



**Billing Code: 3410-16-P**

**DEPARTMENT OF AGRICULTURE**

**Office of the Secretary**

**7 CFR Part 12**

**[Docket ID NRCS-2018-0010]**

**RIN 0578-AA65**

**Highly Erodible Land and Wetland Conservation**

**AGENCY:** Office of the Secretary, USDA.

**ACTION:** Final rule.

**SUMMARY:** The United States Department of Agriculture (USDA) is issuing a final rule for the Highly Erodible Land and Wetland Conservation provisions of the Food Security Act of 1985, as amended (the 1985 Farm Bill). USDA published an interim rule, with request for comments, on December 7, 2018, to clarify 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 received comments from 65 commenters who provided 354 comments in response to the interim rule. Additionally, one of the 65 comments was submitted by an organization that submitted a spreadsheet of 15,094 substantively identical comments. This rule makes permanent many of the changes made in the interim rule, responds to comments received, and makes further adjustments in response to some of the comments received.

**DATES:** This rule is effective **[Insert date of publication in the *FEDERAL REGISTER*]**.

**FOR FURTHER INFORMATION CONTACT:** For specific questions about this rulemaking, please contact Jason Outlaw, (202) 720-7838, or by email at

jason.outlaw@usda.gov. Persons with disabilities who require alternative means for communication should contact the USDA Target Center at (202) 720-2600 (voice).

## **SUPPLEMENTARY INFORMATION:**

### **Background**

Title XII of the 1985 Farm Bill, encourages participants in USDA programs to adopt land management and conservation measures by linking eligibility for USDA program benefits to farming practices on highly erodible land and wetlands. In particular, the highly erodible land conservation (HELC) provisions of the 1985 Farm Bill 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, unless such production is in compliance with an approved conservation system. Additionally, the wetland conservation (WC) provisions of the 1985 Farm Bill 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, unless an exemption applies. The Agricultural Act of 2014 amended the 1985 Farm Bill to expand the HELC/WC requirements to encompass crop insurance benefits, and thus, USDA program participants obtaining Federally reinsured crop insurance must be in compliance with an Natural Resources Conservation Service (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 Farm Bill, however, affords relief to program participants who meet certain conditions identified under the 1985 Farm Bill by exempting

certain actions from the ineligibility provisions. The USDA regulations implementing the HELC and WC provisions of the 1985 Farm Bill are found at 7 CFR part 12.

On December 7, 2018, USDA published in the *Federal Register* (83 FR 63046-63052) an interim rule that amended 7 CFR part 12 to provide transparency to USDA program participants and stakeholders concerning how USDA delineates, determines, and certifies wetlands. The interim rule also provided information to program participants to better understand whether their actions may result in ineligibility for USDA program benefits. The interim rule made the following changes to 7 CFR part 12:

- Added definitions, for “Best drained condition,” “Normal climatic conditions,” “Playa,” “Pocosin,” “Pothole,” and “Wetland hydrology;”
- Revised the definition for “Wetland determination” with respect to farmed wetland, farmed wetland pasture, and prior-converted cropland (PC);
- Revised the provision related to potentially highly erodible land to encompass the use of light detection and ranging (LiDAR) or other elevation data of an adequate resolution to make slope length and steepness measurements;
- Identified that if a person disagrees with an offsite determination on potentially highly erodible soils, NRCS would make an onsite determination;
- Clarified that wetland determinations will be done on a field or sub-field basis;
- Confirmed that wetland determinations made after November 28, 1990, and before July 3, 1996, are certified wetland determinations if the determination was issued on the June 1991 version of Forms NRCS-CPA-026 or SCS-CPA-026, the person was notified that the determination had been certified, and that the map document was of sufficient quality to determine ineligibility for program benefits;

- Identified that in order for a wetland determination 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;
- Clarified that:
  - The wetland determination process includes three distinct steps,
  - Wetland hydrology consists of inundation or saturation by surface or ground water during a growing season at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation,
  - When a wetland is affected by drainage manipulations that occurred prior to December 23, 1985, wetland hydrology will be identified on the basis of the best drained condition resulting from such drainage manipulations, and
  - Wetland hydrology determination will be made in accordance with the current Federal wetland delineation methodology in use by NRCS at the time of the determination; and when making a decision on wetland hydrology, NRCS will utilize a fixed precipitation date range of 1971 through 2000 for determining normal climatic conditions; and
- Identified that minimal effect determinations will be based upon a functional assessment of functions and values of the subject wetland through an onsite evaluation and that an assessment of related wetlands in the area may be made based on an onsite evaluation or through a general knowledge of wetland conditions in the area.

## **Summary of Public Comments**

The interim rule had a 60-day comment period ending February 6, 2019. USDA received 65 timely responses to the rule. Additionally, one organization submitted 15,094 substantively identical responses which were also considered.

USDA received some comments that were either not relevant to the interim rule or lacked a direct connection to any specific component of the interim rule. Some of these comments cited the various benefits of wetlands. Others cited the benefits to humanity of increased drainage. Several alleged a lack of due process. Some wanted the Fourth Amendment to the U.S. Constitution to apply to onsite wetlands determinations. A few comments suggested specific testing criteria and alleged that NRCS carried an evidentiary burden. USDA also received comments that expressed support for the interim rule in general and comments that expressed a general lack of support for the interim rule.

USDA also received comment that provided the commenters' understanding about the history of the WC provisions, representations about Congressional intent, the nature of NRCS implementation of the WC provisions, and an overview of the purposes of particular Federal legislation, including the Administrative Procedure Act (APA), the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA). USDA does not respond to the commenters' characterization of these Federal statutes or representations about NRCS intent as far as its past implementation efforts, but has responded to comment where appropriate when this legal framework and prior NRCS implementation relates to the interim rule or this final rule.

USDA appreciates the level of public interest that comes with wetlands. They are an important resource. NRCS follows the appropriate process for issuing rules consistent with statutory language in section 1246 of the 1985 Farm Bill. Onsite wetland determinations and

aerial imagery do not constitute an unreasonable search or seizure. Wetland determinations conducted for eligibility in voluntary USDA programs is not a part of a criminal law proceeding. A USDA program participant or applicant consents to the review of his or her land for HELC/WC purposes by applying for assistance from USDA. USDA appreciates the comments in support of the interim rule. For any comments that lacked a direct application to the interim rule and were not addressed in this preamble, USDA appreciates the consideration with which such comments were developed and provided, and, to the extent practicable, will consider those comments in the development of future rulemakings or applicable policies.

In this preamble, the comments have been organized alphabetically by topic. The topics include:

- Abandonment;
- APA;
- Appeals;
- Area of request for certified wetland determinations;
- Best drained condition;
- Certification map quality;
- Certification status of pre-1996 wetland determinations;
- Climate references in rulemaking;
- Commenced conversion;
- Definitions;
- Endangered Species Act consultation;
- Farmed under natural conditions;
- Mitigation;

- National Environmental Policy Act;
- Navigable Waters Protection Rule applicability;
- Normal climatic conditions;
- Offsite analysis of potentially highly erodible land;
- Offsite analysis of wetland minimal effect;
- Seasonal wetlands;
- Setback distances; and
- Wetland hydrology indicators.

The topics that generated the greatest response include the certification status of wetland determinations between 1990 through 1996, wetland hydrology indicators, normal climatic conditions, and the offsite analysis of wetland minimal effect. This final rule responds to comments received during the public comment period and incorporates changes, as determined appropriate by USDA.

#### **Abandonment of Farmed Wetland and Farmed Wetland Pasture**

*Comment:* USDA received comment expressing concern that a person has a right to maintain hydrologic conditions on farmed wetland and farmed wetland pasture that was converted to crop production prior to the 1985 Farm Bill, regardless of abandonment.

*Response:* No changes were made in the interim rule with respect to abandonment of farmed wetlands and farmed wetland pasture (7 CFR 12.33(c)). Abandonment applies to farmed wetland and farmed-wetland pasture when wetland conditions return after December 23, 1985, unless certain conditions are met. This is a part of long-standing policy and regulation. USDA also affirms that USDA program participants may continue to farm farmed wetlands and farmed

wetland pasture under natural conditions without risk of losing their eligibility for USDA program benefits, as long as additional hydrological manipulations do not occur.

### **Administrative Procedure Act (APA)**

*Comment:* USDA received comment related to the applicability of the APA to USDA implementation of the highly erodible land and wetland conservation provisions.

*Response:* USDA is not required by any statute to promulgate 7 CFR part 12 pursuant to notice and comment rulemaking under the APA. Section 1246 of the Food Security Act of 1985, as amended by the Agricultural Act of 2014, specified that the promulgation of regulations and administration of programs under this title shall be made as an interim rule effective on publication with an opportunity for notice and comment. The APA requirements for notice and comment, 5 U.S.C. 553, do not apply to a matter relating to public property, loans, grants, benefits, or contracts (5 U.S.C. 553(a)(2)). The matters identified in the December 2018 interim rule relate to USDA program grants and other benefits and thus notice and comment rulemaking are not required under the APA even without the specific statutory exemption.

*Comment:* USDA received comment that wished to remind NRCS that NRCS must respond in a reasoned manner to comments that raise significant issue with rules, and that failure to do so would be arbitrary and capricious.

*Response:* USDA has reviewed the comment received to the interim rule, summarizes the significant comment, and responds to such herein.

