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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 12

[NRCS-2018-0010]

RIN 0578-AA65

Highly Erodible Land and Wetland Conservation

AGENCY: Office of the Secretary, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: The U.S. Department of Agriculture (USDA) is issuing an interim rule for the Highly Erodible Land and Wetland Conservation Compliance provisions of the Food Security Act of 1985, as amended. This rulemaking clarifies how USDA delineates, determines, and certifies wetlands located on subject land in a manner sufficient for making determinations of ineligibility for certain USDA program benefits. USDA is seeking comments from the public about these clarifications that will be considered prior to issuing a final rule.

DATES: Effective [Insert date of publication in the FEDERAL REGISTER].

Comments must be received [Insert date 60 days after publication in the FEDERAL REGISTER].

ADDRESSES: Comments should be submitted, identified by Docket Number NRCS-2018-0010, using any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Mail or hand-delivery: Public Comments Processing, Attention: National Leader for Wetland and Highly Erodible Land Conservation, USDA, Natural Resources Conservation Service, 1400 Independence Avenue, SW, Washington, D.C. 20250.

NRCS will post all comments on <http://www.regulations.gov>. In general, personal information provided with comments will be posted. If your comment includes your address, phone number, email, or other personal identifying information (PII), your comments, including PII, may be available to the public. You may ask in your comment that your PII be withheld from public view, but this cannot be guaranteed.

This rule also may be accessed, and comments submitted, via the Internet.

FOR FURTHER INFORMATION CONTACT:

For specific questions about this document, please contact Jason Outlaw at (202) 720-7838 or Jason.outlaw@wdc.usda.gov.

SUPPLEMENTARY INFORMATION:

Regulatory Certifications

Executive Order 12866

This rule is not a “significant regulatory action” under Executive Order 12866.

Regulatory Flexibility Act

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

Environmental Evaluation

It has been determined through an environmental assessment that the issuance of this interim final rule will not have a significant impact upon the human environment. Copies of the environmental assessment may be obtained by contacting Karen Fullen at (503) 273-2404 or Karen.fullen@por.usda.gov.

Executive Order 12372

Executive Order 12372, “Intergovernmental Review of Federal Programs,” requires consultation with State and local officials. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal Financial assistance and direct Federal development. This program is not subject to Executive Order 12372, which requires consultation with State and local officials.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule will not preempt State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. Before any judicial action may be brought regarding the provisions of this rule, appeal provisions of 7 CFR parts 11, 614, and 780 must be exhausted.

Executive Order 13132

This rule has been reviewed under Executive Order 13132, “Federalism.” The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the Federal Government and the States, or on the distribution of

power and responsibilities among the various levels of government, nor does this rule impose substantial direct compliance costs on State and local governments; therefore, consultation with the States is not required.

Executive Order 13175

This rule has been reviewed in accordance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

USDA has assessed the impact of this rule on Indian Tribes and determined that this rule does not, to our knowledge, have Tribal implications that require Tribal consultation under Executive Order 13175. If a Tribe requests consultation, the Natural Resources Conservation Service (NRCS) will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided.

Unfunded Mandates Reform Act of 1995

Pursuant to Title II of the unfunded Mandates Reform Act of 1995, Pub. L. 104–4, the effects of this rulemaking action on State, local, and Tribal governments, and the public have been assessed. This action does not compel the expenditure of \$100 million or more by any State, local, or Tribal governments, or anyone in the private sector;

therefore, a statement under Section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

Federal Assistance Programs

This rule has a potential impact on participants for many programs listed in the Catalog of Federal Domestic Assistance in the Agency Program Index under the Department of Agriculture.

Paperwork Reduction Act

Section 1246 of the Food Security Act of 1985 provides that regulations issued under Title XII are exempt from the requirements of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

E-Government Act Compliance

USDA is committed to complying with the E-Government Act to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Discussion of Provisions

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

1985, a program participant is ineligible for certain USDA program benefits for the production of an agricultural commodity on a converted wetland, or after November 28, 1990, for the conversion of a wetland that makes the production of an agriculture commodity possible. The Agricultural Act of 2014 amended the 1985 Act to expand the HELC/WC requirements to encompass crop insurance benefits, and thus, producers obtaining Federally reinsured crop insurance must be in compliance with an NRCS-approved conservation plan for all highly erodible land; not plant or produce an agricultural commodity on a wetland converted after February 7, 2014; and not have converted a wetland after February 7, 2014, to make possible the production of an agricultural commodity. The 1985 Act, however, affords relief to program participants who meet certain conditions identified under the 1985 Act by exempting such actions from the ineligibility provisions.

