

United States Department of Agriculture  Natural Resources Conservation Service  Conservation and Ecosystem Assistance Division	<b>NATIONAL FOOD SECURITY ACT MANUAL          3RD EDITION</b>  <b>PART 527 - Appendix</b>  <b>TABLE OF CONTENTS</b>
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527.1	The Food Security Act of 1985, As Amended, Compiled through 2004	<a href="#"><u>527-1</u></a>
527.2	Wetland Mitigation Plan Development	<a href="#"><u>527-107</u></a>
527.3	Appeal Rule, 7 CFR 614	<a href="#"><u>527-119</u></a>
527.4	Wetland Criteria/Indicators/Procedures	<a href="#"><u>527-179</u></a>
527.5	Highly Erodible Land Conservation and Wetland Conservation Rule, 7 CFR 12	<a href="#"><u>527-193</u></a>
527.6	Functional Assessment Using the Hydrogeomorphic Approach	<a href="#"><u>527-243</u></a>
527.6.1	Guidance for Minimal Effects Determinations Prior to Implementation of Hydrogeomorphic Approach for the Functional Assessment of Wetlands	<a href="#"><u>527-249</u></a>
527.7	Memorandum of Understanding between ASCS and SCS	<a href="#"><u>527-261</u></a>
527.8	Memorandum of Understanding between SCS, ASCS, FWS, and FmHA	<a href="#"><u>527-266</u></a>
527.9	Memorandum of Understanding between FmHA, SCS, and ASCS	<a href="#"><u>527-269</u></a>
527.10	National Bulletin – ADS – Extension FSA Cooperative Agreement	<a href="#"><u>527-274</u></a>
527.11	Memorandum of Understanding between Extension Service and SCS	<a href="#"><u>527-276</u></a>
527.12	Memorandum of Agreement among EPA, USDA, USDI, and DOD	<a href="#"><u>527-284</u></a>
527.13	Crop Residue Measurement Requirement (REMOVED)	
527.14	MWI Regional Coordinator List	527-297
527.15	Technical Assistance, Soil Loss Equations, 7 CFR 610, Subpart B	<a href="#"><u>527-299</u></a>

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**527.1 Food Security Act of 1985, as Amended through 2004**

**FOOD SECURITY ACT OF 1985**<sup>1-1</sup>

[As Amended Through Public Law 108-498, Dec. 23, 2004]

TITLE XII—CONSERVATION

SUBTITLE A—DEFINITIONS

DEFINITIONS

SEC. 1201.<sup>1201-1</sup> **[16 U.S.C. 3801]** (a) For purposes of subtitles A through E:

(1) The term “agricultural commodity” means—

(A) any agricultural commodity planted and produced in a State by annual tilling of the soil, including tilling by one-trip planters; or

(B) sugarcane planted and produced in a State.

(2)<sup>1201-1</sup> CONSERVATION PLAN.—The term “conservation plan” means the document that—

(A) applies to highly erodible cropland;

(B) 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 schedule; and

(C) 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 Secretary, or by the Secretary.

(3)<sup>1201-1</sup> CONSERVATION SYSTEM.—The term “conservation system” means a combination of 1 or more conservation measures or management practices that—

(A) are based on local resource conditions, available conservation technology, and the standards and guidelines contained in the Natural Resources Conservation Service field office technical guides; and

(B) are designed 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.

(4) The term “conservation district” means any district or unit of State or local government formed under State or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a “conservation district”, “soil conservation district”, “soil and water conservation district”, “resource conservation district”, “natural resource district”, “land conservation committee”, or a similar name.

<sup>1-1</sup> P.L. 99-198, 99 Stat. 1504, Dec. 23, 1985.

<sup>1201-1</sup> Sec. 301(a) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 980, April 4, 1996, amended this section by redesignating former paragraphs (2) through (16) as paragraphs (4) through (18), respectively, and by inserting new paragraphs (2) and (3).

(5) The term “cost sharing payment” means a payment made by the Secretary to an owner or operator of a farm or ranch containing highly erodible cropland under the provisions of section 1234 (b) of this Act.

(6)(A) The term “converted wetland” means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if—

(i) such production would not have been possible but for such action; and

(ii) before such action—

(I) such land was wetland; and

(II) such land was neither highly erodible land nor highly erodible cropland.

(B) Wetland shall not be considered converted wetland if production of an agricultural commodity on such land during a crop year—

(i) is possible as a result of a natural condition, such as drought; and

(ii) is not assisted by an action of the producer that destroys natural wetland characteristics.

(7) <sup>1201-2</sup> FIELD.—The term “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 that is not exempt under section 1212, shall be considered as part of the field in which the land was included on December 23, 1985, unless the owner and Secretary agree to modification of the boundaries of the field to carry out this title.

(8) The term “highly erodible cropland” means highly erodible land that is in cropland use, as determined by the Secretary.

(9)(A) The term “highly erodible land” means land—

(i) that is classified by the Soil Conservation Service as class IV, VI, VII, or VIII land under the land capability classification system in effect on the date of the enactment of this Act; or

(ii) that has, or that if used to produce an agricultural commodity, would have an excessive average annual rate of erosion in relation to the soil loss tolerance level, as established by the Secretary, and as determined by the Secretary through application of factors from the universal soil loss equation and the wind erosion equation, including factors for climate, soil erodibility, and field slope.

(B) For purposes of this paragraph, the land capability class or rate of erosion for a field shall be that determined by

<sup>1201-2</sup>Sec. 301(b) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 980, April 4, 1996, amended this paragraph in its entirety. For the previous version of this paragraph, see p. 5-1 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

the Secretary to be the predominant class or rate of erosion under regulations issued by the Secretary.

(C)<sup>1201-3</sup> EQUATIONS.—Not later than 60 days after the date of enactment of this subparagraph, the Secretary shall publish in the Federal Register the universal soil loss equation and wind erosion equation used by the Department of Agriculture as of that date. The Secretary may not change the equations after that date except following notice and comment in a manner consistent with section 553 of title 5, United States Code.

(10) The term “hydric soil” means soil that, in its undrained condition, is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation.

(11) The term “hydrophytic vegetation” means a plant growing in—

(A) water; or

(B) a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(12) The term “in-kind commodities” means commodities that are normally produced on land that is the subject of an agreement entered into under subtitle D.

(13) The term “rental payment” means a payment made by the Secretary to an owner or operator of a farm or ranch containing highly erodible cropland to compensate the owner or operator for retiring such land from crop production and placing such land in the conservation reserve in accordance with subtitle D.

(14) The term “Secretary” means the Secretary of Agriculture.

(15) The term “shelterbelt” means a vegetative barrier with a linear configuration composed of trees, shrubs, and other approved perennial vegetation.

(16) The term “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.

(17) The term “vegetative cover” means—

(A) perennial grasses, legumes, forbs, or shrubs with an expected life span of 5 or more years; or

(B) trees.

(18)<sup>1201-4</sup> The term “wetland”, except when such term is part of the term “converted wetland”, means land that—

(A) has a predominance of hydric soils;

(B) 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

<sup>1201-3</sup> Sec. 301(c) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 981, April 4, 1996, added this subparagraph.

<sup>1201-4</sup> The last sentence was added by the Urgent Supplemental Appropriation Act, 1986, P.L. 99-349, 100 Stat. 714, July 8, 1986. Sec. 1421(a) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3572, Nov. 28, 1990, revised the first sentence in its entirety.

(C) under normal circumstances does support a prevalence of such vegetation. For purposes of this Act, and any other Act, this term shall not include lands in Alaska identified as having high potential for agricultural development which have a predominance of permafrost soils.<sup>1201-5</sup>

(b) The Secretary shall develop—

- (1) criteria for the identification of hydric soils and hydrophytic vegetation; and
- (2) lists of such soils and such vegetation.

SUBTITLE B—HIGHLY ERODIBLE LAND CONSERVATION

**SEC. 1211. [16 U.S.C. 3811] PROGRAM INELIGIBILITY.**<sup>1211-1</sup>

(a) IN GENERAL.—Except as provided in section 1212, and notwithstanding any other provision of law,<sup>1211-2</sup> any person who in any crop year produces an agricultural commodity on a field on which highly erodible land is predominate, or designates land on which highly erodible land is predominate to be set aside, diverted, devoted to conservation uses, or otherwise not cultivated under a program administered by the Secretary to reduce production of an agricultural commodity, as determined by the Secretary shall be ineligible for—<sup>1211-3</sup>

(1)<sup>1211-4</sup> as to any commodity produced during that crop year by such person—

(A)<sup>1211-5</sup> 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;

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

(C)<sup>1211-6</sup> a disaster payment; or

(D)<sup>1211-7</sup> a loan made, insured, or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) or any other provision of law adminis-

<sup>1201-5</sup>The last sentence was added by the Urgent Supplemental Appropriation Act, 1986, P.L. 99-349, 100 Stat. 714, July 8, 1986.

<sup>1211-1</sup>Sec. 2002(a)(1) of the Farm Security and Rural Investment Act of 2002, P.L. 107-171, 116 Stat. 233, May 13, 2002, amended this sec. by striking the section heading and all that follows through “Except as provided in” and inserting the sec. heading and all that follows through “Except as provided in”.

<sup>1211-2</sup>Sec. 311(1) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-982, 110 Stat. 1004, April 4, 1996, amended this section by striking “following the date of enactment of this Act,”.

<sup>1211-3</sup>Sec. 1411(1) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3569, Nov. 28, 1990, revised the first sentence by adding the phrase “, or designates” through “determine by the Secretary”.

<sup>1211-4</sup>Sec. 311(2) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this paragraph by striking former subparagraph (C) and by redesignating subparagraphs (D) and (E) as subparagraphs (C) and (D), respectively. For the previous version of this paragraph, see pp. 5-3 and 5-4 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1211-5</sup>Sec. 311(2)(A) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended subparagraph (A) in its entirety.

<sup>1211-6</sup>Sec. 311(2)(C) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this subparagraph by striking “made under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.), under section 132 of the Disaster Assistance Act of 1989 (7 U.S.C. 1421 note), or under any similar provision enacted subsequent to August 14, 1989”.

<sup>1211-7</sup>Sec. 1411(4) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3569, Nov. 28, 1990, deleted “or” after the semicolon.

tered by the Consolidated Farm Service Agency,<sup>1211-8</sup> if the Secretary determines that the proceeds of such loan will be used for a purpose that will contribute to excessive erosion of highly erodible land;

(2)<sup>1211-9</sup> a payment made under section 4 or 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b or 714c) during such crop year for the storage of an agricultural commodity acquired by the Commodity Credit Corporation; or

(3)<sup>1211-10</sup> during the crop year—

(A) a payment made pursuant to a contract entered into under the environmental quality incentives program under chapter 4 of subtitle D;

(B) a payment under any other provision of subtitle D;

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

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

(b)<sup>1211-11</sup> **HIGHLY ERODIBLE LAND.**—The Secretary shall have, and shall not delegate to any private person or entity, authority to determine whether a person has complied with this subtitle.

#### EXEMPTIONS

SEC. 1212. [16 U.S.C. 3812] (a)<sup>1212-1</sup>(1) During the period beginning on the date of the enactment of this Act and ending on the later of January 1, 1990, or the date that is 2 years after the date land on which a crop of an agricultural commodity is produced was mapped by the Soil Conservation Service for purposes of classifying such land under the land capability classification system in effect on the date of enactment of this Act, except as provided in paragraph (2), no person shall become ineligible under section 1211 for program loans, payments, and benefits as the result of the production of a crop of an agricultural commodity on any land that was—

(A) cultivated to produce any of the 1981 through 1985 crops of an agricultural commodity; or

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

(2) If, as of January 1, 1990, or 2 years after the Soil Conservation Service has completed a soil survey for the farm, whichever is later, a person is actively applying a conservation plan,<sup>1212-2</sup> such person shall have until January 1, 1995, to comply with the plan

<sup>1211-8</sup>Sec. 311(2)(D) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this subparagraph by striking “Farmers Home Administration” and inserting “Consolidated Farm Service Agency”.

<sup>1211-9</sup>Sec. 1411(4) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3569, Nov. 28, 1990, deleted the period and inserted “; or”.

<sup>1211-10</sup>Sec. 311(3) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this paragraph in its entirety. For the previous version of this paragraph, see p. 5-4 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1211-11</sup>Subsec. (b) added by sec. 2002(a)(2) of the Farm Security and Rural Investment Act of 2002, P.L. 107-171, 116 Stat. 233.

<sup>1212-1</sup>Sec. 1412(a) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3569, Nov. 28, 1990, added paragraphs (3) and (4).

<sup>1212-2</sup>Sec. 301(d)(1) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 981, April 4, 1996, amended this paragraph by striking “that documents” and all that follows through “by the Secretary”. For the previous version of this paragraph, see pp. 5-4 and 5-5 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).



without being subject to program ineligibility. In carrying out this subsection, the Secretary, Soil Conservation Service, and local soil conservation districts shall minimize the quantity of documentation a person must submit to comply with this paragraph.

(3) Any person who owns or operates highly erodible land that was the subject of a contract entered into under subchapter B of chapter 1 of subtitle D shall only be required to apply a conservation plan established under this subtitle. The person shall not be required to meet a higher conservation standard than the standard applied to other highly erodible cropland located within the same area. If the person's conservation plan requires structures to be constructed, the person shall<sup>1212-3</sup> have until 2 years after the expiration of such contract to comply with the conservation plan, or a longer period of time if the Secretary determines compliance is otherwise technically or economically not feasible, or such longer period is otherwise appropriate, before such person will be subject to program ineligibility with respect to such land under section 1211.

(4) On the expiration of a contract entered into under subchapter B of chapter 1 of subtitle D, the provisions of this subtitle shall apply to the acreage that was the subject of such contract.

(b)<sup>1212-4</sup> No person shall become ineligible under section 1211 for program loans, payments, and benefits as the result of the production of a crop of an agricultural commodity—

(1) planted before the date of enactment of this Act; or

(2) planted during any crop year beginning before the date of enactment of this Act.

(c)<sup>1212-5</sup> No person shall become ineligible under section 1211 for program loans, payments, and benefits as the result of the production of a crop of an agricultural commodity or the designation of land to be set aside, diverted, devoted to conservation uses, or otherwise not cultivated under a program administered by the Secretary to reduce production of an agricultural commodity (hereafter in this subsection referred to as "set aside")—

(1) on highly erodible land in an area—

(A) within a conservation district, under a conservation system that has been approved by a conservation district after the district has determined that the conservation system is in conformity with technical standards set forth in the Soil Conservation Service technical guide for such district; or

(B)<sup>1212-6</sup> not within a conservation district, under a conservation system determined by the Secretary to be adequate for the protection of highly erodible land that has been set aside or for the production of such agricultural

<sup>1212-3</sup>Sec. 312 of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this paragraph by striking "shall, if the conservation plan established under this subtitle for such land requires structures to be constructed," and inserting "shall only" and all that follows through "the person shall".

<sup>1212-4</sup>Sec. 1412(b) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-124, 104 Stat. 3569, Nov. 28, 1990, amended this subsection by inserting "or" after the semicolon in para. (1); by striking the semicolon in para. (2) and inserting a period.

<sup>1212-5</sup>Sec. 1412(b) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3570, Nov. 28, 1990, redesignated subsec. (b)(3)-(5) as subsec. (c)(1)-(3), respectively and added the first sentence to this Subsection.

<sup>1212-6</sup>Sec. 1421(b) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3570, Nov. 28, 1990, added "for the protection of highly erodible land that has been set aside or".

commodity on any highly erodible land subject to this title;  
or

(2)<sup>1212-7</sup> on highly erodible land that is planted or set aside in reliance on a determination by the Soil Conservation Service that such land was not highly erodible land, except that this paragraph shall not apply to any agricultural commodity that was planted or set aside on any land after the Soil Conservation Service determines that such land is highly erodible land;  
or

(3)<sup>1212-8</sup> on highly erodible land planted to alfalfa during each of the 1981 through 1985 crop years as part of a rotation practice approved by the Secretary, if the person has submitted a conservation plan, in which case,<sup>1212-9</sup> such person shall have until June 1, 1988, to comply with the plan without being subject to program ineligibility under section 1211.

(d)<sup>1212-10</sup> Section 1211 shall not apply to a loan described in section 1211 made before the date of enactment of this Act.

(e)<sup>1212-11</sup> If a tenant is determined to be ineligible for payments and other benefits under section 1211, the Secretary may limit such ineligibility only to the farm which is the basis for such ineligibility determination if—

(1) the tenant has established to the satisfaction of the Secretary that—

(A) the tenant has made a good faith effort to meet the requirements of this section, including enlisting the assistance of the Secretary to obtain a reasonable conservation plan<sup>1212-12</sup> for such farm; and

(B) the landlord on the farm refuses to comply with such plan on such farm; and

(2) the Secretary determines that such lack of compliance is not a part of a scheme or device to avoid such compliance. The Secretary shall provide an annual report to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate concerning the ineligibility determinations limited during the previous 12-month period under this subsection.

(f)<sup>1212-13</sup>(1) No<sup>1212-14</sup> person shall become ineligible under section 1211 for program loans, payments, and benefits as a result of the failure of such person to actively apply a conservation

<sup>1212-7</sup> Sec. 1421(b) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3570, Nov. 1990, added “or set aside” each place it appears.

<sup>1212-8</sup> Sec. 3 of P.L. 100-28, 101 Stat. 291, April 24, 1987, added para. (3).

<sup>1212-9</sup> Sec. 301(d)(2) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 981, April 4, 1996, amended this paragraph by striking “based on” and all that follows through “and the Secretary,” and inserting “, in which case,”. For the previous version of this paragraph, see p. 5-6 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1212-10</sup> Sec. 1412(b) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3570, Nov. 28, 1990, redesignated subsec. (c) as subsec. (d).

<sup>1212-11</sup> Sec. 1412(c) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3570, Nov. 28, 1990, added this subsection.

<sup>1212-12</sup> Sec. 301(d)(3) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 981, April 4, 1996, amended this subparagraph by striking “conservation compliance plan” and inserting “conservation plan”.

<sup>1212-13</sup> Sec. 1412(d) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3570, Nov. 28, 1990 added this subsection.

<sup>1212-14</sup> Sec. 313(a)(1) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this paragraph by striking “Except to the extent provided in paragraph (2), no” and inserting “No”.

plan,<sup>1212-15</sup> if the Secretary determines that the person has acted in good faith and without an intent to violate this subtitle. A person who meets the requirements of this paragraph shall be allowed a reasonable period of time, as determined by the Secretary, but not to exceed 1 year, during which to implement the measures and practices necessary to be considered to be actively applying the person's conservation plan.<sup>1212-16</sup>

(2) If the Secretary determines that a person who has failed to comply with the provisions of section 1211 with respect to highly erodible cropland that was not in production prior to December 23, 1985, and has acted in good faith and without an intent to violate the provisions,<sup>1212-17</sup> the Secretary shall, in lieu of applying the ineligibility provisions in section 1211, reduce by not less than \$500 nor more than \$5,000, depending on the seriousness of the violation as determined by the Secretary, program benefits described in section 1211 that such producer would otherwise be eligible to receive in a crop year.

(3) Any person whose benefits are reduced in any crop year under this subsection shall continue to be eligible for all of the benefits described in section 1211 for any subsequent crop year if, prior to the beginning of such subsequent crop year, the Secretary determines that such person is actively applying a conservation plan<sup>1212-18</sup> according to the schedule set forth in such plan.

(4)<sup>1212-19</sup> Notwithstanding any other provision of this subtitle, no person shall become ineligible under section 1211 for program loans, payments, and benefits as a result of the failure of such person to actively apply a conservation plan,<sup>1212-20</sup> if the Secretary—

(A)<sup>1212-21</sup> determines that such failure results in a violation of section 1211 that is technical and minor in nature and that such violation has a minimal effect on the erosion control purposes of the conservation plan applicable to the land on which such violation has occurred;

<sup>1212-15</sup> Sec. 301(d)(4)(A) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 981, April 4, 1996, amended this paragraph by striking "that documents" and all that follows through "under subsection (a)". For the previous version of this paragraph, see pp. 5-6 and 5-7 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1212-16</sup> Sec. 313(a)(2) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this paragraph by striking "such person has—" and all that follows through the period at the end of former subparagraph (B) and inserting "the person has" and all that follows through "person's conservation plan.". For the previous version of this paragraph, see pp. 5-6 and 5-7 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1212-17</sup> Sec. 313(b) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 982, April 4, 1996, amended this paragraph by striking "meets the requirements of paragraph (1)" and inserting "with respect to highly erodible cropland that was not in production prior to December 23, 1985, and has acted in good faith and without an intent to violate the provisions".

<sup>1212-18</sup> Sec. 301(d)(4)(B) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 981, April 4, 1996, amended this paragraph by striking "prepared under subsection (a)".

<sup>1212-19</sup> Sec. 313(c) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 983, April 4, 1996, amended this paragraph by striking a former last sentence. For the previous version of this paragraph, see p. 5-7 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1212-20</sup> Sec. 301(d)(4)(C) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 981, April 4, 1996, amended this paragraph by striking "that documents" and all that follows through "subsection (a)". For the previous version of this paragraph, see p. 5-7 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1212-21</sup> Sec. 204(2) of the Food, Agriculture, Conservation, and Trade Act Amendments of 1991, P.L. 201-237, 105 Stat. 1855, Nov. 28, 1991, deleted "such violations" and inserted "such violation".

(B) determines that such failure is due to circumstances beyond the control of the person; or

(C) grants the person a temporary variance from the practices specified in the plan for the purpose of handling a specific problem, including weather, pest, and disease problems.<sup>1212-22</sup>

(5)<sup>1212-23</sup> EXPEDITED PROCEDURES FOR TEMPORARY VARIANCES.—After consultation with local conservation districts, the Secretary shall establish expedited procedures for the consideration and granting of temporary variances under paragraph (4)(C). If the request for a temporary variance under paragraph (4)(C) involves the use of practices or measures to address weather, pest, or disease problems, the Secretary 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 the Secretary fails to render a decision during the period, the temporary variance shall be considered granted.

(g)<sup>1212-24</sup> The Secretary, in providing assistance to an individual in the preparation or revision of a conservation plan under this section, shall provide such individual with information—

(1) concerning cost effective and applicable erosion control measures that may be available to such individual to meet the requirements of this section; and

(2)<sup>1212-25</sup> concerning crop flexibility, base adjustment, and conservation assistance options that may be available to such individual to meet the requirements of this section, including the provisions of titles X, XII, and XIII of the Food, Agriculture, Conservation, and Trade Act of 1990 (or the amendments made by such titles).

(h)<sup>1212-26</sup> Section 1211 shall not apply to the noncommercial production of agricultural commodities on a farm if such production is limited to two acres or less and if the Secretary determines that such production is not intended to circumvent the conservation requirements otherwise applicable to lands under this subtitle.

**SEC. 1213. [16 U.S.C. 3812a] DEVELOPMENT AND IMPLEMENTATION OF CONSERVATION PLANS AND CONSERVATION SYSTEMS.**<sup>1213-1</sup>

(a) TECHNICAL REQUIREMENTS.—In connection with the standards and guidelines contained in Natural Resources Conservation Service field office technical guides applicable to the development and use of conservation measures and management practices as part of a conservation system, the Secretary shall ensure that the standards and guidelines permit a person to use a conservation system that—

- (1) is technically and economically feasible;
- (2) is based on local resource conditions and available conservation technology;

<sup>1212-22</sup> Sec. 314(1) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 983, April 4, 1996, amended this subparagraph by striking “problem” and inserting “problem, including weather, pest, and disease problems”.

<sup>1212-23</sup> Sec. 314(2) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 983, April 4, 1996, added paragraph (5).

<sup>1212-24</sup> Sec. 1412(e) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3571, Nov. 28, 1990, added this subsection.

<sup>1212-25</sup> Sec. 204(2) of the Food, Agriculture, Conservation, and Trade Act of 1991, P.L. 102-237, 105 Stat. 1855, Dec. 13, 1991, deleted “XIII,” and inserted “XIII”.

<sup>1212-26</sup> Sec. 1412(f) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3571, Nov. 28, 1991, added this subsection.

<sup>1213-1</sup> Sec. 315(a)(2) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 984, April 4, 1996, added this section.

(3) is cost-effective; and

(4) does not cause undue economic hardship on the person applying the conservation system under the person's conservation plan.

(b) MEASUREMENT OF EROSION REDUCTION.—For the purpose of determining whether there is a substantial reduction in soil erosion on a field containing highly erodible cropland, the measurement of erosion reduction achieved by the application of a conservation system under a person's conservation plan shall be based on the estimated annual level of erosion at the time of the measurement compared to the estimated annual level of erosion that existed before the implementation of the conservation measures and management practices provided for in the conservation system.

(c) RESIDUE MEASUREMENT.—

(1) RESPONSIBILITIES OF THE SECRETARY.—For the purpose of measuring the level of residue on a field, the Secretary shall—

(A) take into account any residue incorporated into the top 2 inches of soil, as well as the growing crop, in the measurement;

(B) provide technical guidelines for acceptable residue measurement methods;

(C) provide a certification system for third parties to perform residue measurements; and

(D) provide for the acceptance and use of information and data voluntarily provided by the producer regarding the field.

(2) ACCEPTANCE OF PRODUCER MEASUREMENTS.—Annual residue measurements supplied by a producer (including measurements performed by a certified third party) shall be used by the Secretary if the Secretary determines that the measurements indicate that the residue level for the field meets the level required under the conservation plan.

(d) CERTIFICATION OF COMPLIANCE.—

(1) IN GENERAL.—For the purpose of determining the eligibility of a person for program benefits specified in section 1211 at the time application is made for the benefits, the Secretary shall permit the person to certify that the person is complying with the person's conservation plan.

(2) STATUS REVIEWS.—If a person makes a certification under paragraph (1), the Secretary shall not be required to carry out a review of the status of compliance of the person with the conservation plan under which the conservation system is being applied.

(3) REVISIONS AND MODIFICATIONS.—The Secretary shall permit a person who makes a certification under paragraph (1) 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. The Secretary may not revise the person's conservation plan without the concurrence of the person.

(e) TECHNICAL ASSISTANCE.—The Secretary shall, using available resources and consistent with the Secretary's other conservation responsibilities and objectives, provide technical assistance to a person throughout the development, revision, and application of

the conservation plan and any conservation system of the person. At the request of the person, the Secretary may provide technical assistance regarding conservation measures and management practices for other lands of the person that do not contain highly erodible cropland.

(f) ENCOURAGEMENT OF ON-FARM RESEARCH.—To encourage on-farm conservation research, the Secretary 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 the Secretary considers have a reasonable likelihood of success.

#### SOIL SURVEYS

SEC. 1214.<sup>1214-1</sup> [16 U.S.C. 3813] The Secretary shall, as soon as is practicable after the date of enactment of this Act, complete soil surveys on those private lands that do not have a soil survey suitable for use in determining the land capability class for purposes of this subtitle. In carrying out this section, the Secretary shall, insofar as possible, concentrate on those localities where significant amounts of highly erodible land are being converted to the production of agricultural commodities.

