500 nor more than \$5,000 depending upon the seriousness of the violation, as determined by FSA. The dollar amount of the reduction will be determined by FSA and may be based on the number of acres and the degree of erosion hazard for the area in violation, as

determined by NRCS, or upon such other factors as FSA deems appropriate.

(iv) Any person whose benefits are reduced in a crop year under paragraph (a)(5) of this section may be eligible for all of the benefits specified under § 12.4 (d) and (e) for any subsequent crop year if NRCS determines that such person is applying a conservation plan according to the schedule set forth in the plan on all highly erodible land planted to an agricultural commodity or designated as conservation use.

(6) *Allowable variances.*

(i) Notwithstanding any other provisions of this part, no person shall be determined to be ineligible for benefits as a result of the failure of such person to apply a conservation system if NRCS determines that—

(A) The failure is technical and minor in nature and that such violation has little effect on the erosion control purposes of the conservation plan applicable to the land on which the violation has occurred; or

(B) The failure is due to circumstances beyond the control of the person; or

(C) NRCS grants a temporary variance from the practices specified in the plan for the purpose of handling a specific problem, including weather, pest, and disease problems, which NRCS determines cannot reasonably be addressed except through such variance.

(ii) If the person's request for a temporary variance involves the use of practices or measures to address weather, pest, or disease problems, NRCS shall make a decision on whether to grant the variance during the 30-day period beginning on the date of receipt of the request. If NRCS fails to render a decision during the period, the temporary variance shall be considered granted unless the person seeking the variance had reason to know that the variance would not be granted. In determining whether to grant a variance for natural disasters such as weather, pest, or disease problems, NRCS will consider such factors as:

(A) The percent of a stand damaged or destroyed by the event;

(B) The percent of expected crop production compared to normal production for that crop;

(C) The documented invasion of non-native insects, weeds, or diseases for which no recognized treatment exists;

(D) Whether an event is severe or unusual based on historical weather records; and

(E) Other specific circumstances caused by a natural event that prevented the implementation of conservation practices or systems, installation of structures, or planting of cover crops.

(b) *Exemptions for wetlands and converted wetlands.*

(1) *General exemptions.* 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 converted wetland or the conversion of wetland if:

(i) The land is a prior-converted cropland and meets the definition of a prior-converted cropland as of the date of a wetland determination by NRCS;

(ii) The land has been determined by NRCS to be a prior-converted cropland and such determination has been certified, and NRCS determines that the wetland characteristics returned after the date of the wetland certification as a result of—

(A) The lack of maintenance of drainage, dikes, levees, or similar structures,

(B) The lack of management of the lands containing the wetland, or

(C) Circumstances beyond the control of the person;

(iii) The land was determined by NRCS to be a farmed wetland or a farmed-wetland pasture and—

(A) Such land meets wetland criteria through a voluntary restoration, enhancement, or creation action after that determination,

(B) The technical determinations regarding the baseline site conditions and the restoration, enhancement, or creation action have been adequately documented by NRCS,

(C) The proposed conversion action is documented by the NRCS prior to implementation, and

(D) The extent of the proposed conversion is limited so that the conditions will be at least equivalent to the wetland functions and values that existed at the time of implementation of the voluntary wetland restoration, enhancement, or creation action;

(iv) NRCS has determined that the conversion is for a purpose that does not make the production of an agricultural commodity possible, such as conversions for fish production, trees, vineyards, shrubs, cranberries, agricultural waste management structures, livestock ponds, fire control, or building and road construction and no agricultural commodity is produced on such land;

(v) NRCS has determined that the actions of the person with respect to the conversion of the wetland or the combined effect of the production of an agricultural commodity on a wetland converted by the person or by someone else, individually and in connection with all other similar actions authorized by NRCS in the area, would have only a minimal effect on the wetland

functions and values of wetlands in the area;

(vi) (A) After December 23, 1985, the Army Corps of Engineers issued an individual permit pursuant to section 404 of the Clean Water Act, 33 U.S.C. 1344, authorizing such action and the permit required mitigation that adequately replaced the functions and values of the wetlands converted, as determined by NRCS, or

(B) After December 23, 1985, the action is encompassed under section 404 of the Clean Water Act, 33 U.S.C. 1344, by an Army Corps of Engineers nationwide or regional general permit and the wetland functions and values were adequately mitigated, as determined by NRCS; or

(vii) The land is determined by NRCS to be—

(A) An artificial wetland,

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

(C) A nontidal drainage or irrigation ditch excavated in non-wetland, or

(D) A wetland 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 land is not permitted without loss of eligibility for USDA program benefits, unless NRCS determines under paragraph (b)(1)(v) of this section that further drainage activities applied to such land would have minimal effect on the wetland functions and values in the area. In applying this paragraph, a converted wetland 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 of this part.