The USDA regulations implementing the HELC and WC provisions of the 1985 Act are found at 7 CFR part 12. The regulations at 7 CFR part 12 list actions that may result in a determination of ineligibility, the program benefits that are at risk, and the conditions under which these activities can occur without losing program eligibility. The regulations are divided into three subparts. Subpart A describes the terms of ineligibility, USDA programs encompassed by its terms, the list of exemptions from ineligibility, the agency responsibilities, and conditions that apply when persons adversely affected by an agency determination request an appeal. Subpart B describes in greater detail the technical aspects of the HELC provisions, including the technical criteria for identification of highly erodible lands, criteria for highly erodible field determinations, and requirements for the development of conservation plans and conservation systems.

Subpart C describes in greater detail the technical aspects of the WC provisions, including the criteria for determining a wetland, the criteria for determining a converted wetland, and the uses of wetlands and converted wetlands that can be made without losing program eligibility.

USDA policy guidance regarding implementation of the HELC and WC provisions is found in the current edition of the NRCS National Food Security Act Manual (NFSAM), including the procedures for how to delineate wetlands and make wetland determinations in accordance with Subpart C of 7 CFR part 12. This rule provides transparency to USDA program participants and stakeholders concerning how USDA delineates, determines, and certifies wetlands. It also allows program participants to better understand whether their actions may result in ineligibility for USDA program benefits. USDA requests public comment and will consider incorporating such public comment into its policy guidance.

Wetland Determination Criteria – Policy and Regulatory Clarifications

The Complexity of Identification of Wetlands in the Agricultural Landscape

The complexity of making a wetland determination in highly altered agricultural landscapes requires flexibility in the approach used to identify wetlands. Since 1986, USDA has provided the internal agency policy on making HELC and WC determinations in the NFSAM. In response to multiple statutory changes and changes to the science, those methods have evolved over the decades since passage of the WC provisions. The regulations and internal agency policy have also been revised many times over this 33-year period. The purpose of this interim rule, with request for comment, is to codify

many technical portions of the existing agency policy that have not undergone public review and comment.

Overview of Wetland Determination Procedures

USDA developed the wetland determination procedures from the statutory framework for the WC provisions. In particular, section 1201(a) of the 1985 Act defines “wetland” as follows:

“(27) The term “wetland”, except when such term is part of the term “converted wetland”, means land that—

(A) has a predominance of hydric soils;

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

(C) under normal circumstances does support a prevalence of such vegetation.

For purposes of this Act, and any other Act, this term shall not include lands in Alaska identified as having high potential for agricultural development which have a predominance of permafrost soils.”

Section 1201(b) of the 1985 Act requires the Secretary to develop “(1) criteria for the identification of hydric soils and hydrophytic vegetation; and (2) lists of such soils and such vegetation.”

USDA then defined in the regulation that a wetland determination is “a decision regarding whether or not an area is a wetland, including identification of wetland type and size.” Thus, the term wetland determination for the WC provisions includes a basic three-step process: 1) wetland identification; 2) application of exemption criteria from

§12.5(b) of this part, to determine the appropriate wetland conservation label; and 3) determination of size of each area delineated on the certified wetland determination map.

Step One – Wetland Identification. During the first step of wetland identification, NRCS determines whether the site meets the 1985 Act’s definition of wetland “under normal circumstances.” Normal circumstances are those conditions (vegetation, soils, and hydrology) that would occur in the absence of any post-1985 drainage actions, without regard to whether the vegetation has been removed or significantly altered, and during the wet portion of the growing season under normal climatic conditions.

NRCS staff utilize four different sources of information when deciding whether an area would, under normal circumstances, meet the 1985 Act definition of wetland, including 7 CFR Part 12, the 1987 Corps of Engineers Wetland Delineation Manual (Corps Manual), the regional supplements to the Corps Manual, and the Food Security Act Wetland Identification Procedures (FSA Procedures) located in the NFSAM, Part 514. The FSA Procedures are not stand-alone procedures, but rather, they supplement the Corps methods when identifying wetlands for Food Security Act purposes. The Corps Manual provides for three levels:

- A Level 1 determination is the use of only off-site resources to confirm the presence or absence of a prevalence of hydrophytic vegetation, a predominance of hydric soil, and the occurrence of wetland hydrology. Each of the three factors is assessed independently of the others. In some States, NRCS augments the Corps Level 1 methods with State Off-Site Methods (SOSM), tailored to unique wetland identification challenges in the State. SOSM identify additional off-site indicators

and processes that can be used to assist in the determinations of hydrophytic vegetation, hydric soils, and wetland hydrology.

