

the right to receive such cash payments in whole or in part.

#### § 625.19 Appeals.

(a) A person participating in the HFRP may obtain a review of any administrative determination concerning eligibility for participation utilizing the administrative appeal regulations provided in 7 CFR parts 11 and 614.

(b) Before a person may seek judicial review of any administrative action concerning eligibility for program participation under this part, the person must exhaust all administrative appeal procedures set forth in paragraph (a) of this section, and for purposes of judicial review, no decision will be a final agency action except a decision of the Chief under these procedures.

(c) Any appraisals, market analysis, or supporting documentation that may be used by NRCS in determining property value are considered confidential information, and will only be disclosed as determined at the sole discretion of NRCS in accordance with applicable law.

(d) Enforcement actions undertaken by NRCS in furtherance of its federally held property rights are under the jurisdiction of the Federal District Court, and are not subject to review under administrative appeal regulations.

#### § 625.20 Scheme and device.

(a) If it is determined by NRCS that a person has employed a scheme or device to defeat the purposes of this part, any part of any program payment otherwise due or paid to such person during the applicable period may be withheld or be required to be refunded with interest thereon, as determined appropriate by NRCS.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person of payments for 10-year cost-share agreements, contracts, or easements for the purpose of obtaining a payment to which a person would otherwise not be entitled.

(c) A person who succeeds to the responsibilities under this part will report in writing to NRCS any interest of any kind in enrolled land that is held by a predecessor or any lender. A failure of full disclosure will be considered a scheme or device under this section.

Signed this 4th day of February, 2010, in Washington, DC.

**Dave White,**

Chief, Natural Resources Conservation Service.

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BILLING CODE 3410-16-P

## DEPARTMENT OF AGRICULTURE

### Natural Resources Conservation Service

#### 7 CFR Part 650

RIN 0578-AA55

#### Compliance With NEPA

**AGENCY:** Natural Resources Conservation Service, United States Department of Agriculture.

**ACTION:** Final rule.

**SUMMARY:** The Natural Resources Conservation Service (NRCS) published an interim final rule on July 13, 2009, that identified additional categorical exclusions, which are actions that NRCS has determined do not individually or cumulatively have a significant effect on the human environment and, thus, should not require preparation of an environmental assessment (EA) or environmental impact statement (EIS) under the National Environmental Policy Act (NEPA). This final rule responds to comments received on the interim final rule and makes final the provisions set forth in the interim final rule. NRCS' categorical exclusions encompass actions that promote restoration and conservation activities related to past natural or human induced damage, or alteration of floodplains and watershed areas. For projects being funded under the American Recovery and Reinvestment Act of 2009 (ARRA), this final rule will assist NRCS in meeting mandates set forth in ARRA for undertaking actions in the most expeditious manner and in compliance with NEPA.

**DATES:** *Effective Date:* The rule is effective February 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** Matt Harrington, National Environmental Coordinator, Ecological Sciences Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6158 South Building, Washington, DC 20250; Telephone: (202) 720-4925; Fax: (202) 720-2646; or e-mail [NEPA2008@wdc.usda.gov](mailto:NEPA2008@wdc.usda.gov), and identify in the subject line, "Information Requested." This final rule may be accessed via Internet. Users can access the final rule at: [http://www.nrcs.usda.gov/programs/Env\\_Assess/index.html](http://www.nrcs.usda.gov/programs/Env_Assess/index.html). Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA TARGET Center at: (202) 720-2600 (voice and TDD).

**SUPPLEMENTARY INFORMATION:**

## Regulatory Certifications

### Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule is a non-significant regulatory action under Executive Order 12866.

### Regulatory Flexibility Act

Pursuant to 5 U.S.C. 605(c) of the Regulatory Flexibility Act, NRCS has determined that this final rule will not have a significant economic impact on a substantial number of small entities as defined by that Act. Therefore, a regulatory flexibility analysis is not required for this final rule.

### Environmental Analysis

This final rule amends the procedures for implementing NEPA at 7 CFR part 650 and will not directly impact the environment. An agency's NEPA procedures are guidance to assist the agency in its fulfillment of responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular action. The Council for Environmental Quality (CEQ) set forth the requirements for establishing agency NEPA procedures in its regulations at 40 CFR 1505.1 and 1507.3. The CEQ regulations do not require agencies to conduct NEPA analyses or prepare NEPA documentation when establishing their NEPA procedures. The determination that establishing agency NEPA procedures does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc. v U.S. Forest Service*, 230 F.3d 947, 954-55 (7th Cir. 2000).