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 wetland is converted due to the actions of the district or entity, the person shall be considered to have caused or permitted the drainage. Notwithstanding the provisions of the preceding sentences and as determined by FSA to be consistent with the purposes of this part, the activities of a drainage district or other similar entity will not be attributed to a person to the extent that

the activities of the district or entity were beyond the control of the person and the wetland converted is not used by the person for the production of an agricultural commodity or a forage crop for harvest by mechanical means or mitigation for the converted wetland occurs in accordance with this part.

(2) *Commenced conversion wetlands.*

(i) The purpose of a determination of a commenced conversion made under this paragraph is to implement the legislative intent that those persons who had actually started conversion of a wetland or obligated funds for conversion prior to December 23, 1985, would be allowed to complete the conversion so as to avoid unnecessary economic hardship.

(ii) All persons who believed they had a wetland or converted wetland for which conversion began but was not completed prior to December 23, 1985, must have requested by September 19, 1988, FSA to make a determination of commencement in order to be considered exempt under this section.

(iii) Any conversion activity considered by FSA to be commenced under this section lost its exempt status if such activity as not completed on or before January 1, 1995. For purposes of this part, land on which such conversion activities were completed by January 1, 1995, shall be evaluated by the same standards and qualify for the same exemptions as prior-converted croplands. For purposes of this part, land on which such conversion activities were not completed by January 1, 1995, shall be evaluated by the same standards and qualify for the same exemptions as wetlands or farmed wetlands, as applicable.

(iv) Only those wetlands for which the construction had begun, or to which the contract or purchased supplies and materials related, qualified for a determination of commencement. However, in those circumstances where the conversion of wetland did not meet the specific requirements of this paragraph, the person could have requested a commencement of conversion determination from the FSA Deputy Administrator for Farm Programs, upon a showing that undue economic hardship would have resulted because of substantial financial obligations incurred prior to December 23, 1985, for the primary and direct purpose of converting the wetland.

(3) *Wetlands farmed under natural conditions.* A person shall not be determined to be ineligible for program benefits under § 12.4 of this part as a result of the production of an agricultural commodity on a wetland on which the owner or operator of a farm

or ranch uses normal cropping or ranching practices to produce agricultural commodities in a manner that is consistent for the area, where such production is possible as a result of natural conditions, such as drought, and is without action by the producer that alters the hydrology or removes woody vegetation.

(4) *Mitigation.*

(i) No person shall be determined to be ineligible under § 12.4 for any action associated with the conversion of a wetland if the wetland functions and values are adequately mitigated, as determined by NRCS, through the restoration of a converted wetland, the enhancement of an existing wetland, or the creation of a new wetland, if the mitigation—

(A) Is in accordance with a mitigation plan approved by NRCS;

(B) Is in advance of, or concurrent with, the wetland conversion or the production of an agricultural commodity, as applicable;

(C) Is not at the expense of the federal government in either supporting the direct or indirect costs of the restoration activity or costs associated with acquiring or securing mitigation sites, except if conducted under a mitigation banking pilot program established by USDA;

(D) Occurs on lands in the same general area of the local watershed as the converted wetlands, provided that for purposes of this paragraph, lands in the same general area of the local watershed may include regional mitigation banks;

(E) Is on lands for which the owner has granted an easement to USDA, recorded the easement on public land records, and has agreed to the maintenance of the restored, created, or enhanced wetland for as long as the converted wetland for which the mitigation occurred remains in agricultural use or is not returned to its original wetland classification with equivalent functions and values; and

(F) Provides the equivalent functions and values that will be lost as a result of the wetland conversion.

(ii) A mitigation plan is a record of decisions that document the actions necessary to compensate for the loss of wetland functions and values that result from converting a wetland. The mitigation plan may be a component of a larger natural resources conservation plan.

(iii) The State Conservationist, in consultation with the State Technical Committee, may name certain types or classes of wetland not eligible for exemption under paragraph (b)(4)(i) of this section where the State

Conservationist determines that mitigation will not achieve equivalent replacement of wetland functions and values within a reasonable time frame or for other reasons identified by the State Conservationist. Any type or class of wetland that a State Conservationist identifies as not eligible for exemption under paragraph (b)(4)(i) of this section will be published in the Federal Register for inclusion in this part.

(5) *Good Faith Violations.*

(i) A person who is determined under § 12.4 to be ineligible for benefits as the result of the production of an agricultural commodity on a wetland converted after December 23, 1985, or as the result of the conversion of a wetland after November 28, 1990, may regain eligibility for benefits if—

(A) FSA determines that such person acted in good faith and without the intent to violate the wetland provisions of this part, and

(B) NRCS determines that the person within an agreed to period, not to exceed 1 year, is implementing all practices in a mitigation plan.