### **Appeals**

*Comment:* USDA received comment concerned with which delineation methodology for wetland determinations would be used following a successful appeal. USDA also received

comment that sought a right for taxpayers other than the USDA program participants to have a right to appeal wetlands determinations by NRCS.

*Response:* As detailed in the NRCS appeal procedures at 7 CFR part 614, an initial certified wetland determination is issued as a preliminary technical determination which is made using the delineation methodology in place at the time it is issued. If the preliminary wetland determination is appealed, then it may remain unchanged or be revised by NRCS and issued as a final technical determination. If any changes are made between the preliminary and final technical determinations, the original delineation methodology is used even if procedures have changed. However, if the final technical determination is appealed to the USDA National Appeals Division and is remanded to NRCS due to agency error, a new preliminary determination would be conducted following the current delineation methodology (assuming any changes in methodology had occurred). The same principle would apply to any wetland determination remanded to NRCS through Federal court proceedings.

With respect to taxpayer appeals, taxpayers (aside from the affected producer) are not party to wetland determinations. The entire framework of 7 CFR part 12 relates to the eligibility of persons to receive USDA program benefits. As such, there is no right set forth in either statute or case law for someone other than the affected person to challenge final agency action on an administrative decision such as a wetlands determination. The administrative appeal procedures are predicated upon review of an adverse decision that affects persons as USDA program participants, and taxpayers in general do not have standing for purposes of the appeal procedures.

### **Area of Request for Certified Wetland Determinations**

*Comment:* USDA received comment identifying that a USDA program participant should be able to request a certified wetland determination for their entire tract. Comment also raised concern that the interim rule implied that the reference to field/subfield meant that NRCS would apply this scope of a certified wetland determination retroactively.

*Response:* USDA confirms that a certified wetland determination may be conducted for an entire tract if requested to do so by the USDA program participant. The change in the interim rule of identifying that certified wetland determinations would be made on a field or subfield basis was made in order to remove the strict “whole tract” requirement. Due to limited resources, NRCS has commonly prioritized certified wetland determination requests to those fields on which USDA program participants are planning to conduct, or have already conducted, land manipulations which may affect their eligibility, and this practice is expected to continue. USDA did not intend to imply that the scope of a certified wetland determination would be applied retroactively. Therefore, this final rule adds language to § 12.30(a)(3) to clarify that wetland determinations, delineations, and certifications may be done on a tract, field, or sub field basis, and has adjusted the language in § 12.30(c)(1) accordingly.

### **Best Drained Condition**

*Comment:* USDA received comment related to the definition and use of the term “best drained condition,” including comments that expressed: general support for the definition; concerns that identification of the best drained condition be based on sound documentation; that the benefit of the doubt should be given to the USDA program participant; and concern that the interim rule preamble reference to abandonment contradicts the statutory interpretation that once land is identified as PC, it remains always as PC, “once PC, always PC.” The comment further

recommended that USDA clarify this principle and that under the rule that PC is no longer considered wetland.

*Response:* The interim rule introduced and defined the term “best drained condition” 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 Farm Bill, 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 those hydrologic conditions that existed on wetlands that were converted to crop production prior to the 1985 Farm Bill to the extent that those conditions existed on or before December 23, 1985, due to drainage in its “as-built” condition.

Regarding the identification of the best drained condition, NRCS makes this decision based upon the best available evidence, which can include remote resources such as historical aerial imagery or other evidence such as drainage records found in USDA records or provided by a USDA program participant.

Section 12.31(c) is clarified as to the limited instance when abandonment occurred before and existed as of December 23, 1985; in such instance, NRCS will not consider best drained condition. NRCS will not identify wetland hydrology based on the best drained condition when a wetland supported woody vegetation such that production of an agricultural commodity was not possible on December 23, 1985. This is in keeping with the definitions of “prior-converted cropland” and “farmed wetland” established in the interim rule published on September 6, 1996, (61 FR 47019-47038), which specifies that PC and farmed wetland cannot support woody vegetation as of December 23, 1985. By excluding the consideration of best drained condition on such lands, section 12.31(c) ensures that they are properly identified as wetland in step one of

the wetland identification process described at 7 CFR 12.30(c)(7), and thus outside the definition of either “prior-converted cropland” or “farmed wetland”.

This final rulemaking is not intended to change past implementation of the “once PC, always PC” concept and provides a narrow scope to which abandonment applies to the consideration of best drained condition which is consistent with the September 6, 1996 interim rule and which was not affected by the December 2018 interim rule. NRCS understands the desire to simplify regulatory criteria utilizing short-hand language that seems to explain a concept more readily, such as “once PC, always PC”. However, the statutory structure identifies particular actions that will either result in a person being determined ineligible for USDA program benefits or result in them being determined exempt from ineligibility. The regulation reflects this structure. However, NRCS can confirm that as long as land remains in agricultural use, lands identified as PC in an NRCS certified wetland determination will not be considered converted wetlands for purposes of determining program ineligibility under the WC provisions.

Regarding the concern that PC is no longer wetland, USDA agrees that this is the case in the majority of situations, but a blanket statement as such cannot be made. Even so, as the WC provisions do not impose ineligibility with respect to the use of PC, there is no reason for USDA to identify whether PC is any longer a wetland.

### **Certification Status of pre-1996 Wetland Determinations**

*Comment:* USDA received comment related to the certification status of wetland determinations conducted before July 3, 1996. These comments:

- Expressed concern over the quality of data used to make determinations before 1996 and that such determinations are thus inaccurate, and that any action to

accept as certified any pre-1996 “inventory maps” was contrary to Congressional intent;

- Suggested that NRCS should deem pre-November 28, 1990 determinations as certified as well or consider criteria for which a determination conducted prior to 1990 could be considered certified;
- Expressed concern that the interim rule failed to provide clarity on the commenters’ understanding of the impetus for the rulemaking, namely the status of pre-1996 “official” wetland determinations; and
- Expressed support for the interim rule on this issue. Several comments simply sought further clarification.

*Response:* As a reminder, this rulemaking is intended as a codification and clarification of existing practice rather than a substantive change of overall regulatory framework or policy with regard to the certification status of wetland determinations. The interim rule did not change the legal status of any certified wetland determination made between 1990 and 1996, nor does NRCS have discretion to change any previously issued certified wetland determinations except under the limited circumstances identified in the regulations.

Certification of wetland determinations was initiated in the Food Agriculture Conservation and Trade Act of 1990 (1990 Farm Bill), which made all determinations completed after the 1990 Farm Bill’s enactment date that were provided with a certification statement by a USDA official and appeal rights certified as a matter of law. The 1990 Farm Bill defined certification by directing, upon providing notice to affected owners or operators, the Secretary shall certify each such map as sufficient for the purpose of making determinations of ineligibility for program benefits and shall provide an opportunity to appeal such delineations to the

Secretary prior to making such certification final. Further, the conference report to accompany the 1990 Farm Bill provided that the Managers agree that the certification process is to provide farmers with certainty as to which of their lands are to be considered wetlands for purposes of Swampbuster. On April 23, 1991, USDA issued regulations implementing the changes to the WC provisions in the 1990 Farm Bill. Language on certification was contained in § 12.30(c) which stated, 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. Beginning in June 1991, certification was accomplished by completion of the SCS-CPA-026 form. This form required that the District Conservationist certify by signature that “I certify that the above determination is correct and adequate for use in determining eligibility for USDA program benefits...” and provided appeal rights on the back side of the “Person Copy” of the form.

The Federal Agriculture Improvement and Reform Act of 1996 (1996 Farm Bill) further clarified certification by, among other items, providing that a final certification ... shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary. In turn, these 1996 Farm Bill clarifications were codified in the September 6, 1996 interim rule in 7 CFR 12.30(c)(1). The 1996 interim rule specified that all wetland determinations made after July 3, 1996, will be done on a tract basis and will be considered certified wetland determinations. The 1996 interim rule also specified that determinations made prior to July 3, 1996 were subject to the regulations in place at the time of the determination, and the preamble emphasized that if NRCS certified a wetland determination prior to July 3, 1996, the certification will remain valid.

The language in the 2018 interim rule with respect to the certification status of pre-1996 wetland determinations simply clarified their status as it exists and has existed under the regulations in place at the time the wetland determinations were originally conducted and certified, irrespective of any hindsight determination as to the quality of data upon which those determinations were made. Unlike the assumption by commenters, one of the purposes of the interim rule was to correct misunderstandings regarding the certification status of pre-1996 wetland determinations and was not to change the legal status of wetland determinations conducted prior to 1996. Certified wetland determinations conducted today, as well as those that have been certified since 1990, are completed using the methods and data required at the time of issuance, and any subsequent judgement as to their sufficiency as certified wetland determinations solely based on these methods or data is not authorized under the applicable legal framework.

This principle applies even when the Soil Conservation Service (SCS) or NRCS issued a certified wetland determination which may have been supported by a “wetland inventory” prepared prior to 1996. The process for conducting wetland inventories began in the late 1980’s as a means for USDA to better meet the workload demand and assure timely response to requests for wetland determinations and was only completed in some States. The primary sources of information used to develop wetland inventory maps were USDA soil survey and hydric soils lists, United States Fish and Wildlife Service (USFWS) National Wetland Inventory maps, United States Geological Survey Topographic maps, and aerial imagery. Following the 1990 Farm Bill amendments, when the SCS or later the NRCS received a wetland determination request, the agency would review wetland inventory maps, if available, for completeness and accuracy. The Agency could use a wetland inventory map as the basis for preparing a certified

wetland determination, after adjusting the depiction of the presence of potential wetlands based on additional information such as a field visit, evidence provided by the farmer such as drainage records, and other information such as new aerial imagery or updated soil surveys. It is clear that Congress was aware of this process from the conference report to accompany the 1990 Farm Bill:

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.

