

PART 12—HIGHLY ERODIBLE LAND CONSERVATION AND WETLAND CONSERVATION

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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 values, acreage, and functions of the Nation's wetlands.

[61 FR 47025, Sept. 6, 1996, as amended at 76 FR 82077, Dec. 30, 2011]

§ 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.

Approved insurance provider means a private insurance company that has been approved and reinsured by FCIC to provide insurance coverage to persons participating in programs authorized by the Federal Crop Insurance Act, as amended (7 U.S.C. 1501–1524).

Best drained condition means the hydrologic conditions with respect to depth, duration, frequency, and timing of soil saturation or inundation resulting from drainage manipulations that occurred prior to December 23, 1985, and that exist during the wet portion of the growing season during normal climatic conditions.

CCC means the Commodity Credit Corporation, a 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;

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(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.

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.

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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.

FCIC means the Federal Crop Insurance Corporation, a wholly owned corporation within USDA whose programs are administered by RMA.

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.

NIFA means the National Institute of Food and Agriculture, an agency of USDA which is generally responsible for coordinating the information and educational programs of USDA.

Normal climatic conditions means the normal range of hydrologic inputs on a site as determined by the bounds provided in the Climate Analysis for Wetlands Tables or methods posted in the Field Office Technical Guide.

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.

Playa means a usually dry and nearly level lake plain that occupies the lowest parts of closed depressions (basins). Temporary inundation occurs primarily in response to precipitation-runoff events. Playas may or may not be characterized by high water table and saline conditions. They occur primarily in the Southern Great Plains.

Pocosin means a wet area on nearly level interstream divides in the Atlantic Coastal Plain. Soils are generally organic but may include some areas of high organic mineral soils.

Pothole means a closed depression, generally circular, elliptical, or linear in shape, occurring in glacial outwash plains, moraines, till plains, and glacial lake plains.

Reinsurance year means a 1-year period beginning July 1 and ending on June 30 of the following year, identified by reference to the year containing June.

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

RMA means the Risk Management Agency, an agency within USDA that administers the programs of the FCIC through which Federally reinsured crop insurance is provided to American farmers and ranchers.

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

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(3) Under normal circumstances does 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 delineation means outlining the boundaries of a wetland determination on aerial photography, digital imagery, other graphic representation of the area, or on the land.

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 manipu-

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lated and used to produce an agricultural commodity at least once before December 23, 1985, and on December 23, 1985, did not support woody vegetation, and met the following hydrologic criteria:

(i) If not a playa, pocosin, or pothole, experienced inundation 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), which requisite inundation is determined through:

(A) Observation of wetland hydrology indicators as identified in the local NRCS Field Office Technical Guide;

(B) Procedures identified in State Off-Site Methods for wetland identification set forth in the local NRCS Field Office Technical Guide; or

(C) The use of analytic techniques, such as the use of drainage equations or the evaluation of monitoring data.

(ii) If a playa, pocosin, or pothole experienced ponding for 7 or more consecutive days during the growing season in most years (50-percent chance of more) or saturation for 14 or more consecutive days during the growing season in most years (50-percent chance or more). Wetlands which are found to support wetland hydrology through Step 1 of the wetland determination process in §12.30(c)(7) and application of the procedures described in §12.31(c) will be determined to meet the requisite criteria.

(5) *Farmed-wetland pasture* is a wetland that prior to December 23, 1985, was manipulated and managed for pasture or hayland, was not used to produce an agricultural commodity at least once before December 23, 1985, and on December 23, 1985, experienced inundation or ponding for 7 or more consecutive days during the growing season in most years (50-percent chance or more) or saturation for 14 or more consecutive days during the growing season in most years (50-percent chance or more). Wetlands which are found to support wetland hydrology through step 1 of the wetland determination process in §12.30(c)(7) and application of the procedures described in §12.31(c) will be determined to meet the requisite criteria.

(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 did not meet the hydrologic criteria for farmed wetland.

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

Wetland hydrology means inundation or saturation by surface or groundwater during a growing season at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation.

(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.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996; 76 FR 4803, Jan. 27, 2011; 80 FR 22879, Apr. 24, 2015; 83 FR 63050, Dec. 7, 2018; 85 FR 35151, Aug. 28, 2020]

§ 12.3 Applicability.

(a) The provisions of this part apply to all land, including Indian tribal land, in the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa,

and the Commonwealth of the Northern Mariana Islands.