(ii) In determining whether a person acted in good faith under paragraph (b)(5)(i)(A) of this section, the FSA shall consider such factors as whether—

(A) The characteristics of the site were such that the person should have been aware that a wetland existed on the subject land,

(B) NRCS had informed the person about the existence of a wetland on the subject land,

(C) The person did not convert the wetland, but planted an agricultural commodity on converted wetland when the person should have known that a wetland previously existed on the subject land,

(D) The person has a record of violating the wetland provisions of this part or other Federal, State, or local wetland provisions, or

(E) There exists other information that demonstrates that the person acted with the intent to violate the wetland provisions of this part.

(iii) After the requirements of paragraph (b)(5)(i) of this section are met, USDA may waive applying the ineligibility provisions of § 12.4.

(6) *Reliance upon NRCS wetland determination.* (i) A person shall not be ineligible for program benefits as a result of taking an action in reliance on a previous certified wetland determination by NRCS.

(ii) A person who may be ineligible for program benefits as the result of the production of an agricultural commodity on converted wetland or for the conversion of a wetland may seek relief under § 12.11 of this part if such

action was taken in reliance on an incorrect technical determination by NRCS as to the status of such land. If the error caused the person to make a substantial financial investment, as determined by the NRCS, for the conversion of a wetland, the person may be relieved of ineligibility for actions related to that portion of the converted wetland for which the substantial financial investment was expended in conversion activities. The relief available under this paragraph shall not apply to situations in which the person knew or reasonably should have known that the determination was in error because the characteristics of the site were such that the person should have been aware that a wetland existed on the subject land, or for other reasons.

(7) *Responsibility to provide evidence.*

It is the responsibility of the person seeking an exemption related to converted wetlands under this section to provide evidence, such as receipts, crop-history data, drawings, plans or similar information, for purposes of determining whether the conversion or other action 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 USDA 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 FSA.*

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

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

(3) FSA shall make the following determinations 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 § 12.5(a)(1);

(ii) The establishment of field boundaries;

(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 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 § 12.4(g) and § 12.5(a)(1);

(v) 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;

(vi) Whether the conversion of a particular wetland was commenced before December 23, 1985, for the purposes of § 12.5(b)(3);

(vii) Whether the conversion of a wetland was caused by a third party under § 12.5(b)(1)(vii)(D);

(viii) Whether certain violations were made in good faith under §§ 12.5(a)(5) or 12.5(b)(5);

(ix) The determination of the amount of reduction in benefits based on the seriousness of the violation, based on technical information provided by NRCS;

(x) The determination of whether the application of the producer's conservation system would impose an undue economic hardship on the producer; and

(xi) Whether the proceeds of a farm loan made, insured, or guaranteed by FSA will be used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetland.

(4) A representative number of farms selected in accordance with instructions issued by the Deputy Administrator shall be inspected by an authorized representative of FSA to determine compliance with any requirement specified in this part as a prerequisite for obtaining program benefits.

(5) FSA may consult with U.S. Fish and Wildlife Service on third-party determinations.

(c) *Administratoin by NRCS.*

(1) The provisions of this part that are applicable to NRCS shall be administered under the general supervision of the Deputy Chief for Natural Resources Conservation Programs, and shall be carried out in the field by the regional conservationist, state conservationist, area conservationist, and district conservationist or other NRCS representative.

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

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

(ii) Whether highly erodible land is predominant on a particular field under § 12.22;

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

(A) The CD and NRCS, or

(B) By NRCS;

(iv) Whether the conservation system that a person is using has been approved by the CD under § 12.5(a)(2) or, in an area not within a CD, a conservation system approved by NRCS to be adequate for the production of an agricultural commodity on highly erodible land;

(v) Whether the actions of a person(s) with respect to the conversion of a wetland or production of an agricultural commodity on converted wetland would have only a minimal effect on the functions and values of wetlands in the area;

(vi) Whether an approved conservation plan is being applied on highly erodible fields in accordance with the schedule specified therein or whether a failure to apply the plan is technical and minor in nature, due to circumstances beyond the control of the person, or whether a temporary variance from the requirements of the plan should be granted;

(vii) Whether an approved conservation system is being used on a highly erodible field;

(viii) Whether the conversion of a wetland is for the purpose or has the effect of making the production of an agricultural commodity possible;

(ix) Whether a farmed wetland or farmed-wetland pasture is abandoned;

(x) Whether the planting of an agricultural commodity on a wetland is possible under natural conditions;

(xi) Whether maintenance of existing drainage of a wetland described in § 12.33 exceeds the scope and effect of the original drainage;

(xii) Whether a plan for the mitigation of a converted wetland will be approved and whether the mitigation of a converted wetland is accomplished according to the approved mitigation plan;

(xiii) Whether all technical information relating to the determination of a violation and severity of a violation has been provided

to FSA for making payment-reduction determinations; and

(xiv) Whether or not a commenced-conversion activity was completed by January 1, 1995.