Rather than rejecting this process in 1996, Congress confirmed that a producer could rely upon prior certified determinations regardless if they were supported by wetland inventory maps or onsite data collected during a field visit. In fact, section 1222(a) as amended by the 1996 Farm Bill stated explicitly that no person shall be adversely affected because of having taken an action based on a previous certified wetland delineation by the Secretary. The delineation shall not be subject to a subsequent wetland certification or delineation by the Secretary, unless requested by the person. Further, in the 1996 Farm Bill, Congress also removed the previous requirement for periodic review and update of wetland delineations, demonstrating Congressional support for the concept of certification first enacted in the 1990 Farm Bill.

The interim rule was silent with respect to the certification status of pre-1990 wetland determinations. The certification of wetland determinations requirement was established in the Food, Agriculture, Conservation, and Trade Act of 1990 (1990 Farm Bill). When conducting new certified wetland determinations, NRCS considers all available information, including pre-1990 wetland determinations and the documentation associated with any field visits that occurred associated with any appeal and onsite review.

*Comment:* USDA received comment that expressed concern over whether NRCS followed NEPA in 2013 for an alleged policy change, identified in a March 2013 Decision Memorandum, to deem these determinations as certified.

*Response:* NRCS developed the March 2013 Decision Memorandum to obtain Secretarial approval to: (1) update immediately NRCS internal agency policy to describe more fully, but not change, the wetland determination methods as they were being implemented by staff across the Nation; and (2) develop an interim rule for the Secretary's consideration. There was no basis in law to prepare NEPA documentation for the preparation of a decision memorandum about whether to conduct rulemaking or to clarify existing policy. The 2013 Decision Memorandum made clear that NRCS was only clarifying the long-standing national policy instituted under the statutory mandate of certification so plainly provided in the 1990 Farm Bill and revised in the 1996 Farm Bill.

*Comment:* USDA received comment that suggested that NRCS not decertify and conduct revised determinations based on new mapping technology unless the USDA program participant raises the issue;

*Response:* The interim rule did not make any changes regarding potential revision of determinations that are considered certified. NRCS confirms that certified wetland

determinations are subject to revision only under limited circumstances, namely if the land in question has been removed from agricultural use, upon request of the USDA program participant, or when a violation of the WC provisions has occurred.

*Comment:* USDA received comment that the WC provisions provided that only those actions taken based on previous certified determinations would be exempt from adverse agency action under 16 U.S.C. 3822(a)(6) and that actions taken based upon previous “final” or “official” determinations were not so exempted.

*Response:* As discussed above, USDA does not agree that 1990 through 1996 determinations are “final” or “official” or any other designation other than “certified” or not. USDA concurs that the WC provisions specify that no person can be adversely affected because of having taken an action based on a previous certified wetland delineation by the Secretary. However, the interim rule did not change the ability of a producer who has a non-certified determination to seek equitable relief under 7 CFR 12.11. A producer’s ability to seek equitable relief under 7 CFR 12.11 was first established in the April 23, 1991 regulations which provided that an 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.

*Comment:* USDA received comment that the interim rule restates NRCS’s established policy that pre-1996 determinations are considered certified if the person was notified that the determination had been certified, and the map document was of sufficient quality to determine ineligibility for program benefits, but fails to identify the requirement that the producer must have been given notice of their appeal rights when the determination was issued. The comment

also opined that any policy NRCS would consider implementing that would allow the agency to accept as certified pre-1996 wetland determinations without additional evidence of their accuracy or that appeal rights were given at the time the determination was made would be contrary to Congress' intent.

*Response:* USDA did not fail to identify the requirement that a producer had been given notice of their appeal rights. In particular, as explained in the interim rule preamble, USDA issued in June 1991 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 producer's copy. Section 12.30(c)(1), as amended by the interim rule, then identified that determinations made after November 28, 1990, and before July 3, 1996, are certified wetland determinations if the determination was issued on the June 1991 version of form NRCS-CPA-026 or SCS-CPA-026, which, given the forms' content, confirms that a producer was provided their appeal rights. The interim rule then also specifies that if the wetland determination was issued on a different version of the form, that wetland determination is 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. The interim rule did not certify any of these pre-1996 wetland determinations that were not already certified pursuant to the procedures under the 1991 final rule, nor is NRCS considering adopting any policy with respect to certification of wetland determinations contrary to Congressional intent.

*Comment:* USDA received comment asserting that when pre-1996 wetland determinations are not considered certified, there are no circumstances consistent with statute that NRCS could use outdated wetland delineation methods to review and certify an old determination and specified that NRCS should remove the provision from the interim rule and

instead make clear that determinations of wetland hydrology will be made in accordance with the wetland delineation methodology currently in use by NRCS.

*Response:* USDA generally agrees with the comment; however, no revisions to the rule are necessary. The interim rule established that in order for a wetland determination made after November 28, 1990, and before July 3, 1996 to be considered certified, the determination must have been formally issued by NRCS, certifying the determination was of sufficient quality to determine ineligibility for program benefits, along with all appeal rights. The only exception is in situations where the previously issued certified wetland determination map document maintained by the producer or in the NRCS case file is now of such poor quality to render it impossible to locate wetlands on the farm. In these situations, a new certified wetland determination map, utilizing current methods, will be provided with appeal rights. Further, specific to 1991 through 1996 determinations, the amendments provided in the 1990 Farm Bill, as supported by the 1991 rule, directed NRCS to certify, at the time of issuance, the wetland determination meets all quality and administrative mandates in effect at the time of issuance and certification. The interim rule did not certify any pre-1996 wetland determinations, and NRCS policy has always been, and remains, that wetland determinations are made and certified as accurate and sufficient in accordance with the wetland delineation methods in effect at the time of certification, with the minor exception that is explained above under wetland determinations which have been appealed.

*Comment:* USDA received comment that NRCS statements contemporaneous with the 1996 interim rule demonstrate that the agency understood its statutory mandate to require a review of previous wetland determinations to ensure their “accuracy” and that NRCS was

considering establishing a specific time frame for completing the evaluation of existing wetland determinations.

*Response:* The comment does not provide the full context under which such statements were made in the 1996 interim rule. In particular, as explained in the preamble of the 1996 interim rule, NRCS was considering conducting a review of wetland determinations in collaboration with other agencies who had entered into the Wetlands Memorandum of Agreement (MOA) in 1994. The 1994 MOA was to facilitate the use of NRCS wetland determinations for the Clean Water Act. The “certification” under the MOA aimed to ensure the accuracy of wetland delineations conducted prior to November 28, 1990 for the purposes of the WC provisions, as well as providing a useful basis for establishing reliance on wetland delineations for Clean Water Act purposes. It was in this context that the MOA agencies recognized the importance of providing certainty for the agricultural community as to the status of their wetland determinations which have not been certified for use for both the WC provisions and the Clean Water Act, and that the Agencies were considering the establishment of a specific time frame for completing the evaluation of existing wetland determinations, and that based on the evaluation landowners would be notified whether their current wetland determinations are acceptable for both the WC provisions and the Clean Water Act. (61 FR 47025). It is important to note that the discussion on the MOA and evaluation of existing wetland determinations in the 1996 rule preamble follows the statement, If NRCS certified a wetland determination prior to July 3, 1996, the certification will remain valid (61 FR 47025). As such, it is clear that the evaluation applied to wetland determinations conducted prior to 1990.

This evaluation was limited to portions of five states in the prairie pothole region of the United States and was not a comprehensive study of the WC program for purposes of WC

certification. The purpose of the evaluation was to apply the different off-site wetland determination methods used in the different states at the time and to determine the consistency, not the accuracy, of the findings. The evaluation team did not review the quality of any previously issued certified wetland determinations or any older non-certified determinations. After the 1996 Farm Bill amendments definitively closed any opportunity for review and update of previously issued certified determinations, the Agency remained challenged on how to treat pre-1990 non-certified wetland determinations. Following the findings from the evaluation and facing the 1995 moratorium on wetland determinations which had been imposed by Secretary Glickman in response to bi-partisan Congressional legislation, the Agency recommended to the Department to end the practice of reviewing and updating previously completed wetland determinations. In a 1997 Informational Memorandum, the Agency proposed that wetland determinations would be conducted only on request, when a manipulation is planned, or in cases of potential violations, adhering to the 1996 statutory changes. Thereafter, the Secretary lifted the moratorium on wetland determinations.

At no point in the preamble or the regulation part of the 1996 rule did the Secretary provide NRCS the authority to review and update proactively any certified wetland determination, including those determinations issued and certified by the Agency prior to 1996. In fact, the practice was explicitly prohibited in the statement in the preamble if NRCS certified a wetland determination prior to July 3, 1996, the certification will remain valid. The certainty discussed in length in the 1990 Conference Report, enacted into law in the 1990 Amendments, and strengthened in the 1996 amendments, provided assurance to USDA program participants that once certified, a wetland determination would never be changed by USDA except for limited circumstances identified above. The clarification provided in the 2017 amendment to the NRCS

National Food Security Act Manual (NFSAM), as codified in regulation in the 2018 interim rule, supports this assurance.