(b) The rules in this part are applicable to all current and future determinations on matters within the scope of this part. Nothing in these rules relieves any person of any liability under previous versions of these rules.

(c) Notwithstanding paragraph (b) of this section, for the purpose of eligibility for Federal crop insurance premium subsidy for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524), the provisions of this part apply to final HEL and wetland conservation determinations, including all administrative appeals, after February 7, 2014, on matters within the scope of this part.

(1) For acts or situations of non-compliance or failure to certify compliance according to this part, ineligibility for Federal crop insurance premium subsidies will be applied beginning with the 2016 reinsurance year for any Federally reinsured policy or plan of insurance with a sales closing date on or after July 1, 2015.

(2) [Reserved]

[80 FR 22879, Apr. 24, 2015]

§ 12.4 Determination of ineligibility.

(a) *Actions*. Except as provided in §§ 12.5 or 12.13, 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 a wetland that was converted after December 23, 1985; 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*. Except as provided in § 12.13, a person determined to be ineligible under paragraph (a)(2)

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of this section is 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 converted wetland. Except as provided in §12.13, a person determined to be ineligible under paragraph (a)(3) of this section for the conversion of a wetland is 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 values, acreage, and functions 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) 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 values, acreage, and functions affected, the recovery time for full mitigation of the wetland values, acreage, and functions, and the impact that a reduction in payments would have on the person's ability to repay a USDA farm loan will be considered in 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, marketing assistance loans, and any type of price support or payment made available under the Agricultural Act of 2014, the Commodity Credit Corporation Charter Act (15 U.S.C. 714b and 714c), or successor Acts.

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(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 on 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) and;

(6) Federal crop insurance premium subsidies for a policy or plan of insurance offered under the Federal Crop Insurance Act (7 U.S.C. 1501-1524).

(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) *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.

(g) *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.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996; 76 FR 82077, Dec. 30, 2011; 80 FR 22880, Apr. 24, 2015]

§ 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 agri-

cultural 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 1981 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

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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 will become ineligible under §12.4 as a result of the failure of such person to apply a conservation system on highly erodible land if all of the following apply:

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

(B) NRCS determines that the person complies with paragraph (a)(5)(ii) of this section; and

(C) The good faith determination of the FSA county or State committee has been reviewed and approved by the applicable State Executive Director, with the technical concurrence of the State Conservationist; or district director, with the technical concurrence of the area conservationist.

(ii) A person who otherwise meets the requirements of paragraphs (a)(5)(i)(A) and (a)(5)(i)(C) of this section will 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 actively applying the person's conservation plan, as determined by USDA. 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 year.

(iii) 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 will 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 will 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, but 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 year.

(iv) A person who meets the requirements of paragraphs (a)(5)(i) and (a)(5)(ii) of this section will, 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 by an amount commensurate with 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 determines appropriate.

(v) 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, prior to the beginning of the subsequent crop year, NRCS determines that such person is actively applying a conservation plan according to the schedule specified 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.

(7) *Technical and minor violations.* Notwithstanding any other provisions of this part, a reduction in benefits in an amount commensurate with the seriousness of the violation, as determined by FSA, and consistent with paragraph (a)(5)(iv) of this section, will be applied if NRCS determines that a violation involving highly erodible land that would otherwise lead to a loss of benefits is both of the following:

(i) Technical and minor in nature; and

(ii) Has a minimal effect on the erosion control purposes of the conserva-

tion plan applicable to the land on which the violation occurred.

(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 values, acreage, and functions 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,

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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 values, acreage, and functions 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 values, acreage, and functions 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

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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 values, acreage, and functions 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 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 or in the case of a mitigation bank operated under a USDA program, an entity approved by 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 values, acreage, and functions; and

(F) Provides the equivalent values, acreage, and functions 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 values, acreage, and functions 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 values, acreage, and functions 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 of this

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part 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 all of the following apply:

(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 is implementing all practices in a mitigation plan within an agreed-to period, not to exceed one year; and

(C) The good faith determination of the FSA county or State committee has been reviewed and approved by the applicable State Executive Director, with the technical concurrence of the State Conservationist; or district director, with the technical concurrence of the area conservationist.

(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 pre-

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vious 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.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996; 76 FR 82077, Dec. 30, 2011; 80 FR 22880, Apr. 24, 2015]

§ 12.6 Administration.

(a) *General.* In general determinations will be made as follows:

(1) Except as provided in paragraph (a)(2) of this section, a determination of ineligibility for benefits in accordance with the provisions of this part will 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 will be made by the agency responsible for making such determinations, as provided in this section.