(3) NRCS may 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 a wetland scope-and-effect 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.

(5) A determination of whether or not an area meets the highly erodible land criteria or whether wetland criteria, identified in accordance with the current Federal wetland delineation methodology in use at the time of the determination and that are consistent with current mapping conventions, may be made by the NRCS representative based upon existing records or other information and without the need for an on-site determination. This determination will be made by the NRCS representative as soon as possible following a request for such a determination.

(6) An on-site determination as to whether an area meets the applicable criteria shall be made by an NRCS representative if the person has disagreed with the determination made under paragraph (c)(5) of this section, or if adequate information is not otherwise available to an NRCS representative on which to make an off-site determination.

(7) An on-site determination, where applicable, will be made by the NRCS representative as soon as possible following a request for such a determination, but only when site conditions are favorable for the evaluation of soils, hydrology, or vegetation.

(8) 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.

(9) 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 NRCS.

(d) *Administration by CSREES.* The CSREES shall coordinate the related information and education program for

USDA concerning implementation of this rule.

(e) *Assistance of other Federal agencies.* If NRCS determines, through agreement or otherwise, that the purposes of this part would be furthered by the assistance of other Federal agencies with wetland responsibilities, NRCS may accept such assistance and adopt any or all such actions by these agencies as an action by an NRCS representative under this part.

§ 12.7 Certification of compliance.

(a) *Self-certification.* 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 USDA whether any field in which the person applying for the benefits has an interest and intends to produce an agricultural commodity contains highly erodible land;

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

(3) A person may certify application of practices required by the person's conservation plan. NRCS shall permit a person who makes such a certification with respect to a conservation plan to revise the conservation plan in any manner, if the same level of conservation treatment provided for by the conservation system under the person's conservation plan is maintained. NRCS may not revise the person's conservation plan without the concurrence of the person;

(4) The person applying for a FSA direct or guaranteed farm credit program 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 for the purpose, or to have the effect, of making the production of an agricultural commodity possible; and

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

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

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

§ 12.8 Affiliated persons.

(a) *Ineligibility of affiliated persons.* Ineligibility of an individual or entity under this part for benefits shall also be an ineligibility for benefits for "affiliated persons" as defined in this section.

(b) *Affiliated persons of an individual.* If the person requesting benefits is an individual, the affiliated persons are:

(1) The spouse and minor child of such person or guardian of such child; except that spouses who establish to the satisfaction of the COC that operations of the husband and wife are maintained separately and independently shall not be considered affiliates;

(2) Any partnership, joint venture, or other enterprise in which the person or any person listed in paragraphs (b)(1) has an ownership interest or financial interest; unless such interest is held indirectly through another business enterprise; or

(3) Any trust in which the individual, business enterprise, or any person listed in paragraph (b)(1) is a beneficiary or has a financial interest, unless such interest is held indirectly through another business enterprise.

(c) *Affiliated persons of an entity.* If the person who has requested benefits from USDA is a corporation, partnership, or other joint venture, the affiliated persons are any participant or stockholder therein of the corporation, partnership, or other joint venture, except for persons who have an indirect interest through another business enterprise in such corporation, partnership, or other joint venture or persons with a 20 percent or less share in a corporation.

(d) *Limitation.* Any reduction in payments which results only from the application of the affiliation provisions of this section to a partnership, joint venture, trust, or other enterprise shall be limited to the extent of interest held in such partnership, joint venture, trust, or other enterprise by the person or business enterprise that committed the violation. However, for violations for which the business enterprise is considered directly responsible under the provisions of this part, the business enterprise shall be subject to a full loss

of benefits, including those instances in which the business enterprise has an interest in the land where the violation occurred or where the business enterprise had an interest in the crops produced on the land.

(e) *Avoidance of this part.* Limitations on affiliation shall not apply as needed to correct for any action that would otherwise tend to defeat the purposes of this part.

§ 12.9 Landlords and tenants.

(a) *Landlord eligibility.*

(1) Except as provided in paragraph (a)(2) 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 USDA program benefits accruing with respect to land other than those in which the tenant or sharecropper has an interest.

(2) The provisions of paragraph (a)(1) 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.

(b) *Tenant or renter eligibility.*

(1) The ineligibility of a tenant or renter may be limited to the program benefits listed in § 12.4(c) accruing with respect to only the farm on which the violation occurred if:

(i) The tenant or renter shows that a good-faith effort was made to comply by developing an approved conservation plan for the highly erodible land in a timely manner and prior to any violation of the provisions of this part; and

(ii) The owner of such farm refuses to apply such a plan and prevents the tenant or renter from implementing certain practices that are a part of the approved conservation plan; and

(iii) FSA determines that the lack of compliance is not a part of a scheme or device as described in § 12.10.