#### SEC. 1215. [16 U.S.C. 3814] NOTICE AND INVESTIGATION OF POSSIBLE COMPLIANCE DEFICIENCIES.<sup>1215-1</sup>

(a) IN GENERAL.—An employee of the Department of Agriculture who observes a possible compliance deficiency or other potential violation of a conservation plan or this subtitle while providing on-site technical assistance shall provide to the responsible persons, not later than 45 days after observing the possible violation, information regarding actions needed to comply with the plan and this subtitle. The employee shall provide the information in lieu of reporting the observation as a compliance violation.

(b) CORRECTIVE ACTION.—The responsible persons shall attempt to correct the deficiencies as soon as practicable after receiving the information.

(c) REVIEW.—If the corrective action is not fully implemented not later than 1 year after the responsible persons receive the information, the Secretary may conduct a review of the status of compliance of the persons with the conservation plan and this subtitle.

#### Subtitle C—Wetland Conservation

#### SEC. 1221. [16 U.S.C. 3821] PROGRAM INELIGIBILITY.<sup>1221-1</sup>

(a) PRODUCTION ON CONVERTED WETLAND.—Except as provided in this subtitle and notwithstanding any other provision of law, any person who in any crop year produces an agricultural commodity on converted wetland, as determined by the Secretary, shall be—

- (1) in violation of this section; and

<sup>1214-1</sup> Sec. 315(1) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 983, April 4, 1996, redesignated former section 1213 as section 1214.

<sup>1215-1</sup> Sec. 316 of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 985, April 4, 1996, added this section.

<sup>1221-1</sup> Sec. 321 of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 986, April 4, 1996, amended this section by redesignating subsection (b) as subsection (c) and by striking the section heading and all that follows through the end of subsection (a) and inserting the text printed above. For the previous version of this section, see pp. 5-8 and 5-9 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

(2) ineligible for loans or payments in an amount determined by the Secretary to be proportionate to the severity of the violation.

(b) **INELIGIBILITY FOR CERTAIN LOANS AND PAYMENTS.**—If a person is determined to have committed a violation under subsection (a) during a crop year, the Secretary shall determine which of, and the amount of, the following loans and payments for which the person shall be ineligible:

(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 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 the Consolidated Farm Service Agency, if the Secretary determines that the proceeds of the loan will be used for a purpose that will contribute to conversion of a wetland (other than as provided in this subtitle) to produce an agricultural commodity.

(3) During the crop year:

(A) A payment made pursuant to a contract entered into under the environmental quality incentives program under chapter 4 of subtitle D.

(B) A payment under any other provision of subtitle D.

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

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

(c) <sup>1221-2</sup> **WETLAND CONVERSION.**—Except <sup>1221-3</sup> as provided in section 1222 and notwithstanding any other provision of law, any person who in any crop year beginning after November 28, 1990, <sup>1221-4</sup> converts a wetland by draining, dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland shall be ineligible for those payments, loans, or programs specified in subsection (b) <sup>1221-5</sup> for that crop year and all subsequent crop years.

(d) <sup>1221-6</sup> **PRIOR LOANS.**—This section shall not apply to a loan described in subsection (b) made before December 23, 1985.

<sup>1221-2</sup> Sec. 1421(b)(6) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3572, Nov. 28, 1990, added this subsection. For redesignation, see note 1221-1.

<sup>1221-3</sup> Sec. 321(b)(1)(A) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 986, April 4, 1996, amended this subsection by striking “Except” and inserting “WETLAND CONVERSION.—Except”.

<sup>1221-4</sup> Sec. 321(b)(1)(B) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 986, April 4, 1996, amended this subsection by striking “subsequent to the date of enactment of the Food, Agriculture, Conservation, and Trade Act of 1990” and inserting “beginning after November 28, 1990.”

<sup>1221-5</sup> Sec. 321(b)(1)(C) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 986, April 4, 1996, amended this subsection by striking “subsections (a) (1) through (3)” and inserting “subsection (b)”.

<sup>1221-6</sup> Sec. 321(b)(2) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 986, April 4, 1996, added subsection (d).

(e)<sup>1221-7</sup> WETLAND.—The Secretary shall have, and shall not delegate to any private person or entity, authority to determine whether a person has complied with this subtitle.

**SEC. 1222.**<sup>1222-1</sup> **[16 U.S.C. 3822] DELINEATION OF WETLANDS; EXEMPTIONS.**

(a)<sup>1222-2</sup> DELINEATION BY THE SECRETARY.—

(1) IN GENERAL.—Subject to subsection (b) and paragraph (6), the Secretary shall delineate, determine, and certify all wetlands located on subject land on a farm.

(2) WETLAND DELINEATION MAPS.—The Secretary shall delineate wetlands on wetland delineation maps. On the request of a person, the Secretary shall make a reasonable effort to make an on-site wetland determination prior to delineation.

(3) CERTIFICATION.—On providing notice to affected persons, the Secretary shall—

(A) certify whether a map is sufficient for the purpose of making a determination of ineligibility for program benefits under section 1221; and

(B) provide an opportunity to appeal the certification prior to the certification becoming final.

(4) DURATION OF CERTIFICATION.—A final certification made under paragraph (3) shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary.

(5) REVIEW OF MAPPING ON APPEAL.—In the case of an appeal of the Secretary's certification, the Secretary shall review and certify the accuracy of the mapping of all land subject to the appeal to ensure that the subject land has been accurately delineated. Prior to rendering a decision on the appeal, the Secretary shall conduct an on-site inspection of the subject land on a farm.

(6) RELIANCE ON PRIOR CERTIFIED DELINEATION.—No person shall be adversely affected because of having taken an action based on a previous certified wetland delineation by the Secretary. The delineation shall not be subject to a subsequent wetland certification or delineation by the Secretary, unless requested by the person under paragraph (4).

(b)<sup>1222-3</sup> EXEMPTIONS.—No person shall become ineligible under section 1221 for program loans or payments under the following circumstances:

(1) As the result of the production of an agricultural commodity on the following lands:

(A) A converted wetland if the conversion of the wetland was commenced before December 23, 1985.

<sup>1221-7</sup> Sec. 2002(b) of the Farm Security and Rural Investment Act of 2002, P.L. 107-171, 116 Stat. 233, May 13, 2002, added subsection (e).

<sup>1222-1</sup> Sec. 1422 of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3573, Nov. 28, 1990, revised this section in its entirety.

<sup>1222-2</sup> Sec. 322(a) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended subsection (a) in its entirety. For the previous version of this subsection, see pp. 5-9 and 5-10 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1222-3</sup> Sec. 322(b) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended subsection (b) in its entirety. For the previous version of this subsection, see p. 5-10 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).



(B) Land that is a nontidal drainage or irrigation ditch excavated in upland.

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

(D) A wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce an agricultural commodity in a manner that is consistent for the area where the production is possible as a result of a natural condition, such as drought, and is without action by the producer that destroys a natural wetland characteristic.

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

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

(G) A converted wetland if the original conversion of the wetland was commenced before December 23, 1985, and the Secretary determines the wetland characteristics returned after that date as a result of—

(i) the lack of maintenance of drainage, dikes, levees, or similar structures;

(ii) a lack of management of the lands containing the wetland; or

(iii) circumstances beyond the control of the person.

(H) A converted wetland, if—

(i) the converted wetland was determined by the Natural Resources Conservation Service to have been manipulated for the production of an agricultural commodity or forage prior to December 23, 1985, and was returned to wetland conditions through a voluntary restoration, enhancement, or creation action subsequent to that determination;

(ii) technical determinations regarding the prior site conditions and the restoration, enhancement, or creation action have been adequately documented by the Natural Resources Conservation Service;

(iii) the proposed conversion action is approved by the Natural Resources Conservation Service prior to implementation; and

(iv) 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 prior to implementation of the voluntary wetland restoration, enhancement, or creation action.

(2) For the conversion of the following:

(A) An artificial lake or pond created by excavating or diking land that is not a wetland to collect and retain water and that is used primarily for livestock watering, fish production, irrigation, wildlife, fire control, flood con-

trol, cranberry growing, rice production, or as a settling pond.

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

(C) A wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce an agricultural commodity in a manner that is consistent for the area where the production is possible as a result of a natural condition, such as drought, and is without action by the producer that destroys a natural wetland characteristic.

(D) A wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date as a result of—

(i) the lack of maintenance of drainage, dikes, levees, or similar structures;

(ii) a lack of management of the lands containing the wetland; or

(iii) circumstances beyond the control of the person.

(E) A wetland, if—

(i) the wetland was determined by the Natural Resources Conservation Service to have been manipulated for the production of an agricultural commodity or forage prior to December 23, 1985, and was returned to wetland conditions through a voluntary restoration, enhancement, or creation action subsequent to that determination;

(ii) technical determinations regarding the prior site conditions and the restoration, enhancement, or creation action have been adequately documented by the Natural Resources Conservation Service;

(iii) the proposed conversion action is approved by the Natural Resources Conservation Service prior to implementation; and

(iv) 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 prior to implementation of the voluntary wetland restoration, enhancement, or creation action.

(c) **ON-SITE INSPECTION REQUIREMENT.**—No program loans, payments, or benefits shall be withheld from a person under this subtitle unless the Secretary has conducted an on-site visit of the subject land.

(d) <sup>1222-4</sup> **IDENTIFICATION OF MINIMAL EFFECT EXEMPTIONS.**—For purposes of applying the minimal effect exemption under subsection (f)(1), the Secretary shall identify by regulation categorical minimal effect exemptions on a regional basis to assist persons in avoiding a violation of the ineligibility provisions of section 1221. The Secretary shall ensure that employees of the Department of Agriculture who administer this subtitle receive appropriate train-

<sup>1222-4</sup> Sec. 322(c) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended subsection (d) in its entirety. For the previous version of this subsection, see p. 5-10 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

ing to properly apply the minimal effect exemptions determined by the Secretary.

(e) NONWETLANDS.—The Secretary shall exempt from the ineligibility provisions of section 1221 any action by a person upon lands in any case in which the Secretary determines that any one of the following does not apply with respect to such lands:

(1) Such lands have a predominance of hydric soils.

(2) Such lands are 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.

(3) Such lands, under normal circumstances, support a prevalence of such vegetation.

(f) <sup>1222-5</sup> MINIMAL EFFECT; MITIGATION.—The Secretary shall exempt a person from the ineligibility provisions of section 1221 for any action associated with the production of an agricultural commodity on a converted wetland, or the conversion of a wetland, if 1 or more of the following conditions apply, as determined by the Secretary:

(1) The action, individually and in connection with all other similar actions authorized by the Secretary in the area, will have a minimal effect on the functional hydrological and biological value of the wetlands in the area, including the value to waterfowl and wildlife.

(2) The wetland and the wetland values, acreage, and functions are mitigated by the person through the restoration of a converted wetland, the enhancement of an existing wetland, or the creation of a new wetland, and the restoration, enhancement, or creation is—

(A) in accordance with a wetland conservation plan;

(B) in advance of, or concurrent with, the action;

(C) not at the expense of the Federal Government;

(D) in the case of enhancement or restoration of wetlands, on not greater than a 1-for-1 acreage basis unless more acreage is needed to provide equivalent functions and values that will be lost as a result of the wetland conversion to be mitigated;

(E) in the case of creation of wetlands, on greater than a 1-for-1 acreage basis if more acreage is needed to provide equivalent functions and values that will be lost as a result of the wetland conversion that is mitigated;

(F) on lands in the same general area of the local watershed as the converted wetland; and

(G) with respect to the restored, enhanced, or created wetland, made subject to an easement that—

(i) is recorded on public land records;

(ii) remains in force for as long as the converted wetland for which the restoration, enhancement, or creation to be mitigated remains in agricultural use or is not returned to its original wetland classification with equivalent functions and values; and

<sup>1222-5</sup> Sec. 322(d) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended subsection (f) in its entirety. For the previous version of this subsection, see p. 5-11 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

(iii) prohibits making alterations to the restored, enhanced, or created wetland that lower the wetland's functions and values.

(3) The wetland was converted after December 23, 1985, but before November 28, 1990, and the wetland values, acreage, and functions are mitigated by the producer through the requirements of subparagraphs (A), (B), (C), (D), (F), and (G) of paragraph (2).

(4) The action was authorized by a permit issued under section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) and the wetland values, acreage, and functions of the converted wetland were adequately mitigated for the purposes of this subtitle.

(g) MITIGATION APPEALS.—A person<sup>1222-6</sup> shall be afforded the right to appeal, under section 1243, the imposition of a mitigation agreement requiring greater than one-to-one acreage mitigation to which the person<sup>1222-6</sup> is subject.

(h)<sup>1222-7</sup> GOOD FAITH EXEMPTION.—

(1) EXEMPTION DESCRIBED.—The Secretary may waive a person's ineligibility under section 1221 for program loans, payments, and benefits as the result of the conversion of a wetland subsequent to November 28, 1990, or the production of an agricultural commodity on a converted wetland, if the Secretary determines that the person has acted in good faith and without intent to violate this subtitle.

(2) PERIOD FOR COMPLIANCE.—The Secretary shall provide a person who the Secretary determines has acted in good faith and without intent to violate this subtitle with a reasonable period, but not to exceed 1 year, during which to implement the measures and practices necessary to be considered to<sup>1222-8</sup> actively restoring the subject wetland.

(i) RESTORATION.—Any person who is determined to be ineligible for program benefits under section 1221 for any crop year shall not be ineligible for such program benefits under such section for any subsequent crop year if, prior to the beginning of such subsequent crop year, the person has fully restored the characteristics of the converted wetland to its prior wetland state or has otherwise mitigated for the loss of wetland values, as determined by the Secretary, through the restoration, enhancement, or creation of wetland values in the same general area of the local watershed as the converted wetland.<sup>1222-9</sup>

(j)<sup>1222-10</sup> DETERMINATIONS; RESTORATION AND MITIGATION PLANS; MONITORING ACTIVITIES.—Technical determinations, the development of restoration and mitigation plans, and monitoring ac-

<sup>1222-6</sup> Sec. 322(e) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended this subsection by striking "producer" and inserting "person". The amendment was executed to both places where "producer" appeared as the probable intent of Congress.

<sup>1222-7</sup> Sec. 322(f) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended subsection (h) in its entirety. For the previous version of this subsection, see p. 5-12 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1222-8</sup> So in original. Probably should be "to be".

<sup>1222-9</sup> Sec. 322(g) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended this subsection by inserting "or has otherwise" and all that follows through "as the converted wetland".

<sup>1222-10</sup> Sec. 322(h) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, amended subsection (j) in its entirety. For the previous version of this subsection, see pp. 5-12 and 5-13 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

tivities under this section shall be made by the National<sup>1222-11</sup> Resources Conservation Service.

(k)<sup>1222-12</sup> MITIGATION BANKING PROGRAM.—Using authorities available to the Secretary, the Secretary may operate a pilot program for mitigation banking of wetlands to assist persons to increase the efficiency of agricultural operations while protecting wetland functions and values. Subsection (f)(2)(C) shall not apply to this subsection.

**SEC. 1223.**<sup>1223-1</sup> [16 U.S.C. 3823] **AFFILIATED PERSONS.**

If a person is affected by a reduction in benefits under section 1221 and the affected person is affiliated with other persons for the purpose of receiving the benefits, the benefits of each affiliated person shall be reduced under section 1221 in proportion to the interest held by the affiliated person.

**SEC. 1224.**<sup>1224-1</sup> [16 U.S.C. 3824] **FAIRNESS OF COMPLIANCE.**

If the actions of an unrelated person or public entity, outside the control of, and without the prior approval of, the landowner or tenant result in a change in the characteristics of cropland that would cause the land to be determined to be a wetland, the affected land shall not be considered to be wetland for purposes of this subtitle.

Subtitle D—Agricultural Resources Conservation Program<sup>1230-1</sup>

**CHAPTER 1—COMPREHENSIVE CONSERVATION  
ENHANCEMENT PROGRAM**<sup>1230-2</sup>

**Subchapter A—General Provisions**

**SEC. 1230. [16 U.S.C. 3830] COMPREHENSIVE CONSERVATION ENHANCEMENT PROGRAM.**<sup>1230-3</sup>

(a) ESTABLISHMENT.—

(1) IN GENERAL.—During the 1996 through 2002<sup>1230-4</sup> calendar years, the Secretary shall establish a comprehensive con-

<sup>1222-11</sup> So in original. Probably should be “Natural”.

<sup>1222-12</sup> Sec. 322(i) of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 987, April 4, 1996, added this subsection.

<sup>1223-1</sup> Sec. 324 of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 992, April 4, 1996, added this section. Sec. 323 of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 992, April 4, 1996, repealed a former section 23 (relating to consultation with the Secretary of the Interior). For the previous version of this section, see pp. 5-13 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

<sup>1224-1</sup> Sec. 1424 of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3576, Nov. 28, 1990, added this section.

<sup>1230-1</sup> Sec. 1431(1) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3576, Nov. 28, 1990, deleted “Conservation Reserve” and “Agricultural Resources Conservation Program”.

<sup>1230-2</sup> Sec. 1432 of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3577 added this entire chapter.

Sec. 2006(a) of the Farm Security and Rural Investment Act of 2002, P.L. 107-171, 116 Stat. 237, May 13, 2002, amended the heading of chapter 1 in its entirety.

<sup>1230-3</sup> Sec. 331 of the Federal Agriculture Improvement and Reform Act of 1996, P.L. 104-127, 110 Stat. 992, April 4, 1996, amended this section in its entirety. For the previous version of this section, see pp. 5-13 and 5-14 of Vol. III—Conservation and Miscellaneous Programs (as of January 16, 1996).

Sec. 2006(b)(1) of the Farm Security and Rural Investment Act of 2002, P.L. 107-171, 116 Stat. 237, May 13, 2002, amended the heading of sec. 1230 in its entirety.

Sec. 2006(b)(3) of the Farm Security and Rural Investment Act of 2002, P.L. 107-171, 116 Stat. 237, May 13, 2002, struck former subsec. (c). For the text, see p. 4-19 of Soil Conservation Laws (as of December 27, 2001).

<sup>1230-4</sup> So in original. Probably should be “2002 through 2007”.

## 527.2 Wetland Mitigation Plan Development

### (1) Definition of Mitigation

This appendix is an overview of the NRCS Wetland Conservation - Technical Assistance Policy and provides guidance for developing plans for use in the Mitigation provisions described in Chapter 517. For activities or actions where NRCS provides technical assistance, the NRCS Technical Assistance Policy must be followed, unless a specific exemption applies. A technical discussion is provided on the definition of mitigation consistent with the Council on Environmental Quality (CEQ) regulation at 40 CFR 1508.20. A programmatic definition of mitigation related to specific FSA provisions are provided in Chapter 517.

The definition of mitigation, consistent with the CEQ regulations includes the avoidance of impacts; the minimization of impacts; and the compensation for unavoidable impacts, considered in that order of preference. Mitigation for a single project may incorporate one or more of these aspects of mitigation. The terms avoidance, minimization and compensatory mitigation are described below.

- (a) **Avoidance** - A comprehensive evaluation of practicable alternatives to the proposed activity must be conducted. Included in this evaluation should be alternatives that would avoid wetland impacts altogether. This evaluation must demonstrate that the least environmentally damaging practicable alternative that satisfies the project purpose has been selected.

A practicable alternative is one that is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. The alternatives analysis includes consideration of the following factors:

- (i) Environmental – Fish and wildlife habitat, soil erosion, water quality, flooding, groundwater recharge/discharge, and recreation;
- (ii) Economics - Cost effectiveness, including changes in farm operation costs attributed to labor, equipment, timeliness, and convenience of farm operation;
- (iii) Resource suitability - Ability of soil, water, and related resources to support the intended use;
- (iv) Technology - Availability of technology to reasonably accomplish the objectives; and
- (v) Other pertinent factors.

## 527.2 Wetland Mitigation Plan Development, (Cont'd)

- (b) **Minimization** - Wetland impacts may be at least partially mitigated through minimization efforts, such as modification of the activity to limit the wetland acreage affected by the proposed activity. As with avoidance, all steps to minimize the wetland impacts must be fully considered, and take those determined to be appropriate and practicable.
  
- (c) **Compensatory mitigation** - Compensatory mitigation is a physical measure taken to offset unavoidable wetland impacts and includes: restoration, creation and enhancement of wetlands. Compensatory mitigation is required for those unavoidable impacts which will result from the proposed activity after avoidance and minimization steps have been fully applied.
  - (i) Restoration - Wetland restoration is the rehabilitation or re-establishment of a former wetland area (e.g., a severely impacted wetland area characterized by relic hydric soils and presence of few or no hydrological, biological or chemical functions) to its original, natural wetland condition.
  - Enhancement - Wetland enhancement is the improvement, maintenance or management for a particular wetland function in an existing (or only slightly degraded) wetland.
  - (ii) Creation - Wetland creation is the conversion of a non-wetland area into a wetland, typically through the removal of upland soils and the introduction of wetland hydrologic and vegetative characteristics.

Of the three types of compensatory mitigation, restoration is the preferable option from an ecological as well as cost standpoint. Restoration reestablishes the natural order and ratio of community composition in a watershed or ecosystem. In addition, it is typically much easier to reintroduce the requisite water sources and vegetation to former wetland areas since site morphology, seed bank and soil organic parameters may already be present. Therefore, the likelihood of success is relatively high. Creation and enhancement typically or may require much greater physical manipulation, and may inadvertently damage important terrestrial environmental resources or existing aquatic resources.

As part of the mitigation process, the functional attributes of the wetland to be impacted, and the significance of the loss of those wetland functions to the aquatic and terrestrial ecosystem, must be determined. The hydrogeomorphic approach to wetland functional assessment, along with other approved procedures for wetland functional assessment, should be used to assess wetland functions.

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)

## 527.2 Wetland Mitigation Plan Development, (Cont'd)

### (2) Applicability of Mitigation Requirements

The purpose of the sequencing process of mitigation is to provide the maximum consideration and protection of significant wetland functions in the implementation of FSA program activities. However, it is recognized that certain types of activities that are typically conducted in or near wetlands generally have minimal adverse environmental impacts, individually or cumulatively. Similarly, there are certain types of wetlands, because of their state of degradation, landscape position, or hydrologic source that may be impacted by a variety of activities with few adverse environmental effects occurring.

Therefore, application of the mitigation requirements, i.e., avoidance, minimization and compensation, will vary to reflect the degree of the potential for adverse impacts on wetlands posed by specific activities.

(Note: For the purposes of this section, natural or less than frequently cropped wetlands are defined as those wetlands that more years than not are predominated by hydrophytic vegetation or exhibit important wetland functional attributes typical for that wetland class. Frequently cropped wetlands are defined as those wetlands that are cropped or intensively managed more years than not such that hydrophytic vegetation is rarely or never present and important wetland functional attributes typical for that wetland class are rarely exhibited.)

#### (a) Activities Impacting Natural and Less Than Frequently Cropped Wetlands

The sequencing requirements of mitigation must be thoroughly applied as three independent steps for activities (including irrigation water management, water conservation, water quality, and erosion control systems) impacting natural and less than frequently cropped wetlands.

The application of the avoidance and minimization steps of mitigation, in which practicable alternatives and alternative project configurations are evaluated, is particularly important when planning projects in natural wetland systems. This is due primarily to the environmental cost of wetland losses and the difficulties associated with physical compensation for complex wetland systems. Thus, it is technically and economically preferable to avoid impacts to natural and less than frequently cropped wetlands rather than compensate for losses.



## 527.2 Wetland Mitigation Plan Development, (Cont'd)

### (b) Activities Impacting Frequently Cropped Wetlands

For activities impacting frequently cropped wetlands, the mitigation requirements are considered satisfied where appropriate compensatory mitigation (i.e., restoration of prior converted cropland) is provided.

### (3) **Procedural Outline for Mitigation Planning, Implementation, Monitoring and Evaluation**

The success or failure of the mitigation rests upon the appropriate biological, physical and chemical decisions being made at all stages of mitigation, including the mitigation plan, the site evaluation procedures, and the physical mitigative measures employed. Thus, the technical validity of the mitigation plan, which drives the mitigation process from conceptual to on-the-ground, is essential in the mitigation process.

Attachment A provides an outline of general mitigation planning, implementation, monitoring and evaluation techniques that when utilized in concert with site-specific attributes, should increase the likelihood of mitigation success.

## 527.2 Wetland Mitigation Plan Development, (Cont'd)

### ATTACHMENT A

#### Procedural Outline for Mitigation Planning, Evaluation and Monitoring

#### PART 1 -- CHARACTERIZATION OF PROJECT IMPACTS

The purpose of this section is to provide a characterization of the project impacts, including an assessment of the wetland functions that will be affected. This information should be used to compare against the proposed mitigation to ensure that all project impacts are appropriately offset.

##### I. Project Overview

Provide a narrative description of the project including a description of the nature and extent (in acres) of wetland and other natural resource impacts. The description should include both direct and indirect impacts.

##### II. Project Location

- (A) Provide a narrative description of the location of the project, including its landscape position (e.g., floodplain, headwaters, etc.) and surrounding land use.
- (B) Maps - Project site should be clearly marked on appropriate maps (e.g., USGS topographic quad, county soil survey, National Wetland Inventory map).

##### III. Characterization of Wetland Area to be Impacted

- (A) Wetland Classification (e.g., Hydrogeomorphic Class, Cowardin/National Wetland Inventory Class).
- (B) Soils - Provide a description of the soil characteristics including soil series, soil color and texture, and amount of organics.
- (C) Vegetation - Provide a description of the species composition for all strata and include a list of species by scientific and common names.

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)

## **527.2 Wetland Mitigation Plan Development, (Cont'd)**

- (D) Hydrology - Provide a description of the hydroperiod for the wetland that includes information on timing, depth and duration of inundation and/or saturation. This characterization should include a list of any indicators of inundation or saturation and any recorded data that may exist.

### **IV. Functional Assessment**

To determine the wetland functions that may be impacted by the project, conduct a functional assessment (attach worksheet - see Appendix 527.6) and provide a narrative description of how each function will be affected by the project.

## 527.2 Wetland Mitigation Plan Development, (Cont'd)

### PART 2 -- CHARACTERIZATION OF MITIGATION SITE

#### (I) Mitigation Site Location

- (A) Provide a narrative description of the location of the mitigation site, including its landscape position (e.g., floodplain, headwaters, etc.), surrounding land use, proximity to the project site, relationship to influential topographic features (e.g., streams, dams, levees) and proximity to an existing wetland that exhibits target wetland conditions.
- (B) Maps (mitigation site should be clearly marked on appropriate maps (e.g., USGS topographic quad, county soil survey, National Wetlands Inventory map).

#### (II) Site Characterization of Existing Physical Conditions

- (A) Wetland Classification (e.g., Hydrogeomorphic Class, Cowardin/National Wetland Inventory Class).
- (B) Soils - Provide a description of the soil characteristics including soil series, soil color and texture, and amount of organics.
- (C) Vegetation - Provide a description of the species composition for all strata and include a list of species by scientific and common names.
- (D) Hydrology - Provide a description of the hydroperiod for the site that includes information on timing, depth and duration of inundation and/or saturation. This characterization should include a list of indicators of inundation or saturation and any recorded data that may exist.
- (E) Topography - Provide a description of the site's topography including elevations.