(2) Eligibility for Federal crop insurance premium subsidies will be based on final determinations, including all

administrative appeals, made by NRCS and FSA. Neither RMA, FCIC, approved insurance providers, or any employee, agent, or contractors thereof, will make any determination regarding compliance with the highly erodible land or wetland provisions of this part, unless specifically provided for in § 12.13.

(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 plan or 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) *Administration by NRCS.* (1) The provisions of this part that are applicable to NRCS shall be administered under the general supervision of the Associate Chief for Conservation, 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

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(B) 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 form 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 implementa-

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tion 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.

(10) NRCS will operate a program or work with third parties to establish mitigation banks to assist persons in complying with §§ 12.4(c) and 12.5(b)(4). Persons will be able to access mitigation banks established or approved through this program without requiring the Secretary to hold an easement in a mitigation bank.

(d) *Administration by NIFA.* The NIFA 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.

(f) *Administration by RMA.* The provisions of this part that are applicable to RMA will be administered under the general supervision of the Administrator, RMA.

(1) Eligibility for Federal crop insurance premium subsidies will be based on the person's:

(i) Accurate and timely filing of a certification of compliance (Form AD-1026 or successor form) with the conservation compliance provisions; and

(ii) Compliance with the conservation compliance provisions.

(2) Ineligibility for Federal crop insurance premium subsidies due to violations of the conservation compliance provisions will be based on final determinations, including all administrative appeals, made by NRCS and FSA as provided in this part.

(3) Neither RMA nor FCIC will make any determination of eligibility regarding compliance with the highly erodible land or wetland provisions in this part, unless specifically provided for in § 12.13.

(4) RMA will provide the applicable information regarding determinations made by NRCS and FSA to the appropriate approved insurance providers to ensure those determinations affecting Federal crop insurance premium subsidy eligibility are implemented according to this part.

(g) *Approved insurance providers.* No approved insurance provider or any employee, agent, or contractor of an approved insurance provider will:

(1) Make any determination of eligibility regarding compliance with the highly erodible land or wetland provisions of this part; or

(2) Be responsible or liable for a person's eligibility for Federal crop insurance premium subsidy under this part, except in cases of fraud, misrepresentation, or scheme and device by the approved insurance provider or any employee, agent, or contractor thereof.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996; 76 FR 4804, Jan. 27, 2011; 80 FR 22880, Apr. 24, 2015]

§ 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 or 12.13 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

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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.

(d) *Timely filing.* In order for a person to be determined eligible for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524), the person must have Form AD-1026 or successor form on file with FSA, as specified in § 12.13.

[61 FR 47025, Sept. 6, 1996, as amended at 80 FR 22880, Apr. 24, 2015]

§ 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

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(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.* Landlord eligibility will include the following:

(1) Except as provided in paragraph (a)(2) of this section, the ineligibility of a tenant or sharecropper for:

(i) Program benefits (as specified in § 12.4) except as provided in paragraph (a)(1)(ii) of this section will 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; and

(ii) Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524) will, in lieu of ineligibility for premium subsidy, result in a reduction in the amount of premium subsidy paid by FCIC on all policies and plans of insurance for the landlord.

(A) The percentage reduction will be determined by comparing the total number of cropland acres on the farm on which the violation occurred to the total number of cropland acres on all farms in which landlord has an interest, as determined by FSA.

(B) The farms and cropland acres used to determine the premium subsidy reduction percentage will be the farms and cropland acres of the landlord for the reinsurance year in which the tenant or sharecropper is determined ineligible.

(C) The percentage reduction will be applied to all policies and plans of insurance of the landlord in the reinsurance year subsequent to the reinsurance year in which the tenant or sharecropper is determined ineligible.

(D) If the landlord and tenant or sharecropper are insured under the same policy, the landlord will be ineligible for premium subsidy on that policy in lieu of a percentage reduction on that policy.

(2) 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:

(i) The provisions of paragraph (a)(1)(i) of this section will not be applicable to a landlord; and

(ii) A landlord will be ineligible for premium subsidy on all policies and plans of insurance in the reinsurance year subsequent to the reinsurance year in which the tenant or sharecropper is determined ineligible.