(2) If relief is granted under paragraph (b)(1) of this section, the tenant or renter must actively apply those conservation treatment measures that are determined to be within the control of the tenant or renter.

§ 12.10 Scheme or device.

All or any part of the benefits listed in § 12.4 otherwise due a person from USDA 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 USDA any information having a bearing on the application of the provisions of this part or submitting false information to USDA 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.

§ 12.11 Action based upon advice or action of USDA.

The provisions of part 718 of this Title, as amended, relating to performance based upon the action or advice of a County Committee (COC) or State FSA Committee shall be applicable to the provisions of this part. In addition, if it is determined by the appropriate USDA agency that the action of a person which would form the basis of any ineligibility under this part was taken by such person in good-faith reliance on erroneous advice, information, or action of any other authorized representative of USDA, the appropriate agency may make such benefits available to the extent that similar relief would be allowed under 7 CFR part 718.

§ 12.12 Appeals.

Any person who has been or who 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 appeals procedures of the agency which rendered such determination. Agency appeal procedures are contained in the Code of Federal Regulations as follows: FSA, part 780 of this title; NRCS, part 614 of this title; Rural Utilities Service, part 1900, subpart B of this title.

Subpart B—Highly Erodible Land Conservation

§ 12.20 NRCS responsibilities regarding highly erodible land.

In implementing the provisions of this part, NRCS 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 FSA committees, for the purposes of this part.

§ 12.21 Identification of highly erodible lands criteria.

(A) *Basis for identification as highly erodible.* 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. The equation for measuring erosion is described below.

(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 NRCS field office technical guide and the references which are a part of the guide. The Universal Soil Loss Equation, the Revised Universal Soil Loss Equation, and the Wind Erosion Equation and the rules under which NRCS uses the equations are published at §§ 610.11 through 610.15 of this title.

(b) *Highly erodible.* A soil map unit 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) *Potentially highly erodible.* 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) *Predominance.* 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) *Modification of field boundaries.* 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, FSA. FSA shall use the technical determination of NRCS in approving this request.

(c) *Impact of changing field boundaries.* When field boundaries are changed to include areas of land that were included in a field that was previously determined to be predominately highly erodible according to paragraph (a) of this section, such areas shall continue to be subject to the requirements for predominately highly erodible fields, except as provided in paragraph (b) of this section.

(d) *Small area of noncropland.* 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(a)(2) if they are included in an approved conservation plan for the entire highly erodible field.

§ 12.23 Conservation plans and conservation systems.

(a) *Use of field office technical guide.* A conservation plan or conservation system developed for the purposes of § 12.5(a) must be based on, and to the extent practicable conform with, the NRCS field office technical guide in use at the time the plan is developed or revised. For highly erodible croplands which were used to produce agricultural commodities prior to December 23, 1985, the applicable conservation systems in the field office technical guide are designed to achieve substantial reductions in soil erosion. Conservation systems shall be

technically and economically feasible; based on local resource conditions and available conservation technology; cost-effective; and shall not cause undue economic hardship on the person applying the conservation system. Any conservation plans or systems that were approved prior to July 3, 1996, are deemed to be in compliance with this paragraph.

(b) *Substantial reduction in soil erosion.* For the purpose of determining whether there is a substantial reduction in soil erosion on a field containing highly erodible cropland which was used to produce an agricultural commodity prior to December 23, 1985, the measurement of erosion reduction achieved by applying a conservation plan or system shall be based on a comparison of the estimated annual level of erosion that is expected to occur on that portion of the field for which a conservation plan or system was developed and is being applied, to the estimated annual level of erosion that existed on that same portion of the field before the application of a conservation plan or system. On a field that is converted from native vegetation after July 3, 1996, and where any crop production will result in increased erosion, in no case will the required conservation plan or system permit a substantial increase in erosion.

(c) *Field trials.* NRCS may allow a person to include in the person's conservation plan or a conservation system under the plan, on a field-trial basis, practices that are not currently approved but that NRCS considers have a reasonable likelihood of success. These trials must have prior approval by NRCS, and must be documented in the person's conservation plan specifying the limited time period during which the field trial is in effect. If, at the end of the conservation field trial period, NRCS finds that the practice does not meet conservation compliance requirements, the person will not be ineligible for USDA program benefits during the period of the field trial.

(d) *Highly erodible land previously under a Conservation Reserve Program contract.* Any person who owns or operates highly erodible land that was under a Conservation Reserve Program contract as authorized by section 1231 of the Food Security Act of 1985, as amended, shall have 2 years after the expiration of termination of the contract to fully apply a conservation system if the conservation plan for such land requires the installation of structural measures for the production of an agricultural commodity. NRCS officials may extend this period one additional year for circumstances beyond the

control of the person. The person shall not be required to meet a higher conservation standard than the standard applied to other highly erodible cropland located within the area served by the field office technical guide for the area in which the field is located.