#### (III) Mitigation Techniques - identify and describe the specific techniques that will be undertaken

##### (A) Design Documentation

1. Include survey sheets and construction drawings of the mitigation site, preconstruction and post construction as-builts
2. Include time-line for each phase of the mitigation

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)

## 527.2 Wetland Mitigation Plan Development, (Cont'd)

### (B) Soils

1. Document the target soil conditions
2. Document the means of achieving target soil organic content, e.g. enriching existing soils with organic matter
3. Document soil compaction
4. Document the placement of surface features (e.g., cobbles and debris piles) that may effect soil conditions

### (C) Revegetation Specifications

1. Target species composition for all strata scientific and common names, including indicator status of each.
2. Methods for achieving target species composition (e.g., planting, natural revegetation). For planting, include detailed description of plant species, stocking rates and method (e.g., acorns, bare root seedlings, saplings)
3. Target limits of the percent of species comprising dominant vegetation in all strata.
4. Identify on a plan the location of plantings as determined by hydrologic and topographic conditions.

### (D) Hydrology

1. Document the target hydrologic regime including timing, duration and depth of inundation and/or saturation
2. Document the means by which the target hydrologic regime will be established (e.g., blockage of existing drains or diversions, removal of levees, installation of new structures)
3. Document the predominant influence and source of water
  - a. Surface water
    - (i) Overbank flooding
    - (ii) Precipitation
  - b. Groundwater
    - (i) Discharge
    - (ii) Recharge
    - (iii) Flowthrough

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)

## **527.2 Wetland Mitigation Plan Development, (Cont'd)**

### **(IV) Functional Assessment**

To determine if wetland functions that exist on the mitigation site, conduct a functional assessment (attach worksheet - see NFSAM 527.6) and provide a narrative description of each function present.

## 527.2 Wetland Mitigation Plan Development, (Cont'd)

### PART 3 -- CHARACTERIZATION OF TARGET MITIGATION CONDITIONS AND SITE SPECIFIC MITIGATION TECHNIQUES

- (I) Mitigation Project Description - Provide a brief description of the target wetland conditions, including the project type, (e.g., restoration, creation) size, and wetland classification (e.g., Hydrogeomorphic class, Cowardin/NWI class).
  
- (II) Mitigation Goals and Objectives
  - (A) Site-specific - Provide detailed goals and measurable objectives for the proposed mitigation project.
    1. Wetland Type
    2. Acreage replacement
    3. Function replacement - (See Appendix 527.6 for a list of wetland functions)
  
  - (B) Watershed goals - Discuss how the mitigation project will affect overall watershed goals, including:
    1. Habitat development/protection
    2. Species recovery
    3. Water quality/quantity issues
    4. Flood control
    5. Recreation and other human uses
  
- (III) Mitigation Techniques - identify and describe the specific techniques that will be undertaken
  - (A) Design Documentation
    1. Include survey sheets and construction drawings of the mitigation site, preconstruction and post construction as-builts
    2. Include time-line for each phase of the mitigation
  
  - (B) Soils
    1. Document the target soil conditions
    2. Document the means of achieving target soil organic content, e.g. enriching existing soils with organic matter
    3. Document soil compaction
    4. Document the placement of surface features (e.g., cobbles and debris piles) that may effect soil conditions

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)

## 527.2 Wetland Mitigation Plan Development, (Cont'd)

### (C) Revegetation Specifications

1. Target species composition for all strata scientific and common names, including indicator status of each
2. Methods for achieving target species composition (e.g., planting, natural revegetation). For planting, include detailed description of plant species, stocking rates and method (e.g., acorns, bareroot seedlings, saplings)
3. Target limits of the percent of species comprising dominant vegetation in all strata
4. Identify on a plan the location of plantings as determined by hydrologic and topographic conditions

### (D) Hydrology

1. Document the target hydrologic regime including timing, duration and depth of inundation and/or saturation
2. Document the means by which the target hydrologic regime will be established (e.g., blockage of existing drains or diversions, removal of levees, installation of new structures)
3. Document the predominant influence and source of water
  - a. Surface water
    - (i) Overbank flooding
    - (ii) Precipitation
  - b. Groundwater
    - (i) Discharge
    - (ii) Recharge
    - (iii) Flowthrough



## 527.2 Wetland Mitigation Plan Development, (Cont'd)

### PART 4 -- MONITORING

#### (I) Rationale

Monitoring should be based on the stated objectives of the mitigation plan, and should utilize on-site measurements of specific parameters or functions (i.e., performance criteria) that will indicate the overall trend of the mitigation towards the desired functional wetland state. While monitoring criteria cannot be strictly prescribed, there are general parameters that should be evaluated to determine the mitigation trend. These parameters are presented below to act as a guide in preparing site-specific monitoring plans; however, they should also reflect the mitigation goals and objectives (see Part 3).

#### (II) Parameters

##### (A) Vegetation

1. Species composition
  - a. Percent cover
  - b. Density
2. Survival rate of planted species
3. Ratio of planted species to volunteer species

##### (B) Soils

1. Organic content
2. Soil color and texture
3. Soil redox potential

##### (C) Hydrology

1. Surface water
  - a. Quantitative measures of the timing, depth, and duration of inundation
  - b. Description of primary influences (e.g., Overbank flooding, overland flow, precipitation)
2. Ground water
  - a. Seasonal groundwater elevation

## 527.2 Wetland Mitigation Plan Development, (Cont'd)

### (D) Habitat

1. Aquatic community - indicator species
  - a. Quantitative measures of species utilizing site over time
  - b. Qualitative description of habitat development
2. Terrestrial community - indicator species
  - a. Quantitative measures of species utilizing site over time
  - b. Qualitative description of habitat development

### (III) Sampling Frequency

Specific sampling frequencies should be identified for each parameter to be monitored. Sampling frequency may be highly variable between geographic regions and wetland types. The frequency of sampling should provide sufficient data to reliably indicate if the mitigation is successful.

#### (A) Vegetation

1. Sampling should occur over a multi-year period until a successful trend in species survival and community development is evident

#### (B) Soils

1. The frequency of the soils evaluation (e.g., organic content, soils color and texture) should be reflective of the time necessary to demonstrate anaerobic conditions in upper part of the soil

#### (C) Hydrology

1. Sampling of the surface and groundwater, as appropriate, should occur on preferably a continuous basis, or at least weekly during each inundation event, during the first three months of the growing season

#### (D) Habitat

1. Monitoring frequency is highly species dependent; selection of target organisms will drive the sampling frequency and time. Monitored populations may change as the site goes through successional changes; sampling plan should be flexible in order to accommodate such changes

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)

## 527.2 Wetland Mitigation Plan Development, (Cont'd)

### (IV) Monitoring Reports

Monitoring reports should be generated on a quarterly or annual basis, as appropriate, for the duration of the monitoring period

### (V) Performance Criteria

#### (A) Rationale

As with monitoring criteria, it is difficult to prescribe set performance criteria for all mitigation sites. In general, successful performance should be based on the achievement of the goals of the mitigation, which are functional in nature. Thus, site-specific performance criteria should be developed that address the several critical parameters (e.g., functional replacement, corridor development, species recovery, acreage replacement). The data gathered during the monitoring phase of the mitigation should be used to verify trends in the development of the site towards full function. In setting the "normal" or "acceptable" trend curve for a certain parameter, reference population data may be used. The reference data should encompass successional development information collected over time from several representative wetlands sites.

**527.3**

**NRCS Appeals Rule, 7 CFR 614, May 16, 2006**

(B) The holdings or sources of income of which the filer, spouse, or dependent child have no specific knowledge through a report, disclosure, or constructive receipt, whether intended or inadvertent.

(3) *Excepted investment funds.* (i) No information is required under paragraph (i)(1) of this section about the underlying holdings of an excepted investment fund as defined in paragraph (i)(3)(ii) of this section, except that the fund itself shall be identified as an interest in property and/or a source of income.

(ii) For purposes of financial disclosure reports filed under the provisions of this subpart, an "excepted investment fund" means a widely held investment fund (whether a mutual fund, regulated investment company, common trust fund maintained by a bank or similar financial institution, pension or deferred compensation plan, or any other investment fund), if:

(A)(1) The fund is publicly traded or available; or

(2) The assets of the fund are widely diversified; and

(B) The filer neither exercises control over nor has the ability to exercise control over the financial interests held by the fund.

(iii) A fund is widely diversified if it holds no more than 5% of the value of its portfolio in the securities of any one issuer (other than the United States Government) and no more than 20% in any particular economic or geographic sector.

(j) *Special rules.* (1) Political campaign funds, including campaign receipts and expenditures, need not be included in any report filed under this subpart. However, if the individual has authority to exercise control over the fund's assets for personal use rather than campaign or political purposes, that portion of the fund over which such authority exists must be reported.

(2) In lieu of entering data on a part of the report form designated by the Office of Government Ethics, a filer may attach to the reporting form a copy of a brokerage report, bank statement, or other material, which, in a clear and concise fashion, readily discloses all information which the filer would otherwise have been required to enter on the concerned part of the report form.

(k) For reports of confidential filers described in § 2634.904(a)(3) of this subpart, each supplemental confidential financial disclosure report shall include only the supplemental information:

(1) Which is more extensive than that required in the reporting individual's

public financial disclosure report under this part; and

(2) Which has been approved by the Office of Government Ethics for collection by the agency concerned, as set forth in supplemental agency regulations and forms, issued under §§ 2634.103 and 2634.601(b) (see § 2634.901(b) and (c) of this subpart).

#### § 2634.908 [Amended]

■ 22. Section 2634.908 is amended by removing the phrase "twelve months ending September 30," in paragraph (a) and adding in its place the phrase "calendar year,".

#### PART 2640—INTERPRETATION, EXEMPTIONS AND WAIVER GUIDANCE CONCERNING 18 U.S.C. 208 (ACTS AFFECTING A PERSONAL FINANCIAL INTEREST)

■ 23. The authority citation for part 2640 continues to read as follows:

**Authority:** 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 208; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

#### Subpart A—General Provisions

##### § 2640.102 [Amended]

■ 24. Section 2640.102 is amended by adding the phrase "and 2634.907(i)(3)" after the citation "5 CFR 2634.310(c)" at the end of the fifth sentence in the note to paragraph (a).

[FR Doc. 06-4529 Filed 5-15-06; 8:45 am]

BILLING CODE 6345-02-P

## DEPARTMENT OF AGRICULTURE

### Natural Resources Conservation Service

#### 7 CFR Part 614

RIN 0578-AA16

#### Appeal Procedures

**AGENCY:** Natural Resources Conservation Service.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** The Natural Resources Conservation Service (NRCS), United States Department of Agriculture (USDA) issues this interim final rule amending NRCS's informal appeals procedures as required by Title II of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, 7 U.S.C. 6991 *et seq.* (the 1994 Act). This interim final rule amends regulations

promulgated by the interim final regulations published by the Secretary of Agriculture for NRCS on December 29, 1995 (60 FR 67313), and also includes new language to address statutory changes and make procedural and structural changes. Because of the substantive changes the agency is making to its informal appeal process under the current regulation, NRCS is publishing this rule as an interim final rule with request for comments.

NRCS has determined that issuing an interim final rule with request for comments rather than a proposed rule was justified in order to implement the changes required by statute as well as to institute procedural improvements. This interim final rule with request for comments puts the public on notice of the changes being made while affording an opportunity to comment. At the same time, much needed changes and improvements to the current regulation may be implemented immediately thereby better serving the public and the USDA.

**DATES:** *Effective Date:* May 16, 2006. Comments must be received by June 15, 2006.

NRCS invites interested persons to submit comments on this interim final rule. Comments may be submitted by any of the following methods: Mail: Send comments to: Beth Schuler, Natural Resources Conservation Service, 1400 Independence Avenue, SW., 103, Washington, DC 20250, or E-Mail: Send comments to [beth.schuler@wdc.usda.gov](mailto:beth.schuler@wdc.usda.gov). You may also submit comments via facsimile transmission to: (615) 673-6705; or through the Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

**ADDRESSES:** This interim final rule can be accessed via the internet. Users can access the NRCS homepage at: <http://www.nrcs.usda.gov/programs/appeals/interimfinalrule>.

**FOR FURTHER INFORMATION CONTACT:** Beth A. Schuler, Conservation Planning and Technical Assistance Division, Room 6015-S, 1400 Independence Ave, SW., 103, Washington, DC 20250. Telephone: (615) 646-9741; E-mail:

[beth.schuler@wdc.usda.gov](mailto:beth.schuler@wdc.usda.gov). Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

#### SUPPLEMENTARY INFORMATION:

##### Executive Order 12866

This interim final rule has been determined to be not significant under

Executive Order 12866 and has not been reviewed by the Office of Management and Budget (OMB).

#### **Paperwork Reduction Act of 1995**

This rule does not constitute a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 35).

#### **Unfunded Mandates Reform Act of 1995**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and Tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

#### **Executive Order 13132**

It has been determined under Executive Order 13132, Federalism, that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various levels of government.

#### **Regulatory Flexibility Act**

This regulation will not have a significant economic impact on a substantial number of small entities. This action does not increase the burden on any entity, or the costs to any small business to comply with these regulations, because it merely clarifies and establishes procedures for participants to use in filing appeals of adverse decisions. Therefore, this action is determined to be exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605) and no Regulatory Flexibility Analysis was prepared.

#### **Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The provisions of this rule are not retroactive. The provisions of this rule preempt State and local laws to the extent such State and local laws are inconsistent. The administrative appeal provisions published at 7 CFR part 11 must be exhausted before any action for judicial review may be brought against NRCS.

#### **Environmental Evaluation**

The environmental impacts of this rule have been considered in accordance with the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and NRCS has concluded that promulgation of this rule is categorically excluded from NEPA's requirement from an environmental impact analysis under the Department of Agriculture regulations, 7 CFR 1b.3(a)(1). Actions implemented under this rule fall in the category of policy development, planning and implementation which relates to routine activities and similar administrative functions and no circumstances exist that would require preparation of an environmental assessment or environmental impact statement.

#### **Executive Order 12372**

This regulation is not subject to the provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published June 24, 1983 (48 FR 29115).

#### **Government Paperwork Elimination Act**

NRCS is committed to compliance with the Government Paperwork Elimination Act as well as continued pursuit of providing all services electronically when practicable. This rule requires that a participant must make a written request to appeal a determination or decision issued to a participant for a program administered by NRCS. In part, the procedures in this rule lend themselves to electronic request and submission. NRCS will pursue, either solely or jointly with the Farm Service Agency, with whom NRCS shares some appeal procedures, 7 CFR part 780, the development of an application that will allow program participants to request an appeal online. It will also enable both FSA and NRCS to manage the requests and reporting aspects electronically.

#### **Background and Purpose**

On December 29, 1995, the Secretary of Agriculture published an interim final rule for the National Appeals Division (NAD) to implement Title II, Subtitle H of the 1994 Act, which rule established interim procedures, at 7 CFR part 11, for appeals of adverse decisions by USDA agency officials to the NAD (60 FR 67298). The interim final rule also included conforming changes relating to regulations governing agency informal appeals, including part 614. NAD published its final rule in the

**Federal Register** on June 23, 1999 (64 FR 33367). At that time, it was expressly noted that the final rule for NAD did not include rules for agency appeal procedures and that those rules would be published separately by the respective agencies.

Section 275 of the 1994 Act, 7 U.S.C. 6995, requires USDA agencies to hold informal hearings at the request of a participant for the decisions they render. NRCS interprets the "informal hearing" requirement to require the agency to provide an opportunity for informal appeal at the agency level. This interim final rule amends the current NRCS appeal procedures as promulgated by the 1995 interim final rule to better conform to the requirements of the 1994 Act and subsequent legislation, as well as to make other substantive changes to clarify and improve the agency's informal appeals process.

NRCS's goal in promulgating these informal appeals procedures is to facilitate at the agency level the resolution of disputes arising from adverse technical determinations and program decisions. In contrast to the appeals process administered by NAD under part 11, NRCS's informal appeals process establishes several means through which participants can obtain review by NRCS personnel who have detailed knowledge of agricultural conservation operations as well as expertise in farm and ranch management. After a decision rendered by NRCS becomes final, participants may pursue the appeals processes set forth at 7 CFR part 780 and 7 CFR part 11, as appropriate.

#### **Overview of Informal Appeals Options**

Program disputes in NRCS vary in complexity, sums at stake, and feasibility of resolution. Therefore, the availability of effective, informal appeal procedures is central to NRCS's goal of achieving just, speedy, and cost-effective resolutions to program and technical disputes. Accordingly, this rule sets forth three separate means of informal appeal: Mediation, reconsideration, and hearing. The text of the rule provides appeal options in the alternative, meaning a participant must choose one avenue of appeal. This structure was adopted in order to facilitate efficient resolution of disputes. The sections below describe each of the appeal options available to participants.

**Mediation:** The mediation informal appeal option is available for both preliminary technical decisions and program decisions. This rulemaking incorporates additional guidelines that have become a part of the agency's

practice over the last several years regarding the use of the mediation to resolve NRCS program disputes. Under this rule, all mediations will be conducted by a "qualified mediator," as defined at § 614.2. In a State that has a USDA certified mediation program, a "qualified mediator" is a person who is accredited as a mediator under relevant State law. In a State that does not have a USDA certified program, a "qualified mediator" is a person who meets certain core knowledge and training requirements set forth in the definition of the term. Additionally, this rule clarifies that all mediation requests are to be submitted to the appropriate State Conservationist, as indicated in the written decision notice received by the participant.

Under 7 U.S.C. 5103(a)(1)(A), NRCS must participate in good faith in any State mediation program certified under 7 U.S.C. 5101. NRCS is applying this good faith requirement to mediation generally, regardless of whether the dispute is being mediated under a State certified mediation program. This good faith policy is set forth in this rulemaking at § 614.11. NRCS demonstrates good faith in mediation by doing, among other things, the following:

- Designating a person to represent NRCS in mediation;
- Defining the NRCS representative's authority to bind NRCS to agreements reached in the mediation;
- Instructing NRCS's representative to ensure that any agreement reached during, or as a result of, the mediation is consistent with the statutory and regulatory provisions and generally applicable program policies and is mutually agreed to in writing by all affected parties;
- Authorizing NRCS's representative to assist in identifying and exploring additional options that may resolve the dispute;
- Assisting, as necessary, in making pertinent records available for review and discussion during the mediation;
- Directing NRCS's representative in the mediation to forward any written agreement proposed in mediation to the appropriate NRCS official for approval; and
- Considering, in a timely manner, dispute resolution proposals requiring actions or approvals.

The basic issue in mediation of an agency program dispute is whether one or more parties to the mediation meet program requirements. Parties mediating a dispute are not free to make their own law or policy, and mediation is not a means to obtain a result not

otherwise permissible under statute, regulations, or generally applicable agency policy and program procedure. Within these parameters, mediation of disputes can produce benefits when the mediation reveals additional relevant facts and new insights. For example, NRCS program mediation may result in: identifying alternative means for a participant to comply with regulatory requirements, exploring alternative mitigation strategies when a wetland has been converted, or considering possible changes to a farming operation with regard to compatible uses of easement acreages. Additionally, when other private parties having an interest in the issue are involved in the mediation, the mediation may assist in identifying potential flexibility in the positions of these private parties which could lead to a more global resolution of the dispute.

NRCS will endeavor to ensure that the representative designated for NRCS in any mediation is a person with appropriate knowledge of the decision-making parameters implicated in the program dispute and who has the authority to bind the agency. However, in some cases, it may not be possible to have an agency representative present who has settlement authority. In those instances, NRCS will designate an NRCS representative who will be responsible for acting as a liaison to the authorized NRCS decision-maker and will be responsible for securing timely consideration of any settlement proposal.

Mediations occurring in the informal appeal process are confidential with some limited exceptions. For example, during the course of mediation, it is anticipated that NRCS's representative may need to communicate with other agency officials such as the deciding official. At the outset of the mediation, NRCS will outline the other possible NRCS officials who may need to be contacted in order to resolve the dispute and seek the concurrence of the other parties to the mediation for such exceptions to the general rule of confidentiality. In addition, any mediated final settlement agreement will not be confidential but will become a part of the official record. Once a dispute has been settled through an executed settlement agreement, the participant waives all further appeals as to that issue. All settlement agreements must be in writing and signed by the parties with the proper authority.

**Reconsideration:** Reconsideration is a review by the designated conservationist or State Conservationist of an NRCS preliminary technical determination. In contrast to the current

regulation, this rule provides for reconsideration of a preliminary technical determination in conjunction with the field review. In addition, this rule establishes a two tiered review process. Specifically, under this rule, the designated conservationist conducts the field visit, supplements the agency record, and makes his or her reconsideration decision within 15 days of the field visit. If the reconsideration decision is favorable to the participant, then the designated conservationist issues the reconsideration as the final technical determination. If the reconsideration decision is still adverse to the participant, the designated conservationist forwards the reconsideration decision and the agency record to the State Conservationist for an independent review and final determination, unless the participant waives in writing further informal appeal. In cases of waiver, the designated conservationist issues the reconsideration decision as the final technical determination. Otherwise, the State Conservationist's reconsideration decision becomes the final agency technical determination upon receipt by the participant. This rule making does not set forth a specified time frame for the State Conservationist's decision in order to provide needed flexibility for any additional information gathering that may be necessary. However, it is the agency's intention that the State Conservationist's decision will be made as soon as practicable. This is in keeping with agency's commitment to ensuring an effective and efficient informal appeals process.

NRCS believes adding reconsideration to the field review process will improve the accuracy of technical determinations and sufficiency of the administrative record upon which the technical decision is based. Both the agency and the participant benefit from this change because it fosters the best possible technical decisions in accordance with law and policy and offers the participant a meaningful opportunity for appeal at the NRCS State level. These changes to the current appeal rule also ensure that the participant has the option of obtaining an impartial review of an adverse preliminary technical determination within the agency by an authority other than the original decision maker. A decision issued on reconsideration constitutes a final technical determination in accordance with the regulation at § 614.8, and as such, starts the running of time for any subsequent appeal to the FSA county committee pursuant to 7 CFR part 780,

if applicable, or NAD under 7 CFR part 11.

*Hearing:* The hearing appeal option is available for adverse program decisions, much like reconsideration is available for technical determinations. A hearing provides an informal opportunity for a participant to present testimony and/or documentary evidence before the appropriate State Conservationist to show why an adverse NRCS program decision is erroneous and why it should be reversed or how it should be modified. In this rulemaking, several changes have been made to the hearing process. First, language has been added to clarify that the Federal Rules of Evidence do not apply to these hearings. Second, this rule provides that only verbatim transcripts may serve as official transcripts of an NRCS hearing. And, lastly, this rule does not include the right of appeal to NAD which was included at § 614.204(c) in the current regulation since the participant will likely forgo that option by appealing to the State Conservationist. In lieu of an NRCS hearing, a participant may appeal a program decision to the FSA county committee pursuant to 7 CFR part 780, if it is a conservation program under Title XII of the Food Security Act of 1985, as amended, (Title XII) or to NAD pursuant to 7 CFR part 11.

*FSA county committee appeals:* Pursuant to 7 U.S.C. 6995 and 7 CFR part 780, a participant may seek an optional informal review by an FSA county committee of an NRCS final technical determination or program decision made under Title XII. A participant may also choose to forgo the FSA county committee appeal option and appeal directly to NAD under 7 CFR part 11.

This rule, at § 614.10, changes the current regulation by adding the FSA county committee appeal option for Title XII program decisions. In addition, the actions of the State Conservationist on remand from the FSA county committee have been changed from permissive to mandatory in this rule making to ensure uniformity.

#### **Program Decisions and Technical Determinations**

This section provides a general overview of technical determinations and program decisions, which are part of NRCS's program implementation and administration responsibilities.

Preliminary and final technical determinations are those determinations by an NRCS official that relates to the condition of the natural resources and cultural practices based on science and the best professional judgment of natural resource professionals

concerning soils, water, air, plants, and animals.

A program decision is a decision reached by an NRCS official based on applicable regulations and program policy. Program decisions may relate to eligibility for program benefits, compatible use authorizations, compliance with program requirements, and other actions. Program decisions may be based on previously issued technical determinations, such as those program decisions issued by NRCS with regard to program eligibility, contract status, or practice installation. A program decision may also be issued solely for the purpose of program administration, such as a response to a request for equitable relief.

#### **Non-Appellable Decisions and Determinations**

Not all adverse decisions or determinations that affect program participants are appellable under this part. Section 614.4 provides a list of the types of decisions that are not appellable. Any notice transmitting an NRCS program decision or technical determination that is determined not to be appellable will provide the reason the decision or determination is not appellable.

For example, program decisions or technical determinations made pursuant to statutory provisions or regulations that are not dependent upon a unique set of facts are generally not appellable. Thus, a decision is not appellable if it is based upon general program policy, a statutory or regulatory requirement that is applicable to all similarly situated participants, or technical standards and equations. In addition, decisions of the NRCS Chief or State Conservationists on equitable relief made under the regulations implementing section 1613 of the Farm Security and Rural Investment Act of 2002, 7 U.S.C. 7996, are discretionary decisions that do not afford participants any rights of appeal within NRCS or any right to judicial review.

This rulemaking includes a new provision, § 614.13, which affords the participant the opportunity to seek the review of the State Conservationist of an NRCS decision denying an appeal based upon appellability. Section 614.13 also informs the participant of the right to seek an appellability review from NAD.

#### **Section-by-Section Analysis**

NRCS is making significant changes to the organization and substance of the existing informal appeals regulation in order to address statutory changes and comments received since the 1995 rule making, as well as to improve the

informal appeals process. The following text describes the changes made to each section of the rule.

#### *Section 614.1 General*

This section retains the same designation and remains substantially the same in content. This section explains the scope and purpose of the agency's informal appeal regulation.

#### *Section 614.2 Definitions*

This section remains the same in designation, but adds several new definitions and removes a few definitions that appear in the existing appeal procedures. Specifically, definitions have been added for the terms "agency", "agency record", "appeal", "final technical determination", "hearing", "mediator", "participant", "program decision", "qualified mediator", "reconsideration", and "verbatim transcript." The definitions for "adverse technical determination" and "decision" have not been included in this rule.

The definitions for "final technical determination", "reconsideration" and "program decision" are added to provide precision and clarity in the use of those terms. The term "agency record" is defined in order to help improve the agency's decision making and documentation process. The term "participant" is broadly defined in this rulemaking to mean any individual or entity who has applied for, or whose right to participate in, a program or receive a payment or benefit in accordance with any program covered by this regulation has been affected by an adverse NRCS decision. The term "participant" does not include individuals or entities whose disputes arise under the items excluded in the definition of a participant set out in the NAD regulations at 7 CFR part 11. The broadening of the definition of "participant" removes the need to also use the term "landowner" as was done in the existing appeal regulation.