(b) *Tenant or sharecropper eligibility.* Tenant or sharecropper eligibility will include the following:

(1) If all of the requirements in paragraph (b)(2) of this section are met:

(i) The ineligibility of a tenant or sharecropper, except as provided in paragraph (b)(1)(ii) of this section, may be limited to the program benefits listed in §12.4(b) accruing with respect to only the farm on which the violation occurred; and

(ii) In lieu of ineligibility for Federal crop insurance premium subsidies for all policies or plans of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524), the premium subsidy on all policies and plans of insurance of the ineligible tenant or sharecropper will be reduced.

(A) The percentage reduction will be determined by comparing the total number of cropland acres on the farm on which the violation occurred to the total number of cropland acres on all farms in which tenant or sharecropper has an interest, as determined by FSA.

(B) The farms and cropland acres used to determine the premium subsidy reduction percentage will be the farms and cropland acres of the tenant or sharecropper for the reinsurance year in which the tenant or sharecropper is determined ineligible.

(C) The percentage reduction will be applied to all policies and plans of insurance of the tenant or sharecropper in the reinsurance year subsequent to the reinsurance year in which the tenant or sharecropper is determined ineligible.

(D) If the landlord and tenant or sharecropper are insured under the same policy, the tenant or sharecropper will be ineligible for premium subsidy on that policy in lieu of a percentage reduction on that policy.

(2) The provisions of paragraph (b)(1) of this section will not apply unless all the following are met:

(i) The tenant or sharecropper 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;

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

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

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

[61 FR 47025, Sept. 6, 1996, as amended at 80 FR 22881, Apr. 24, 2015]

§ 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

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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.

§ 12.13 Special Federal crop insurance premium subsidy provisions.

(a) *General.* The provisions and exemptions in this section are only applicable to Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524). The exemptions in this section are in addition to any that apply under §12.5. Any conflict between this section and another will be resolved by applying this section, but only for Federal crop insurance premium subsidies. Any exemptions or relief under this section apply to Federal crop insurance premium subsidies and do not apply to other benefits even for the same person for the same crop year or reinsurance year. Unless otherwise specified in this section, the provisions in this section apply to both highly erodible land and wetlands.

(b) *Ineligibility for failing to certify compliance.* Subject to paragraph (b)(2) of this section, failing to certify compliance as specified in §12.7 will result in ineligibility as follows:

(1) A Form AD-1026, or successor form, for the person must be filed with FSA for the reinsurance year in order for the person to be eligible for any Federal crop insurance premium subsidies for the reinsurance year. Persons will be ineligible for Federal crop insurance premium subsidy on their crop insurance policy if form AD-1026, or successor form, has not been filed with FSA for the reinsurance year by the premium billing date for their Federally-reinsured crop insurance policy.

(2) A person that has not filed an AD-1026 for the reinsurance year by the premium billing date may be eligible for premium subsidy for the reinsurance year if they provide information

necessary for the person's filing of a Form AD-1026 if the person:

(i) Is unable to file a Form AD-1026 due to circumstances beyond the person's control, as determined by FSA; or

(ii) Files a Form AD-1026 in good faith and FSA subsequently determines that additional information is needed, but the person is unable to comply due to circumstances beyond the control of the person.

(3) A person who does not have Form AD-1026, or successor form, on file with FSA for the reinsurance year may be eligible for Federal crop insurance premium subsidy for the initial reinsurance year if the person can demonstrate they meet RMA's conditions for new to farming, new to crop insurance, a new entity, or have not previously been required to file form AD-1026.

(c) *Ineligibility for violations.* If a person is ineligible due to a violation of the provisions of this part, the timing and results will be as follows:

(1) Unless an exemption in this section or §12.5 applies, ineligibility for Federal crop insurance premium subsidy for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524) due to a violation of the provisions of this part will:

(i) Not apply to the reinsurance year in which the violation occurred or any reinsurance year prior to the date of the final determination of a violation, including all administrative appeals of the determination, as determined by NRCS or FSA as applicable; and

(ii) Only apply to reinsurance years subsequent to the date of a final determination of a violation, including all administrative appeals of the determination, as determined by NRCS or FSA as applicable. A person who is in violation of the provisions of this part, as determined by FSA or NRCS, in a reinsurance year, will, unless otherwise exempted, be ineligible for any Federal crop insurance premium subsidy beginning with the subsequent reinsurance year. For example, a person who is determined to be in violation of the provisions of this part and has exhausted all administrative appeals on June 1, 2015, (2015 reinsurance year) will, unless otherwise exempted, be ineligible for Federal crop insurance premium sub-

sidy effective July 1, 2015, the start of the 2016 reinsurance year, and will not be eligible for any Federal crop insurance premium subsidy for any policy or plan of insurance during the 2016 reinsurance year. Even if the person becomes compliant during the 2016 reinsurance year, the person will not be eligible for Federal crop insurance premium subsidy until the 2017 reinsurance year starting on July 1, 2016.