(e) *Information regarding conservation options.* NRCS, in providing assistance to a person for the preparation or revision of a conservation plan under this part, will provide such person with information concerning cost-effective and applicable erosion control alternatives, crop flexibility, or other conservation assistance options that may be available.

(f) *Timely request for assistance.* Persons who require NRCS 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.

(g) *Action by conservation districts.* Conservation districts approve or disapprove conservation plans or conservation systems after NRCS determines that the plans or systems conform to the NRCS 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, NRCS will approve or disapprove, as appropriate, the conservation plan or system in question.

(h) *Application of a conservation plan or system.* A person is considered to be applying a conservation plan for purposes of § 12.5(a) if the conservation system or plan being applied achieves or exceeds the substantial reduction in soil erosion as described in paragraph (b) which the conservation system or plan was designed to achieve. It is the responsibility of the person to:

(1) Certify that the conservation plan or system is being applied; and

(2) Arrange for a revision of the conservation plan with NRCS, if changes are made in land use, crop rotation or management, conservation practices, or in the original schedule of practice installation that would affect the achievement of substantial reduction in soil erosion in a given crop year.

(i) *Appeal to FSA.* 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 FSA under § 12.12.

(j) *Undue economic hardship.* After a technical determination has been made, the FSA county committee shall, if a person asserts that the application of the person's conservation system would impose an undue economic hardship on the person, make a recommendation to the State FSA Committee as to whether or not the application of the conservation system would impose an undue economic hardship. The State FSA Committee may provide the person with a variance on the basis of the hardship. Under this variance, and any conditions that may be required in the variance, the person will be considered to be in compliance with the applicable provisions of this part. The State FSA Committee will consider relevant factors, such as the cost of installation of required conservation practices and benefits earned through programs subject to compliance with this part, and the person's general economic situation.

Subpart C—Wetland Conservation

§ 12.30 NRCS responsibilities regarding wetlands.

(a) *Technical and coordination responsibilities.* In carrying out the provisions of this part, NRCS shall:

(1) Oversee the development and application of criteria to identify hydric soils in consultation with the National Technical Committee for Hydric Soils and make available to the public an approved county list of hydric soil map units, which is based upon the National List of Hydric Soils;

(2) Coordinate with the U.S. Fish and Wildlife Service and others in updating the National List of Plant Species that Occur in Wetlands;

(3) Make or approve wetland determinations, delineations and certifications, functional assessments, mitigation plans, categorical minimal effects, and other technical determinations relative to the implementation of the wetland conservation provisions of this part;

(4) Develop and utilize off-site and on-site wetland identification procedures;

(5) Assure quality of service and determinations through procedures developed by NRCS in consultation with other Federal agencies that have wetland responsibilities;

(6) Investigate complaints and make technical determinations regarding potential violations;

(7) Develop a process at the state level, in coordination with the U.S. Fish and Wildlife Service, to ensure that these provisions are carried out in a technically defensible and timely

manner, seek assistance as appropriate, and annually review the progress being made on implementation; and

(8) Conduct reviews of implementation and provide the Army Corps of Engineers, Environmental Protection Agency, and the U.S. Fish and Wildlife Service an opportunity to participate in this review.

(b) *Technical assistance from others*
In carrying out the provisions of this part, NRCS may request technical assistance from the U.S. Fish and Wildlife Service, State or local agencies conservation districts, or qualified private entities when NRCS determines that additional staff resources or technical expertise are needed to address adequately the requirements of this part or to enhance the quality of implementation of this part.

(c) *Certification of wetland determinations and wetland delineations.*

(1) Certification of a wetland determination means that the wetland determination is of sufficient quality to make a determination of ineligibility for program benefits under § 12.4 of this part. Certification of a wetland determination shall be completed according to delineation procedures agreed to by the Army Corps of Engineers, the Environmental Protection Agency, the U.S. Fish and Wildlife Service and NRCS. NRCS may certify a wetland determination without making a field investigation. NRCS will notify the person affected by the certification and provide an opportunity to appeal the certification prior to the certification becoming final. All wetland determinations made after July 3, 1996, will be done on a tract basis and will be considered certified wetland determinations. A not-inventoried designation within a certified wetland is subject to change when the soil, hydrology, and vegetation evaluation is completed and identified as to type of wetland or as a non-wetland. This change from a not-inventoried designation to an approved wetland designation will be done at the request of the landowner or during a formal investigation of a potential violation.

(2) The wetland determination and wetland delineation shall be certified as final by the NRCS official 30 days after providing the person notice of certification or, if an appeal is filed with USDA, after the administrative appeal procedures are exhausted.