The term "qualified mediator" is provided by this rule so that there is a clear direction regarding the qualifications required in order to mediate an NRCS dispute.

The term "verbatim transcript" is added as part of agency's new policy providing that only verbatim transcripts constitute an official record of a hearing and that recordings are prohibited. This policy change ensures a uniform, accurate, and fair means of documenting NRCS hearings. In addition, this policy parallels NAD's policy.

The definition of "adverse technical determination" contained in the



existing appeal regulation is not included here because the meaning of the term has been adequately covered in the appealability section. The general term "decision" is not included here because the types of NRCS decisions are more precisely defined in this rule as noted above.

#### *Section 614.3 Applicability of Appeal Procedures*

This section sets forth the types of decision that are appealable. Section 614.3 addresses the applicability of the informal appeal process contained in sections 614.3, 614.100 and 614.200 of the current appeal regulation. The effect of this change is to streamline the regulation by reorganizing the informal appeals procedures based upon whether a technical determination or a program decision is being appealed.

In addition, since promulgation of the 1995 rule, new programs have been authorized under Title XII and some programs have been repealed. Consequently, this section amends the current regulation by updating the listing of programs to which these informal appeals apply.

Comments have been received on this section concerning FSA review of adverse NRCS technical determinations made under Title XII program authorities being limited to technical determinations. The commenters argued that all decisions, not just technical determinations, made for those programs authorized under Title XII may be appealed under 7 CFR part 780. NRCS agrees with these comments. 7 U.S.C. 6932(d) provides that the "[u]ntil such time as an adverse decision described in this paragraph is referred to the National Appeals Division for consideration, the [Consolidated] Farm Service Agency shall have initial jurisdiction over any administrative appeal resulting from an adverse decision made under title XII of the Food Security Act of 1985 (16 U.S.C. § 3801 *et seq.*)." Therefore, in this rulemaking, NRCS has changed the scope of the FSA county committee review to encompass all technical determinations and program decisions made under Title XII.

#### *Section 614.4 Decisions Not Subject To Appeal*

This section has been renumbered so that it follows directly after the section dealing with applicability. NRCS has expanded this section in order to provide additional clarification as to those decisions that are not subject to appeal. For example, this section adds new language which provides that the correction of errors on contract and

other program documents by NRCS and the results of computations or calculations made by NRCS pursuant to the contract or agreement are not appealable.

#### *Section 614.5 Reservation of Authority*

This section remains the same in content. However, the number designation has been changed from § 614.4 so that the two sections addressing applicability in this rulemaking appear sequentially. Under this section, the Chief of NRCS, either as the head of the agency or as the Executive Vice President of CCC, and the Secretary reserve the authority to determine, at any time, any question arising under programs within their respective authority or from reversing or modifying any program decision or technical determination made by NRCS or CCC.

#### *Section 614.6 Agency Records and Decision Notices*

This section is new. It sets forth the agency's policy that all decisions under this part are based upon an agency record. The agency record is an administrative record comprised of all the documentation, including reports, maps, photographs, correspondence, etc., that the decision-maker relied upon when making his or her decision. In determining which documents are included in the agency record, the decision-maker will err on the side of inclusiveness. The agency is responsible for compiling the agency record and maintaining it. A copy of the agency record is available to the participant upon request. The completeness of the agency record, as well as the consideration of all relevant facts, is critical to an effective appeal process. Consequently, development of the agency record is being emphasized in this rulemaking.

This section also sets forth agency policy on decision notices, including content, deadlines, and methods of delivery. Specifically, NRCS policy requires that an adverse program decision or technical determination must: (1) Be in writing, (2) set forth its factual basis, and (3) explain its application of relevant statute, regulations, and policy. NRCS must send written notice of its decision to the participant via certified mail, return receipt requested, or hand delivery within 10 working days of rendering a technical determination or program decision. In this regard, this section conforms to section 6994 of the 1994 Act, which requires that the Secretary provide written notice of an adverse decision and notice of appeal rights no

later than 10 working days after the decision is made.

#### *Section 614.7 Preliminary Technical Determinations*

This section was designated as Subpart B, Section 614.101—Notice of Preliminary Technical Determinations in the current appeal regulation. As described earlier in this preamble, two substantive changes are being made to this section. One change is that the field review appeal option is now combined with a reconsideration determination by either the designated conservationist or the State Conservationist. The other change is that the participant now has the option of waiving in writing the appeal process for the purpose of immediately implementing any actions required by NRCS.

In addition, in the current regulation, preliminary technical determinations include only those initial written technical determinations provided to a USDA program participant for the programs authorized under Title XII. However, NRCS also makes technical determinations for non-Title XII conservation programs. Consequently, NRCS is amending the regulation so that all technical determinations issued by the agency, regardless of statutory authority, will be issued first as a preliminary technical determination with appeal rights as set forth in this section. NRCS is making this change, in part, by eliminating the subpart structure which was organized around Title XII and non-Title XII decisions.

Comments have been received concerning whether waiting 30 days for a preliminary technical determination to become final prior to being able to appeal to the FSA county committee or to NAD is timely program administration. Given the technical nature of these types of agency decisions, the agency's experience is that issuing the technical decision as preliminary and then affording an adequate informal appeal process at the agency level where such expertise resides is essential to effective program administration. Consequently, the agency is making no significant changes to the regulation as a result of these comments. However, for those participants who want a final technical determination so that they may begin required actions as determined by NRCS (e.g., wetland restoration), NRCS is providing at § 614.7(d) a new option to waive appeal.

#### *Section 614.8 Final Technical Determinations*

This section was designated in the current regulation as § 614.103—Final

Determinations. This section sets forth when technical determinations become final and the appeals procedures available. The content of this section remains similar to the current regulation. However, changes are being made to address finality for reconsideration appeals, to remove subsection (b), and to set forth the available appeal options.

Concern has been raised that participants should be advised of the basis for the technical determination (or program decision), as well as the procedure to be utilized to pursue review or appeal at the time of the notification of the preliminary technical determination.

NRCS notes that this type of requirement was generally addressed at § 614.103(b) in the current regulation. However, NRCS agrees with this concern and, as previously discussed, has included guidance in this rulemaking at § 614.7 "Agency records and decision notices." In addition, NRCS has included further guidance regarding notification as part of the NRCS Appeals and Mediation policy document, Conservation Programs Manual, Part 510, Appeals and Mediation, (440-V-CPM).

#### *Section 614.9 Program Decisions*

This section sets forth the informal appeals procedures available for program decisions which were originally contained in subpart C of the current regulation. Program decisions are decisions issued for conservation programs administered by NRCS which relate to the administration of a conservation program. Unlike technical determinations, program decisions are issued as 'final decisions' meaning they may be appealed directly to NAD or the FSA county committee, if the program decision is made under a Title XII program.

The informal appeals options provided in this section are similar to those provided in the current regulation with three exceptions. First, language is included that addresses appeal to the FSA county committee for Title XII decisions. Second, § 614.203(b)(3) in the current regulation, which provided that the State Conservationist has up to 30 days to render a final decision if no mediated settlement has been reached, is not included in this rule making. This is consistent with the structure of informal appeal options set forth for technical determinations and makes sense given that the informal appeal options for an adverse program decisions are in the alternative, that is, participants choose either mediation or a hearing. Third, this section now

provides a clear deadline within which the State Conservationist must render his or her opinion after the hearing.

#### *Section 614.10 Appeals Before the Farm Service Agency County Committee*

This section was designated as subpart B, § 614.104, Appeals of technical determinations, in the current regulation. The agency is changing the title of this section to "Appeals before the Farm Service Agency county committee" because both program and technical appeals may be appealed to the FSA county committee. Likewise, this section provides that technical determinations and program decisions made under Title XII may be appealed to the FSA county committee.

NRCS is also clarifying the appeal options available to participants for those programs authorized under Title XII. NRCS had initially interpreted 7 U.S.C. 6932 as mandating an informal appeal hearing before the county or area FSA committee of all Title XII conservation program technical determinations before a determination could be appealed to NAD. This rule corrects that misinterpretation by providing that appeal of Title XII decisions to the FSA county committees by the participant is optional and that a participant may appeal directly to NAD once a decision is final.

Finally, in contrast to the current regulation, this section makes mandatory the steps a State Conservationist takes if the FSA county committee requests the State Conservationist's review. This change is being made to ensure completeness of the agency record and uniformity in the appeals process.

#### *Section 614.11 Mediation*

This section encompasses those sections designated as § 614.102—Mediation of preliminary technical determinations and § 614.203—Mediation of adverse final decisions in the current regulation by setting forth agency policy regarding mediation for both preliminary technical decisions and program decisions. In addition to the organizational change, new policy is added to address the requirements for mediation in good faith, confidentiality, and mediator impartiality.

NRCS has removed the reference to "qualified members of a local conservation district" as a source of mediators because of its ambiguity. The new language provides that, in those states without a certified State Mediation Program, qualified mediators will be provided, when available, through a request by the participant to NRCS.

#### *Section 614.12 Transcripts*

This new section is added to provide uniform policy regarding how participants may obtain official transcripts of hearings before the State Conservationist under § 614.9. Only official transcripts will become a part of the agency record. This provision is similar to NAD's policy regarding transcripts as set forth in 7 CFR part 11.

#### *Section 614.13 Appealability Review*

This section of the rule is new and provides the participant with the option of seeking review by the appropriate State Conservationist of a decision to deny an appeal based upon appealability. The participant may choose to forgo this informal review option and seek the review of NAD under 7 CFR part 11.

#### *Section 614.14 Computation of Time*

This is a new section added to address computation of deadlines under this rule as part of the agency's efforts to clarify and improve the informal appeals process.

#### *Section 614.15 Implementation of Final Agency Decisions*

This is a new provision addressing implementation of final USDA decisions. This provision is similar to the decision implementation requirement set forth in the NAD rules of appeal. An NRCS decision must be implemented within 30 days after the agency decision becomes a final USDA decision. A program decision or technical determination becomes a final USDA decision when a participant allows the time to request appeal to expire without appealing the decision. Implementation of a final USDA decision must be initiated by the agency within the required period, but does not necessarily have to be completed within the 30 day period. For example, additional time may be required to obtain updated financial or other information relating to eligibility or feasibility, to obtain a new appraisal, or to reassess the wetland features on a tract of farmland.

Whether the final decision is implemented by NRCS may depend upon the availability of funds. If funds are not available, a final decision on appeal will not cause a payment to be issued immediately to a participant, notwithstanding a successful appeal. However, in such circumstances, the appeal is still an effective resolution of the issues related to the participant's compliance with the appealed program requirements. If funds later become available, and a participant's

circumstances remain unchanged, NRCS may make payment.

#### *Section 614.16 Participation of Third Parties in NRCS Proceedings*

This is a new section which parallels a similar provision in the NAD appeal regulations. This section provides that NRCS may invite third parties whose interests may be affected in the informal appeals process to join as a party to the appeal.

#### *Section 614.17 Judicial Review*

This section is new and was added to address when an NRCS participant can bring action in a court of competent jurisdiction against NRCS for disputes covered by this part. This section parallels the provision for judicial review contained in the NAD regulations at 7 CFR part 11.

#### **List of Subjects in 7 CFR Part 614**

Administrative practice and procedure, Agriculture, Agriculture commodities, Alternative Dispute Resolution, Appeal, Conservation programs, Contracts, Decisions, Determinations, Easements, Farmers, Farmland, Mediation, Soil conservation.

■ Accordingly, the regulations found at 7 CFR part 614 are revised in their entirety as follows:

### **PART 614—NRCS APPEAL PROCEDURES**

Sec.

- 614.1 General.
- 614.2 Definitions.
- 614.3 Decisions subject to informal appeal procedures.
- 614.4 Decisions not subject to appeal.
- 614.5 Reservation of authority.
- 614.6 Agency records and decision notices.
- 614.7 Preliminary technical determinations.
- 614.8 Final technical determinations.
- 614.9 Program decisions.
- 614.10 Appeals before the Farm Service Agency county committee.
- 614.11 Mediation.
- 614.12 Transcripts.
- 614.13 Appealability review.
- 614.14 Computation of time.
- 614.15 Implementation of final agency decisions.
- 614.16 Participation of third parties in NRCS proceedings.
- 614.17 Judicial review.

**Authority:** 5 U.S.C. 301; 7 U.S.C. 6932 and 6995; and 16 U.S.C. 3822(a).

#### **§ 614.1 General.**

This part sets forth the informal appeal procedures under which a participant may appeal adverse technical determinations or program decisions made by officials of the Natural Resources Conservation Service (NRCS), an agency under the United

States Department of Agriculture (USDA). These regulations reflect NRCS policy to resolve at the agency level, to the greatest extent possible, disputes arising from adverse technical determinations and program decisions made by NRCS. Once a decision is rendered final by NRCS, participants may appeal to the National Appeals Division (NAD) as provided for under 7 CFR part 11, or the FSA county committee pursuant to 7 CFR part 780 for decisions rendered under Title XII of the Food Security Act of 1985, as amended, 16 U.S.C. 3801 *et seq.* (Title XII).

#### **§ 614.2 Definitions.**

The following definitions are applicable for the purposes of this part:

- (a) *Agency* means NRCS and its personnel.
- (b) *Agency record* means all documents and materials, including documents submitted by the participant and those generated by NRCS, upon which the agency bases its program decision or technical determination. NRCS maintains the agency record and will, upon request, make available a copy of the agency record to the participant(s) involved in the dispute.
- (c) *Appeal* means a written request by a participant asking for review (including mediation) of an adverse NRCS technical determination or program decision under this part. An appeal must set out the reason(s) for appeal and include any supporting documentation. An appeal is considered filed when it is received by the appropriate NRCS official as indicated in the decision notice.
- (d) *Chief* means the Chief of NRCS or his or her designee.

(e) *Commodity Credit Corporation (CCC)* means a wholly owned Government corporation within USDA.

(f) *Conservation district* means any district or unit of State or local government developed under State law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a conservation district, soil and water conservation district, natural resource district, conservation committee, or similar name.

(g) *County committee* means a Farm Service Agency (FSA) county or area committee established in accordance with section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)).

(h) *Designated conservationist* means the NRCS official, usually the district conservationist, whom the State Conservationist designates to be

responsible for the program or compliance requirement to which this part is applicable.

(i) *Final technical determination* means a decision by NRCS concerning the status and condition of the natural resources and cultural practices based on science and best professional judgment of natural resource professionals concerning soils, water, air, plants, and animals that has become final through the informal appeal process, the expiration of the time period to appeal, or waiver of the appeal process.

(j) *Hearing* means an informal appeal proceeding that affords a participant opportunity to present testimony and documentary evidence to show why an adverse program decision is in error and why the adverse decision should be reversed or modified.

(k) *Mediation* means a process in which a neutral third party, the mediator, meets with the disputing parties, usually the participant and the agency. Through mediation, the parties have the opportunity to work together with the assistance of the mediator to: Improve communications, understand the relevant issues, develop and explore alternatives, and reach a mutually satisfactory resolution.

(l) *Mediator* means a neutral third party who serves as an impartial facilitator between two or more disputants to assist them in resolving a dispute. The mediator does not take sides or render decisions on the merits of the dispute. The mediator assists the parties in identifying areas of agreement and encourages the parties to explore potential options toward resolution.

(m) *Participant* means any individual or entity who has applied for, or whose right to participate in or receive, a payment or other benefit in accordance with any program administered by NRCS to which the regulations in this part apply is affected by a decision of NRCS. The term does not include those individuals or entities excluded in the definition of participant published at 7 CFR 11.1.

(n) *Preliminary technical determination* means the initial written decision by NRCS on a technical matter concerning the status and condition of the natural resources and cultural practices based on science and best professional judgment of natural resources professionals concerning soils, water, air, plants and animals, which has not become final under this part.

(o) *Program decision* means a written decision by NRCS concerning eligibility for program benefits, program administration or program

implementation and based upon applicable regulations and program instructions. Program decisions are issued as final decisions.

(p) *Qualified mediator* means a mediator who is accredited under State law in those States that have a mediation program certified by the USDA pursuant to 7 CFR part 785, or, in those States that do not have a mediation program certified by the USDA, an individual who has attended a minimum of 40 hours of core mediator knowledge and skills training and, to remain in a qualified mediator status, completes a minimum of 20 hours of additional training or education during each 2-year period. Such training or education must be approved by USDA, by an accredited college or university, or by one of the following organizations: State Bar, a State mediation association, a State approved mediation program, or a society of dispute resolution professionals.

(q) *Reconsideration* means a subsequent reconsideration of a preliminary technical determination by the designated conservationist or the State Conservationist.

(r) *Secretary* means the Secretary of Agriculture.

(s) *State Conservationist* means the NRCS official, or his or her designee, in charge of NRCS operations within a State.

(t) *Title XII* means Title XII of the Food Security Act of 1985, as amended, 16 U.S.C. 3801 et seq.

(u) *Verbatim transcript* means the official, written record of proceedings of a hearing of an adverse program decision appealable under this part.

#### **§ 614.3 Decisions subject to informal appeal procedures.**

(a) This part applies to NRCS adverse program decisions and technical determinations made with respect to:

- (1) Conservation programs and regulatory requirements authorized under Title XII, including:
  - (i) Conservation Security Program;
  - (ii) Conservation Reserve Program and the Conservation Reserve Enhancement Program;
  - (iii) Environmental Quality Incentives Program;
  - (iv) Farm and Ranch Lands Protection Program;
  - (v) Grassland Reserve Program;
  - (vi) Highly Erodible Land Conservation;
  - (vii) Wetland Conservation;
  - (viii) Wetlands Reserve Program;
  - (ix) Wildlife Habitat Incentives Program; and
  - (x) Conservation Innovation Grants.
- (2) Non-Title XII conservation programs or provisions, including:

- (i) Agriculture Management Assistance Program;
  - (ii) Emergency Watershed Protection Program;
  - (iii) Soil and Water Conservation Program;
  - (iv) Water Bank Program;
  - (v) Watershed Protection and Flood Prevention Program; and
  - (vi) Healthy Forest Reserve Program.
- (3) Any other program to which this part is made applicable.

(b) With respect to matters identified in paragraph (a) of this section, participants may appeal adverse decisions concerning:

- (1) Denial of participation in a program;
  - (2) Compliance with program requirements;
  - (3) Issuance of payments or other program benefits to a participant in a program;
  - (4) Technical determinations made under Title XII;
  - (5) Technical determinations or program decisions that affect a participant's eligibility for USDA program benefits;
  - (6) The failure of an official of NRCS to issue a technical determination or program decision subject to this part; and
  - (7) Incorrect application of general policies, statutory or regulatory requirements.
- (c) Only a participant directly affected by a program decision or a technical determination made by NRCS may invoke the informal appeal procedures contained in this part.

(d) Appeals of adverse final technical determinations and program decisions subject to this part are also covered by the NAD rules of procedure, set forth at 7 CFR part 11, and by the FSA county committee appeals process, set forth at 7 CFR part 780, for informal appeals of Title XII decisions.

#### **§ 614.4 Decisions not subject to appeal.**

(a) Decisions that are not appealable under this part include:

- (1) Any general program provision, program policy, or any statutory or regulatory requirement that is applicable to all similarly situated participants, such as:
  - (i) Program application ranking criteria;
  - (ii) Program application screening criteria
  - (iii) Published soil surveys; or
  - (iv) Conservation practice technical standards included in the local field office technical guide or the electronic FOTG (eFOTG).
- (2) Mathematical or scientific formulas established under a statute or

program regulation and a program decision or technical determination based solely on the application of those formulas;

(3) Decisions made pursuant to statutory provisions or implementing regulations that expressly make agency program decisions or technical determinations final;

(4) Decisions on equitable relief made by a State Conservationist or the Chief pursuant to Section 1613 of the Farm Security and rural Investment Act of 2002, 7 U.S.C. 7996;

(5) Disapproval or denials of assistance due to lack of funding or lack of authority;

(6) Decisions that are based on technical information provided by another federal or State agency, *e.g.*, lists of endangered and threatened species; or

(7) Corrections by NRCS of errors in data entered on program contracts, easement documents, loan agreements, and other program documents.

(b) Complaints involving discrimination in program delivery are not appealable under this part and are handled under the existing USDA civil rights rules and regulations.

(c) Appeals related to contractual issues that are subject to the jurisdiction of the Agriculture Board of Contract Appeals are not appealable under the procedures within this part.

(d) Enforcement actions under conservation easement programs administered by NRCS.

#### **§ 614.5 Reservation of authority.**

The Secretary of Agriculture, the Chief of NRCS, if applicable, or a designee, reserve the right to make a determination at any time on any question arising under the programs covered under this part within their respective authority, including reversing or modifying in writing, with sufficient reason given therefore, any decision or technical determination made by an NRCS official.

#### **§ 614.6 Agency records and decision notices.**

(a) All NRCS decisions under this part are based upon an agency record. NRCS will supplement the agency record, as appropriate, during the informal appeals process.

(b) NRCS notifies participants of the agency's preliminary and final technical determinations and program decisions through decision notices. By certified mail return receipt requested, NRCS will send to the participant a decision notice within 10 working days of rendering a technical determination or program decision. In lieu of certified

mail, NRCS may hand deliver notices to participants with written acknowledgment of delivery by the participant. Each decision notice contains the following:

- (1) The factual basis for the technical determination or program;
- (2) The regulatory, statutory, and/or policy basis for the technical determination or program decision; and
- (3) Information regarding any informal appeal rights available under this part; the process for requesting such appeal; and the procedure for requesting further review before the FSA county committee pursuant to 7 CFR 780 or NAD pursuant to 7 CFR part 11, if applicable.

**§ 614.7 Preliminary technical determinations.**

(a) A preliminary technical determination becomes final 30 days after the participant receives the decision, unless the participant files an appeal with the appropriate NRCS official as indicated in the decision notice requesting:

- (1) Reconsideration with a field visit in accordance with paragraphs (b) and (c) of this section; or

(2) Mediation as set forth in § 614.11.

(b) If the participant requests reconsideration with a field visit, the designated conservationist, participant, and, at the option of the conservation district, a district representative will visit the subject site for the purpose of gathering additional information and discussing the facts relating to the preliminary technical determination. The participant may also provide any additional documentation to the designated conservationist. Within 15 days of the field visit, the designated conservationist, based upon the agency record as supplemented by the field visit and any participant submissions, will reconsider his or her preliminary technical determination. If the reconsidered determination is no longer adverse to the participant, the designated conservationist issues the reconsidered determination as a final technical determination. If the preliminary technical determination remains adverse, then the designated conservationist will forward the revised decision and agency record to the State Conservationist for a final determination pursuant to paragraph (c) of this section, unless further appeal is waived in writing by the participant in accordance with paragraph (d) of this section.

(c) The State Conservationist will issue a final technical determination to the participant as soon as is practicable after receiving the reconsideration and agency record from the designated

conservationist. The technical determination issued by the State Conservationist becomes a final NRCS decision upon receipt by the participant. Receipt triggers the running of the 30 day appeal period to NAD, or, if applicable, to the FSA county committee.

(d) In order to address resource issues on the ground immediately, a participant may waive, in writing to the State Conservationist, appeal rights so that a preliminary technical decision becomes final before the expiration of the 30 day appeal period.

**§ 614.8 Final technical determinations.**

(a) Preliminary technical determinations become final and appealable:

(1) 30 days after receipt of the preliminary technical decision by the participant unless the determination is appealed in a timely manner as provided for in this regulation.

(2) 30 calendar days after the beginning of a mediation session if a mutual agreement has not been reached by the parties; or

(3) Upon receipt by the participant of the final technical determination issued on reconsideration as provided above in § 614.7(c).

(b) The participant may appeal the final technical determination to:

(1) The FSA county committee pursuant to 7 CFR part 780 if the determination is made under Title XII;

or

(2) NAD pursuant to 7 CFR part 11.

**§ 614.9 Program decisions.**

(a) Program decisions are final upon receipt of the program decision notice by the participant. The participant has the following options for appeal of the program decision:

(1) An informal hearing before NRCS as provided for in paragraphs (b) through (d) of this section;

(2) Mediation as provided for at § 614.11; or

(3) A hearing before NAD pursuant to 7 CFR part 11 or, if the program decision is made under Title XII, appeal before the FSA county committee pursuant to 7 CFR part 780.

(b) A program participant must file an appeal request for a hearing with the appropriate State Conservationist as indicated in the decision notice within 30 calendar days from the date the participant received the program decision.

(c) The State Conservationist may accept a hearing request that is untimely filed under paragraph (b) of this section if the State Conservationist determines that circumstances warrant such an action.

(d) The State Conservationist will hold a hearing no later than 30 days from the date that the appeal request was received. The State Conservationist will issue a written final NRCS decision no later than 30 days from the close of the hearing.

**§ 614.10 Appeals before the Farm Service Agency county committee.**

(a) In accordance with 7 CFR part 780, a participant may appeal a final technical determination or a program decision to the FSA county committee for those decisions made under Title XII.

(b) When the FSA county committee hearing the appeal requests review of the technical determination by the applicable State Conservationist prior to issuing their decision, the State Conservationist will:

(1) Designate an appropriate NRCS official to gather any additional information necessary for review of the technical determination;

(2) Obtain additional oral and documentary evidence from any party with personal or expert knowledge about the facts under review;

(3) Conduct a field visit to review and obtain additional information concerning the technical determination; and

(4) After the actions set forth in paragraphs (b)(1) through (3) of this section are completed, provide the FSA county committee with a written technical determination in the form required by § 614.6(b)(1) through (2) as well as a copy of the agency record.

**§ 614.11 Mediation.**

(a) A participant who wishes to pursue mediation must file request for mediation under this part with the NRCS official designated in the decision notice no later than 30 days after the date on which the decision notice was received. Participants in mediation may be required to pay fees established by the mediation program.

(b) A dispute will be mediated by a qualified mediator as defined at § 614.2(p).

(c) The parties will have 30 days from the date of the first mediation session to reach a settlement agreement. The mediator will notify the State Conservationist whether the parties have reached an agreement.

(d) Settlement agreement reached during, or as a result of, the mediation process must be in writing, signed by all parties to the mediation, and comport with the statutory and regulatory provisions and policies governing the program. In addition, the participant must waive all appeal rights as to the

issues resolved by the settlement agreement.

(e) At the outset of mediation, the parties must agree to mediate in good faith. NRCS demonstrates good faith in the mediation process by, among other things:

- (1) Designating an NRCS representative in the mediation;
- (2) Making pertinent records available for review and discussion during the mediation; and
- (3) To the extent the NRCS representative does not have authority to bind the agency, directing the NRCS representative to forward in a timely manner any written agreement proposed in mediation to the appropriate NRCS official for consideration.

(f) *Mediator impartiality.* (1) No person may serve as mediator in an adverse program dispute who has previously served as an advocate or representative for any party in the mediation.

(2) No person serving as mediator in an adverse program dispute may thereafter serve as an advocate for a participant in any other proceeding arising from or related to the mediated dispute, including, without limitation, representation of a mediation participant before an administrative appeals entity of USDA or any other Federal agency.

