

### § 12.3

agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:

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

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

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

*Wetland delineation* means outlining the boundaries of a wetland determination on aerial photography, digital imagery, other graphic representation of the area, or on the land.

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

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996; 76 FR 4803, Jan. 27, 2011]

### § 12.3 Applicability.

(a) *Geographic scope*. The provisions of this part shall apply to all land, including Indian tribal land, in the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Federated States of Micronesia, the Republic of Palau, and the Republic of the Marshall Islands.

(b) *Effective date*. The provisions of this part apply to all actions taken after July 3, 1996, and to determinations made after or pending on July 3, 1996, except to the extent that § 12.5(a)(5) and 12.5 (b)(4) through (b)(8)

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specify retroactive application on December 23, 1985, and November 28, 1990, for certain actions and determinations regarding wetlands and converted wetlands. Actions taken and determinations made prior to July 3, 1996, are subject to regulations set forth in this part as of July 2, 1996, except as otherwise provided in this part. Further, to the extent that a person may be eligible for an exemption for an action taken before July 3, 1996, the action is subject to the provisions of this part.

[61 FR 47025, Sept. 6, 1996, as amended at 76 FR 82076, Dec. 30, 2011]

### § 12.4 Determination of ineligibility.

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

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

(2) The person produces an agricultural commodity on wetland that was converted after December 23, 1985; or

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

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

(c) *Wetland conservation*. A person determined to be ineligible under paragraph (a)(2) of this section shall be ineligible for all or a portion of the USDA program benefits listed in paragraph (d) of this section for which the person otherwise would have been eligible during the crop year of the commodity that was planted on the converted wetland. A person determined to be ineligible under paragraph (a)(3) of this section for the conversion of a wetland shall be ineligible for all or a portion of the USDA program benefits listed in paragraph (d) of this section for which the person otherwise would have been eligible during the crop year which is equal to the calendar year

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

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

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

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

a conservation plan or conservation system as required by this part);

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

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

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

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

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

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

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

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

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

(1) NRCS has determined that—

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

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

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

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

(h) *Intent to participate in USDA programs.* Persons who wish to participate in any of the USDA programs described in paragraph (d) or (e) of this section are responsible for contacting the appropriate agency of USDA well in advance of the intended participated date so that Form AD-1026 can be completed. This contact will help assure that the appropriate determinations regarding highly erodible land or wetland, and conservation plans or conservation systems are scheduled in a timely manner. A late contact may not allow sufficient time for USDA to service the request and could result in a substantial delay in receiving a USDA determination of eligibility or ineligibility.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996; 76 FR 82077, Dec. 30, 2011]

### § 12.5 Exemption.

(a) *Exemptions regarding highly erodible land—*(1) *Highly erodible cropland in production or in USDA programs during 1981 through 1985 crop years.* During the period beginning on December 23, 1985, and ending on the later of January 1, 1990, or the date that is two years after the date the cropland on which an agricultural commodity is produced was surveyed by NRCS to determine if such land is highly erodible, no person shall be determined to be ineligible for benefits as provided in § 12.4 as the result of the production of an agricultural commodity on any highly erodible land:

(i) That was planted to an agricultural commodity in any year 1981 through 1985; or

(ii) That was set aside, diverted, or otherwise not cultivated in any such

crop years under a program administered by the Secretary for any such crops to reduce production of an agricultural commodity.

(2) *Compliance with a conservation plan or conservation system.* As further specified in this part, no person shall be ineligible for the program benefits described in § 12.4 as the result of production of an agricultural commodity on highly erodible land or the designation of such land for conservation use if such production or designation is in compliance with a conservation plan or conservation system approved under paragraph (a)(2)(i) or (a)(2)(ii) of this section. A person shall not be ineligible for program benefits under § 12.4 as the result of the production of an agricultural commodity on highly erodible land or as the result of designation of such land as conservation use if the production or designation is:

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

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

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

(4) *Areas of 2 acres or less.* No person shall be determined to be ineligible under § 12.4 for noncommercial production of agricultural commodities on