### **Certified Wetland Determination Map Quality Concerns**

*Comment:* USDA received comment concerning the quality of wetland determination maps and requesting that NRCS clarify what constitutes a map of sufficient quality for making determinations of ineligibility benefits.

*Response:* In the interim rule, USDA identified that in order for a 1990 through 1996 wetland determination to be considered certified, the map document must be of sufficient quality to determine ineligibility for program benefits. The purpose of the wetland determination map is so that the USDA program participant can accurately self-certify that they are in compliance with the WC provisions, and USDA can respond to questions regarding eligibility. There are rare situations where certified wetland determination maps produced prior to development of computer map production capabilities and quality document reproduction technologies are of such poor quality that neither the person, nor USDA can accurately discern the location of wetlands on the map. As explained in the language in the interim rule, such a map would not be considered of sufficient quality for eligibility determination purposes.

### **Climate References in Rulemaking**

*Comment:* USDA received comment suggesting that reference to climate and environment not be used in rulemaking.

*Response:* USDA will continue to use terminology that is necessary or facilitates the implementation of its responsibilities in concert with the scientific understanding of meteorological, atmospheric, hydrological, and soil health issues facing USDA program participants and agricultural operations of the United States.

## **Commenced Conversion**

*Comment:* USDA received comment related to commenced conversion wetlands, identifying that it appears that the interim rule changed the original statutory commenced conversion language as the interim rule uses the term “occurred” when referencing wetland conversions prior to December 23, 1985, while the statute uses the term commenced.

*Response:* USDA did not make any change in the interim rule that affected the treatment of commenced conversion wetlands under 7 CFR part 12. As specified in the September 6, 1996, interim rule, a person seeking a commenced conversion exemption must have completed the conversion activity on or before January 1, 1995. As the commenced conversion exemption is no longer available, USDA uses the term “occurred” to simplify explanation of the WC provisions.

## **Definitions**

*Comment:* USDA received comment seeking surety that the term “farmed wetland” meets all three criteria for wetland. USDA also received comment about the definitions of pothole, playa, and pocosin, which sought to expand the definition of potholes to cover the Great Plains; or to clarify the definition of a pothole. Comment on certain definitions or their aspects, such as hydrology criteria for farmed wetlands, are addressed in their own sections of this preamble.

*Response:* The definition of wetland is a general term, whereas farmed wetland and farmed wetland pasture are specific types of wetlands identified as having been manipulated prior to December 23, 1985, but still retaining wetland characteristics. USDA affirms that farmed wetland and farmed wetland pasture must meet all three wetland criteria: soil, vegetation under normal circumstances, and the hydrology criteria identified in regulation. USDA does not

agree that additional specificity in their definitions is needed, as each definition starts out with the requirement that they are a wetland. As described in the wetland determination process in § 12.30(c)(7), wetland type is identified in step 2, which is after the determination of the three wetland criteria, and the definition of wetland in both statute and regulation require all three criteria.

USDA appreciates the support it has received for adding definitions of potholes, playas, and pocosins. As provided in the preamble to the interim rule, the definitions of pothole, playa, and pocosin provided in the interim rule were unchanged from definitions provided in agency policy since the early 1990s. There is no scientific basis to amend the definitions set forth in the interim rule and USDA does not wish to alter the long-standing scope of protections for these types of wetlands at this time.

In order to gain consistency in the construction of the definitions of farmed wetland, farmed wetland pasture, and PC, minor adjustments are being made in § 12.2. The phrase, at least once before December 23, 1985, is added in reference to the frequency that an agricultural commodity must have been produced on farmed wetland to be consistent with the definition of PC. USDA affirms that only one instance of agricultural commodity crop production prior to December 23, 1985, is and has always been needed in order to qualify for either the farmed wetland or PC designations. Similarly, although the definition for farmed wetland pasture has always specified that it must have been managed for pasture or hayland, clarification is added that it also was not used to produce an agricultural commodity at least once before December 23, 1985, which allows USDA and the public an easier juxtaposition between this and the farmed wetland designation, and is consistent with long-standing application of these definitions.

Finally, the phrase, prior to December 23, 1985, is relocated in the definition of farmed wetland pasture to be consistent with its location in the definition of farmed wetland.

### **Endangered Species Act Consultation**

*Comment:* USDA received comment that USDA must undertake consultation under the ESA with respect to the potential impacts to listed species and their habitat before implementing the interim rule and alleging that USDA is currently in ongoing violation of the ESA and its implementing regulations.

*Response:* USDA disagrees consultation under section 7 of the ESA was required for its rulemaking action. ESA section 7(a)(2) requires agencies, in consultation with either the Secretary of the Interior or Commerce, to ensure that any action authorized, funded, or carried out by an agency is not likely to jeopardize species listed under the Act or designated critical habitat (16 U.S.C. 1536(a)(2)). As discussed further below, the procedural and substantive requirements of the Act are not triggered here because: (1) wetland determinations are not an “action” that “authorizes, funds, or carries out” activities by producers impacting protected species or critical habitat; (2) neither the interim rule nor this final rulemaking are an affirmative “agency action” for the purposes of the ESA, only a clarification of long-standing policy; and (3) even if the interim rule or this final rule were an affirmative agency action, USDA does not have discretion to deviate from the requirements set forth by Congress. For these reasons, the requirements of ESA section 7(a)(2) are not triggered here.

First, NRCS provides technical assistance to USDA program participants in the form of wetland determinations to assist them to comply with the WC provisions. Producers choose whether to comply with the WC provisions based on their desire to participate voluntarily in covered USDA programs and other factors. NRCS can neither prohibit nor permit USDA

program participants from converting wetlands potentially used by ESA-listed species to agricultural production; therefore, NRCS' technical determinations are not agency actions that trigger the consultation requirements of ESA section 7(a)(2). Further, as established by a memorandum (FWS/AES/DCHR/007178) dated April 2, 2001 from the USFWS's Acting Deputy Director to the Regional Directors, "consultation under section 7(a)(2) of the Endangered Species Act is not required when the Natural Resources Conservation Service conducts official wetland determinations or delineations on private lands under the Food Security Act of 1985, as amended." Additionally, section 1223 of the 1985 Farm Bill previously required consultation with USFWS on the identification of wetlands and the determination of exemptions, but such consultation was specifically removed in the 1996 Farm Bill. While the consultation referenced previously in section 1223 was not specific to ESA consultation, its removal identifies that Congress did not believe consultation with USFWS was needed on any wetland determination related concerns. Thus, wetland determinations themselves are not "agency actions" that trigger the requirements of ESA section 7(a)(2).

Second, because wetland determinations themselves are not agency actions that trigger the requirements of ESA Section 7(a)(2), guidance or clarification from USDA is also not an agency action that triggers the Act's requirements. Neither the interim rulemaking, this final rulemaking, nor the technical methods by which NRCS makes wetland determinations have the potential to adversely impact protected species or critical habitat. Additionally, the interim rule and this final rule are codifying long-standing policy and this codification does not alter the status quo. Thus, NRCS has determined that the rule would have no effect on any listed species. When an action will have "no effect" on listed species, consultation requirements are not triggered.

Third, ESA only applies to actions over which the agency has discretionary control sufficient to impose measures for the benefit of protected species. Most of rule implements statutory requirements prescribed by Congress, such that NRCS has no discretionary control. Further, NRCS' provision of technical assistance to agricultural producers in the form of a wetland determination carries no authority to prevent producers for converting wetlands to agricultural production. Where an agency is required to act in particular manner, there is no utility in ESA consultation and the requirement is not triggered.

*Comment:* USDA received comment that stated that by permitting producers to certify inaccurate wetland determinations and convert improperly delineated wetlands to agricultural use without penalty, NRCS's actions at the very least "may affect" listed species by facilitating the destruction of important habitat for endangered migratory birds and other animals that frequent agricultural wetlands. The comment also asserts that the interim rule, as a change in policy, reversed the incentive to preserve such wetlands and thus necessarily affects listed species.

*Response:* As described above, the interim rule and this final rule do not facilitate the destruction of habitat or otherwise affect listed species because USDA is not authorizing producers to take any activities, these rulemakings are only a clarification of long-standing policy and not a change in policy, and USDA does not have discretion to deviate from the requirements set forth by Congress. The comment mischaracterizes the certification process as the producer does not "certify" wetland determinations, whether the commenter considers such wetland determination accurate or not. Comment may be based upon misinterpretation of the internal 2013 Decision Memorandum that made reference to producer review of pre-1996 certified wetland determinations (discussed above). NRCS certifies wetland determinations in accordance with statutory, regulatory, and policy guidance. The 2013 Decision Memorandum

simply reflected this legal framework where prior certified wetland determinations remain certified unless a new determination is requested by the producer; however, the new determination process that follows any such request is conducted by the agency and such review does not in any way mean that the producer is certifying the wetland determination.

Further, as previously noted above, a memorandum (FWS/AES/DCHR/007178) dated April 2, 2001 from the USFWS's Acting Deputy Director to the Regional Directors stated, "consultation under section 7(a)(2) of the Endangered Species Act is not required when the Natural Resources Conservation Service conducts official wetland determinations or delineations on private lands under the Food Security Act of 1985, as amended." Additionally, as described elsewhere in this preamble, the interim rule did not effect a change in policy, and therefore does not meet the definition of "action" under ESA section 7.