(2) Eligibility for Federal crop insurance premium subsidy for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524) due to a violation of the provisions of this part will be based on FSA and NRCS final determinations, including all administrative appeals, regarding compliance with the provisions of this part.

(3) The amount of premium subsidy for an insured person will be reduced when any person with a substantial beneficial interest in the insured person is ineligible for premium subsidy under this part. The amount of reduction will be commensurate with the ineligible person's substantial beneficial interest in the insured person. The ineligible person's substantial beneficial interest in the insured person will be determined according to the policy provisions of the insured person.

(4) Administrative appeals include appeals made in accordance with §12.12 and part 11 of this title, but do not include any judicial review or appeal, or any other legal action.

(d) *Exemption to develop and comply with an approved HEL conservation plan.* The following exemptions provide a delay in the requirement to develop and comply with an NRCS approved HEL conservation plan for certain persons.

(1) Persons subject to the provisions of this part regarding highly erodible land, specifically those related to section 1211(a) of the Food Security Act of 1985, as amended, for the first time solely due to amendments to that section by section 2611(a) of the Agricultural Act of 2014 (16 U.S.C. 3811(a)(1)), will have 5 reinsurance years after the date the person is determined to have HEL and has exhausted all administrative appeals, if applicable, to develop and comply with a conservation plan

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approved by NRCS before being ineligible for Federal crop insurance premium subsidies. The additional time to develop and comply with a conservation plan approved by NRCS applies only to persons who have not previously been subject to the highly erodible land conservation provisions of this part. The additional time provided in this paragraph does not apply to any person who had any interest in any land or crop, including an affiliated person, that was subject to the provisions of this part before February 7, 2014. The 5 reinsurance years to develop and comply with a conservation plan approved by NRCS starts:

(i) For persons who have no land with an NRCS HEL determination, the 5 reinsurance years begins the start of the reinsurance year (July 1) following the date NRCS makes a HEL determination and the person exhausts all their administrative appeals; or

(ii) For persons who have any land for which an NRCS HEL determination has been made and all administrative appeals have been exhausted, the 5 reinsurance years begins the start of the reinsurance year (July 1) following the date the person certifies compliance with FSA to be eligible for USDA benefits subject to the conservation compliance provisions.

(2) Persons who meet all the following criteria will have 2 reinsurance years from the start of the reinsurance year (July 1) following the date the person certifies compliance with FSA to be eligible for USDA benefits subject to the conservation compliance provisions to develop and comply with a conservation plan approved by NRCS before being ineligible for Federal crop insurance premium subsidies:

(i) Were subject to the provisions of this part regarding highly erodible land, specifically those related to section 1211(a) of the Food Security Act of 1985 (16 U.S.C. 3811(a)(1)), as amended, any time before February 7, 2014;

(ii) Before February 7, 2014, stopped participating in all USDA programs subject to the provisions of this part regarding highly erodible land;

(iii) Would have been in violation of the provisions of this part regarding highly erodible land had they contin-

ued to participate in those programs after February 7, 2014; and

(iv) Are currently in violation of the provisions of this part regarding highly erodible land.

(e) *Exemption for prior wetland conversions completed prior to February 7, 2014.* No person will be ineligible for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524) for:

(1) Converting a wetland if the wetland conversion was completed, as determined by NRCS, before February 7, 2014; or

(2) Planting or producing an agricultural commodity on a converted wetland if the wetland conversion was completed, as determined by NRCS, before February 7, 2014.

(f) *Exemption for wetland conversion that impacts less than 5 acres.* The following exemption is for wetland conversion that impacts less than 5 acres of an entire farm:

(1) In lieu of ineligibility for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524) due to a wetland conversion violation or concurrent with a planned wetland conversion occurring after February 7, 2014, a person may, if approved by NRCS, pay a contribution to NRCS in an amount equal to 150 percent of the cost of mitigating the converted wetland, as determined by NRCS.

(2) A person is limited to only one exemption, as determined by NRCS, described in paragraph (f)(1) of this section per farm.

(3) NRCS will not refund this payment even if the person later conducts actions which will mitigate the earlier conversion.