(3) In the case of an appeal, NRCS will review and certify the accuracy of the determination of all lands subject to the appeal to ensure that the subject lands have been accurately delineated. Prior to a decision being rendered on the

appeal, NRCS will conduct an on-site investigation of the subject land.

(4) Before any benefits are withheld, an on-site investigation of a potential wetland violation will be made by NRCS. The affected person will be provided an opportunity to appeal the on-site determination to USDA if the on-site determination differs from the original determination. Such action by NRCS shall be considered a review of the prior determination and certification of the delineation. If the prior determination was a certified wetland determination, an appeal of the NRCS on-site determination shall be limited to the determination that the wetland was converted in violation of this part.

(5) A copy of the information from the final certified wetland determination and the wetland delineation shall be recorded on official USDA aerial photography, digital imagery, or other graphic representation of the area.

(6) As long as the affected person is in compliance with the wetland conservation provision of this part, and as long as the area is devoted to the use and management of the land for production of food, fiber, horticultural crops, a certification made under this section will remain valid and in effect until such time as the person affected by the certification requests review of the certification by NRCS. A person may request review of a certification only if a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions, or if NRCS concurs with an affected person that an error exists in the current wetland determination

§ 12.31 On-site wetland identification criteria.

(a) *Hydric soils.*

(1) NRCS shall identify hydric soils through the use of published soil maps which reflect soil surveys completed by NRCS or through the use of on-site reviews. If a published soil map is unavailable for a given area, NRCS 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) NRCS 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 NRCS at 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, 800 North Capitol Street NW., Suite 700, 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 NRCS 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 and Wildlife Service at National Wetland Inventory, Monroe Bldg. Suite 101, 9720 Executive Center Drive, St. Petersburg, Florida 33702.

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

(i) NRCS determines through the criteria 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, NRCS will determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions.

(3) The determination of prevalence of hydrophytic vegetation will be made in accordance with the current Federal wetland delineation methodology in use by NRCS at the time of the determination.

(c) *Mitigation wetlands.*

Notwithstanding the provisions 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(b)(1)(vii)(A) of this part.

(d) *Minimal effect determination.* For the purposes of § 12.5(b)(1)(v) of this part, NRCS shall determine whether the effect of any action of a person associated with the conversion of a wetland, the conversion of wetland and the production of an agricultural commodity on converted wetland, or the combined effect of the production of an agricultural commodity on a wetland converted by someone else has a minimal effect on the functions and values of wetlands in the area. Such determination shall be based upon a functional assessment of functions and values of the wetland under consideration and other related wetlands in the area, 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 NRCS 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 NRCS is exempt under § 12.5(b)(1)(v) of this part. However, any additional action of a person that will change the functions and values of a wetland for which a minimal-effect determination has been made shall be reported to NRCS 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 certain program benefits. In situations where the wetland functions and values are replaced by the restoration, enhancement or creation of a wetland in accordance with a mitigation plan approved by NRCS, the exemption provided by the determination will be effective after NRCS determines that all practices in a mitigation plan are being implemented.

(e) *Categorical Minimal Effect Exemptions.*

(1) The state conservationist, in consultation with the state technical committee established under 16 U.S.C. 3861, shall identify any categories of conversion activities and conditions which are routinely determined by NRCS to have minimal effect on wetland functions and values, as described in paragraph (d) of this section, and recommend to the Chief, NRCS, or a designee, inclusion on a list of categorical minimal effect exemptions.

(2) The Chief, or designee, shall evaluate the conversion practices recommended by the state conservationists in the region to ensure consistency across State and regional lines, and to determine whether any categories of conversion activities identified pursuant to paragraph (e)(1) of this section, if such activities were exempt from the ineligibility provisions of § 12.4, would only have a minimal effect on wetland functions and values in a wetland system within the region.

(3) Any categories of conversion activities which meet the criteria of paragraph (e)(2) of this section will be published in the Federal register for inclusion in this part and shall be exempt under § 12.5(b)(1)(v) of this part.

(4) The NRCS local field office shall maintain a list of any activities and conditions which are determined by the Chief, or designee, exempt pursuant to this section and will provide the list to a person upon request.

§ 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. 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 effect of the

drainage or other altering activity is not clearly discernible, NRCS 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 for the purpose of or permitting the production of an agricultural commodity, the area will be considered 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 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 return following cessation of the natural condition which made production of the agricultural commodity possible; or

(2) Such land is correctly identified as farmed wetland or farmed-wetland pasture.

§ 12.33 Use of wetland and converted wetland.