For all these reasons, the agency has not taken an action that would affect listed species and trigger the consultation requirements of ESA section 7(a)(2). USDA thus has determined that the rule will have no effect on listed species.

### **Farmed Under Natural Conditions**

*Comment:* USDA received comment related to farmed under natural conditions requesting that NRCS reiterate that farming under natural conditions is allowed.

*Response:* USDA affirms that USDA program participants may continue to farm wetlands under natural conditions without risk of losing their eligibility for USDA program benefits. As first stated in the 1986 interim rule and still existing in § 12.32(b)(1), destruction of herbaceous hydrophytic vegetation shall not be considered an action that destroys a natural wetland characteristic.

### **Mitigation**

*Comment:* USDA received comment urging NRCS to encourage mitigation efforts, and in doing so, amend its regulations generally not to require more than a one-to-one ratio for mitigation.

*Response:* In the Agriculture Improvement Act of 2018 (2018 Farm Bill), Congress reauthorized the availability of funding for NRCS to support wetland mitigation banks, and such funds have been made available. USDA believes the availability of wetland mitigation banks for WC mitigation purposes will greatly encourage wetland mitigation efforts. The WC statutory provisions identify that wetland and the wetland values, acreage, and functions must be mitigated, and that a person can appeal any ratio greater than a one-to-one. No changes were made in response to this comment.

### **Navigable Waters Protection Rule**

*Comment:* USDA received comment expressing confusion about the wetland conservation provisions of the 1985 Farm Bill and the Federal Clean Water Act.

*Response:* It should be emphasized that this final rule, in part, governs the identification of wetlands for the purpose of implementing the wetland conservation provisions of the 1985 Farm Bill. This rulemaking does not affect the identification of waters subject to the Federal Clean Water Act or the implementation of any other Federal, State, or local provision protecting or regulating wetlands or any other land or water resources. At times, NRCS wetland determinations may encompass wetlands that are also subject to Clean Water Act regulations, including Clean Water Act section 404 discharge of dredged or fill material permitting requirements. However, due to the unique statutory provisions of the 1985 Farm Bill, while NRCS wetland determinations may identify certain areas as exempt under the 1985 Farm Bill, those same areas may have the potential to be jurisdictional under the Clean Water Act.

The U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) have recently revised the definition of “waters of the United States” in the Navigable Waters Protection Rule, which establishes the scope of Federal jurisdiction under the Clean Water Act. See 85 FR 22250-22342 (April 21, 2020). In the rulemaking to revise the definition of “waters of the United States,” the EPA and the Army have retained their long-standing definition of “wetlands” and have defined “prior-converted cropland” for purposes of the Clean Water Act, including when these lands would no longer be excluded from the definition of “waters of the United States.” NRCS notes that this rule defines “prior-converted cropland” differently for 1985 Farm Bill purposes than the definition that is identified in the EPA and the Army “waters of the United States” rulemakings for Clean Water Act purposes. Further, NRCS also notes that this final rule for 1985 Farm Bill purposes is entirely separate from the EPA and the Army “waters of the United States” rulemakings.

USDA recognizes that USDA program participants may be confused between the sometimes-differing requirements of the 1985 Farm Bill and the Clean Water Act. To avoid confusion, NRCS clearly informs USDA program participants that NRCS wetland determinations are for purposes of implementing the 1985 Farm Bill’s wetland conservation provisions only, and that the participant should contact the U.S. Army Corps of Engineers for clarification about whether a particular activity will require a Clean Water Act section 404 permit.

### **National Environmental Policy Act (NEPA) compliance**

*Comment:* USDA received comment on the Environmental Assessment (EA) for the interim rule that it had failed to meet its NEPA responsibilities by not identifying sufficient alternatives, failing to conduct an Environmental Impact Statement (EIS) due to several factors

the commenters' identified that should have triggered such analysis, failure to provide a "hard" look, and failing to meet other NEPA requirements.

*Response:* Much of this criticism rests upon the mischaracterization of the interim rule. The provisions of the rule regarding certification of wetland determinations made between 1990 and 1996, only clarify existing policy that itself implements statutory language that NRCS lacks discretion to change. The remainder of the rule clarifies and codifies existing NRCS policy and procedures with regard to the methods NRCS uses to identify wetlands and does not change the status quo. Thus, NRCS properly prepared an EA and reached a Finding of No Significant Impact (FONSI).

In the 1990 Amendments to the Farm Bill, Congress directed USDA to establish a process for certifying wetlands determinations. To implement this mandate, SCS developed the process of certification through completion of the SCS-CPA-026 form, which certifies that the maps are sufficient for determination of ineligibility and notifies the farmer of his or her appeal rights. In 1996, Congress expressly circumscribed NRCS's discretion to revise prior determinations, providing that a previous certified wetland delineation shall not be subject to a subsequent wetland certification or delineation by the Secretary unless requested by the person.

While NRCS had some initial discretion to establish a process for certifying wetland determinations in the wake of the 1990 Amendments—discretion it used to develop the SCS-CPA-026 form process—Congress expressly removed any discretion to revisit those certifications in the 1996 Amendments. Thus, if a determination was certified between 1990 and 1996 under the criteria applicable at that time, the 1996 Amendments left the NRCS with no discretion except to continue recognizing those determinations as certified.

One discretionary addition made in the interim rule is for NRCS to continue to use the 1971 through 2000 precipitation dataset in its decisions on whether wetland hydrology criteria are met under normal circumstances rather than begin to use the currently available 1981 through 2010 precipitation dataset and establish a precedent to continue to update the dataset used every 10 years. Because the 1971 through 2000 precipitation dataset has been the one NRCS has used since it began making certified wetland determinations, codifying the continued use of that dataset also does not represent a change from the status quo. Further, because the term “normal circumstances” as used in the 1985 Farm Bill includes hydrology manipulations that occurred before the date of enactment, NRCS must have enough years of pre-1985 precipitation data available to use in making decisions on wetland hydrology.

NRCS was not required to prepare an EIS because the interim rule only clarified and did not change existing NRCS policy and procedures and because NRCS lacks discretion to change policy in a manner that would revisit certifications made between 1990 and 1996. Further, NEPA has no specific requirement regarding the number of alternatives an agency must develop and analyze; at a minimum, an agency must carry forward one action alternative and the no-action alternative. An agency is not required to consider alternatives that have substantially similar consequences. As described in the EA, a 1991 National Resources Inventory (NRI) completed a wetlands survey that confirmed wetland conversions to agriculture had slowed compared to those occurring before the 1985 Farm Bill and noted that agricultural activities seemingly had less impact on wetland conversions than expected (Schnepf 2008). The EA also cites the 2010 NRI Summary Report (Sucik and Marks 2014) analysis of data showing the status and recent trends of wetlands in four regions of the U.S. The report documents wetland losses in the northeast and southeast, primarily resulting from urban development, not conversion to

agriculture. Further, the central and western regions have experienced a gain in wetland acres, primarily on agricultural lands.

Because conversion to agriculture is only one cause of wetland losses, and NRCS has no information indicating conversion to agriculture is currently a primary cause, NRCS does not expect the precipitation dataset used to help make determinations on the presence or absence of wetland hydrology to make a significant difference in the amount of wetlands identified as subject to the wetland conservation provisions. Because an alternative that considered decadal updates to the precipitation dataset would have substantially similar environmental consequences as the proposed action retaining use of the 1971 through 2000 dataset, the no action and proposed action alternatives were sufficient.

#### **Normal Climatic Conditions and Precipitation Data**

*Comment:* USDA received comment on the information that NRCS uses to determine “normal circumstances” to meet the hydrology component of the wetland definition that the land “under normal circumstances” does support a prevalence of hydrophytic vegetation. In particular, USDA received comment related to:

- Support for the definition of normal climatic conditions in § 12.2(a);
- Requesting a change from hydrologic inputs to precipitation;
- Increased clarity as to when to seek information in Climate Analysis for Wetlands Tables (WETS Tables) as opposed to the Field Office Technical Guide (FOTG);
- Concern about how NRCS uses data collected by the National Oceanic and Atmospheric Administration in establishing normal climatic condition for the WETS Tables.
- Concern about maintaining current precipitation data, including—

- Support for NRCS using the 1971 through 2000 data set;
  - Recommendation to use only pre-1985 data, including only normal rainfall data from years prior to 1985;
  - Recommendations about how to use the existing data set situationally;
  - Recommendation to use the 1981 through 2010 data set since the 1971 through 2000 data set was associated with a drier time period;
  - Use 1971 through 2000 data set for wetland determinations with pre-1985 manipulations and current precipitation data for new land being brought into production;
  - Limiting use of the 1971 through 2000 data set to only those situations where the producer can demonstrate the existence of special circumstances, such as where the use of the new dataset would create a demonstrably unfair result.
- Seeking a connection between the definitions of normal climatic conditions and normal circumstances;
  - Conduct an analysis of the hydrologic conditions that occurred prior to 1985;
  - Clarify how the precipitation data dates were chosen and how they will be applied.

*Response:* USDA appreciates the support it has received for the definition of “normal climatic conditions” as defined in the interim rule and will retain that language in this final rule. NRCS understands the comment about focusing on precipitation but hydrologic inputs can include other sources of water such as floodwater from an adjacent stream that may require consideration in the FOTG.