(g) *Exemption for wetland conversion when a policy or plan of insurance is available to a person for the first time.* The following exemption is for wetland conversion when a policy or plan of insurance is available to the person for the first time.

(1) When a policy or plan of insurance that provides coverage for an agricultural commodity is available to the person, including as a person who is a substantial beneficial interest holder,

for the first time after February 7, 2014, as determined by RMA, ineligibility for Federal crop insurance premium subsidies for such policy or plan of insurance due to a wetland conversion violation will only apply to wetland conversions that are completed, as determined by NRCS, after the date the policy or plan of insurance first becomes available to the person.

(2) The exemption described in paragraph (g)(1) of this section:

(i) Applies only to the policy or plan of insurance that becomes available to the person for the first time after February 7, 2014, as determined by RMA;

(ii) Does not exempt or otherwise negate the person's ineligibility for Federal crop insurance premium subsidies on any other policy or plan of insurance; and

(iii) Applies only if the person takes steps necessary, as determined by NRCS, to mitigate all wetlands converted after February 7, 2014, in a timely manner, as determined by NRCS, but not to exceed 2 reinsurance years.

(3) For the purposes of the paragraph (g)(1) of this section:

(i) A policy or plan of insurance is considered to have been available to the person after February 7, 2014, if, after February 7, 2014, in any county in which the person had any interest in any acreage, including as a person who is a substantial beneficial interest holder:

(A) There was a policy or plan of insurance available on the county actuarial documents that provided coverage for the agricultural commodity; or

(B) The person obtained a written agreement to insure the agricultural commodity in any county; and

(ii) Changing, adding, or removing options, endorsements, or coverage to an existing policy or plan of insurance will not be considered as a policy or plan of insurance being available for the first time to a person.

(h) *Wetland conversion mitigation exemption.* Unless another exemption applies, the following exemption provides additional time to mitigate wetland conversions.

(1) A person determined to be in violation of the provisions of this part due to a wetland conversion occurring after February 7, 2014, will have 1 reinsur-

ance year after the final determination of violation, including all administrative appeals, as determined by NRCS, to initiate a mitigation plan to remedy the violation, as determined by NRCS, before becoming ineligible for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524.). For example, if in May 2017, after NRCS has determined that a person is in violation for converting a wetland and the person has exhausted all administrative appeals, the person will have until June 30, 2018, to initiate a mitigation plan to remedy the violation before becoming ineligible for Federal crop insurance premium subsidies starting with the 2019 reinsurance year.

(2) Notwithstanding paragraph (h)(1) of this section, if a person determined to be in violation of the provisions of this part due to a wetland conversion occurring after February 7, 2014, as determined by NRCS, and is subject to the provisions of this part for the first time solely due to section 2611(b) of the Agricultural Act of 2014, such person will have 2 reinsurance years after the final determination of violation, including all administrative appeals, as determined by NRCS, to be implementing all practices in a mitigation plan to remedy the violation, as determined by NRCS, before becoming ineligible for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524).

(3) Administrative appeals include appeals made in accordance with §12.12 and part 11 of this title, but do not include any judicial review or appeal, or any other legal action.

(i) *Good faith exemption.* The following is a good faith exemption for wetland conservation:

(1) A person determined by FSA or NRCS to be in violation, including all administrative appeals, of the provisions of this part due to converting a wetland after February 7, 2014, or producing an agricultural commodity on a wetland that was converted after February 7, 2014, may regain eligibility for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act

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(7 U.S.C. 1501-1524) if all of the following criteria are met:

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

(ii) NRCS determines that the person is implementing all practices in a mitigation plan to remedy or mitigate the violation within an agreed-to period, not to exceed 2 reinsurance years; and

(iii) The good faith determination of the FSA county or State committee has been reviewed and approved by the applicable State Executive Director, with the technical concurrence of the State Conservationist; or District Director, with the technical concurrence of the area conservationist.

(2) In determining whether a person acted in good faith under paragraph (i)(1)(i) of this section, FSA will consider such factors as whether:

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

(ii) NRCS had informed the person about the existence of a wetland on the subject land;

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

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

(3) After the requirements of paragraph (i)(1) of this section are met, FSA may waive applying the ineligibility provisions of this section to allow the person to implement the mitigation plan approved by NRCS. The waiver will apply for up to two reinsurance years.