- A Level 2 determination is based on the use of on-site methods from the Corps Manual and field indicators from the regional supplements for each of the three factors. As appropriate, the FSA Procedures augment the Corps methods. If a Level 2 approach is used, SOSM would not be used since SOSM are designed to augment off-site methods.
- A Level 3 determination is a combination of the use of on-site and off-site indicators or methods among the three factors, but not within a single factor. For example, a Level 3 determination might utilize off-site methods or indicators for soils, then utilize on-site methods and indicators for vegetation and hydrology. If applicable, SOSM would be limited to the factor(s) where a decision is made exclusively from off-site methods/resources, so in this example, SOSM would be used for soils, but not for vegetation or hydrology.

The findings in Step 1 results are recorded on a wetland identification base map indicating the area(s) in question as either wetland or non-wetland as defined in the 1985 Act.

Step 2 – Determination of Food Security Act Exemptions/Labels. In this step, NRCS utilizes the wetland/non-wetland base map produced from Step 1 to assign WC labels.

WC labels are based on exemptions to the WC provisions, as provided in §12.5(b) of this part.

Step 3 – Sizing of Wetlands. The last step is to determine the size of each area delineated and assigned a WC label. The delineations, WC labels, and sizes of each

delineation are documented on the certified wetland determination map provided to the program participant.

Determining Normal Precipitation

In Step 1 (wetland identification) of the wetland determination process, NRCS applies the FSA Procedures to determine if a site “under normal circumstances” meets the 1985 Act wetland definition. “*Normal circumstances*” as used in the statutory wetland definition is not defined in §12.2 (Definitions) of this part but is discussed in §12.31(b) only as it relates to a determination of hydrophytic vegetation. In the FSA Procedures, the term is defined as it relates to the entire wetland identification process. The consideration of normal circumstances includes assessing how disturbance (e.g., tillage, mowing, grazing, application of herbicides, and drainage) might alter the site conditions, and how climate (e.g., dry season, wet season, snow pack, drought, and excessive precipitation) might alter the site conditions. NRCS policy requires the consideration of normal circumstances for each of the three wetland diagnostic factors.

To determine normal circumstances, NRCS is required to determine if the indicators (on-site or off-site) are reflective of normal climatic conditions. NRCS is identifying in part 12 the criteria that NRCS commonly uses to determine normal climatic conditions.

The NRCS National Water and Climate Center compiles precipitation data using information from National Oceanic and Atmospheric Administration weather stations and publishes normal precipitation data that encompass 30 years of weather data. NRCS uses this weather data in Chapter 19 of the NRCS National Engineering Field Handbook Climate Analysis for Wetlands Tables (WETS). The tables can be updated to encompass

the most recent 30-year cycle of data and are available in the Field Office Technical Guide.

The agency is concerned that the forward adjustment of precipitation data will result in unfair and inconsistent determinations and will fail to best represent conditions in or prior to 1985, a critical decision common to many exemptions. To address this concern, NRCS is establishing a fixed precipitation data set. This data set will provide continued certainty to agricultural producers, and the 1985 date of enactment of the WC provisions falls near the mid-point of this data set.

Use of Corps Manual

NRCS utilizes parts of the 1987 Army Corps of Engineers Wetland Delineation Manual and approved regional supplements, subject to agency-defined variances required to implement the 1985 Act provisions. NRCS has received questions about the basis for its use of the 1987 Corps Manual.

In 1980, the Environmental Protection Agency (EPA) issued interim guidance for identifying wetlands under Section 404 of the Clean Water Act. In 1980 and 1982, the Army Corps of Engineers and EPA published a joint rule and provided their definition of a wetland as:

“Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” (33 CFR Section 328.3)

This definition was used by the Corps and EPA as they developed and published the Technical Report Y-87-1 Corps of Engineers Wetlands Delineation Manual and Wetland Identification and Delineation Manual (EPA 1988 Manual).

In the 1985 Act, Congress defined wetlands subject to the WC provisions as:

“land that has a predominance of hydric soils and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.”