The definition of normal climatic conditions does not itself provide guidance as to when WETS Tables or the FOTG is appropriate. The determination of normal climatic conditions will typically be determined with the use of WETS Table data as provided in the NRCS Engineering Field Handbook. If other methods are used, such as those to account for hydrologic inputs other than precipitation, that data and methods for its use will be provided in the FOTG. This flexibility is necessary to assure the accuracy of wetland determinations being issued across the highly diverse ecoregions contained within the United States.

The term “normal circumstances” is part of the statutory wetland definition but is not defined itself in statute or in 7 CFR part 12. Agency policy explains that there are two considerations in the determination of normal circumstances. One is consideration of pre and post December 23, 1985, disturbance and the other is consideration of climate. The term “normal climatic conditions” is applied to the latter, and specifically requires that wetland identification be based on conditions that are present under normal climate, not those conditions which are present due to abnormally wet or dry conditions.

USDA appreciates the concerns expressed by the commenters critical of NRCS’ continued use of the 1971 through 2000 data set. NRCS’ National Water and Climate Center (NWCC) has prepared WETS Tables to help assess normal climatic conditions. The WETS Tables display monthly rainfall data as the monthly average (50th percentile), and the values at which there is a 30 percent chance that the rainfall will be less or more than those values (30th and 70th percentiles). The range between the 30th and 70th percentiles defines normal monthly rainfall. Rainfall records from a defined period preceding the date of onsite or remotely sensed (for example, aerial photograph) evidence can be compared with these values to determine if observed conditions were reflective of what would be expected under “normal climatic

conditions.” This data is stored in the Agricultural Applied Climate Information System (AgACIS) which is a public repository for data collected at stations in the National Weather Service (NWS) Cooperative Network. Data and several standard summary reports are available. Historically, the most common summary reports used in NRCS are Temperature and Precipitation Summary, Frost-Free Days, Growing Season, and WETS Tables. AgACIS brings historical climate information (used for the 1971 through 2000 WETS Tables and other historical datasets) and near real-time data together under one umbrella system where they are fused into quality products to assess historical climate trends, enhance daily operational decisions, or assist with any number of climate dependent activities. USDA believes that the data quality and control processes used by the NWS are adequate and that the NWS Cooperative Network encompasses enough geographic coverage to fully represent the agricultural landscape.

For data sets that are used to document local climatic conditions, such as daily rainfall and temperature records, climatologists recognize a 30-year period of record as a minimum for statistical accuracy. Because NRCS must consider best drained conditions that existed on or before December 23, 1985, it must use the 1971 through 2000 data set to have enough years of data to evaluate observations of hydrology indicators. The 1981 through 2010 data set would not allow for enough years prior to December 23, 1985, to be able to assess normal climatic conditions for many determinations. To assure fair and consistent application of this process and predictability for USDA program participants, NRCS has maintained its use of the 1971 through 2000 data set. NRCS received comment that use of a 30-year average was reasonable, and NRCS agrees that such an average is accurate while not being influenced by shorter term climatic variability. Regarding the use of a more contemporary dataset for the evaluation of land currently being brought into production, USDA appreciates this comment but feels that

providing consistency in the process and predictability for USDA program participants, correlated to the statutory date of December 23, 1985, is an important aspect of implementation of the WC provisions, and that the continued use of the 1971 through 2000 data set is appropriate in all situations.

### **Office of Inspector General Audit Report in 2017**

*Comment:* USDA received comment asserting that the interim rule failed to address the 2017 Office of Inspector General (OIG) Audit Report, “USDA Wetland Conservation Provisions in the Prairie Pothole Region.” Some of the comment concerning the content of the OIG Report are addressed in the Certification Status of pre-1996 Wetland Determinations section of this preamble. The remainder are addressed below.

*Response:* As documented in the NRCS response contained in the report, USDA disagrees with much of the content of the 2017 OIG report and the report’s characterizations of NRCS actions taken. As is common to all audits, matters are identified as needing improvement and if significant, warrant a recommendation. The 2017 OIG report only issued two recommendations. The first recommendation was for the Agency to issue clarity on certification. The agency agreed to release “additional policy clarification providing specific guidance to evaluate the certification status of determinations issued prior to 1996.” In good-faith, NRCS released its clarification in a 2017 amendment to the NFSAM, and in the December 2018 interim rule. NRCS was not required to reference the OIG report itself in the interim rule.

As noted above, NRCS has long recognized that determinations made between 1990 and 1996 on a properly completed CPA-026 form are certified. In 2010 through 2012, however, NRCS realized that staff in the four prairie pothole States were incorrectly applying national policy and not recognizing certified determinations made between 1990 and 1996. Between

2012 and 2013, NRCS National Office staff worked with these four States to better explain the statute, regulations, and policy regarding certification. In 2013, NRCS leadership in those states asked staff to align the application of certification in support of the statute and the 1991 and 1996 regulations. In 2013, NRCS proposed, in a Decision Memorandum to the Secretary of Agriculture, that the certification issue be clarified in the preamble of an upcoming proposed rule. However, in the wake of the Agricultural Act of 2014, the proposed clarification of certification policy in a rule was not made due to other priorities – namely the recoupling of crop insurance benefits to the highly erodible land and wetland conservation provision requirements.

In March 2014, OIG received a complaint alleging that NRCS officials were improperly directing officials in the prairie pothole states to treat wetland determinations from 1990 through 1996 as certified rather than making new wetland determinations. During OIG’s investigation, NRCS explained to the OIG auditors the 28-year history of certification, including the initiation of certification subsequent to enactment of the 1990 Farm Bill, the amendments on certification in the 1996 Farm Bill, and the 1991 and 1996 implementing regulations. In 2017 OIG issued a report which concluded that NRCS policy had been to consider wetland determinations made between 1990 through 1996 as not certified “unless the determination was appealed and upheld,” and that NRCS’s 2013 instructions to the prairie pothole states, that 1990 through 1996 determinations were certified if the producer had been notified of its right to appeal, represented a change in policy. While NRCS disputed the OIG’s characterization of its policy, it accepted OIG’s recommendation that NRCS eliminate confusion regarding certification, by issuing clarifying guidance: “Recommendation 1 — Issue official guidance reinforcing correct and current rules and clarifying procedures for making wetland determinations and certification, including the status of pre-1996 determinations.”

The report's recommended management action was not to correct erroneous agency policy, or to change agency policy. The management action was for NRCS to issue guidance clarifying that two rules (the 1991 final rule and the 1996 interim rule), apply to certified determinations. To determine the certification status of any previously issued determination, NRCS must use the rule in force at the time of the previously issued determination. NRCS acted on the OIG recommendation and issued a clarifying amendment to the NFSAM in 2017 and the interim rule in 2018; both of which met the recommendation of clarifying certification, including the status of pre-1996 determinations.

### **Off-site Analysis of Potentially Highly Erodible Land**

*Comment:* NRCS received comment related to potentially highly erodible land (PHEL), concerning the establishment of this designation, defining the resolution of the elevation data that NRCS may use, and identifying that NRCS should emphasize offsite determinations involving PHEL can be appealed.

*Response:* NRCS identifies highly erodible land based upon the predominant soil map unit in a field. Where soil map units have a range of slope and steepness factors that could result in a soil map unit being determined either highly erodible or not for water erosion, NRCS gives that soil map unit a designation of potentially highly erodible land, following a process first described in the 1986 interim rule and still existing in § 12.21(c). The final erodibility of a particular field that contains potentially highly erodible soil map units has been determined through onsite measurements of slope and steepness. However, USDA identified in the interim rule that NRCS could also make a determination of erodibility using new technological tools, including the use of LiDAR or other elevational data in lieu of an onsite measurement. The availability and type of elevational data varies across the United States, and NRCS has

developed procedures to evaluate its use. Additionally, NRCS specifically added that if a person disagrees with an offsite determination on potentially highly erodible soils, a determination will be made onsite. No changes were made in response to these comments.

### **Offsite Analysis of Wetland Minimal Effect**

*Comment:* USDA received comment related to the offsite analysis of wetland minimal effect, including the role of States in minimal effect analysis, recommending NRCS only conduct onsite minimal effect analysis, recommending NRCS conduct minimal effect analysis even after commencement of potential conversion activities, questioning how many minimal effect determinations have been issued, suggesting NRCS use yield records as evidence for offsite analysis, suggesting that any burden of establishing minimal effect post-conversion should not be on the person while other comment insisted that such burden remain with the person, recommending NRCS develop a list of categorical minimal effect activities, and suggesting that the interim rule left too much to agency discretion. Comment also asserted that NRCS could not remove the on-site evaluation requirement simply to make it easier to offer this exemption to USDA program participants and that the Agency must adopt specific criteria for when off-site methods can be used.

*Response:* USDA appreciates the attention and support this issue has received. NRCS considers all useful evidence in analyzing whether an activity will result in a minimal effect. While onsite analysis of minimal effect to the wetlands in the area might provide more robust data, it is not always a practicable option, as NRCS may not have the authority to visit wetlands in the area outside the site under consideration of the minimal effect request. The interim rule clarifies that offsite analysis is an option to determine the impacts of the action on wetlands in the area, while an onsite visit is required to the site under consideration of a minimal effect

exemption. Minimal effect analysis must happen on a case-by-case basis and the language of the interim rule, which is not changed in this final rule, provides a reasonable balance between clarity and discretion to allow for case-by-case analysis. Once a potential conversion activity has commenced, an accurate and fair minimal effect determination is made more difficult because of disturbance which is why the burden is on the USDA program participant to demonstrate minimal effect in that situation. While NRCS will not be adopting any list of categorical minimal effects in this rule, the option to create such a list exists for future rulemakings and States would play a role in the development of any list.