(j) *Landlord and Tenant wetland violations relief.* The following provides landlord and tenant relief for wetland violations:

(1) Except as provided in (j)(2) of this section, the ineligibility of a tenant or sharecropper for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524) will, in lieu of ineligibility for premium subsidy, result in a reduction in the amount of premium subsidy paid

by FCIC on all policies and plans of insurance for the landlord.

(i) The percentage reduction will be determined by comparing the total number of cropland acres on the farm on which the violation occurred to the total number of cropland acres on all farms in which landlord has an interest, as determined by FSA.

(ii) The farms and cropland acres used to determine the premium subsidy reduction percentage will be the farms and cropland acres of the landlord for the reinsurance year in which the tenant or sharecropper is determined ineligible.

(iii) The percentage reduction will be applied to all policies and plans of insurance of the landlord in the reinsurance year subsequent to the reinsurance year in which the tenant or sharecropper is determined ineligible.

(iv) If the landlord and tenant or sharecropper are insured under the same policy, the landlord will be ineligible for premium subsidy on that policy in lieu of a percentage reduction on that policy.

(2) A landlord will be ineligible for the premium subsidy on all policies and plans of insurance in the reinsurance year subsequent to the reinsurance year in which the tenant or sharecropper is determined ineligible if the production of an agricultural commodity on a 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 February 7, 2014, or if the landlord has acquiesced in such activities by the tenant or sharecropper.

(3) If all the requirements in paragraph (j)(4) of this section are met, in lieu of ineligibility for Federal crop insurance premium subsidies for all policies or plans of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524) for producing or planting an agricultural commodity on a wetland converted after February 7, 2014, the premium subsidy on all policies and plans of insurance of the ineligible tenant or sharecropper will be reduced.

(i) The percentage reduction will be determined by comparing the total number of cropland acres on the farm

on which the violation occurred to the total number of cropland acres on all farms in which tenant or sharecropper has an interest, as determined by FSA.

(ii) The farms and cropland acres used to determine the premium subsidy reduction percentage will be the farms and cropland acres of the tenant or sharecropper for the reinsurance year in which the tenant or sharecropper is determined ineligible.

(iii) The percentage reduction will be applied to all policies and plans of insurance of the tenant or sharecropper in the reinsurance year subsequent to the reinsurance year in which the tenant or sharecropper is determined ineligible.

(iv) If the landlord and tenant or sharecropper are insured under the same policy, the tenant or sharecropper will be ineligible for premium subsidy on that policy in lieu of a percentage reduction on that policy.

(4) The provisions of paragraph (j)(3) of this section will not apply unless all the following are met:

(i) The tenant or sharecropper shows that a good-faith effort was made to comply by developing a plan, approved by NRCS, for the restoration or mitigation of the converted wetland in a timely manner and prior to any violation;

(ii) The owner of such farm refuses to apply such a plan and prevents the tenant or sharecropper from implementing the approved plan;

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

(iv) The tenant or sharecropper actively applies the practices and measures of the approved plan that are within their control.

(k) *Evaluation of certification.* NRCS will evaluate the certification in a timely manner.

(1) A person who properly completes, signs, and files Form AD-1026, or successor form, with FSA certifying compliance with the provisions of this part will be eligible for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524) during the period of time such certification is being evaluated by NRCS, if an evaluation is required.

(2) A person will not be ineligible for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524) if:

(i) NRCS fails to complete a required evaluation of the person's Form AD-1026, or successor form in a timely manner after all documentation has been provided to NRCS; and

(ii) The person is subsequently determined to have been in violation of the provisions of this part during the time NRCS was completing the evaluation.

(3) The relief from ineligibility provided in paragraph (k)(2) of this section:

(i) Applies only to violations that occurred prior to or during the time NRCS is completing the required evaluation;

(ii) Does not apply to any violations that occur subsequent to NRCS completing the evaluation;

(iii) Does not apply if FSA or NRCS determines the person employed, adopted, or participated in employing or adopting a scheme or device, as provided in § 12.10, to evade the provisions of this part or to become eligible for the relief provided in paragraph (k)(2) of this section; and

(iv) Does not apply if the required evaluation is delayed due to unfavorable site conditions for the evaluation of soils, hydrology, or vegetation.

(1) *Failing to notify FSA of a change.* Requirements to pay equitable contribution for failing to notify FSA of a change are as follows.

(1) A person who fails to notify FSA of any change that could alter their status as compliant with the provisions of this part and is subsequently determined, by FSA or NRCS, to have committed a violation of the wetland conservation provisions of this part after February 7, 2014, will be required to pay to NRCS an equitable contribution.