(g) *Confidentiality.* Mediation is a confidential process except for those limited exceptions permitted by the Administrative Dispute Resolution Act at 5 U.S.C. 574. All notes taken by participants (Mediator, Management Representative, Disputants, and Disputants' Representative) during the mediation must be destroyed. As a condition of participation, the participants and any interested parties joining the mediation must agree to the confidentiality of the mediation process. The parties to mediation, including the mediator, will not testify in administrative or judicial proceedings concerning the issues discussed in mediation, nor submit any report or record of the mediation discussions, other than the mediation agreement or the mediation report, except as required by law.

**§ 614.12 Transcripts.**

(a) No recordings shall be made of any hearing conducted under § 614.9. In order to obtain an official record of a hearing, a participant may obtain a verbatim transcript as provided in paragraph (b) of this section.

(b) Any party to an informal hearing appeal under § 614.9 may request that a verbatim transcript is made of the hearing proceedings and that such

transcript is made the official record of the hearing. The party requesting a verbatim transcript must pay for the transcription service and provide a copy of the transcript to NRCS at no charge.

**§ 614.13 Appealability review.**

A participant may request a review of a decision denying an appeal based upon appealability by submitting a written request to the appropriate State Conservationist as indicated in the decision notice. This written request must be received by the State Conservationist within 30 calendar days from the date the participant received notice from NRCS that a decision was not appealable. The State Conservationist will render a decision on appealability within 30 days of receipt of the participant's review request. In the alternative, the participant may request review of the appealability decision by NAD pursuant to 7 CFR part 11.

**§ 614.14 Computation of time.**

(a) The word "days" as used in this part means calendar days, unless specifically stated otherwise.

(b) Deadlines for any action under this part, including deadlines for filing and decisions, which fall on a Saturday, Sunday, federal holiday or other day on which the relevant NRCS office is closed during normal business hours, will be extended to close of business the next working day.

**§ 614.15 Implementation of final agency decisions.**

No later than 30 days after an agency decision becomes a final administrative decision of USDA, NRCS will implement the decision.

**§ 614.16 Participation of third parties in NRCS proceedings.**

When an appeal is filed under this part, NRCS will notify any party third party whose interests may be affected of the right to participate as an appellant in the appeal. If the third party declines to participate then NRCS's decision will be binding as to that third party as if the party had participated.

**§ 614.17 Judicial review.**

A participant must receive a final determination from NAD pursuant to 7 CFR part 11 prior to seeking judicial review.

Signed in Washington, DC, on May 8, 2006.

**Bruce I. Knight,**

*Chief, Natural Resources Conservation Service, and Executive Vice President, Commodity Credit Corporation.*

[FR Doc. 06-4572 Filed 5-15-06; 8:45 am]

**BILLING CODE 3410-16-P**

**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Parts 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, and 1131**

[Docket No. AO-14-A75, et al.; DA-06-06]

**Milk in the Northeast and Other Marketing Areas; Order Amending Orders**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule; re-interpretation.

**SUMMARY:** This final rule amends the current ten Federal milk marketing orders issued under the Agricultural Marketing Agreement Act of 1937 (AMAA) to reflect a re-interpretation of the Milk Regulatory Equity Act of 2005, that was signed into law on April 11, 2006. Each order is amended to change the "April 11, 2006" in § 1\_\_\_\_.7 to "May 1, 2006."

7 CFR parts	Marketing area	AO Nos.
1001 ...	Northeast .....	AO-14-A75
1005 ...	Appalachian .....	AO-388-A19
1006 ...	Florida .....	AO-356-A40
1007 ...	Southeast .....	AO-366-A48
1030 ...	Upper Midwest .....	AO-361-A41
1032 ...	Central .....	AO-313-A50
1033 ...	Midwest .....	AO-166-A74
1124 ...	Pacific Northwest ..	AO-368-A36
1126 ...	Southwest .....	AO-231-A69
1131 ...	Arizona .....	AO-271-A41

**DATES:** *Effective Date:* May 1, 2006.

**FOR FURTHER INFORMATION CONTACT:** Gino M. Tosi, Associate Deputy Administrator for Order Formulation and Enforcement, USDA/AMS/Dairy Programs, Stop 0231-Room 2971-S, 1400 Independence Avenue, SW., Washington, DC 20250-0231, (202) 690-1366, e-mail address: [gino.tosi@usda.gov](mailto:gino.tosi@usda.gov).

**SUPPLEMENTARY INFORMATION:** This final rule re-interprets the provisions of the Milk Regulatory Equity Act of 2005 (Pub. L. 109-215, 120 Stat. 328), that amended the Agricultural Marketing Agreement Act of 1937 (AMAA).

Due to the ambiguity of the legislative language and the Congressional intent as reflected in the floor debate and elsewhere, the Department has determined that the Federal milk marketing orders should be amended to reflect the complete removal of Nevada from any marketing area.

*Prior documents in this proceeding:*  
*Final Rule:* Issued April 25, 2006;  
 Published May 1, 2006 (71 FR 25495).

## 527.4 Wetland Criteria/Indicators/Procedures

### (I) INTRODUCTION

Wetland is defined as land that;

1. Has a predominance of hydric soils and
2. Is inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances, does support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.

Wetlands are identified through the confirmation of wetland criteria. All three wetland criteria, hydric soils, hydrophytic vegetation, and wetland hydrology, normally must be met for an area to be identified as wetland. Each criterion must be independently assessed by collecting, analyzing, and documenting data to support the determination. NRCS must demonstrate that an area is wetland, and each determination or delineation must be supported by sufficient evidence. Evidence is gained by collecting data through mandatory technical procedures that indicate if wetland criteria are met. The criteria, indicators, and procedures for making wetland determinations and delineations are contained in this section.

Refer to the “Wetland Criteria/Indicators/Procedures table” for the correct manual to utilize for making wetland determinations on agricultural lands, nonagricultural lands, and narrow bands and small pockets in agricultural lands.

**527.4 Wetland Criteria/Indicators/Procedures (Cont'd)**

**WETLAND CRITERIA/INDICATORS/PROCEDURES FOR  
AGRICULTURAL & NON AGRICULTURAL LAND  
FOR DECISIONS REGARDING FOOD SECURITY ACT AND CLEAN WATER ACT**

Verification, Determination, and Delineation	Agricultural Land (native vegetation is disturbed/removed)	Narrow Bands & Small Pockets in Ag Lands	Agricultural Land (native vegetation is undisturbed)
MANUAL (Procedures)	NFSAM	COE 87M*	COE 87M*
CRITERIA	NFSAM	COE 87M	COE 87M*
Soils	NTCHS***		
Vegetation	NFSAM		
Hydrology			
INDICATORS		COE 87M	COE 87M****
Soils	Field Indicator of Hydric Soils		
Vegetation	COE 87M		
Hydrology	COE 87M & Hydrology Tools		
TRAINING REQUIRED:	NFSAM **	COE Reg. IV	COE Reg. IV

\* Supplemented with guidance documents

\*\* COE Reg. IV training - highly recommended

\*\*\* Use Indicator of Hydric Soils for Agricultural Land (National Technical Committee for Hydric Soils)

(180-V-NFSAM, Third Ed., Circular No. 1, August 2006)



## 527.4 Wetland Criteria/Indicators/Procedures (Cont'd)

### (II) CRITERIA

#### (A) Hydric Soil Criteria for All Land Uses

The list of hydric soils is created by computer using the criteria developed by the National Technical Committee for Hydric Soils. The criteria are selected soil properties that are documented in Soil Taxonomy and were designed primarily to generate a list of hydric soils from the database of Soil Interpretations Records. Criteria 1, 3, and 4 serve as both database criteria and as indicators for identification of hydric soils. Criterion 2 serves only to retrieve soils from the database.

#### (B) The hydric soil criteria is as follows:

1. All Histosols except Folists, or
2. Soils in Aquic suborders, great groups, or subgroups, Albolls suborder, Aquisalids, Pachic subgroups, or Cumulic subgroups that are:
  - a. Somewhat poorly drained with a water table equal to 0.0 foot (ft) from the surface during the growing season, or
  - b. Poorly drained or very poorly drained and have either:
    - (i) Water table equal to 0.0 ft during the growing season if textures are coarse sand, sand, or fine sand in all layers within 20 inches (in), or for other soils
    - (ii) Water table at less than or equal to 0.5 ft from the surface during the growing season if permeability is equal to or greater than 6.0 in/hour (h) in all layers within 20 in, or
    - (iii) Water table at less than or equal to 1.0 ft from the surface during the growing season if permeability is less than 6.0 in/h in any layer within 20 inches, or
3. Soils that are frequently ponded for long duration or very long duration during the growing season, or
4. Soils that are frequently flooded for long duration or very long duration during the growing season.

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)

## 527.4 Wetland Criteria/Indicators/Procedures (Cont'd)

### (C) Hydrophytic Vegetation Criteria

1. 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.
  - a. A plant shall be considered 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.
  - b. For the purposes of the definition of “wetland” in Sec. 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.
  - c. 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. (Currently, the COE REG IV criteria and indicators for on-site methodology.)

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)

(D) Wetland Hydrology Criteria

The hydrology criteria for wetlands is as follows:

1. Inundation (flooding or ponding) occurs for 7 consecutive days or longer during the growing season in most years (50% chance or more); or
2. Saturation at or near the surface occurs for 14 consecutive days or longer during the growing season in most years (50% chance or more). Soils may be considered to be saturated to the surface when the water table is within:
  - a. 0.5 ft of the surface for coarse sand, sand or fine sandy soils; or
  - b. 1.0 ft of the surface for all other soils.

Further refinement of hydrology criteria for determining farmed wetlands (FW) and farmed wetland pasture (FWP) is as follows:

3. For an area to be designated to be FW the area must meet the definition in 514.22a and the following hydrology criteria:
  - a. If the area is a pothole, playa, or pocosin is inundated for at least 7 consecutive days or saturated for at least 14 consecutive days during the growing season; or
  - b. If the area is not a pothole, playa, or pocosin it has a 50 percent chance of being seasonally ponded or flooded for at least 15 consecutive days during the growing season under normal conditions.
4. For an area to be designated a FWP the area must meet the definition in 514.23a and the following hydrology criteria:
  - a. The area is inundated for at least 7 consecutive days during the growing season or saturated for at least 14 consecutive days during the growing season.

## 527.4 Wetland Criteria/Indicators/Procedures (Cont'd)

### (E) Growing Season

The growing season is defined as that part of the year when soil temperatures at 19.7 inches below the soil surface are higher than biologic zero (5 degrees C). As this quantitative determination requires in-ground instrumentation, growing season may be estimated by approximating the number of frost free days. The growing season can be approximated as the period of time between the average date of the last killing frost to the average date of the first killing frost. This represents a temperature threshold of 28 degrees F or lower at a frequency of 5 years in 10. Growing season data can be obtained from the Climate Data Access Network (CDAF), at Portland, Oregon. The State Climate Data Liaison (CDL) in the state office has the procedure for obtaining the data.

In certain parts of the country where the plant communities have adapted to regional conditions, local methods of determining growing season may be more accurate than that described above. Such methods may be used when accompanied by the technical rationale.

## 527.4 Wetland Criteria/Indicators/Procedures (Cont'd)

### (III) INDICATORS FOR WETLANDS ON AGRICULTURAL LANDS

The interaction of soils, vegetation and hydrology results in the development of characteristics unique to wetlands. These characteristics are represented by specific indicators which can be used to assist in verification of the presence of hydric soils, hydrophytic vegetation, and wetland hydrology. The following sections describe the various indicators for soils, vegetation and hydrology that should be used in determining wetland boundaries. While the indicators are initially considered as independent variables in the determination process, it is the preponderance of the evidence -- that is, the weight of all the indicators together -- that leads to the final determination of wetland conditions. These indicators are gathered during on-site reviews.

#### (A) Soils Indicators

The Field Indicators of Hydric Soils of the United States (Reference Section II of FOTG) shall be used to indicate if the soils criterion is met. The Field Indicators do NOT, however, identify every hydric soil and the lack of observation of one of the Field Indicators does not necessarily mean the soil is NOT hydric.

When soil conditions are difficult to interpret or seem inconsistent with the landscape, vegetation, or hydrology, it may be necessary to obtain the assistance of an experienced wetland delineator or soil scientist. It is expected that occasions will arise where confirmation of saturation and reduction, as required by the hydric soil definition, will depend on intensive data collected by direct measurement or by other means.

To fully document a hydric soil, the soil should be examined and described to whatever depths are necessary to test for the presence of applicable hydric soil indicators. In most soils, the depth of excavation should be at least 50 cm or 20 inches. Document features observed. Compare the soil features observed to that required by each Field Indicator. Specify which indicators have been met.

#### (B) Vegetation Indicators

NFSAM criteria may be documented by use of the appropriate vegetation sections of the "Corps of Engineers Wetlands Delineation Manual" (Waterways Experiment Station Technical Engineers Report Y-87-1, January 1987) and current national guidance, i.e., October 7, 1991, Questions and Answers on the 1987 Manual and the Corps of Engineers, March 6, 1992, guidance to the field "Clarification and Interpretation of the 1987 Manual,".

(180-V-NFSAM, Third Ed., Amend. 5, September 2000)

## 527.4 Wetland Criteria/Indicators/Procedures (Cont'd)

### (C) Hydrology Indicators

NFSAM criteria may be documented through use of indicators from the appropriate hydrology sections of the Federal Wetland Delineation Procedures.

In addition, the following analytical techniques may be used to supplement indicators and procedures found in the COE 1987 Manual. These techniques are outlined in the Hydrology Tools for Wetland Delineation Manual:

1. Use of Stream and Lake Gages
2. Runoff Volumes
3. Remote Sensing
4. DRAINMOD
5. Scope and Effect Equations
6. NRCS Drainage Guides
7. Observation Wells

### (IV) **PROCEDURES**

Certified wetlands determinations/delineations are conducted through either off-site procedures or on-site procedures. Off-site procedures should only be utilized where the application of remote sensing technology can effectively identify wetlands, such as on open agricultural lands. Off-site procedures must be made according to wetland mapping conventions that have been agreed to by NRCS, EPA, COE, and FWS.

Mapping conventions must be based on field tested correlations between off-site information and on-site wetland determinations. Mapping conventions must reflect regional differences in interpretation of wetland signatures. (See 513, Subpart C).

#### (A) Off-site Determinations

Offsite procedures are dependent on the availability of information for making a wetland determinations/delineations, the quality of this information, and the ability to interpret these data. Off-site determinations/delineations must be based on wetland mapping conventions that have interagency concurrence and that have been field tested to ensure adequate correlation between office information and actual wetland conditions.

#### 527.4 Wetland Criteria/Indicators/Procedures (Cont'd)

The following information should be utilized when making off-site determinations/delineations: (See Chapter 513, Subpart C for procedures for developing off-site wetland mapping conventions):

1. U.S.G.S. topographic maps depicting the site and the watershed.
2. National Wetland Inventory (NWI) maps, state wetland maps or local wetland maps.
3. NRCS soil survey maps where hydric soils or soils with hydric inclusions on the site have been previously identified.
4. Aerial photos or FSA slides of the site. Mapping conventions must be followed when interpreting aerial photography. Depending upon the location, wetland signatures may include:
  - a. Hydrophytic vegetation
  - b. Surface water
  - c. Saturated soils
  - d. Flooded or drowned-out crops
  - e. Stressed crops due to wetness
  - f. Differences in vegetation patterns due to different planting dates
  - g. Inclusion of wet area into set-aside programs.
  - h. Other
5. Climatological data to ensure that the wetland signatures are reflective of long term hydrological conditions. The Hydrology tools for Wetland Delineation Manual provides a procedure for the use of the climatological data to ensure the signatures are representative.
6. Data and analysis shall be made based on the conditions on the land and information as of December 23, 1985.

#### (B) On-site Determinations

When wetland can not be identified off-site by an approved mapping convention process, use on-site procedures to make certified wetland determinations/delineations.

(180-V-NFSAM, Third Ed., Circular 1, August 2006)

## 527.4 Wetland Criteria/Indicators/Procedures (Cont'd)

### (C) Disturbed Areas

Disturbed areas include sites where significant alteration of the soils, vegetation or hydrology has occurred to the extent that indicators cannot be relied upon to identify wetland conditions. Disturbance may include human activities (e.g., intensive farming, filling, excavation, clearing, damming, cultivation, or land management activities) or natural events (e.g., avalanches, mudslides, head-cutting, aggradation, and degradation). Disturbances may be on-site (e.g., draining, dredging, filling) or off-site (e.g., terraces, diversions, dams, head-cuts).

In general, disturbance includes any activity that affects the flow of water into or out of a wetland; any change in the natural condition of the soil; and any alteration or elimination of the natural hydrophytic plant community.

Significant vegetative disturbance includes farming or ranching practices that alter the species composition of the plant community so that it is no longer in a natural condition. For example, wetlands that are cropped or established to tame grasses should be considered vegetatively disturbed. Also, remnants of natural vegetation in wetlands that are otherwise vegetatively altered should not be solely relied upon to determine a prevalence of hydrophytic vegetation.

Utilize the following procedures for evaluating the soils, vegetation and hydrology on disturbed sites. Utilize the data sheets attached hereto for recording the data.

#### 1. Soils

For areas where the soils have been significantly altered, additional analyses must be performed to determine the soils that would occur under normal circumstances. The procedures in NFSAM are to be used but may be supplemented by the procedures found in the COE 87 Manual for Atypical Situations (Section F). Apply the indicators of hydric soils as found in above in Section III of this part and document on the data sheets in NFSAM Section 526.41 through 526.48, or similar COE data sheets.

#### 2. Vegetation

For areas where vegetation has been significantly disturbed, additional analyses must be performed to determine the vegetation that would occur under normal circumstances. The procedures found in NFSAM are to be utilized and may be supplemented by the procedures found in the COE 87 Manual for Atypical Situations (Section F). Apply the indicators as found above in Section III of this part and document on data sheets in NFSAM 526.41 through 526.48, or similar COE data sheets.



## 527.4 Wetland Criteria/Indicators/Procedures (Cont'd)

### 3. Hydrology

For areas where the hydrology has been significantly altered, additional analyses must be performed to determine the hydrology that would occur under normal circumstances. The procedures found in NFSAM are to be utilized and may be supplemented by the procedures found in the COE 87 Manual for Atypical Situations (Section F). Apply the indicators as found above in Section III of this part. Data sheets of NFSAM 526.41 through 526.48, or similar COE data sheets are used to record the data.

Additional procedures in the Hydrology Tools for Wetland Delineation Manual may be used to supplement NFSAM and the COE 87 Manual. The effects of drainage may be evaluated using scope and effect equations found in the Hydrology Tools manual. Also, DRAINMOD model version 4.0 can also be used to evaluate the long range impact of the drainage features on the water table.

### (D) Undisturbed Areas

The "Corps of Engineers Wetlands Delineation Manual" (Waterways Experiment Station Technical Engineers Report Y-87-1, January 1987) and current national guidance, i.e., the Corps of Engineers, March 1992 guidance to the field "Clarification and Interpretation of the 1987 Manual" must be used to conduct delineations on all lands not considered agricultural land per the MOA and may be used where land is not in annually tilled crops. (Appendix 527.12). These lands are areas where the existing vegetation can be used to determine whether the area meets applicable hydrophytic vegetation criteria in making a wetland delineation. The data sheets provided in the COE 87 manual and supplemental guidance must be used to record data.

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)

**527.5**

**HELC/WC Rule, 7 CFR 12, September 6, 1996**

# Rules and Regulations

Federal Register

Vol. 61, No. 174

Friday, September 6, 1996

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## 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 resource 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 of 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 conservation 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 conservation plans or conservation systems are scheduled in a timely manner. A late contact may not allow sufficient time for USDA to service the request and could result in a substantial delay in receiving a USDA determination of eligibility or ineligibility.

#### § 12.5 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]

BILLING CODE 3410-01-M

### **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

## 527.6 Functional Assessment Using the Hydrogeomorphic Approach

### (I) INTRODUCTION

#### (A) What is functional assessment?

Functional assessment of wetlands is used to measure the level of performance of hydrological, chemical, and biological properties and processes occurring in wetland ecosystems. There is a general need to measure wetland functions in order to determine whether wetland regulations and enforcement in the United States are effective in reducing, increasing, or not changing overall wetland performance. On a practical level, activities in individual wetlands that alter their level of functioning are estimated using a rapid assessment method. Activities may include filling, draining, removing woody vegetation, and altering the flow of water. Functional assessment assists in determining whether such activities are likely to lead to a change in functional performance of hydrologic, chemical, and biological features. If the activities decrease or eliminate one or more functions related to these features, additional criteria can be applied to judge whether the losses in function are locally, regionally, or nationally significant. (Part 526.64 - Minimal Effect)

To measure the effects of agricultural activities, functional assessments are conducted for a proposed alteration of the wetland before it occurs and then estimated based on assumed effects of the projected activity after alteration. The difference between these two levels of performance is the loss in functioning due to the impact. Alternatively, if a degraded wetland is to be restored, functional assessment allows an estimate of increases in functioning by comparing the change in functional performance before and after the restoration activity.

Various functional assessment methods have been used for over two decades to estimate the capacity of wetlands to perform a particular groups of functions. The hydrogeomorphic (HGM) approach described herein differs from former methods in three ways: (1) classification of the wetland according to hydrogeomorphic setting so the details of the assessment method are tailored to a specific wetland class, (2) identification of discrete functions for the various wetland classes, and (3) use of reference wetlands as benchmarks for gauging relative levels of functioning.

## 527.6 Functional Assessment Using the Hydrogeomorphic Approach (Cont'd.)

### (B) Classification, Functions, and Reference Wetlands

Classification criteria are based on the position of the wetland in the landscape (geomorphic setting), dominant sources of water, and the flow and fluctuation of the water once in the wetland. The principles of this classification are described in Brinson (1993), and the classes have since been modified into seven hydrogeomorphic groups: riverine, depressionnal, slope, mineral soil flats, organic soil flats, estuarine fringe, and lacustrine fringe. The purpose of the classification is to reduce the amount of natural variation that has to be dealt with in conducting an assessment, and thus make assessments more precise and efficient. The aim of classification is to isolate most of this assessment can be more sensitive to the losses or gains in functions due to impacts or restoration classes.

The second component of the HGM approach is to more critically describe functions that wetlands perform. It has long been recognized that some wetlands perform certain functions better than others, not because they are impacted in some way, but because they are inherently different. For example, bottomland hardwood forests of the southeastern United States support breeding habitat for neotropical migrants more intensively than rain-fed peat bogs in northern Minnesota. Because these two extremes in breeding habitat differ so greatly due to many intrinsic properties, comparisons between them become meaningless. The same logic applies to comparing functions between depressionnal and riverine wetlands in South Carolina. To avoid assessment of functions that are inappropriate for the wetland class, functions are described differently for the seven classes of wetlands mentioned above. Even if the functions overlap significantly between classes, which they often do, they are likely to be performed at different levels or intensities. Even if the intensities of a particular function were similar for two classes, the field indicators and variables (defined below) to assess the function would differ sufficiently to require separate treatment.

The third component of the HGM approach is to establish standards of comparison based on wetland sites that represent the highest level expected in the landscape in performing the appropriate suite of wetland functions for the class. Standards differ from function to function, but examples include the number of trees per acre, the average depth of flooding, and the level of sediment removal. Rather than establishing standards on the basis of which level would result in, say, trapping the most sediment, standards are determined by field direct measurements or by indicators on wetlands that are self-sustaining and representative of the highest levels of overall performance.

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)



## 527.6 Functional Assessment Using the Hydrogeomorphic Approach (Cont'd.)

This component of functional assessment requires that reference wetlands be established for various wetland classes in many physiographic provinces of the United States. Just as soil series are characterized for various climatic regions of the United States, and recommended uses and limitations are defined for each series, regional subclasses of reference wetlands (i.e., regional variations of the seven "national" classes) must be used to determine reference standards, i.e., "what the wetland of that subclass should do" in performing functions.

### (C) How is a Function Estimated?

The HGM approach is designed for rapid determination of functional performance and functional change. Work required for classification and development of reference standards is the price that must be paid in order for the assessment itself to be performed with precision and efficiency. Functions such as organic carbon export or maintenance of detrital food webs cannot be measured directly unless many hours of research time are invested. Instead, both logic and an understanding of the fundamentals of ecosystem science allow estimates of functional performance. In fact, years of past research and ongoing research efforts often can be brought to bear on insight into individual wetland functions. For example, river floodplain wetlands (e.g., the riverine class) function to store floodwaters that otherwise would be conveyed much more rapidly downstream if a levee confined the flow to the channel. The logic to support this function of water storage is straightforward; the data to substantiate this function for riverine wetlands are abundant.

In order to take advantage of such logic and empirical evidence, a series of indicators and variables are brought together to estimate levels of functioning. For example, using the function of "retention of particulates" (e.g., sediment removal), the use of indicators and variables can be illustrated for depressional wetlands with a surface outlet. First, the function is identified as being dependent upon factors known to affect the mobility and accumulation of sediments. For many depressional wetlands, factors include the dominant land use in the uplands surrounding the wetland (VUPUSE), land use in the buffer zone adjacent to the wetland (VBUFFUSE), land use in the wetland itself (VWETUSE), and the presence or absence of a wetland outlet (VOUTLET). An example of the foregoing variables combined logically to model the particulate retention function is:  $\text{Particulate Retention} = (\text{VUPUSE} + \text{VBUFF} + \text{VWETUSE} + \text{VOUTLET})/4$ .

## 527.6 Functional Assessment Using the Hydrogeomorphic Approach (Cont'd.)

In other words, land use or condition in the surrounding upland affects the sediment supply to the wetland, land use in the outermost edge of the wetland (buffer) affects the distribution of sediment sources, the use of the wetland itself may affect vegetation roughness and thus the extent to which the supply is retained, and the outlet condition determines the extent to which sediments are exported rather than retained. If there were research to reveal that one of these variables was more influential in particulate retention than others, variables could be weighted and adjusted accordingly in the configuration of the equation. For example, if information supports that alterations to the outlet have greater effects on particulate retention than other variables, the equation could be expressed as:

$$\text{Particulate Retention} = (VUPUSE + VBUFF + VWETUSE)/3 + VOUTLET)/2.$$

The variables are all derived from measurements, visual indicators, and other sources that allow the variable to be scaled between zero and 1.0. By definition, the reference standard is equivalent to 1.0. In the example above, if the reference standard for VUPUSE is ungrazed native prairie, the variable would be 1.0 by definition (e.g., the condition associated with wetlands that exhibit the highest level of functioning overall).

If VUPUSE had a condition of row crop agriculture, its effect relative to a reference standard of 1.0, may be 0.1; if grazed prairie but not native grasses, a 0.5 may be appropriate. In other words, the closer the measured or observed variable is to the reference standard condition, the higher the variable scores, up to a maximum of 1.0. Rowcrop agriculture normally produces more sediment from uplands than does grazing, so one might wonder why a score of only 0.1 is assigned to VUPUSE. The reason is that more sediment is not necessarily better. Although many wetlands are natural sinks for sediment in the landscape, large supplies of sediment deposited at non-geological rates are not sustainable from the standpoint of wetland functioning. In other words, the wetland assessed at 0.1 for VUPUSE would probably soon fill up and eventually lose all other wetland functions because it received sediments at too high a rate.