In the Urgent Supplemental Appropriation Act, 1986, Congress added the following to the wetland definition:

“this term shall not include lands in Alaska identified as having high potential for agricultural development which have a predominance of permafrost soils.”

The 1985 Act definition represents the first time that Congress defined the term “wetland.” Also, for the first time in Federal law, Congress also provided a definition for the terms “hydric soil” and “hydrophytic vegetation.” These three congressional definitions in the 1985 Act only differ slightly from what is used by the Corps and EPA for Section 404 of the Clean Water Act. The Manager’s Report to the 1990 Act acknowledges that NRCS used wetland delineation methodology that had been developed in consultation with other Federal and State agencies.

Since the WC provisions contain specific definitions, exemptions, and guidance for its implementation, where these provisions differ from those in the Corps Manual, NRCS identifies these differences in the FSA procedures. Thus, NRCS adopted the use

of the Corps methods, but not in their entirety. Where needed to address differences in the two laws, and where needed to address unique challenges of delineating wetlands on agricultural lands, NRCS provides variances to the Corps methods.

To avoid confusion, NRCS clearly informs the program participant that the determinations are for purposes of the WC provisions only, and that the producer should contact the Army Corps of Engineers for clarification about whether a particular activity will require a Clean Water Act Section 404 permit.

Definition of Pothole, Playa, and Pocosin

Current language in 7 CFR part 12 distinguishes farmed wetland hydrology criteria on whether the area is a pothole, playa, or pocosin. These three landforms are not defined in the regulation. Since it is a critical determination about the scope of the restrictions to which a producer will be subject, there is a need for a regulatory definition to provide consistency in the determination of the presence of these special land forms. NRCS has longstanding definitions in policy, located in the appendix to the NFSAM; however, the appendix was not transferred to the current electronic policy document storage system. NRCS is amending §12.2 to add these definitions to the WC regulation.

Hydrology Criteria for Farmed Wetland, Farmed Wetland Pasture, and Prior

Converted Cropland

The prior hydrologic criteria for farmed wetland and farmed wetland pasture was based strictly on the quantification of the number of days that the wetland experienced inundation or saturation during the growing season. Further, for farmed wetland, these criteria differed depending on the landscape position of the wetland, with playa, pothole,

and pocosin requiring 7 days of inundation or 14 of saturation, and all other landscape positions requiring 15 consecutive days of inundation.

Quantification of a number-based hydrologic criteria is both inefficient and cost prohibitive, and if practiced, requires the installation of monitoring equipment. For this reason, other Federal agencies with responsibilities for wetland conservation or regulation either did not adopt or have since abandoned such an approach in favor of one that uses more readily observable and easily quantifiable criteria. The agency has itself moved from a number-based approach to such an approach, with criteria that are based on observable conditions resulting from such inundation or saturation and is therefore more consistent with the agency's statutory definition of "wetland." Codifying this indicator-based approach as the current science and approach by NRCS to make a decision on wetland hydrology will improve transparency and understanding by program participants and the general public.

Best Drained Condition

The term "best drained condition" is introduced and defined to provide clarity regarding a long-standing and practiced statutory concept that is fundamental to the identification of wetlands that experienced drainage manipulations prior to enactment of the 1985 Act, and to meet congressional intent to provide certainty to persons concerning the status of such land and its future use. This long-standing concept provides that a person has the statutory right to maintain hydrologic conditions on wetlands that were converted to crop production prior to the 1985 Act, and are not abandoned, to the extent that those conditions existed on or before December 23, 1985.

Wetland Hydrology

The definition of wetland requires the presence of hydrology sufficient to support a prevalence of hydrophytic vegetation. Hydrology, as it relates to the definition of “wetland” contained in §12.2, is further referenced throughout part 12 as a diagnostic factor for which consideration is required during the identification of wetlands. To provide clarification concerning this requirement, the definition of wetland hydrology and its related identification procedures are being incorporated into part 12, with associated reference to the underlying considerations of “best drained condition” and the determination of normal climatic conditions in §12.31.