(a) The provisions of § 12.32(b)(2) are intended to protect remaining functions and 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 NRCS determines the effect on losing remaining wetland values would be minimal under § 12.5(b)(1)(v). If, after December 23, 1985, changes due to human activity occurred in the watershed and resulted in an increase in the water regime on a person's land, the person may be allowed to adjust the existing drainage system to accommodate the increased water regime on the condition that the person affected by this additional water provides NRCS with appropriate documentation of the increased water regime, the causes thereof, and the

planned changes in the existing drainage system. In order to maintain program eligibility, a person must provide sufficient documentation and receive approval from NRCS prior to making any changes that will have the effect of increasing the capacity of the existing drainage systems.

(b) Unless otherwise provided in this part, the production of an agricultural commodity on land determined by NRCS to be prior-converted cropland is exempted by law from these regulations for the area which was converted. Maintenance or improvement of drainage systems on prior-converted croplands are not subject to this rule so long as the prior-converted croplands are used for the production of food, forage, or fiber and as long as such actions do not alter the hydrology of nearby wetlands or do not make possible the production of an agricultural commodity on these other wetlands. Other wetlands under this section means any natural wetland, farmed wetland, farmed-wetland pasture, or any converted wetland that is not exempt under § 12.5 of this part.

(c) Abandonment is the cessation for five consecutive years of management or maintenance operations related to the use of a farmed wetland or a farmed-wetland pasture. Unless the criteria for receiving an exemption under § 12.5(b)(1)(iii) are met, such land is considered to be abandoned when the land meets the wetland criteria of § 12.31. In order for documentation of site conditions to be considered adequate under § 12.5(b)(1)(iii), the affected person must provide to NRCS available information concerning the extent of hydrological manipulation, the extent of woody vegetation, and the history of use. In accordance with § 12.5(b)(1)(iii), participation in a USDA approved wetland restoration, set-aside, diverted acres, or similar programs shall not be deemed to constitute abandonment.

(d) The maintenance of the drainage capacity or any alteration or manipulation, including the maintenance of a natural waterway operated and maintained as a drainage outlet, that affects the circulation and flow of water made to a farmed wetland or farmed-wetland pasture would not cause a person to be determined to be ineligible under this part, provided that the maintenance does not exceed the scope and effect of the original alteration or manipulation, as determined by NRCS, and provided that the area is not abandoned. Any resultant conversion of wetlands is to be at the minimum extent practicable, as determined by NRCS.

§ 12.34 Paperwork Reduction Act assigned number.

The information collection requirements contained in this regulation (7 CFR part 12) have been approved by the Office of Management and Budget under provisions of 44 U.S.C. chapter 35 and have been assigned OMB Number 0560-0004.

Signed at Washington, D.C. on August 23, 1996.

Dan Glickman,

Secretary.

[FR Doc. 96-22784 Filed 9-5-96; 8:45 am]

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Agricultural Marketing Service

7 CFR Part 1075

[DA-96-12]

Milk in the Black Hills, South Dakota, Marketing Area; Termination of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule; termination order.

SUMMARY: This document terminates all but certain administrative sections of the order regulating the handling of milk in the Black Hills, South Dakota, marketing area. Termination of this order was requested by Black Hills Milk Producers, a cooperative association that represents all of the producers whose milk is pooled under the order. Thus, termination of the order is required under the Agricultural Marketing Agreement Act of 1937, as amended.

EFFECTIVE DATE: October 1, 1996.

FOR FURTHER INFORMATION CONTACT: Clifford M. Carman, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 720-9368.

SUPPLEMENTARY INFORMATION: The Department is issuing this rule in conformance with Executive Order 12866.

This termination order has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect. This rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), provides that administrative proceedings must be exhausted before parties may file suit in

court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law and requesting a modification of an order or to be exempted from the order. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the District Court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

This order of termination is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and of the order regulating the handling of milk in the Black Hills, South Dakota, marketing area.

Small Business Consideration

During June 1996, the representative period determined for this action, 58 producers (all members of the Black Hills Milk Producers cooperative association) had their milk pooled under the Black Hills order. The Small Business Administration (SBA) criterion of \$500,000 in annual receipts, adjusted to reflect the information for one month (\$500,000 divided by 12, divided by the 1995 average order blend price of \$13.95 per hundredweight) was used to determine that dairy farmers marketing less than 300,000 pounds of milk meet the description of a small dairy farm. On the basis of the pounds of milk marketed during the representative period, 54 of the 58 dairy farmers would be small businesses. Of these, 27 marketed less than 100,000 pounds during June, 20 marketed between 100,000 and 200,000 pounds, and 7 marketed between 200,000 and 300,000 pounds.

In addition to the cooperative, there is one other milk handler regulated under the Black Hills order in South Dakota. Under SBA criterion, this handler would be considered a small business. Consequently, nearly all of the parties affected by the Black Hills milk order would be classified as small entities.

The current reporting, recordkeeping and other compliance requirements of the rule would cease with termination of the order. None of the currently-affected entities would be subject to any additional reporting or recordkeeping requirements for purposes of the Federal milk order program as a result of the