(2) The amount of equitable contribution will be determined by NRCS, but will not exceed the total amount of Federal crop insurance premium subsidy paid by FCIC on behalf of the person for all policies and plans of insurance for all years in which the person is determined to have been in violation.

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(3) A person who fails to pay the full equitable contribution amount by the due date determined by NRCS will be ineligible for Federal crop insurance premium subsidy on any policy or plan of insurance beginning with the subsequent reinsurance year. The person will be ineligible for Federal crop insurance premium subsidy for the entire reinsurance year even if full payment of the equitable contribution amount is received by NRCS during the reinsurance year.

[80 FR 22881, Apr. 24, 2015, as amended at 82 FR 58334, Dec. 12, 2017]

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 that 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, or by use of Light Detection and Ranging or other elevation data of an adequate resolution to make slope length and steepness measurements. In any case where a person disagrees with

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an off-site determination on potentially highly erodible soils, a determination will be made on-site.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996; 83 FR 63051, Dec. 7, 2018]

§ 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.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996]

§ 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

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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 appro-

priate, 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. Wetland determinations, delineations and certifications will be done on a tract, field, or sub-field basis;

(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

(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. In order for a map to be of sufficient quality to determine ineligibility for program benefits, the map document must be legible to the extent that areas that are determined wetland can be discerned in relation to other ground features. 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 considered certified wetland determinations. Determinations made after November 28, 1990, and before July 3, 1996, are considered certified if the determination was issued on the June 1991 version of form NRCS-CPA-026 or SCS-CPA-026, the person was notified that the determination had been certified, and the map document was of sufficient quality to determine ineligibility for program benefits. If issued on a different version of the form, a determination will be considered certified if there is other documentation that the person was notified of the certification, provided appeal rights, and the map document was of sufficient quality to make the determination.

(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

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NRCS. NRCS will make a reasonable effort to include the affected person in the on-site investigation. 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, or 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.

(7) The wetland determination process for wetland conservation compliance includes three distinct steps. In Step 1, wetland identification, it is determined if the area of interest supports a prevalence of hydrophytic vegetation, a predominance of hydric soils, and wetland hydrology under normal circumstances. In Step 2, determination of wetland type, it is determined if any exemptions apply from §12.5(b). The findings are reflected in the assignment of an appropriate wetland conservation compliance label. In Step 3, sizing of the wetland, the boundary of each wetland type determined in

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Step 2 is delineated on the certified wetland determination map.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996; 76 FR 22785, Apr. 25, 2011; 83 FR 63051, Dec. 7, 2018; 85 FR 53152, Aug. 28, 2020]

§ 12.31 Wetland identification procedures.

(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 National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html. 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 Wetland Plant List, or (as determined by NRCS) successor publication. The publication may be accessed at: <http://rsgisias.crrrel.usace.army.mil/NWPL/>.

(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) *Wetland Hydrology.* (1) Wetland Hydrology consists of inundation or saturation by surface or groundwater during a growing season at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation.

(2) When a wetland is affected by drainage manipulations that occurred prior to December 23, 1985, and did not support woody vegetation on December 23, 1985, such that production of an agricultural commodity on that date was possible, wetland hydrology shall be identified on the basis of the best-drained condition resulting from such drainage manipulations.

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

(4) When making a decision on wetland hydrology, NRCS will utilize a fixed precipitation date range of 1971–2000 for determining normal climatic conditions.

(d) *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.

(e)(1) *Minimal effect determination.* For the purposes of §12.5(b)(1)(v), 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 subject wetland and other related wetlands in the area. The assessment of functions and values of the subject wetland will

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be made through an on-site evaluation. Such an assessment of related wetlands in the area may be made based on a general knowledge of wetland conditions in the area. 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.

(2) *Scope of minimal-effect determination.* 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). 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 values, acreage, and functions 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.

(f) *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

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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.

[61 FR 47025, Sept. 6, 1996, as amended at 69 FR 18803, Apr. 9, 2004; 76 FR 82077, Dec. 30, 2011; 80 FR 22885, Apr. 24, 2015; 83 FR 63052, Dec. 7, 2018; 85 FR 53152, Aug. 28, 2020]

§ 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 values, acreage, and functions 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 regula-

tions 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.

[61 FR 47025, Sept. 6, 1996, as amended at 76 FR 82077, Dec. 30, 2011]

PART 13 [RESERVED]