Tract versus Field

Wetland determinations can be conducted on different areas of an agricultural operation. In some cases, the wetland determinations are conducted on a farm tract, while in other instances only specific farm fields or areas within a field are assessed. The USDA program participant initiates the wetland determination with a request submitted to the Farm Service Agency on an AD-1026. If an activity that could potentially result in a determination of ineligibility is planned, the program participant identifies the location of the activity on a map. NRCS will conduct wetland determinations on a field or sub-field basis except when the producer requests a determination for their entire farm tract. To clarify that NRCS will conduct a wetland determination only on the area specified by the USDA program participant, NRCS is replacing the term “tract” with the term “field or sub-field” in 7 CFR §12.30(c), so that it is clear that all wetland determinations will be done on a field or sub-field basis and will be considered certified wetland determinations.

Wetland Minimal Effect Determinations

Part 12 provides for a minimal effect exemption for wetland conversions that have only a minimal effect on the functional hydrological and biological value of the wetland and other wetlands in the area. Current regulatory language requires that the minimal effect determination be based upon a functional assessment made during an on-site evaluation of all wetlands in the area. This requirement is overly burdensome, and on-site evaluations can seldom be made on property not controlled by the subject person. Removing the on-site requirement will better allow USDA to provide this statutory exemption to USDA program participants, and such removal will not provide a substantially different decision as would otherwise occur, especially considering that assessments can be conducted remotely based on a general knowledge of wetland conditions in the area.

Wetland Determination Certification

NRCS began making wetland determinations subsequent to the enactment of the 1985 Act and the interim final rule for 7 CFR part 12 promulgated in 1986. These wetland determinations were completed utilizing soil surveys, U.S. Fish and Wildlife Service National Wetland Inventory maps, and USDA aerial imagery or site visits. Producers were provided appeal rights with these determinations. In the 1990 Farm Bill, the concept of certification of wetland determinations was incorporated into the WC provisions. In particular, as described in the Manager's Report to the 1990 Farm Bill:

“[T]he certification process is to provide farmers with certainty as to which of their lands are to be considered wetlands for purposes of Swampbuster. The Managers note that the current USDA wetland delineation process involves the

use of substantial materials to make an initial determination in the field office, developed in consultation with other appropriate Federal and State agencies. Wetlands identified in this process are delineated on maps which are then mailed to producers for review. If the producer finds such map to be in error, and the USDA agrees that an error has been made, then the map is corrected. If the USDA does not agree that there is an error in the map, and the producer continues to believe so, then the producer may appeal such determination. The Managers find that this process is adequate for certification of any new maps delineated after the date of enactment of this Act. For maps completed prior to the date of enactment of this Act, the Managers intend for producers to be notified that their maps are to be certified and that they have some appropriate time for appeal. In this circumstance, producers who had not already been mailed their maps should be given a map for their review.”

The changes made to 7 CFR part 12 in 1991 included the following incorporation of certification at §12.30(c) (1991):

“SCS determinations of wetland status and any applicable exemptions granted under this part shall be delineated on a map of the farm or tract. Notification of the wetland determination, a copy of the wetland delineation and the SCS appeal procedures shall be provided to each person who completes a Form AD-1026. The wetland determination and wetland delineation shall be certified as final by the SCS official 45 days after providing the person notice or, if appeal is filed with SCS, after a final appeal decision is made by SCS.”

By statute, as clarified in the 1990 Conference Managers Report, determinations made pursuant to the 1991 rule are certified determinations when the producer was provided a copy of the determination and had been provided appeal rights. The producer was not required to appeal the determination for the determination to become certified. In June of 1991, USDA issued a revised CPA-026 form that included certification language in the agency signature block and contained the applicable appeal rights on the back side of the person copy.

The certification provisions were further strengthened in the 1996 Farm Bill, due in part to a moratorium that had been placed on wetland determinations by the Secretary of Agriculture in 1995. In response to these changes, in the 1996 interim final rule USDA identified that all wetland determinations made after its effective date of July 3, 1996, would be considered a certified wetland determination. A final certification remains valid and in effect as long as the area is devoted to an agricultural use or until such time as the person, affected by the review, requests review of the certification 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 CFR §12.30(c)(6).

NRCS, program participants, farm organizations, conservation organizations, and others have long focused upon the certification process for NRCS wetland determinations because of the certainty that such determinations provide to program participants regarding future business decisions. Through this rulemaking, USDA is adding further

guidance in the WC regulation to improve clarity on the statutory concept of certification, particularly for those certified determinations issued between 1990 and 1996.

List of Subjects in 7 CFR Part 12

Administrative practice and procedure, Coastal zone, Crop insurance, Flood plains, Loan programs—agriculture, Price support programs, Reporting and recordkeeping requirements, Soil conservation.