## 527.6 Functional Assessment Using the Hydrogeomorphic Approach (Cont'd.)

While the opportunity for more sediment removal is present in this example, high levels of functioning are not considered sustainable. The equation for sediment retention is an indirect approach based on data accessible through direct observation of indicators. An alternative and more direct way would be to actually measure the need for estimates based on indicators or variables. Such techniques as Cesium-137 distribution could be applied, but are impractical and too expensive for rapid assessment.

Particulate retention is but one function and four variables. In the Riverine Guidebook (Brinson et al. In press), there are 15 functions and 45 variables. The regional models being developed for depressional wetlands have 9 functions and 15 to 20 variables. Model structures are the same in the Riverine Guidebook and regional models, however, for estimating the level of functioning from variables and indicators. Guidelines for identifying functions, establishing and combining variables, and utilizing field indicators are described in more detail in (Smith et al. In press).

### (D) How Is Model Output Handled?

Within the framework for assessment described above, there are several options available for interpreting results. The output, however, should be tailored to provide consistency in meeting the goals of projects to which it is applied. For example, the results of an assessment could be used in determining minimal effects by providing a measure of the level of impacts associated with a proposed drainage project. For restoration purposes, assessment of restoration efforts would need to be compared over a several year period to determine whether project goals are being achieved. Assessment of impacts for a proposed conversion is the most straightforward. For example, if an assessed emergent wetland measures up to the best of the lot for all functions (i.e., it is equivalent to reference standards for all functions), and the conversion is to completely drain the site and grow corn as a commodity crop, each of the functions would decrease from 1.0 to much lower levels, and several are likely to fall to zero. In contrast, a restoration project might propose to raise the functioning of a river floodplain for surface water storage by breaching levees and restoring overbank flow to the wetland. In this case, the level of functioning might be raised from a 0.1 with levees to 0.9 when the levees are breached. A level of 1.0 might not be achieved until emergent vegetation grew enough to develop necessary roughness for the function to rise to reference standards for surface water storage.

## 527.6 Functional Assessment Using the Hydrogeomorphic Approach (Cont'd.)

In practice, each of several functions for a particular wetland in a regional subclass may score differently depending on how it compares with the reference standards developed for the method. Functions are also distributed among four categories: hydrologic, biogeochemical, plant community maintenance, and faunal support. Using these functional groups, guidelines can be established to identify thresholds of significance in decreases of functioning. If, for example, hydrologic functions are lost, the effects would be more long-lasting and severe than if trees had been harvested but the opportunity for their regeneration and regrowth had not been impaired.

The guidelines presented below provide the interface between the determination of minimal effects and changes in functioning due to agricultural and related conversions using HGM assessments.

One method of HGM is contained in Part 526.63a. Where reference standards are not yet located, states are encouraged to develop an HGM process (See 527.6a).

### (E) References:

Brinson, M. M. 1993. A hydrogeomorphic classification for wetlands. U.S. Army Corps of Engineers Waterways Experiment Station, Technical Report TR WRP-DE-4. Vicksburg, Mississippi, USA.

Brinson, M. M., F. R. Hauer, L. C. Lee, W. L. Nutter, R. Rheinhardt, R. D. Smith, and Dennis Whigham. In press. Guidebook for application of hydrogeomorphic assessments to riverine wetlands. U.S. Army Corps of Engineers Waterways Experiment Station, Technical Report TR WRP-DE-xx. Vicksburg, Mississippi, USA.

Smith, R.D., A. Ammann, C. Bartoldus, and M.M. Brinson. In press. An approach for assessing wetland functions based on hydrogeomorphic classification, reference lands, and functional indices. U.S. Army Corps of Engineers Waterways Experiment Station, Technical Report TR WRP-DE-xx. Vicksburg, Mississippi, USA.

**527.6.1 Guidance for Wetland Minimal Effects Determinations**

**(I) BACKGROUND**

In order to ensure national consistency in making wetland minimal effects determinations, a framework for developing a wetland functional assessment procedure is provided. Since the Hydrogeomorphic Approach to the Functional Assessment of Wetlands (HGM) is not available in all states, an interim procedure which addresses the same functions as those in HGM, should be utilized in order to maintain continuity and consistency in assessment procedures until full implementation of HGM.

The State Conservationists (STC) in consultation with the State Technical Committees, will have the responsibility of (1) adapting local assessment procedures to encompass functions identified in the national framework, (2) identifying preemptive (“red flags”) or cautionary (“yellow flags”) conditions that exist that would automatically not qualify for minimal (3) identifying categorical minimal effects exemptions, which are activities or conditions in which recurring requests for minimal effects exemptions are granted in consultation with the Regional Conservationists (4) developing thresholds for treating functional assessment output data in making minimal effect decisions, (5) identifying wetland values in the state and (6) developing a public relations strategy to inform clients of minimal effects exemptions.

Below are the varied types of minimal effects exemptions and the manner in which they are determined.

<b>Categorical Minimal Effects Exemptions</b>	<b>Minimal Effects Activities without Conditions</b>	<b>Minimal Effects Activities with Conditions</b>
Criteria established by the STC in consultation with the State Technical Committee (defined with or without additional future conditions, e.g. use and maintenance of specific BMP’s, special management requirements, etc.)	Functional assessment conducted by the District Conservationist per state procedure	Functional assessment conducted by the District Conservationist per state procedure
No functional assessment required		

**NOTE:** Due to their federally mandated wetland responsibilities, the four Federal agencies (EPA, FWS, COE, and NRCS) which are part of the Federal Wetlands MOA should be represented on the State Technical Committee.

### **527.6.1 Guidance for Wetland Minimal Effects Determinations (Cont'd.)**

The categorical minimal effect exemptions and minimal effect worksheets which the State Conservationist in consultation with the State Technical Committee develop should:

- Evaluate the functions and values of the wetland under consideration as well as the other wetlands in the area
- Be understandable by clients, including the general public
- Be defensible to landuser clients
- Allow as quick and easy field use as possible, but yet retain valid evaluation

The following worksheets may be used for the assessment procedure which includes the functions that should be addressed in localized assessment procedures. These worksheets may be used if a detailed analysis of the impact of the proposed activity is required. It is possible that not all functions will be considered pertinent for a specific state. Currently, information is only available for the functions of riverine and depressional wetland subclasses. As information becomes available, it will be distributed as an addendum to this manual.

**WETLAND FUNCTIONAL ASSESSMENT WORKSHEET  
RIVERINE CLASS**

FUNCTIONS	HYDROLOGY					BIOGEOCHEMISRTY				PLANT COMMUNITY MAINTENANCE		FAUNAL COMMUNITY/ HABITAT MAINTENANCE			
	F1	F2	F3	F4	F5	F6	F7	F8	F9	F10	F11	F12	F13	F14	F15
	Dynamic Surface Water Storage	Long-term Surface Water Storage	Energy Dissipation	Subsurface Storage of Water	Moderation of Groundwater Flow or Discharge	Nutrient Cycling	Removal of Dissolved Elements and Compounds	Retention of Particulates	Organic Carbon Export	Maintain Characteristic Plant Communities	Maintain Characteristic Detrital Biomass	Maintain Spatial Structure of Habitat	Maintain Habitat Interspersion and Connectivity	Maintain Distribution and Abundance of Invertebrates	Maintain Distribution and Abundance of Vertebrates
IMPACT AREA															
Function Present (Y/N)															
Function Reduced (Y/N) or E (eliminated)															
MITIGATION PLAN															
Function Replaced (Y/N)															

**WETLAND FUNCTIONAL ASSESSMENT WORKSHEET  
DEPRESSIONAL CLASS**

	<b>HYDROLOGY</b>	<b>BIOGEOCHEMISRTY</b>				<b>PLANT &amp; FAUNAL COMMUNITY/ HABITAT MAINTENANCE</b>					
<b>FUNCTIONS</b>	F1	F2	F3	F4	F5	F6	F7	F8	F9	F10	F11
	<b>Maintenance of Characteristic Hydrologic Regime</b>	<b>Elemental Cycling</b>	Removal of Dissolved Elements and Compounds	Retention of Particulates	Organic Carbon Export	Maintain Characteristic Plant Communities	Maintain Faunal Habitat	Maintain Food Webs	Maintain Habitat Interspersion and Connectivity Among Wetlands	Maintain Characteristic Invertebrates Community	Maintain Characteristic Vertebrates Community
<b>IMPACT AREA</b>											
<b>Function Present (Y or N)</b>											
<b>Function Reduced (Y/N) or E (eliminated)</b>											
<b>MITIGATION PLAN</b>											
<b>Function Replaced (Y or N)</b>											

Note: There is significant variation in the hydrologic regime of depressional wetlands. As regional models are developed, the hydrology function may be refined to include a more specific characterization of this function.

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)



## 527.6.1 Guidance for Wetland Minimal Effects Determinations (Cont'd.)

### Process to Establish Minimal Effects Procedures for States with Existing Functional Assessment Procedures

If states have wetland assessment procedures in place, modify the procedures to reflect functions identified in the HGM approach. For example, if the term “Floodwater and Stormwater Storage/Attenuation” was used, modify to “Dynamic Surface Water Storage,” or if “Water Quality Protection” was used, modify to “Nutrient Cycling” and “Retention of Particulates.” States may retain their present nomenclature for identified functions if the actual functions reflect those in the HGM approach. However, the reporting nomenclature in FOCS will be that of HGM. If a state has established a numerical scheme for assessing functions, they are not bound to the “yes/no” responses identified on the worksheets provided. However, there must be some type of decision mechanism (a threshold level) included in the procedure to evaluate the output and determine if an activity is “minimal.” In addition to developing threshold levels, the state must also have “red flags” and “yellow flags” developed as well as categorical minimal effects exemptions if they do not already exist. The ‘yellow flags’ may include habitat or species of special state concerns or those qualities identified as values. It is not expected that states with existing procedures completely reinvent their assessment procedures.

Regional Conservationists will be responsible for coordinating consistency among the states and regions in identifying functions, documenting change in functions due to project activities, and demonstrating logic in making minimal effects determinations.

### Process to Establish a Minimal Effects Assessment Procedure for States with No Prior Functional Assessment Procedure:

#### **Step 1:**

The State Conservationist, in consultation with the State Technical Committee will:

1. Identify “red flags” and “yellow flags” for their area; (red flags - e.g., T&E species; yellow flags - e.g., areas/species of special state concern). Conversions will be preempted for red flags and extreme caution will be used on yellow flags.
2. Identify activities that would be encompassed in a Categorical Minimal Effects determination. (e.g. replacement of tile intakes with underground tile or rock intakes according to NRCS standards)
3. Identify which function indicators are pertinent to your area(see list and identify others specific to local conditions)
4. Identify which functions are considered especially valuable in the region (refer to “functions and values” list) and need to be maintained (not reduced or eliminated)
5. Identify thresholds for “minimal” (see examples)

## 527.6.1 Guidance for Wetland Minimal Effects Determinations (Cont'd.)

### **Caution**

The following are only examples. It is necessary for the State Conservationist, in consultation with the State Technical Committee, to establish the thresholds for the minimal effects determinations to reflect the state or local resource conditions. Cumulative effects must also be considered when thresholds are being established.

### **Example 1**

For the riverine class, if 3 or more of the 5 Hydrology functions are reduced; and 3 of the 4 Biogeochemistry functions are reduced and 1 or more of either the Plant Community Maintenance or the Faunal Community functions is reduced, the project effect is not minimal.

### **Example 2**

For the riverine class, if all of the functions within a category (hydrology, biogeochemistry, plant community, or faunal community) is reduced then the project effect is not minimal.

### **Example 3**

For the depressional class, if the Hydrology function is reduced, the project effect is not minimal.

**CAUTION:** Please keep in mind that there may be specific resources that are limited or unique in a particular area or conditions (e.g., dynamic surface water storage may be important to an area that is subject to frequent flooding) that will preempt determining a minimal effect.

Coordinate with adjacent states and Region to ensure consistency.

### **Step 2:**

Use identified items (red flags, yellow flags, values, decision matrix, etc.) to develop a source for documentation to accompany worksheets (worksheets may be modified to address wetland classes and functions identified by the State Conservationist in consultation with the State Technical Committee) provided for depressional and riverine classes. States are encouraged to develop worksheets for wetland classes that do not have draft models published. Refer to the "National Action Plan to Develop the Hydrogeomorphic Approach for Assessing Wetland Functions," to obtain information on development efforts that are currently ongoing for assistance on identifying wetland functions for those specific classes.

Coordinate with adjacent states and Region to ensure consistency.

## **527.6.1 Guidance for Wetland Minimal Effects Determinations (Cont'd.)**

### **Step 3:**

- Provide training to all personnel responsible for making minimal effects determinations (include other federal and state partners as appropriate)
- Coordinate with adjacent states and Region to ensure consistency

### **Steps Used in Performing a Minimal Effect Assessment Procedure**

#### **Step 1:**

Review project to verify that the planned activity is considered a manipulation which “triggers” the wetland provisions.

#### **Step 2:**

Review project proposal for red and yellow flags.

#### **Step 3:**

Determine if categorical minimal effect exemption applies.

#### **Step 4:**

If no categorical minimal effect, conduct field investigation by performing assessment procedure using worksheet.

#### **Step 5:**

Consider effects on other wetlands in the area and cumulative effects (to be determined by the State Technical Committee based on local resources).

#### **Step 6:**

Apply output information from assessment to decision matrix. (Does proposed project exceed thresholds?)

#### **Step 7:**

Notify landowner of decision via letter and provide appeal rights.

**527.6.1 Guidance for Wetland Minimal Effects Determinations (Cont'd.)**

**Values**

Wetland values must be taken into consideration when establishing minimal effect thresholds for specific functions or group of functions. These values are qualities determined by society to be desirable or important. Since wetland values are tied to societal benefits and are based on local resources and concerns, it would be inaccurate and inappropriate to establish national stipulations for identifying wetland values. Therefore, guidance, in the form of a list of functions and their associated values is provided to assist states in identifying important wetland values at the state level that can be applied on a case-by-case basis. Note: The rationale for valuation must be documented (as deemed appropriate by the State Conservationist in consultation with the State Technical Committee).

FUNCTIONS	VALUES
Dynamic Surface Water Storage	Flood control, water quality improvement
Long Term Surface water Storage	Maintains and improves surface water quality, maintains water table elevations, provides wildlife habitat
Subsurface Water Storage	Recharge, maintains baseflow and seasonal flow in streams, replenishment of soil moisture
Dissipation of Energy	Reduces erosion and downstream sediment loading, improves water quality
Cycling of Nutrients	Improves surface water quality
Retention of Particulates	Reduces downstream sediment loading, improves surface water quality, protects in stream habitat
Export of Organic Carbon and Detritus	Enhances decomposition of organic matter, supports aquatic food webs
Maintenance of Plant and Animal Communities	Provides plant and animal habitat, recreation, aesthetics, educational opportunities

For additional information on values and their associated functions refer to “An Approach for Assessing Wetland Functions Using Hydrogeomorphic Classification, Reference Wetlands, and Functional Indices”, Smith et al., page 24.

## **527.6.1 Guidance for Wetland Minimal Effects Determinations (Cont'd.)**

### **INDICATORS OF FUNCTIONS**

Below are examples of some indicators that are related to the identified functions. Please note that indicators vary from region to region. These examples are to serve as guidance for the states to refine to reflect specific regional conditions. For additional information on functions in the riverine subclass refer to, "A Guidebook for Application of Hydrogeomorphic Assessment to Riverine Wetlands", Brinson et al.

#### **DYNAMIC SURFACE WATER STORAGE**

- lichen lines on trees
- aerial photos showing flooding
- water marks
- silt lines
- drift lines
- directionally bent vegetation

#### **LONG -TERM SURFACE WATER STORAGE WATER**

- organic matter accumulation in the soil
- low permeability rates of the soil
- water marks
- sediment deposits
- debris
- hummocks
- oxbows, meanders, abandoned channels

#### **ENERGY DISSIPATION**

- sediment deposits or scours
- silt deposits on vegetation
- buried root collars
- large woody debris moved about
- water marks
- wrack line

#### **SUBSURFACE STORAGE OF WATER**

- coarse soil textures

#### **MODERATION OF GROUNDWATER FLOW OR DISCHARGE**

- permeable soils with somewhat permeable underlying layers

## **527.6.1 Guidance for Wetland Minimal Effects Determinations (Cont'd.)**

### **NUTRIENT CYCLING**

- litter fall or leaf area
- detrital and soil organic matter
- fermentation and humus layers
- down dead woody debris

### **REMOVAL OF ELEMENTS AND COMPOUNDS**

- undecomposed leaf litter
- fresh wrack piles
- silt on litter fall
- rills on adjacent upland slopes
- seeps at toe of slopes
- hummocks
- high flow channels
- litter layer
- humus stratum

### **RETENTION OF PARTICULATES**

- recent flooding evidence in non-drought year
- silt on litter fall of the year
- rills on adjacent upland slopes
- depressions, oxbows, meander scrolls
- natural levees
- lateral tributaries entering floodplain and not connected to the channel
- toe of slope seeps

### **ORGANIC CARBON EXPORT**

- lichen pattern on tree trunks
- undecomposed leaf litter
- fresh wrack piles
- silt on litter fall of the year
- internal drainage channels present and connected to main channel
- standing stock of live and dead biomass
- soil organic matter

### **MAINTAIN CHARACTERISTIC PLANT COMMUNITY**

- species composition, percent cover and density characteristic for natural wetlands of the area (to be identified by the State conservationists in consultation with the state technical committee)

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)

## **527.6.1 Guidance for Wetland Minimal Effects Determinations (Cont'd.)**

### **MAINTAIN CHARACTERISTIC DETRITAL BIOMASS**

- density of dead standing trees characteristic for natural wetlands of the same class in the area
- abundance of down and dead trees is characteristic for natural wetlands of the same class in the area
- surface woody debris characteristic for natural wetlands of the same class in the area

### **MAINTAIN SPATIAL HABITAT STRUCTURE**

- density of dead standing trees characteristic for natural wetlands of the area
- density of cover or number of vertical strata characteristic for natural wetlands of the same class in the area
- number, frequency, and distribution of gaps in forest canopy characteristic for natural wetlands of the area

### **MAINTAIN INTERSPERSION AND CONNECTIVITY**

- aerial photos showing flooding
- silt marks
- directionally bent vegetation
- sediment scour
- sediment deposition
- microtopography (surface roughness) characteristic for natural wetlands of the same class in the area
- vegetated corridors connecting mosaics of habitat types (uplands, wetlands, between channels, and between upstream and downstream)

### **MAINTAIN DISTRIBUTION AND ABUNDANCE OF INVERTEBRATES**

- tunnels, shells, casts, and holes in soil
- galleries in logs and twigs
- tunnels in wood
- evidence of suitable aquatic habitat (depressions, seeps, etc.)

## **527.6.1 Guidance for Wetland Minimal Effects Determinations (Cont'd.)**

### **MAINTAIN ABUNDANCE OF VERTEBRATES**

- egg masses
- tracks
- skins
- skeletons
- feathers
- nests
- burrows
- browsed plants
- sightings of mammals or their dens

### **MAINTENANCE OF CHARACTERISTIC HYDROLOGIC REGIME**

- relatively undisturbed native vegetation
- silt staining
- presence of natural outlet as measured by the %change in volume of water that can be held in the pool
- sediment on plant stems
- woody debris and litter
- microtopography (surface roughness) characteristic for natural wetlands of the same class in the area
- density of cover or number of vertical strata characteristic for natural wetlands of the same class in the area

### **MAINTAINS FOOD WEB**

- presence of a critical or keystone species
- relatively undisturbed native vegetation
- wetland watershed uncultivated, ungrazed, undeveloped with no evidence of sediment delivery
- organic matter accumulation in the soil



## 527.7 Memorandum of Understanding between ASCS and SCS

Memorandum of Understanding  
Between  
Agricultural Stabilization and Conservation Service (ASCS)  
And  
Soil Conservation Service (SCS)

Relative to implementation of the conservation provisions of the Food Security Act of 1985.

Authorities: Soil conservation and Domestic Allotment Act, 16 USC 590 (h); Food Security Act (FSA) of 1985, 16 USC 3811 et seq.

Purpose: Implementation of the highly erodible land and wetland conservation provisions of FSA requires close coordination of efforts and sharing of information regarding producer participation in certain USDA programs between ASCS and SCS. Additionally, both agencies have a role in checking the producer's annual certification of compliance with the conservation provisions of FSA. This memorandum sets forth the specific areas of coordination and data sharing required by both agencies to carry out their responsibilities under FSA and 7 CFR Part 12.

### ASCS RESPONSIBILITIES

ASCS will:

1. Maintain official USDA records relative to the farms, tracts, fields, and cropping history of the producers who participate in certain USDA programs. The records will:
  - a. Record by farm, tract, and field number highly erodible land and wetland determinations.
  - b. Record by farm and tract number:
    1. Approved conservation plans.
    2. Actively applied conservation plans.
  - c. Include site-specific information on the location of highly erodible land, wetland, farmed wetlands, artificial wetlands, commenced exemption determinations, third party converted wetlands, prior converted cropland, and areas of non-wetland and non-highly erodible land.
2. Utilize SCS information to delineate wetland areas on ASCS aerial photography.
3. Utilize SCS determinations of "actively applying the conservation plan" and "applying a conservation system" to determine eligibility for program benefits.
4. Advise a new farm owners an/or operators whether a conservation plan has been developed for the land and of previous HEL and wetland determinations recorded by field on ASCS photography. In the absence of such plans or determinations and /or development of an approved conservation plan.

## 527.7 Memorandum of Understanding between ASCS and SCS, (page 2)

5. Maintain an automated listing of the following SCS determinations:
  - a. That an approved conservation plan has been developed for the tract of land; and
  - b. That the conservation systems described in the conservation plan are being actively applied.
6. Provide data at the field office level to SCS on reconstitution and new programs participants in order to update records on highly erodible land and wetland determinations and approved conservation plans and/or systems. This electronic data-sharing is to begin in calendar year 1990.
7. Be on alert for potential violations of the swampbuster and sodbuster provisions during the course of conducting normal business activities including random spot checks of sodbuster and swampbuster compliance checks.
8. Issue an ASCS-569 to SCS for potential sodbuster cases.
9. Request that SCS make wetland determinations where ASCS has reason to believe that a producer is out of compliance.
10. Make commenced conversion exemptions and third-party conversion exemption determinations.
11. Utilize SCS determinations concerning the extent to which supplies and materials purchased prior to December 23, 1985, would have drained a wetland when making commenced conversion exemption and third-party conversion exemption determinations.
12. Refer to SCS all issues concerning acceptable maintenance of drainage systems.
13. Refer to SCS all questions concerning abandonment of prior converted cropland.
14. Accept certifications from producers for whom SCS has notified ASCS that the producers has conservation plan, and based on that certification assume that producers are actively applying the conservation plan until SCS informs ASCS otherwise.

### SCS RESPONSIBILITIES

SCS will:

1. Make appropriate HEL and wetland determinations on Form SCS-CPA-026 for all Forms AD-1026 referred to SCS by ASCS.
2. Provide ASCS clearly outlined delineations of all wetland determinations on the photocopy and designate HEL fields on the photocopy.

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)

**527.7 Memorandum of Understanding between ASCS and SCS, (page 3)**

3. Provide ASCS with a list of tracts with highly erodible land and approved FSA conservation plans by farm and tract as of January 1, 1990. The list will identify those tracts eligible for a time extension due to lack of a soil survey.
4. Determine whether an approved conservation plan has been developed for the land.
5. Complete a status review on a representative sample of approved conservation plans each calendar year to determine whether the producer is actively applying the approved conservation plan.
6. Inform producers of the result of the status review and of appeal rights on SCS determinations.
7. Report the following to ASCS:
  - a. changes in HEL and wetland determinations.
  - b. That the conservation plan is approved.
  - c. that the producer is not actively applying the conservation plan. This information will also be reported to FmHA and FCIC.
8. Make an appropriate determination and report to both the producer and ASCS on all farms or tracts referred by ASCS on Form ASCS-569.
9. Notify ASCS, using Form ASCS-569, of the final determination that a producer is not using a conservation system or not actively applying the conservation plan after the 45-day appeal time has passed, or after the person has made an appeal.
10. Enter on form ASCS-569 the date that the producer was notified that he or she was not using a conservation system or not actively applying the conservation plan.
11. Determine whether planned activities on drainage systems are considered maintenance or improvement of the current drainage system.
12. Upon request ASCS, make wetland determinations and determine the extent to which supplies and materials purchased prior to December 23, 1985, would have drained wetlands.
13. Provide information to ASCS on cases where SCS is informed of potential violations and make any necessary determinations.
14. Make determinations of abandonment of prior converted cropland.

AGREED:

\_\_\_\_\_  
Chief, SCS

\_\_\_\_\_  
Administrator, ASCS

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

**527.7 Memorandum of Understanding between ASCS and SCS, (Additional Material)**

Subject: Conservation Compliance Implementation

TO: ASCS Offices  
SCS Offices

The Agricultural Stabilization and Conservation Service (ASCS) and the Soil Conservation Service (SCS) signed a Memorandum of Understanding (MOU) on January 9, 1990. The MOU defines a number of the responsibilities of the two agencies in implementing the conservation provisions of the Food Security Act of 1985.

This letter reaffirms our commitment to the terms of the MOU. We do reiterate that it is the sole responsibility of SCS to determine whether producers are actively applying their conservation plans.

SCS will be conducting random checks of producers in each county to determine whether producers are actively applying their plans. SCS will also handle complaints from the public, ASCS, or other agencies regarding this determination. In the event SCS determines a person not to be actively applying the plan, SCS will notify the producer of this decision and handle the appeals associated with such determinations. SCS will then report to ASCS producers not actively applying plans. ASCS will determine U.S. Department of Agriculture benefit ineligibility for the crop year involved.

SCS will also provide information to ASCS relative to cases under consideration for the graduated sanction provision of the law. ASCS will use this information to make the final determination of "good faith" and the amount of graduated sanction that is applicable.

\_\_\_\_\_  
Administrator  
Agricultural Stabilization and  
Conservation Service

\_\_\_\_\_  
Chief  
Soil Conservation Service

**527.7 Memorandum of Understanding between ASCS and SCS, (Additional Material)**

NATIONAL BULLETIN NO. 180-1-16

SUBJECT: CPA - UPDATE OF MEMORANDUM OF UNDERSTANDING (MOU)  
BETWEEN ASCS AND SCS RELATIVE TO CONSERVATION  
COMPLIANCE IMPLEMENTATION

Purpose. To distribute copies of the above MOU to SCS offices.

Expiration Date. September 30, 1991.

Background. The original MOU between ASCS and SCS relative to implementation of the conservation provisions of the 1985 Food Security Act (FSA) was signed by both agencies in January of 1990. The attached update to the original MOU is a reaffirmation of the commitment of both agencies to FSA implementation.