#### **PC Any Land with pre-1985 Drainage**

*Comment:* USDA received comment related to land with pre-1985 drainage, identifying that if conversion had been commenced prior to 1985, including lands identified as farmed wetlands, they should not be subject to the WC provisions.

*Response:* Farmed wetlands have been subject to the WC provisions since 1987 and were formally defined in regulation in 1996. Congress has not altered NRCS administration of farmed wetlands since first described in regulation. Conversely, Congress has embraced farmed wetland terminology in its own explanations of the WC provisions and eligibility for conservation programs under Title XII of the Food Security Act of 1985, such as the Wetlands Reserve Program originally authorized in the 1990 Farm Bill. There have also been specific criteria for identification of commenced conversion wetlands and whether such wetlands are considered exempt or not from the wetland conservation provisions as described above. No changes have been made in response to these comments.

#### **Seasonal Wetlands**

*Comment:* USDA received comment that the interim rule should be withdrawn because it systematically imposes several changes to NRCS's wetlands identification policies that, when considered cumulatively with existing practices, result in the exclusion of seasonal wetlands in wetlands determinations. The comment identifies that seasonal wetlands have been excluded through the wetland maps that form the basis for producer compliance, asserting that the rule certified pre-1996 wetland determinations and that these consistently excluded seasonal wetlands. Additionally, the comment also claims that the older determinations utilize precipitation data from a historically dry period (1990 through 2000) that limits the number and size of seasonal wetlands subject to the wetland conservation compliance requirements and that there is no scientific analysis of the impact of the use of such information.

*Response:* As explained above, the interim rule did not make any changes, and thus does not have an impact, cumulatively or otherwise, on seasonal wetlands. Additionally, the interim rule did not certify any pre-1996 wetland determinations but simply clarified the certification status of wetland determinations made prior to 1996. With respect to the precipitation dataset used, this comment is addressed in the NEPA compliance section. In particular, because the 1971 through 2000 precipitation dataset has been the one NRCS has used since it began making certified wetland determinations, codifying the continued use of that dataset also does not represent a change from the status quo. Further, because the term "normal circumstances" as used in the 1985 Farm Bill includes hydrology manipulations that occurred before the date of enactment, NRCS must have enough years of pre-1985 precipitation data available to use in making decisions on wetland hydrology.

*Comment:* USDA received comment asserting that the interim rule unduly relies on satellite imagery from the hottest time of the year when seasonal wetlands have likely dried out.

The comment recommended that any NRCS wetland determination should account for the use of summer imagery and promote investments in more accurate spring imagery to ensure that identification of seasonal wetlands which fill early in the spring, which is when they provide their most important flood storage and wildlife benefits, particularly for migrating and nesting waterfowl.

*Response:* Neither the interim rule nor this final rule addresses the specific timing of aerial imagery used for making wetland determinations. NRCS utilizes all available data including data collected with new technologies. While spring imagery is helpful in identifying seasonal wetlands, it does not always exist. Aerial imagery taken in the summer months is often available and used, and indicators of spring wetness are commonly evident on imagery taken later in the growing season. Guidance on interpretation of these indicators is provided in technical methods such as State Off-Site Methods for wetland identification and the U.S. Army Corps of Engineers Wetlands Delineation Manual (Corps Manual) regional supplements.

### **Setback Distance Concerns**

*Comment:* USDA received comment related to setback distance concerns, recommending that NRCS adopt a system that avoids site-specific analysis to provide better notice and consistency to USDA program participants.

*Response:* When a USDA program participant wishes to install drainage tile in a field, NRCS provides technical assistance regarding the appropriate distance from a wetland or farmed wetland that they may install the drainage tile without risk of violating the WC provisions. Site-specific analysis is sometimes unavoidable due to the variations of soils, hydrology, and geographic position of wetlands on the landscape. While NRCS will continue to evaluate many requests using a site-specific analysis, NRCS is also currently pursuing improvements to the

methods which are used to provide setback distances to USDA program participants and will consider this comment in their development.

### **Wetland Hydrology Indicators**

*Comment:* USDA received comment on wetland hydrology indicators and other methods used to identify farmed wetland, farmed wetland pasture, and PC. In particular, NRCS received comment related to:

- General support for wetland hydrology indicators and criteria added to the definitions of farmed wetland and farmed wetland pasture in § 12.2(a);
- Concern that the farmed wetland definition was expanded, and conversely results in the reduction of PC;
- Concern that the use of hydrology indicators is arbitrary, and hydrology should not be determined based on a single site visit;
- Concern on the use of hydrology indicators from the U.S. Army Corps of Engineers Wetlands Delineation Manual regional supplements;
- Suggesting clarification on the analytic techniques used to identify farmed wetland and farmed wetland pasture hydrology criteria;
- Suggesting analytical techniques or scientific modeling be the only method used to identify farmed wetland or farmed wetland pasture hydrology;
- Supporting the indicator approach as scientifically sound and consistent with the statutory definition of wetland only if in practice, determinations are capturing the full range of relevant “observable conditions resulting from inundation or saturation,” during both the growing season, and the wet portion of the growing season to capture actual wetland hydrology;

- Suggesting the inundation criteria for pothole farmed wetlands be removed.

*Response:* USDA described in the interim rule how NRCS has long-determined hydrology requirements for farmed wetland and farmed wetland pasture and the methods used in order to bring transparency to USDA program participants. Additionally, USDA simplified the definition of “prior-converted cropland” in the interim rule by removing the previous “was less than” farmed wetland hydrology and stating that prior-converted cropland fails to meet the farmed wetland hydrology criteria. USDA appreciates support for the changes made by the interim rule and the expressed concerns. In response, USDA is making changes in this final rule as explained below.

The September 6, 1996, interim rule established hydrology criteria for determinations of farmed wetland and farmed wetland pasture, which were based strictly on the quantification of the number of days that the subject land experienced inundation or saturation during the growing season. Basing the identification of farmed wetland and farmed wetland pasture hydrology solely on the measurement of a number of days is both inefficient and cost prohibitive. The agency does not routinely implement long-term hydrology monitoring protocols for wetland determinations, nor was the reference to the number of days expected at the time of the 1996 interim rulemaking to be based upon such long-term hydrology monitoring protocols.

Rather, as supported by wetland science and long-standing application, NRCS predominantly used and continues to use the indicator-based approach to wetland identification. Accordingly, the agency commonly relies upon criteria that are based on observable conditions that result from such duration of inundation or saturation. Therefore, the changes made in the interim rule do not constitute an expansion of the identification of farmed wetland or farmed wetland pasture, nor a reduction in the identification of PC, but rather better describe how the

agency makes decisions on the wetland hydrology criteria associated with farmed wetland, farmed wetland pasture, and PC.

In particular, the use of indicators for the identification of farmed wetland and farmed wetland pasture hydrology is one of the observable conditions that the agency has long used. Other Federal agencies with responsibilities for wetland identification also use indicators as readily observable and easily quantifiable criteria that an area supports wetland hydrology. The agency recognizes the potential challenges when using hydrology indicators observed during a single site visit that may be outside of the growing season, and emphasizes caution in the use of indicators in agency training efforts, including reference to Federal guidance documents which offer helpful guidance in the use of indicators. Even so, wetland hydrology indicators remain a reliable and readily observable method for accurately and efficiently documenting the presence of wetland hydrology, and the criteria unique to each WC label such as farmed wetland or farmed wetland pasture. In contrast to long-term onsite hydrology monitoring, this process allows for a timely and accurate response to USDA program participants.

The agency recognizes the concern raised by the use of wetland hydrology indicators as identified in other Federal guidance such as regional supplements to the Corps Manual, which may be modified in the future without consideration to its impact to the identification of farmed wetland and farmed wetland pasture hydrology. This final rule removes the required use of hydrology indicators in the regional supplements to the Corps Manual, and instead identifies that hydrology indicators used for the identification of farmed wetland that is not considered a playa, pocosin, or pothole, will be identified in the local NRCS FOTG. NRCS FOTG's contain local information such as County level soils and climate data. As such, farmed wetland and farmed wetland pasture hydrology indicators may vary by County within a State due to local conditions.

The identification of hydrology indicators in the local NRCS FOTG will provide local input, through consultation with the NRCS State technical committee, transparency to the public, and allow the indicators to be reflective of local conditions which meet the required inundation for 15 consecutive days or more during the growing season or 10 percent of the growing season, whichever is less, in most years. Until such time as the updates to the NRCS FOTGs have been published and public notice provided, NRCS will continue to use Group B (Evidence of Recent Inundation) hydrology indicators from the regional supplements to the Corps Manual, as specified in the interim rule. NRCS expects to issue the local level hydrology indicators for notice and comment in the *Federal Register* on a State basis within six months of the publishing of this final rule. As detailed in the interim rule preamble, NRCS will continue to use the Corps Manual, the regional supplements to the Corps Manual, and the Food Security Act Wetland Identification Procedures located in the NFSAM, Part 514, to make wetland identification decisions as identified in Step 1 of the wetland determination process described in § 12.30(c)(7). The use of hydrology indicators for farmed wetland and farmed wetland pasture occurs in Step 2 of that process, determination of wetland type (or exemption).