For the reasons explained above, USDA amends 7 CFR part 12 as follows:

PART 12—HIGHLY ERODIBLE LAND CONSERVATION AND WETLAND CONSERVATION

1. The authority citation for part 12 continues to read as follows:

Authority: 16 U.S.C. 3801, 3811–12, 3812a, 3813–3814, and 3821–3824.

2. Amend §12.2(a) as follows:

- a. Add definitions, for “Best drained condition”, “Normal climatic conditions”, “Playa”, “Pocosin”, and “Pothole”, in alphabetical order;
- b. Revise paragraphs (4), (5), and (8) of the definition for “Wetland determination”; and
- c. Add the definition of “Wetland hydrology”, in alphabetic order.

The additions and revision read as follows:

§12.2 Definitions.

(a) * * *

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.

* * * * *

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.

* * * * *

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.

* * * * *

Wetland determination * * *

(4) *Farmed wetland* is a wetland that prior to December 23, 1985, was manipulated and used to produce an agricultural commodity, and on December 23, 1985, did not support woody vegetation, and met the following hydrologic criteria:

(i) 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), as determined by having met any of the following hydrologic indicators:

- (A) Inundation is directly observed during a site visit conducted under a period of normal climatic conditions or drier;
 - (B) The presence of any indicator from Group B (Evidence of Recent Inundation) of the wetland hydrology indicators contained in the applicable regional supplement to the Corps of Engineers Wetland Delineation Manual is observed;
 - (C) The presence of conditions resulting from inundation during the growing season is observed on aerial imagery, and the imagery is determined to represent normal or drier than normal climatic conditions (that is, not abnormally wet); or
 - (D) The use of analytic techniques, such as the use of drainage equations or the evaluation of monitoring data, demonstrate that the wetland would experience inundation during the growing season in most years (50-percent chance or more).
- (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) as determined by having met any of the following hydrologic indicators:
- (A) Inundation or saturation is directly observed during a site visit conducted under a period of normal climatic conditions or drier;
 - (B) The presence of one primary or two secondary wetland hydrology indicators contained in the applicable regional supplement to the Corps of Engineers Wetland Delineation Manual is observed;
 - (C) The presence of conditions resulting from inundation or saturation during the growing season is observed on aerial imagery, and the imagery is determined to represent

hydrologic conditions that would be expected to occur under normal or drier than normal climatic conditions (that is, not abnormally wet); or

(D) The use of analytic techniques, such as the use of drainage equations or the evaluation of monitoring data, demonstrate that the wetland would experience inundation or saturation during the growing season in most years (50-percent chance or more).

(5) *Farmed-wetland pasture* is wetland that was manipulated and managed for pasture or hayland prior to December 23, 1985, and on December 23, 1985, 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) as determined by having met any of the following hydrologic indicators:

(i) Inundation or saturation is directly observed during a site visit conducted under a period of normal climatic conditions or drier;

(ii) The presence of one primary or two secondary wetland hydrology indicators contained in the applicable regional supplement to the Corps of Engineers Wetland Delineation Manual is observed;

(iii) The presence of conditions resulting from inundation or saturation during the growing season is observed on aerial imagery, and the imagery is determined to represent hydrologic conditions that would be expected to occur under normal, or drier than normal climatic conditions (that is, not abnormally wet); or

(iv) The use of analytic techniques, such as the use of drainage equations or the evaluation of monitoring data, demonstrate that the wetland would experience inundation or saturation during the growing season in most years (50-percent chance or more).

* * * * *

(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.

* * * * *

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.

* * * * *

3. Amend §12.21 by revising paragraph (c) to read as follows:

§12.21 Identification of highly erodible lands criteria.

* * * * *

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

4. Amend §12.30 by revising paragraph (c)(1), and adding paragraph (c)(7), to read as follows:

§12.30 NRCS responsibilities regarding wetlands.

(c) * * *

(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 done on a field or sub-field basis and 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.

* * * * *

(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 Step 2 is delineated on the certified wetland determination map.

5. Amend §12.31 by revising the section heading, redesignating paragraphs (c) through (e) as paragraphs (d) through (f), adding a new paragraph (c), and revising newly redesignated paragraph (e) to read as follows:

§12.31 Wetland identification procedures.

(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, 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.

* * * * *

(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 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.

Dated: November 28, 2018.

Stephen L. Censky

Deputy Secretary

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