Both the original MOU and the update will be made part of the appendix of the National Food Security Act Manual in a later issuance of the Manual.

Director  
Conservation Planning Division

Attachment

DIST: L, S, T

## 527.8 Memorandum of Understanding between SCS, ASCS, FWS, and FmHA

### MEMORANDUM OF UNDERSTANDING

#### BETWEEN

The Soil Conservation Service (SCS),  
Agricultural Stabilization and Conservation Service (ASCS),  
U.S. Fish and Wildlife service (FWS)

#### AND

The Farmers Home Administration (FmHa)  
Regarding the Establishment of Wetland Conservation Easements on FmHA Inventory Property

#### I. Purpose

This memorandum of understanding (MOU) establishes the procedure and defines the duties and responsibilities of the four respective agencies with regard to establishing wetland conservation easements on FmHA inventory property.

#### II. General

This MOU does not alter the statutory or regulatory authority of SCS, ascS, FWS, or FmHA. This MOU is intended to facilitate the implementation of Section 335(g) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1985 (g)), relating to the establishment of wetland conservation easements on FmHA inventory property through the cooperation efforts that are documented in this MOU.

#### III. Procedures

An Easement Review Team will be established to assist in the development of conservation easements to be established on wetlands located on FmHA inventory property. The easement Review Team will be composed of a representative from the SCS, ASS, FWS, AND FmHA. The purpose of the Easement Review Team is to provide the FmHA State Director with a recommendation as to whether the inventoried property is a marketable agricultural production unit comparable to the property as required, taking into consideration any wetland easements. The FmHA representatives selected by the FmHA State Director will coordinate the responsibilities of the Easement Review Team, schedule any site visits, maintain a running record of Team activity, and summarize and present the recommendations of the Team to the State Director. Members

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)

## 527.8 Memorandum of Understanding between SCS, ASCS, FWS, and FmHA (page 2)

of the Easement Review Team may consult on an informal or formal basis in the development of their recommendations. When developing the Team recommendations, each agency representative on the team will have the final say for their respective component area of responsibility. For example, in the event a disagreement occurs, SCS's recommendation to the Team as to the identification of the wetland types will be final, whereas the FWS recommendation to the Team as to the boundary, terms, and conditions of the easement shall be final. The individual duties and responsibilities of the respective Team members are as follows:

(1) FWS:

(i) Based on technical considerations, delineates and provides to the Easement Review Team, the location, boundaries, terms, and conditions of any proposed wetland conservation easements which includes the delineation of both optimum and discretionary easements.

(ii) Consults with the FmHA State Director when it is necessary to reduce easements below the 10 and 20 percent levels in order to maintain a comparable and marketable agricultural production unit.

(2) SCS identifies and provides to the Easement Review Team, all wetlands by type and boundaries.

(3) ASCS provides to the Easement Review Team cropping information, as to what acreage have been frequently cropped and other data which may be available and useful to the Team in making its comparability and marketability recommendations (i.e., information on yields, average comparable farm size in the area, etc.)

(4) FmHA coordinates Team activities.

(5) The FWS and SCS (jointly), in consultation with Land Grant Professionals (Cooperative Extension Service), develop and agree to the management plan for the wetland conservation easements on haying and grazing land (i.e., the haying and grazing practices are in accordance with forage management standards that provide for the protection and restoration of wetland functional values).

(6) The SCS, ASCS, FWS, and FmHA (jointly) document their analysis and conclusions as to whether an inventory property is a marketable agricultural production unit in exhibit F of Subpart C of Part 1955 of Title 7 of the Code of Federal Regulations (available in any FmHA office). (This exhibit will be completed and filed in the inventory property case file, and will be the basis for establishing conservation easements below the 10 and 20 percent levels on FmHA inventory properties which contain prior converted and/or frequently cropped wetlands.)

Nothing in this Memorandum of Understanding shall be construed as indicating a financial commitment by FmHA, SCS, ASCS, or FWS for the expenditure of funds except as authorized in specific appropriations.

**527.8 Memorandum of Understanding between SCS, ASCS, FWS, and FmHA (page 3)**

This Memorandum of Understanding is effective immediately upon the date of the last signature date below and will continue in effect until modified or revoked by agreement of all parties, or revoked by either party alone upon 30 days written notice. Modifications to this document may be made by mutual agreement and such modifications will be in effect upon signature of the modified document by all parties.

\_\_\_\_\_  
Director  
U.S. Fish and Wildlife Service

\_\_\_\_\_  
Chief  
Soil Conservation Service

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
Administrator  
Agricultural Stabilization  
and Conservation Service

\_\_\_\_\_  
Administrator  
Farmers Home Administration

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Date)



## 527.9 Memorandum of Understanding between FmHA, SCS, and ASCS (page 1)



United States  
Department of  
Agriculture

Farmers  
Home  
Administration

Washington  
D.C.  
20250

MEMORANDUM OF UNDERSTANDING  
BETWEEN  
FARMERS HOME ADMINISTRATION (FmHA),  
SOIL CONSERVATION SERVICE (SCS),  
AND  
AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE (ASCS)

SUBJECT:

Implementation of the conservation compliance provisions of the Food Security Act (FSA) of 1985, as amended by the Food, Agriculture, Conservation, and Trade (FACT) Act of 1990; and the Agricultural Credit Improvement Act of 1992.

AUTHORITIES:

Soil Conservation and Domestic Allotment Act, 16 USC 590 (h); Food Security Act of 1985, 16 USC 3801 et seq.; Agricultural Credit Improvement Act of 1992, Public Law 102-554.

PURPOSE:

Implementation of the highly erodible land (HEL) and wetland (W) conservation provisions of the FSA, as amended, (hereinafter referred to as FSA) requires close coordination of efforts and the sharing of information regarding producer participation in certain U.S. Department of Agriculture (USDA) programs of the FmHA, SCS, and ASCS. This Memorandum of Understanding (MOU) sets forth the specific areas of coordination required by the three Agencies to carry out their responsibilities under the FSA and 7 CFR Subtitle A, Part 12.

IT IS AGREED THAT:

1. If an agricultural commodity is planted on HEL or HEL is designated for conservation uses on land that was cropped or set aside in any year between 1981 and 1985, to remain eligible for USDA program benefits, a person must have developed a conservation plan by January 1, 1990, or the date that is 2 years after SCS has completed a soil survey for the farm, whichever is later. Producers must actively apply the plan and have it fully implemented by January 1, 1995, in order to maintain program eligibility.
2. To remain eligible for benefits, a conservation system must be fully applied when an agricultural commodity is planted on HEL or HEL is designated for conservation uses if:
  - \* the land has not been cropped or set aside in any year between 1981 and 1985, or
  - \* a conservation plan was not signed by January 1, 1990, or the date that is 2 years after SCS has completed a soil survey for the farm, whichever is later.



Farmers Home Administration is an Equal Opportunity Lender.  
Complaints of discrimination should be sent to:  
Secretary of Agriculture, Washington, D.C. 20250

## 527.9 Memorandum of Understanding between FmHA, SCS, and ASCS (page 2)

3. FmHA is responsible for making direct and guaranteed loans to eligible family-size farmers. To qualify for USDA benefits, and before FmHA funds can be advanced for 1992 and future years, persons must meet the conditions for eligibility in Items 1 and 2.

4. FmHA requires that all applicants present adequate documentation for FmHA to determine applicant compliance with the FSA prior to considering the application complete. FmHA cannot complete the processing of an application without the necessary documentation provided by the applicant.

5. Under the Agricultural Credit Improvement Act of 1992, Agencies of the USDA that receive requests from FmHA for information needed to complete an operating loan application must provide this information within 15 calendar days. To complete an application, FmHA may require information from SCS regarding the applicant/borrower's compliance with HEL/W requirements.

6. SCS is responsible for making HEL/W determinations and assisting farmers in developing, applying, and revising conservation plans. SCS decisions in this regard will be final.

7. A copy of the approved conservation plan will be filed in the SCS office, and will not be automatically required in the borrower's FmHA file. The plan will be available for review by FmHA when FmHA makes on-site visits to operations with an approved conservation plan in place. If FmHA determines at any time that loan proceeds were used for a prohibited activity, a copy of the plan should then be obtained from SCS and placed in the borrower's file in case FmHA must take appropriate action to enforce the covenants of loan instruments.

8. Producers are responsible for filing Form AD-1026, "Highly Erodible Land Conservation (HELC) and Wetland (WC) Certification," with ASCS to qualify for USDA program benefits.

9. ASCS is responsible for making determinations regarding producer eligibility for USDA program benefits.

10. If scheduled practices on conservation plans currently in place are not being applied, SCS will consider the conservation plan to be not actively applied. SCS will notify ASCS in writing, and ASCS will determine the ineligible producers as a result of the violation. No new credit will be extended and existing credit may be jeopardized by the failure to meet the schedule. FmHA and SCS will consult jointly with the applicant, at the applicant's request, to determine acceptable methods to bring the applicant into compliance.

11. This MOU may be terminated at any time agreed upon in writing between all Agencies involved.

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)

## 527.9 Memorandum of Understanding between FmHA, SCS, and ASCS (page 3)

### FmHA WILL:

1. Request all FmHA applicants to file Form AD-1026, "Highly Erodible Land Conservation (HELC) and Wetland (WC) Certification," at the local ASCS office, as part of a complete application, to initiate the process of documenting compliance with the FSA.
2. Upon effect of this MOU, provide to the local ASCS office and the local SCS office a master list of all FmHA borrowers in the area served by that County Office, and continue to provide ASCS and SCS with the names of new borrowers on a routine basis.
3. Determine if a feasible plan of operation, which includes the costs and impact of implementing the conservation plan, can be developed. If scheduled practices will not permit a feasible plan to be developed, no credit will be extended unless SCS and the applicant/borrower can revise the proposed conservation plan such that a feasible plan of operation can be developed.
4. Continuously monitor the progress and status of implemented conservation systems for FmHA borrowers on an ongoing basis as part of the routine FmHA loan processing and servicing functions and promptly notify SCS in writing of any suspected or apparent compliance deficiencies.
5. Work with SCS, before approving loans for purchasing or renting new land, to determine if a conservation plan may be needed on the land to be acquired, and the projected cost and impact of implementing the plan.
6. Request from ASCS the HEL/W conservation eligibility status for all applicants before loan approval.
7. Carry out Steps 1 through 6 annually.

### SCS WILL:

1. Annually provide the local FmHA County Office with a copy of the most recent list of approved conservation compliance plans. The list will be delivered as soon as possible to FmHA or within an agreed-to timeframe between SCS and FmHA at the local level.
2. Give first priority to FmHA applicant requests, promptly respond to FmHA requests for HEL/W determinations, and prepare conservation plans when necessary to prevent delays in the loan making process. For FmHA requests regarding operating loan applications, SCS will respond within 15 calendar days of the request.

## 527.9 Memorandum of Understanding between FmHA, SCS, and ASCS (page 4)

3. Make technical assistance available within limits of appropriations to all FmHA borrowers for installation of conservation practices planned and for the revisions of conservation plans to be applied on FmHA borrowers' farms.

4. Conduct a status review on farms, as necessary, when notified in writing of potential compliance deficiencies that have been identified on FmHA borrowers' farms.

5. Notify FmHA and the borrower in writing when SCS finds that an FmHA borrower is not actively applying the conservation plan or is otherwise not found to be in compliance with the FSA, and assist with getting the required practice(s) or acceptable substitute practices(s) applied immediately. SCS will consult with the FmHA County Supervisor when FmHA loan funds will be used to apply the planned practices. If a practice has been rescheduled for a specific future date, SCS will inform FmHA in writing of the changes made in the conservation plan. SCS will also inform FmHA in writing of any violations with respect to W conversion.

6. Provide FmHA with HEL determinations, as necessary, to fulfill FSA requirements; and W determinations, as necessary, to fulfill the requirements of FSA, Sections 335(g) and 363 of the Consolidated Farm and Rural Development Act, and Executive Order 11990.

7. Use an ongoing status review process (spot check) to monitor the status of implementation of conservation plans. SCS will review the list of plans selected for status review with the local FmHA County Office, ensuring that a minimum of 5 percent of FmHA borrowers will be included. When less than 20 FmHA borrowers are in a county, at least one FmHA borrower's farm will be included in the status review each year. SCS will provide to FmHA a report of the annual status reviews, including dates of the spot checks, the borrowers reviewed, and the results of each review.

8. Carry out Steps 1 through 7 annually.

ASCS will:

1. Maintain official USDA records relative to the farms, tracts, fields, and cropping history of the producers who participate in certain USDA programs.

2. Notify FmHA, in writing, if any FmHA borrower is determined ineligible for USDA benefits because an HEL/W conservation violation has occurred.

3. Be on the alert for potential violations of HEL/W conservation provisions during the course of conducting normal business activities, including random spot checks of sodbuster and swampbuster compliance checks.

4. Coordinate Graduated Payment Reductions for all USDA Agencies. ASCS will additionally notify FmHA, in writing, of the reinstatement of eligibility status on applicants/borrowers who were previously ineligible for USDA program benefits.

527.9 Memorandum of Understanding between FmHA, SCS, and ASCS (page 5)

5. Continue to process the Form AD-1026, "Highly Erodible Land Conservation (HEL) and Wetland Conservation (WC) Certification," in accordance with ASCS guidelines. Additionally, if W determinations have not been made, and/or if the producer intends to plant or produce an agricultural commodity on land for which an HEL determination has not been made, ASCS will forward Form AD-1026 to SCS.

6. Carry out Steps 1 through 5 annually.

  
Acting Chief, SCS

091 1993  
Date

  
Acting Administrator, FmHA

AUG 13 1993  
Date

  
Acting Administrator, ASCS

OCT 14 1993  
Date

## 527.10 National Bulletin-ADS-Extension FSA Cooperative Agreement

NATIONAL BULLETIN NO. 120-

SUBJECT: ADS - EXTENSION FSA COOPERATIVE AGREEMENT

TO: State Conservationists and State Resource Conservationists

Purpose. To encourage state conservationists to work with Directors of State cooperative Extension Service (CES) and Administrators of 1890 Land Grant Institutions, including Tuskegee University, to develop and implement a coordinated plan to accelerate implementation of the Conservation Title of the Food Security Act (FSA) of 1985.

Expiration Date. September 30, 1988

Background. The conservation Title of the Food Security Act (FSA) of 1985 has increased the demand for the Extension Service (ES) and Soil Conservation Service (SCS) resources to help farmers plan and apply conservation practices on highly erodible land. About 40 percent of the Nation's farmers, or about 800,000 farmers, must be assisted to develop conservation plans between now and December 31, 1989, to continue to be eligible for farm program benefits administered by USDA.

Several USDA agencies must participate in the important information and education task. ES has been assigned the lead role to coordinate this effort. Accelerating information and education efforts by ES, through the CES, will allow SCS and Soil and Water Conservation District personnel to concentrate more of their efforts on technical assistance.

Some suggested FSA activities which CES can conduct are:

1. Adapt and reproduce sets of slides/tapes/videos, manuals and other group- planning material, such as that developed by CES and SCS in Illinois, for use in other state.
2. Provide instructors and other assistance for group-planning meetings.
3. Develop and distribute informational material such as brochures, radio and TV scripts, posters, displays, slide sets, and videos.
4. Develop a program, prepare material for, and conduct FSA informational and educational meetings for farmers to adequately inform them of their options under the FSA. Conduct special outreach programs for minority and limited resources farmers.
5. Establish or refocus farm demonstrations to show acceptable conservation systems that meet FSA requirements.

-MORE-

DIST: L, S, T

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)

## 527.10 National Bulletin-ADS-Extension FSA Cooperative Agreement (page 2)

6. Plan and help conduct special closed-circuit television programs to inform and educate farmers about the conservation provisions of the FSA.

7. Other.

Enclosed is a Memorandum of Understanding with the ES concerning cooperative efforts to help implement the FSA. You should contact the Director of your State CES and the administrator of the 1890 Land Grant Institutions, including Tuskegee University to review the enclosed Memorandum of Understanding and to develop a coordinated information and education plan for the Conservation Title of the FSA.

Also enclosed is a copy of an example of a cooperative agreement you may use to develop an agreement with the State CES and ES. Specifically, this agreement may be used to transfer funds to CES to help implement FSA activities which are over and above their normal assistance and where you and the State Director/Administrator mutually agree that a transfer of funds is appropriate.

This sample agreement has been developed in conjunction with our Administrative Services Division (ADS), the Conservation Planning Division (CPA) and ES and has the approval of the USDA Office of the General Counsel.

This agreement provides for SCS to make payments to CES using the Advance of Funds by Treasury Check method. It may also be used to make payments using the Reimbursement by Treasury Check method by changing the clause at Section IV-B to read as follows:

"Reimburse the CES for costs incurred by the CES upon receipt and approval on Form SF-270. Reimbursement will be for costs incurred for work items completed during the period covered by the SF-270."

A copy of the memorandum from Dr. Johnsrud to the State Extension offices on this subject is enclosed for your information.

Program questions on the use of this cooperative agreement should be directed to

Chief

Enclosures (3)

## 527.11 Memorandum of Understanding between Extension Service and SCS

Enclosure 1  
MEMORANDUM OF UNDERSTANDING  
between the  
EXTENSION SERVICE  
and the  
SOIL CONSERVATION SERVICE  
UNITED STATES DEPARTMENT OF AGRICULTURE (USDA)

### I. PURPOSE

The purpose of this Memorandum of Understanding (MOU) is to establish a framework for a working relationship between the Extension Service (ES) and the Soil Conservation Service (SCS) to develop and implement a coordinated plan to identify, inform, and educate farmers with highly erodible cropland of their options under the conservation Title of the Food Security Act (FSA) of 1985.

### II. AUTHORITY

Title XII of the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended (7 U.S.C. 3318(b) and the Soil Conservation and Domestic Allotment Act, as amended (16 U.S.C. section 590 a-f).

### III. BACKGROUND

Title XII of the FSA has increased the demand for ES and SCS resources to help farmers plan and apply conservation practices on highly erodible land. About 40 percent of the Nation's farmers, or about 800,000 farmers, must be assisted to develop conservation plans between now and December 31, 1989, to continue to be eligible for farm program benefits administered by USDA.

To accomplish this task in two years requires a well coordinated approach to use limited resources efficiently. An accelerated informational/educational program is needed to help farmers recognize their responsibilities and alternatives under the FSA.

Under provision of section 12.6(c) of the Highly Erodible Land and Wetland Conservation final rule (7 CFR Part 12) and section 704.3(b) of the Conservation Reserve Program final rule (7 CFR Part 704), SCS has been assigned the lead technical assistance role concerning the implementation of the rules.

Under the provisions of section 12.6(c) of the Highly Erodible Land and Wetland conservation final rule (7 CFR Part 12) and Section 704.3(d) of the Conservation Reserve Program final rule (7 CFR Part 704), ES has been assigned the lead role to coordinate the information and education programs concerning the implementation of the rules.

(180-V-NFSAM, Third Ed., Amend. 2, Nov. 1996)



## 527.11 Memorandum of Understanding between Extension Service and SCS (page 2)

Accelerating information and education effort by ES, through the Cooperative Extension System, will allow Soil Conservation Service to concentrate more of its efforts on technical assistance.

### IV. THE EXTENSION SERVICE AGREES TO:

- A. work with SCS to develop a plan for a cooperative effort, involving the cooperative Extension System, to provide the information and technical assistance required by farmers for purposes of title XII of the FSA;
- B. coordinate the development of appropriate educational materials for the use of each participating State Cooperative Extension Service (CES) in helping the deliver such information and technical assistance.
- C. provide a channel of communication between SCS and the State CES concerning activities conducted under the MOU;
- D. encourage each State CES to develop an appropriate program to reach and inform targeted farmers, including special outreach for minority and limited resource farmers;
- E. participate with the State CES and SCS in the development, evaluation and conduct of such informal and educational activities in each State, as may be mutually agreed upon and documented by an appropriate cooperative agreement under the provisions of section 1472(b), of the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended (7 U.S.C. 3318(b).

### V. THE SOIL CONSERVATION SERVICE AGREES TO:

- A. work with the ES to develop a plan for a cooperative effort, involving the Cooperative Extension System, to provide the information and technical assistance required by farmers for purposes of Title XII of the FSA;
- B. provide ES and each participating State CES with lists of farmers with highly erodible cropland to be used to target the State FSA education and information programs;
- C. provide technical support as necessary to ES and State CES for the development of appropriate educational materials;
- D. provide funds and participate with the ES and State CES in the development, evaluation and conduct of such informational and educational activities in each State, as may be mutually agreed upon and documented by an appropriate cooperative agreement under the provisions of section 1472(b) of the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended (7 U.S.C. 3318(b).

**527.11 Memorandum of Understanding between Extension Service and SCS (page 3)**

**VI. THE EXTENSION SERVICE AND THE SOIL CONSERVATION SERVICE MUTUALLY AGREE:**

A. that for purposes of this MOU the term "State Cooperative Extension Service" means an organization established at a land-grant college or university under the Smith-Lever Act of May 8, 1914 (7 U.S.C. 341-349), or section 209(b) of the Act of October 26, 1974 (D.C. Code, Section 31-1719(b) or an eligible institution under section 1444 of the National Agricultural Research, Extension, and Teaching Policy Act of 1977. (7 U.S.C. 3221);

B. to coordinate information and education efforts with soil and water conservation districts, farm managers, the farm lending community, and others;

C. to integrate extension farm profitability planning programs and SCS conservation planning economic analysis, including the coordination of analytical computer software to accomplish this task;

D. to assign appropriate liaison staff members to assure that activities carried out under this agreement are properly coordinated;

E. to establish procedures for cooperative agreements to be developed at the State and national level among the ES, SCS, and State CES for the conduct of State programs. Priority for such agreements will be given to states with heavy FSA workloads;

F. that this is not a fiscal or a funds obligating document. Joint endeavors involving reimbursement or transfer of funds between the two agencies will be handled in accordance with normal government financial procedures, and will be documented as appropriate;

G. that specific projects will be handled according to the terms agreed to by both parties and the participating State CES in cooperative agreements that will supplement this MOU;

H. that this MOU becomes effective upon the date of the final signature and shall continue indefinitely. It may be amended at any time upon the mutual agreement of the parties and it may be cancelled by either party's giving a 30-day advance, written notice to the other party.

UNITED STATES DEPARTMENT  
OF AGRICULTURE  
EXTENSION SERVICE

By: \_\_\_\_\_  
Administrator, Extension Service

\_\_\_\_\_  
Date

UNITED STATES DEPARTMENT  
OF AGRICULTURE  
SOIL CONSERVATION SERVICE

By: \_\_\_\_\_  
Chief, Soil Conservation Service

\_\_\_\_\_  
Date

527.11 Memorandum of Understanding between Extension Service and SCS (page 4)

Enclosure 2  
COOPERATIVE AGREEMENT  
between the  
EXTENSION SERVICE  
UNITED STATES DEPARTMENT OF AGRICULTURE  
COOPERATIVE EXTENSION SERVICE  
STATE OF \_\_\_\_\_  
and the  
SOIL CONSERVATION SERVICE  
UNITED STATES DEPARTMENT OF AGRICULTURE

This agreement is entered into this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, by and between the Extension Service (ES) of the United States Department of Agriculture, the \_\_\_\_\_ Cooperative Extension Service (CES) and the Soil Conservation Service (SCS), United States Department of Agriculture, to accelerate implementation of the Conservation Title of the Food Security ACT (FSA) of 1985.

I. AUTHORITY

Title XII of the Food Security Act of 1985 (16 U.S.C. section 3801 *et. seq.*), section 1472(b) of the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended (7 U.S.C. 3318(b) and the Soil Conservation and Domestic Allotment Act, as amended (16 U.S.C. section 590 a-f).

II. PURPOSES AND OBJECTIVES

The Conservation Title of the Food Security Act (FSA) of 1985 has increased the demand for ES and SCS resources to help farmers plan and apply conservation practices on highly erodible land. About 40 percent of the Nation's farmers, or about 800,000 farmers, must be assisted to develop conservation plans between now and December 31, 1989, to continue to be eligible for farm program benefits administered by USDA.

To accomplish this task in two years requires a well coordinated approach to use limited resources efficiently. An accelerated informational/educational program is needed to help farmers recognize they are farming highly erodible land and to understand and evaluate acceptable conservation systems. Farmers need this information before they are in a position to develop a conservation plan to comply with the Act.

Under provision of section 12.6(c) of the Highly Erodible Land and Wetland Conservation final rule (7 CFR PART 12) and section 704.3(b) of the Conservation Reserve Program final rule (7 CFR Part 704), SCS has been assigned the lead technical assistance role concerning the implementation of the rules.

Under the provisions of section 12.6(f) of the Highly Erodible Land and Wetland Conservation final rule (7 CFR Part 12) and section 704.3(d) of the Conservation Reserve Program final rule (7 CFR Part 704), ES has been assigned the lead role to coordinate the information and education programs concerning the implementation of the rules.

## 527.11 Memorandum of Understanding between Extension Service and SCS (page 5)

Accelerating information and education effort by ES, through the Cooperative Extension System, will allow Soil Conservation Service to concentrate more of its efforts on technical assistance.

### III. THE CES AGREES TO:

- A. Perform the following activities:  
(Insert items as agreed upon in the coordinated information and education plan. Include a budget which specifies the value of in-kind-services, items prepared and services performed within current budgeted funds, and items prepared and services performed subject to reimbursement from SCS or ES. Identify the contributions of the parties as necessary to support the use of a cooperative agreement).
- B. For accounting purposes, notify the SCS monthly of items of work performed and costs incurred. Monitoring and reporting will be done pursuant to the Office of the Management and Budget Circular A-110.
- C. Comply with all of the provisions of Office of Management and Budget Circular A-110 which may be amended from time to time and which are hereby adopted and incorporated by reference.
- D. Comply with the nondiscrimination provisions of Title VI of the Civil Rights Act of 1964, and other nondiscrimination status namely, Section 504, Title IX, and the Age Discrimination Act of 1975, and in accordance with the regulations of the Secretary of Agriculture (7 CFR -15, Sub-part A & B) which provide that no person in the United States shall, on the grounds of race, color, national origin, age, sex, religion, or handicap, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving federal financial assistance from the Department of Agriculture or any agency thereof.
- E. Give the SCS or the Comptroller General, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to this agreement.

### IV. THE ES AGREES TO:

- A. Cooperate and coordinate with the State CES and SCS in the design, development, and conduct of the FSA information education plan.
- B. Provide channels of communication and distribution to the Sates CES, including the 1890 Land-Grant Institutions and Tuskegee University, for information relating to such educational programs that may be used on a national, regional, State, or local basis;
- C. Assign a national program leader with expertise in the area of soil and water conservation who will coordinate and monitor the project, make recommendations concerning planning and procedures to be followed, and reporting to ensure that objectives are being fulfilled.
- D. Provide guidance in the evaluation process and other technical assistance as needed.