When observation of wetland hydrology indicators is not reliable or possible due to disturbance or other factors, it may be necessary to use alternative information such as analytic techniques like drainage equations or the evaluation of monitoring data. Wetlands and the conditions which influence wetland hydrology are variable across the landscape and there are several methods which may be used, such as those that are provided in the NRCS Engineering Field Handbook. As previously discussed, wetland hydrology field indicators are a valid and reliable method for the identification of wetland hydrology, and it would not be an efficient use

of resources to require the use of analytic techniques or onsite hydrology monitoring in every farmed wetland determination when other valid methods exist.

In response to concerns raised on the identification of farmed wetland and farmed wetland pasture hydrology, this final rule provides the means by which playa, pocosin and pothole farmed wetland and all farmed wetland pasture hydrology are identified. As established first in the September 6, 1996, interim rule, playa, pocosin, and pothole farmed wetlands and all farmed wetland pasture have required periods of inundation, ponding, or saturation. Particularly with the inclusion of the saturation requirement, almost exclusively, all playa, pocosin, and pothole farmed wetlands and farmed wetland pasture hydrology criteria evaluations have been based on whether the area in question simply meets the wetland hydrology factor. The final rule change brings transparency and codifies the method by which these determinations have been made since the establishment of the farmed wetland and farmed wetland pasture designations, by stating that areas manipulated prior to December 23, 1985, but which retained wetland hydrology, as determined through step 1 of the wetland determination process in § 12.30(c)(7) and application of the procedures described in § 12.31(c), meet the required hydrology criteria for playa, pocosin, and pothole farmed wetlands and farmed wetland pasture.

Both inundation and saturation criteria for pothole farmed wetlands were established in the September 6, 1996, interim rule and USDA does not agree that there is a need to modify these criteria.

### **The 2018 Farm Bill**

The 2018 Farm Bill made two modifications which affect implementation of the WC provisions. Section 2101, Duty of the Secretary, provides that no person shall become ineligible if it is determined that an exemption to the WC provisions applies, and section 2102, On-Site

Inspection Requirement, provided that a reasonable effort must be made to include the affected person in an onsite visit which must be conducted prior to any determination of ineligibility. The December 2018 interim rule established in the wetland determination process in § 12.30(c)(7) that step 2 includes the determination of whether any exemptions apply, and no further modification in this final rule is needed in support of section 2101. Section 12.30(c)(4) is being amended to clarify that NRCS will continue to make a reasonable effort to include the affected person in the onsite investigation prior to making any determination of ineligibility.

### **Effective Date, Notice and Comment, and Paperwork Reduction Act**

In general, the APA (5 U.S.C. 553) requires a notice of proposed rulemaking be published in the *Federal Register* and interested persons be given an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation, except when the rule involves a matter relating to public property, loans, grants, benefits, or contracts. This rule involves matters relating to USDA program benefits and therefore is exempt from the APA requirements. Further, the regulations to implement the programs of chapter 58 of title 16 of the U.S.C., as specified in 16 U.S.C. 3846, and the administration of those programs, are:

- To be made as an interim rule effective on publication, with an opportunity for notice and comment,
- Exempt from the Paperwork Reduction Act (44 U.S.C. chapter 35), and
- To use the authority under 5 U.S.C. 808 related to congressional review and any potential delay in the effective date.

For major rules, the Congressional Review Act requires a delay in the effect date of 60 days after publication to allow for congressional review. This rule is not major under the

Congressional Review Act, as defined by 5 U.S.C. 804(2). The authority in 5 U.S.C. 808 provides that when an agency finds for good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the rule may take effect at such time as the agency determines. This rule is a not major rule for purposes of the Congressional Review Act, and therefore USDA is not required to delay the effective date for 60 days from the date of publication to allow for congressional review. Therefore, this rule is effective on the date of publication in the *Federal Register*.

### **Executive Orders 12866, 13563, 13771, and 13777**

Executive Order 12866, “Regulatory Planning and Review,” and Executive Order 13563, “Improving Regulation and Regulatory Review,” direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The requirements in Executive Orders 12866 and 13573 for the analysis of costs and benefits apply to rules that are determined to be significant. Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” established a Federal policy to alleviate unnecessary regulatory burdens on the American people.

The Office of Management and Budget (OMB) designated this rule as not significant under Executive Order 12866 and therefore, OMB has not reviewed this rule.

Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” requires that, in order to manage the private costs required to comply with Federal regulations, for every new significant or economically significant regulation issued, the new costs must be

offset by the savings from deregulatory actions. As this rule is designated not significant, it is not subject to Executive Order 13771. In general response to the requirements of Executive Order 13777, USDA created a Regulatory Reform Task Force, and USDA agencies were directed to remove barriers, reduce burdens, and provide better customer service both as part of the regulatory reform of existing regulations and as an on-going approach. NRCS reviews regulations and makes changes to improve any provision that was determined to be outdated, unnecessary, or ineffective.

### **Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare a regulatory analysis of any rule whenever an agency is required by APA or any other law to publish a proposed rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule is not subject to the Regulatory Flexibility Act because no law requires that a proposed rule be published for this rulemaking initiative. Despite the Regulatory Flexibility Act not applying to this rule, the action only affects those entities who voluntarily participate in USDA programs and in doing so receive its benefits. Compliance with the provisions of 7 CFR part 12 is only required for those entities who choose to participate in these voluntary programs.

### **Environmental Analysis**

NRCS conducted an EA of the interim rule and the assessment determined there would not be a significant impact to the human environment and as a result, an EIS was not required to be prepared (40 CFR 1508.13). NRCS reviewed the comments it received to the EA and has responded to them in this preamble. NRCS has also reviewed the changes being made in this

final rule, and determined that the changes do not alter the determinations that NRCS made in its original EA. Therefore, NRCS has made a finding that this final rule will not have a significant impact. A copy of the FONSI may be obtained from either of the following websites:

[www.regulations.gov](http://www.regulations.gov) or

<https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/technical/ecosciences/ec>. A hard copy may also be requested in one of the following ways:

- Via mail: [karen.fullen@usda.gov](mailto:karen.fullen@usda.gov) with “Request for FONSI” in the subject
- line; or
- A written request: Karen Fullen, Environmental Compliance Specialist, Natural Resources Conservation Service, 9173 W Barnes Dr., Suite C, Boise, ID 83709.

### **Executive Order 12372**

Executive Order 12372, “Intergovernmental Review of Federal Programs,” requires consultation with State and local officials that would be directly affected by proposed Federal financial assistance. 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. For reasons specified in the final rule-related notice regarding 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), the programs and activities in this rule are excluded from the scope of Executive Order 12372.

### **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 represent an

irreconcilable conflict with this rule. Before any judicial actions may be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR part 11 are to 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, except as required by law. 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 the requirements of 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.

The USDA has assessed the impact of this rule on Indian Tribes and determined that this rule may have substantial direct Tribal implication that may require Tribal consultation under Executive Order 13175. Tribal consultation for this rule was included in the two 2018 Farm Bill Tribal consultations held on May 1, 2019, at the National Museum of the American Indian, in Washington, D.C., and on June 26 through 28, 2019, in Sparks, NV. For the May 1, Tribal consultation, the portion

of the Tribal consultation relative to this rule was conducted by Bill Northey, USDA Under Secretary for the Farm Production and Conservation mission area, as part of the Title II session. There were no specific comments from Tribes on the matter related to this rule during the Tribal consultation. If a Tribe requests additional consultation, NRCS will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions, and modifications identified in this rule are not expressly mandated by legislation.

### **Unfunded Mandates**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4), requires Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal Governments or the private sector. Agencies generally must prepare a written statement, including cost benefits analysis, for proposed and final rules with Federal mandates that may result in expenditures of \$100 million or more in any 1 year for State, local or Tribal Governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates, as defined under Title II of UMRA, for State, local, and Tribal Governments or the private sector. Therefore, this rule is not subject to the requirements of UMRA.

### **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.

### **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.

Accordingly, the interim rule amending 7 CFR part 12, which was published on December 7, 2018 (83 FR 63046–63052), is adopted as a final rule with the following changes:

**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. In § 12.2, in paragraph (a) designate the definition for “Wetland determination” in proper alphabetical order and revise paragraphs (4) and (5) to read as follows:

**§ 12.2 Definitions.**

(a) \* \* \*

*Wetland determination* \* \* \*

(4) *Farmed wetland* is a wetland that prior to December 23, 1985, was manipulated 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.

\* \* \* \* \*

3. Amend § 12.30 by revising paragraphs (a)(3) and (c)(1) and (4) to read as follows:

**§ 12.30 NRCS responsibilities regarding wetlands.**

(a) \* \* \*

(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;

\* \* \* \* \*

(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 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.

\* \* \* \* \*

(4) Before any benefits are withheld, an on-site investigation of a potential wetland violation will be made by 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.

\* \* \* \* \*

4. Amend § 12.31 by revising paragraph (c)(2) to read as follows:

**§ 12.31 Wetland identification procedures.**

\* \* \* \* \*

(c) \* \* \*

(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.

\* \* \* \* \*

Stephen L. Censky,  
Deputy Secretary,  
U.S. Department of Agriculture.