**527.11 Memorandum of Understanding between Extension Service and SCS (page 6)**

V. SCS AGREES TO:

- A. Provide technical guidance and training as determined by the SCS, ES, and CES to be adequate to enable the CES to carry out its responsibilities under the agreement.
- B. Advance funds to the CES pursuant to this agreement with requests submitted on Standard Form-270. Advances will be made to satisfy immediate disbursement needs on a monthly basis. However, the SCS may make disbursements at any time it determines it to be necessary to facilitate the purpose of this agreement.

VI. IT IS MUTUALLY AGREED:

- A. The total amount of funds which may be provided by SCS to the State CES under this agreement is \$\_\_\_\_\_.
- B. This agreement shall be effective on the date appearing in the first paragraph and shall continue in effect through September 30, 19\_\_\_. It may be renewed for subsequent fiscal years by an exchange of correspondence between the State Conservationist acting for SCS, the Director of the State CES, and the Administrator of ES.
- C. This agreement may be terminated by any of the parties hereto by written notice to the other parties at least \_\_\_\_\_ days in advance of the effective date of the termination.
- D. No member of, or delegate to, Congress or resident commissioner after his election or appointment, and either before or after he has qualified, and no officer, agent, or employee of the government shall be admitted to any share or part of this agreement, or any benefit to arise therefrom. The provision herein with respect to the interest of members of, or delegates to, Congress and resident commissioners shall not be construed to extend to any incorporated company where said agreement is made for the general benefits of such incorporated company.
- E. No officer, agent or employee of the State CES shall participate, directly or indirectly, in any work agreed to in this agreement on his or her own land or on the land of any other officer, agent or employee of the CES.
- F. The State CES will cooperate, as appropriate, with the SCS in the event of the appeal of any decision of the SCS which is based upon any activity conducted by the CES under this agreement.

**527.11 Memorandum of Understanding between Extension Service and SCS (page 7)**

G. This agreement may be amended by the state conservationist acting for the SCS, the Director of the State CES, and the Administrator of ES.

\_\_\_\_\_  
Director  
State Cooperative Extension Service 1/

\_\_\_\_\_  
Date

\_\_\_\_\_  
State Conservationist  
Soil Conservation Service

\_\_\_\_\_  
Date

\_\_\_\_\_  
Administrator  
Extension Service

\_\_\_\_\_  
Date

1/ or Administrator, if the 1890 Land Grant Institutions, or Tuskegee University

## 527.11 Memorandum of Understanding between Extension Service and SCS, (Additional Material)

SUBJECT: SCS/CES Food Security Act Memorandum of Understanding and Agreement

TO: State Extension Directors  
Extension Administrators, 1890 Institutions  
and Tuskegee University

Enclosed is a Memorandum of Understanding (MOU) I recently signed with Wilson Scaling, Chief, Soil Conservation Service (SCS), to establish a framework for working relationships between our two agencies in regard to the Conservation Provision of the Food Security Act (FSA) of 1985.

Chief Scaling and I have agreed it would be in our mutual interest and the interest of the farmers, to develop a coordinated plan of action to identify, inform, and educate farmers with highly erodible cropland of their options under the Conservation Title of the FSA. If this joint plan of action calls for commitment of resources beyond your present capability, and agreement should be developed to provide for fund transfer from the SCS in accordance with the plan of action. A sample agreement which may be used for this purpose is enclosed.

I encourage you to give this activity your immediate attention since farmers must develop conservation plans during 1988 and 1989 to continue their eligibility for most farm program benefits.

This plan should be a part of the overall FSA strategy for the State. It should be coordinated with similar activities of the Agricultural Stabilization and Conservation Service, Farmers Home Administration, Conservation Districts, and others who form your USDA team.

Chief Scaling has requested that the SCS State Conservationist contact you to review the enclosed documents and develop the plan of action. I encourage you to initiate the contact if you do not soon hear from the State Conservationist.

A copy of the National Bulletin used by SCS to transmit this information to their State offices is enclosed. Please note the FSA activities suggested for CES to conduct. There will be an immediate need to adapt and reproduce the group planning material that has been developed by CES and SCS in Illinois for use in your State (activity #1 in the SCS Bulletin). This material has been sent to the SCS State Resource Conservationist and a copy of the transmittal to each State CES Farm Bill Coordinator.

We are still pursuing possibilities for a budget supplemental to more fully support the Extension System's role in implementing the Conservation Title.

\_\_\_\_\_  
Administrator

**MEMORANDUM OF AGREEMENT**

**AMONG THE DEPARTMENT OF AGRICULTURE, THE ENVIRONMENTAL PROTECTION AGENCY, THE DEPARTMENT OF THE INTERIOR, AND THE DEPARTMENT OF THE ARMY**

**CONCERNING THE DELINEATION OF WETLANDS FOR PURPOSES OF SECTION 404 OF THE CLEAN WATER ACT AND SUBTITLE B OF THE FOOD SECURITY ACT**

**I. BACKGROUND**

The Departments of the Army, Agriculture, and the Interior, and the Environmental Protection Agency (EPA) recognize fully that the protection of the Nation's remaining wetlands is an important objective that will be supported through the implementation of the Wetland Conservation (Swampbuster) provision of the Food Security Act (FSA) and Section 404 of the Clean Water Act (CWA). The agencies further recognize and value the important contribution of agricultural producers to our society, our economy, and our environment. We are committed to ensuring that Federal wetlands programs are administered in a manner that minimizes the impacts on affected landowners to the fullest possible extent consistent with the important goal of protecting wetlands. We are also committed to minimizing duplication and inconsistencies between Swampbuster and the CWA Section 404 program. On August 24, 1993, the Administration announced a comprehensive package of reforms that will improve both the protection of wetlands and make wetlands programs more fair and flexible for landowners, including the Nation's agriculture producers. This Memorandum of Agreement (MOA) implements one of over 40 components of the Administration's Wetlands Plan.

**II. PURPOSE AND APPLICABILITY****A. PURPOSE**

The purpose of this MOA is to specify the manner in which wetland delineations and certain other determinations of waters of the United States made by the U.S. Department of Agriculture (USDA) under the FSA will be relied upon for purposes of CWA Section 404. While this MOA will promote consistency between CWA and FSA wetlands programs, it is not intended in any way to diminish the protection of these important aquatic resources. In this regard, all signatory agencies to this MOA will ensure that wetlands programs are administered in a manner consistent with the objectives and requirements of applicable laws, implementing regulations, and guidance.



**B. APPLICABILITY**

1. The Administrator of EPA has the ultimate authority to determine the geographic scope of waters of the United States subject to jurisdiction under the CWA, including the Section 404 regulatory program. Consistent with a current MOA between EPA and the Department of the Army, the Army Corps of Engineers (Corps) conducts jurisdictional delineations associated with the day-to-day administration of the Section 404 program.
2. The Secretary of the USDA, acting through the Chief of the Soil Conservation Service (SCS), has the ultimate authority to determine the geographic scope of wetlands for FSA purposes and to make delineations relative to the FSA, in consultation with the Department of the Interior, Fish and Wildlife Service (FWS).

**III. DEFINITION OF AGRICULTURAL LANDS**

For the purposes of this MOA, the term "agricultural lands" means those lands intensively used and managed for the production of food or fiber to the extent that the natural vegetation has been removed and cannot be used to determine whether the area meets applicable hydrophytic vegetation criteria in making a wetland delineation.

- A. Areas that meet the above definition may include intensively used and managed cropland, hayland, pasture land, orchards, vineyards, and areas which support wetland crops (e.g., cranberries, taro, watercress, rice). For example, lands intensively used and managed for pasture or hayland where the natural vegetation has been removed and replaced with planted grasses or legumes such as ryegrass, bluegrass, or alfalfa, are considered agricultural lands for the purposes of this MOA.
- B. "Agricultural lands" do not include range lands, forest lands, wood lots, or tree farms. Further, lands where the natural vegetation has not been removed, even though that vegetation may be regularly grazed or mowed and collected as forage or fodder (e.g., uncultivated meadows and prairies, salt hay), are not considered agricultural lands for the purposes of this MOA.

Other definitions for the purposes of this MOA are listed below in Section VI.

**IV. ALLOCATION OF RESPONSIBILITY**

- A. In accordance with the terms and procedures of this MOA, wetland delineations made by SCS on agricultural lands, in consultation with FWS, will be accepted by EPA and the Corps for the purposes of determining Section 404 wetland jurisdiction. In addition, EPA and the Corps will accept SCS wetland delineations

527.13

**Reserved**

**527.14 NWI Regional Coordinator List**

<b><u>REGION 1 -- (CA, HI, WA, OR, ID, NV, GUAM, SAMOA)</u></b> Eastside Federal Complex 911 NE 11th Avenue Portland, OR 97232-4181	PHONE: 503/231-6154 FAX: 503/231-2050
<b><u>REGION 2 -- (AZ, NM, OK, TN)</u></b> 500 Gold Ave., SW, Room 4012 P.O. Box 1306 Albuquerque, NM 87102	PHONE: 505/240-6786 FAX: 505/766-8063
<b><u>REGION 3 -- (MN, WI, MI, IL, IA, IN, OH, MO)</u></b> U. S. Fish & Wildlife Service 9720 Executive Center Drive Suite 101, Monroe Bldg. St. Petersburg, FL 33702	PHONE: 813/570-5412 FAX: 813/570-5420
<b><u>REGION 4 -- (AR, GA, LA, MS, AL, FL, SC, NC, TN, KY, PR, VI)</u></b> U.S. Fish and Wildlife Service 1875 Century Blvd. Room 240 Atlanta, GA 30345	PHONE: 404/679-7128 or 404/679-7129 FAX: 404/679-7081
<b><u>REGION 5 -- (ME, NH, VT, MA, CT, RI, NY, PA, NJ, DE, MD, VA, WV)</u></b> 300 Westgate Center Drive Hadley, MA 01035	PHONE: 413/253-8622 FAX: 413/253-8482
<b><u>REGION 6 -- (MT, ND, SD, WY, NE, CO, UT, KS)</u></b> Denver Federal Center P.O. Box 25486 Denver, CO 80225	PHONE: 303/236-2985 X257 FAX: 303/236-0027
<b><u>REGION 7 -- (AK)</u></b> Alaska Regional Office 1011 East Tudor Road Anchorage, AK 99503	PHONE: 907/786-3471 FAX: 907/786-3350

Dated: May 28, 1996.  
 Kenneth C. Clayton,  
 Acting Administrator.  
 [FR Doc. 96-13832 Filed 6-3-96; 8:45 am]  
 BILLING CODE 3410-02-P

## Natural Resources Conservation Service

### 7 CFR Part 610

#### Technical Assistance

**AGENCY:** Natural Resources Conservation Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** Section 301(c) of the Federal Agriculture Improvement and Reform Act of 1996 (FAIRA) requires the Secretary of Agriculture to publish in the Federal Register, within 60 days of the enactment of FAIRA, the universal soil loss equation (USLE) and wind erosion equation (WEQ) used by the Department of Agriculture (the Department) as of the date of publication. The Natural Resources Conservation Service (NRCS) utilizes factors from the USLE, the revised universal soil loss equation (RUSLE) and the WEQ in equations to predict soil erosion due to water and wind. The Department was first required to use the factors from the USLE and WEQ to make highly erodible land (HEL) determinations under the Food Security Act (FSA) of 1985, Pub. L. 99-198. The FSA defined HEL as land that has the potential for an excessive annual rate of erosion in relation to the soil loss tolerance level as determined by the Secretary through application of factors from the USLE and WEQ.

This final rule sets forth the USLE and WEQ used by the Department as of this date and the circumstances under the equations are used. Since the first mandated use of the USLE in 1985, the technology used to predict soil erosion due to water has been refined. The refinement is reflected in a revised USLE (RUSLE) which will also be used under the circumstances described in this rule.

**EFFECTIVE DATE:** This rule is effective June 3, 1996.

**FOR FURTHER INFORMATION CONTACT:** David L. Schertz, National Agronomist, Natural Resources Conservation Service, P.O. Box 2890, Washington, D.C. 20013; Fax 202-720-2646 or Internet: dschertz@usda.gov.

#### SUPPLEMENTARY INFORMATION:

Rulemaking Analyses

*EO 12291:* Not major.

*Regulatory Flexibility Act:* No significant impact.

*Paperwork Reduction Act:* Does not apply.

*National Environmental Policy Act:* Not applicable.

*Civil Rights Impact Analysis:* Not applicable.

*Federalism Assessment:* Does not have sufficient federalism implications to warrant an assessment.

*Unfunded Mandate:* Not applicable.

#### Background And Purpose

The Natural Resources Conservation Service (NRCS) of the United States Department of Agriculture (the Department), utilizes the universal soil loss equation (USLE), the revised universal soil loss equation (RUSLE) and the wind erosion equation (WEQ) to predict soil erosion due to water and wind. Section 301(c) of the Federal Agriculture Improvement and Reform Act of 1996 (FAIRA), which was enacted April 4, 1996, requires the Secretary of Agriculture to publish in the Federal Register by June 3, 1996, the USLE and WEQ used by the Department as of the date of publication. NRCS is publishing the equations and the rules under which the USLE, RUSLE, and WEQ factors are used for administering programs.

The equation for predicting soil loss due to erosion for both the USLE and RUSLE is  $A=R \times K \times LS \times C \times P$ . The factors in the equation have the following definitions:

1. *A* is the estimation of average annual soil loss in tons per acre caused by sheet and rill erosion.
2. *R* is the rainfall erosivity factor.
3. *K* is the soil erodibility factor.
4. *LS* is the slope length and steepness factor.
5. *C* is the cover and management factor.
6. *P* is the support practice factor.

A paper published by K.G. Renard, et al., in the May-June, 1994 Journal of Soil and Water Conservation, volume 49(3), pages 213-220, entitled, "RUSLE revisited: Status, questions, answers, and the future", describes the revision. Primary differences between the USLE and RUSLE include the following:

*R Factor:* RUSLE includes more *R* values for the Western United States than the USLE. For the eastern United States, *R* values are generally the same as those used in the USLE but includes some revisions.

*K Factor:* Values used in RUSLE are similar to the USLE values but are adjusted to account for changes, such as freezing and thawing, and soil moisture. These adjustments are calculated at one-half month intervals for use in RUSLE

and are applicable in the northern and southern plains, midwest, southern, and eastern United States.

*LS Factor:* USLE uses one *LS* table; RUSLE uses four *LS* tables, as determined by the relationship of rill to interrill erosion. Although both the USLE and RUSLE can account for the effects of complex slopes, RUSLE simplifies this *LS* determination through the use of computer technology.

*C Factor:* USLE provides estimates of soil changes for 4-5 crop stage periods throughout the year. RUSLE provides estimates of cover and soil changes on one-half month intervals, especially in relation to canopy, surface residue, residue just under the surface, and the effects of climate on residue decomposition, roughness, roots, and soil consolidation.

*P Factor:* USLE uses *P* factors for contouring, contour stripcropping, and terracing from table values established for field slope ranges; and for terraces, the *P* factor is also based on channel gradients. RUSLE uses *P* factors for farming across the slope and includes new process-based routines to determine the effect of stripcropping and buffer strips. Values for farming across the slope are based on slope length and steepness, row grade, ridge height, storm severity, soil infiltration, and the cover and roughness conditions. The stripcropping *P* factor is based on the amount and location of soil deposition.

The equation for predicting soil loss due to wind erosion is  $E=f(IKCLV)$ . The factors in the equation have the following definitions:

1. *E* is the estimation of average annual soil loss in tons per acre.
2. *f* indicates the equation includes functional relationships that are not straight-line mathematical calculations.
3. *I* is the soil erodibility index.
4. *K* is the ridge roughness factor.
5. *C* is the climatic factor. All climatic factor values are expressed as a percentage of the value established at Garden City, Kansas. Garden City, Kansas was the location of early research in the WEQ and established the standard for climatic factors against which the other locations are measured.
6. *L* is the unsheltered distance across an erodible field, measured along the prevailing wind erosion direction.
7. *V* is the vegetative cover factor.

The Department was first statutorily required to use the factors from the USLE and WEQ to make highly erodible land (HEL) determinations under the Food Security Act (FSA) of 1985, Pub. L. 99-198. The Department published the equations used to determine HEL during promulgation of the regulations

implementing the HEL and wetland conservation provisions of the FSA, 7 CFR Part 12 (see Federal Register, Vol. 52, No. 180, page 35194, September 17, 1987). Section 12.21 provides that land in a soil map unit will be considered to be highly erodible if the quotient of either the RKLS/T or the CI/T equals or exceeds 8. The factors, R, K, and LS are from the USLE. The USLE factors are explained in the U.S. Department of Agriculture Handbook 537. The factors C and I are from the WEQ. The WEQ factors are explained in a paper by N.P. Woodruff and F.H. Siddaway, 1965. The soil loss tolerance (T) value represents the average annual rate of soil erosion that could occur without causing a decline in long term productivity. The specific factors values which are used for determining whether soil map units are considered to be highly erodible are published in the local Field Office Technical Guide (FOTG) which is maintained in each NRCS field office. The values published as of January 1, 1990, in the FOTG are the basis for all HEL determinations. The FOTG is available for review in each NRCS field office. The values vary across the country to correspond to differences in climate, soil types, and topography.

Since the publication of the USLE in 1985, additional research on erosion processes has resulted in refined technology for determining the factor values in the USLE. RUSLE represents a revision of the USLE technology in how the factor values in the equation are determined. RUSLE is explained in the U.S. Department of Agriculture Handbook 703, "Predicting Soil Erosion by Water: A Guide to Conservation Planning with the Revised Universal Soil Loss Equation (RUSLE)."

Since the passage of the FSA in 1985, USLE and WEQ have been used to compile the highly erodible soils list and to make highly erodible field determinations. USLE has been used to develop conservation plans and revisions and to conduct status reviews. As new understanding is gained through research on erosion processes, updates of erosion prediction equations can occur. Changing the highly erodible soils list and field determinations each time these technologies are updated would be disruptive to farmers and impractical for long range planning. Therefore, no changes to the existing highly erodible soils list or field determinations will be made as a result of the implementation of RUSLE. However, as technology is improved, such as with RUSLE, NRCS will use it to develop new conservation plans, plan revisions, and to conduct status reviews. NRCS will not require producers to

meet more restrictive levels of erosion reduction that might result from using RUSLE instead of USLE while carrying out existing conservation plans. Therefore, all existing conservation plans developed using USLE, that have been implemented, will remain acceptable plans for purposes of the HEL conservation provisions of the FSA.

#### List of Subjects in 7 CFR Part 610

Soil conservation, Technical assistance, Water resources.

For the reasons set forth above, 7 CFR Part 610 is amended as follows:

#### PART 610—TECHNICAL ASSISTANCE

1. The authority for Part 610 is revised to read as follows:

Authority: 16 U.S.C. 590a–590f, 590q, 3801(a)(9).

#### § 610.1–610.5. [Designated as Subpart A]

2. Sections 610.1 through 610.5 are designated as subpart A—Conservation Operations.

3. Section 610.1 is revised to read as follows:

##### § 610.1 Purpose.

This subpart sets forth Natural Resource Conservation Service (NRCS) policies and procedures for furnishing technical assistance in conservation operations.

4. Subpart B—Soil Erosion Prediction Equations containing §§ 610.11 through 610.14 is added to read as follows:

#### Subpart B—Soil Erosion Prediction Equations

Sec.

610.11 Purpose and scope.

610.12 Equations for predicting soil loss due to water erosion.

610.13 Equations for predicting soil loss due to wind erosion.

610.14 Use of USLE, RUSLE, and WEQ.

#### Subpart B—Soil Erosion Prediction Equations

##### § 610.11 Purpose and scope.

This subpart sets forth the equations and rules for utilizing the equations that are used by the Natural Resources Conservation Service (NRCS) to predict soil erosion due to water and wind. Section 301 of the Federal Agriculture Improvement and Reform Act of 1996 (FAIRA) and the Food Security Act, as amended, 16 U.S.C. 3801–3813 specified that the Secretary would publish the universal soil loss equation (USLE) and wind erosion equation (WEQ) used by the Department within 60 days of the enactment of FAIRA. This subpart sets forth the equations, definition of factors, and provides the

rules under which NRCS will utilize the USLE, the revised universal soil loss equation (RUSLE), and the WEQ.

#### § 610.12 Equations for predicting soil loss due to water erosion.

(a) The equation for predicting soil loss due to erosion for both the USLE and the RUSLE is  $A=R \times K \times LS \times C \times P$ . (For further information about USLE see the U.S. Department of Agriculture Handbook 537, "Predicting Rainfall Erosion Losses—A Guide to Conservation Planning," dated 1978. Copies of this document are available from the Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013. For further information about RUSLE see the U.S. Department of Agriculture Handbook 703, "Predicting Soil Erosion by Water: A Guide to Conservation Planning with the Revised Universal Soil Loss Equation (RUSLE).") Copies may be purchased from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.)

(b) The factors in the USLE equation are:

(1) *A* is the estimation of average annual soil loss in tons per acre caused by sheet and rill erosion.

(2) *R* is the rainfall erosivity factor. Accounts for the energy and intensity of rainstorms.

(3) *K* is the soil erodibility factor. Measures the susceptibility of a soil to erode under a standard condition.

(4) *LS* is the slope length and steepness factor. Accounts for the effect of length and steepness of slope on erosion.

(5) *C* is the cover and management factor. Estimates the soil loss ratio for each of 4 or 5 crop stage periods throughout the year, accounting for the combined effect of all the interrelated cover and management variables.

(6) *P* is the support practice factor. Accounts for the effect of conservation support practices, such as contouring, contour stripcropping, and terraces on soil erosion.

(c) The factors in the RUSLE equation are defined as follows:

(1) *A* is the estimation of average annual soil loss in tons per acre caused by sheet and rill erosion.

(2) *R* is the rainfall erosivity factor. Accounts for the energy and intensity of rainstorms.

(3) *K* is the soil erodibility factor. Measures the susceptibility of a soil to erode under a standard condition and adjusts it bi-monthly for the effects of freezing and thawing, and soil moisture.

(4) *LS* is the slope length and steepness factor. Accounts for the effect of length and steepness of slope on

erosion based on 4 tables reflecting the relationship of rill to interrill erosion.

(5) *C* is the cover and management factor. Estimates the soil loss ratio at one-half month intervals throughout the year, accounting for the individual effects of prior land use, crop canopy, surface cover, surface roughness, and soil moisture.

(6) *P* is the support practice factor. Accounts for the effect of conservation support practices, such as cross-slope farming, stripcropping, buffer strips, and terraces on soil erosion.

#### **§ 610.13 Equations For Predicting Soil Loss Due To Wind Erosion.**

(a) The equation for predicting soil loss due to wind in the Wind Erosion Equation (WEQ) is  $E=f(IKCLV)$ . (For further information on WEQ see the paper by N.P. Woodruff and F.H. Siddaway, 1965. "A Wind Erosion Equation," Soil Science Society of America Proceedings, Vol. 29, No. 5, pages 602-608, which is available from the American Society of Agronomy, Madison, Wisconsin. In addition, the use of the WEQ in NRCS is explained in the Natural Resources Conservation Service (NRCS) National Agronomy Manual, 190-V-NAM, second ed., Part 502, March, 1988, which is available from the NRCS, P.O. Box 2890, Washington, DC 20013.)

(c) The factors in the WEQ equation are defined as follows:

(1) *E* is the estimation of the average annual soil loss in tons per acre.

(2) *f* indicates the equation includes functional relationships that are not straight-line mathematical calculations.

(3) *I* is the soil erodibility index. It is the potential for soil loss from a wide, level, unsheltered, isolated field with a bare, smooth, loose and uncrusted surface. Soil erodibility is based on soil surface texture, calcium carbonate content, and percent day.

(4) *K* is the ridge roughness factor. It is a measure of the effect of ridges formed by tillage and planting implements on wind erosion. The ridge roughness is based on ridge spacing, height, and erosive wind directions in relation to the ridge direction

(5) *C* is the climatic factor. It is a measure of the erosive potential of the wind speed and surface moisture at a given location compared with the same factors at Garden City, Kansas. The annual climatic factor at Garden City is arbitrarily set at 100. All climatic factor values are expressed as a percentage of that at Garden City.

(6) *L* is the unsheltered distance. It is the unsheltered distance across an erodible field, measured along the prevailing wind erosion direction. This

distance is measured beginning at a stable border on the upwind side and continuing downward to the nonerodible or stable area, or to the downwind edge of the area being evaluated.

(7) *V* is the vegetative cover factor. It accounts for the kind, amount, and orientation of growing plants or plant residue on the soil surface.

#### **§ 610.14 Use of USLE, RUSLE, and WEQ.**

(a) All Highly Erodible Land (HEL) determinations are based on the formulas set forth in 7 CFR § 12.21 using some of the factors from the USLE and WEQ and the factor values that were contained in the local Field Office Technical Guide (FOTG) as of January 1, 1990. In addition, this includes the soil loss tolerance values used in those formulas for determining HEL. The soil loss tolerance value is used as one of the criteria for planning soil conservation systems. These values are available in the FOTG in the local field office of the Natural Resources Conservation Service.

(b) RUSLE will be used to:

(1)(i) Evaluate the soil loss estimates of conservation systems contained in the FOTG.

(ii) Evaluate the soil loss estimates of systems actually applied, where those systems were applied differently than specified in the conservation plan adopted by the producer or where a conservation plan was not developed, in determining whether a producer has complied with the HEL conservation provisions of the Food Security Act of 1985, as amended, 16 U.S.C. § 3801 *et seq.*, set forth in 7 CFR Part 12; and

(2) Develop new or revised conservation plans.

Dated: May 30, 1996.

Paul W. Johnson,  
Chief, Natural Resources Conservation Service.

[FR Doc. 96-13920 Filed 5-31-96; 11:33 am]

BILLING CODE 3410-16-M

### **Agricultural Marketing Service**

#### **7 CFR Part 928**

[Docket No. FV96-928-1-IFR]

#### **Papayas Grown in Hawaii; Assessment Rate**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This interim final rule establishes an assessment rate for the Papaya Administrative Committee (Committee) under Marketing Order No.

928 for the 1996-97 and subsequent fiscal periods. The Committee is responsible for local administration of the marketing order which regulates the handling of papayas grown in Hawaii. Authorization to assess papaya handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program.

**DATES:** Effective on July 1, 1996. Comments received by July 5, 1996, will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523-S, Washington, DC 20090-6456, FAX (202) 720-5698. Comments should reference the docket number and the date and page number of this issue of the Federal Register and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Mary Kate Nelson, Marketing Assistant, California Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721, telephone (209) 487-5901, FAX (209) 487-5901, or Charles L. Rush, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523-S, Washington, DC 20090-6456, telephone (202) 720-5127, FAX (202) 720-5698.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 928 and Order No. 928, both as amended (7 CFR part 928), regulating the handling of papayas grown in Hawaii, hereinafter referred to as the "order." The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. Under the marketing order now in effect, handlers of papayas grown in Hawaii are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable papayas beginning July 1, 1996, and continuing until amended, suspended, or terminated. This rule will not preempt any State or local laws,