### Paperwork Reduction Act

There are no requirements for information collection associated with this final rule that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

### Unfunded Mandates Reform Act of 1995

NRCS assessed the effects of this rulemaking action on State, local, or tribal governments and the public. This action does not compel the expenditure of \$100 million or more in any one year (adjusted for inflation) by any State, local, or tribal governments or anyone in the private sector; therefore, a statement under section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

### Executive Order 13175

This final rule has been reviewed in accordance with Executive Order 13175, Consultation and Coordination with

Indian tribal governments. NRCS has assessed the impact of this final rule on Indian tribal governments, and has concluded that this rule will not 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. As a result, the rule did not meet the threshold for requiring consultation as specified by Executive Order 13175. NRCS remains committed to seeking advice, guidance, and counsel from Indian tribes in regard to natural resource concerns and issues.

#### *Civil Rights Impact Analysis*

In accordance with OMB's determination that this final rule is deemed non-significant, NRCS was not required to conduct a Civil Rights Impact Analysis. However, the NRCS Civil Rights Division reviewed the final rule and determined through a Civil Rights assessment that NEPA's final rule imposes no disproportionately adverse impacts for women, minorities, or persons with disabilities. On July 13, 2009, NRCS published an interim final rule that identified additional categorical exclusions, which are actions that NRCS has determined do not individually or cumulatively have a significant effect on the human environment and, thus, they should not require preparation of an EA or an EIS under NEPA. NRCS' categorical exclusion actions promote restoration and conservation activities related to past natural or human induced damage, or alteration of floodplains and watershed areas. For projects being funded under the ARRA, this final rule will assist NRCS in meeting mandates set forth in ARRA for undertaking actions in the most expeditious manner and in compliance with NEPA. The changes included in this regulation address the identified 21 new categorical exclusions and are applicable to all persons regardless of race, color, national origin, gender, sex, or disability status. Therefore, the NEPA final rule portends no adverse civil rights implications for women, minorities, or persons with disabilities.

#### *Civil Justice Reform*

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. After adoption of this final rule: (1) All State and local laws and regulations that conflict with this rule, or that would impede full implementation of this rule, will be preempted, and (2) no retroactive effect would be given to this final rule.

#### *Executive Order 13132*

NRCS has considered this final rule in accordance with Executive Order 13132, issued August 4, 1999. NRCS has determined that the rule conforms to the Federalism principles set out in this Executive Order; would not impose any compliance costs on the States; and would not have substantial direct effects on the 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. Therefore, NRCS concludes that this rule does not have Federalism implications.

#### *Energy Effects*

NRCS has determined that this final rule does not constitute a significant energy action as defined in Executive Order 13211.

#### *Background*

On July 13, 2009, NRCS published an interim final rule that amended 7 CFR 650.6 to identify an additional 21 actions that can, in the absence of extraordinary circumstances, be categorically excluded from further review in an EA or an EIS. NRCS determined that the new categorical exclusions routinely do not individually or cumulatively have a significant effect on the human environment. The statement supporting the categorical exclusions is available for review at the following Web site: [http://www.nrcs.usda.gov/programs/Env\\_Assess/index.html](http://www.nrcs.usda.gov/programs/Env_Assess/index.html) or upon request from Matt Harrington, National Environmental Coordinator, Ecological Sciences Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6158 South Building, Washington, DC 20250.

NRCS provided a 60-day comment period to solicit responses from the public regarding the identification of the 21 new categorical exclusions. NRCS received 16 substantive and timely filed letters containing approximately 25 comments. Respondents included nine non-governmental organizations, one Federal government agency, one State agency, one local government agency, three individuals, and one tribal agency. Comments were received from Georgia, Iowa, Kansas, Kentucky, Maryland, Mississippi, New Mexico, Oklahoma, Rhode Island, South Dakota, Texas, and Washington, DC. The discussion that follows is a summarized version of the comments and the agency's responses.

#### *Discussion of Comments*

The comments received focused on the following issues: (1) Support for the

expanded list of categorical exclusions; (2) clarification on compliance with other environmental laws and permitting requirements when invoking a categorical exclusion; (3) assessment of tribal implications and consultation; and (4) clarification on certain terms and conditions under which a categorical exclusion may be used.

Eleven of the 16 sets of comments received expressed support for the expanded list of categorical exclusions.

#### *Compliance With Other Environmental Laws*

*Comment:* One respondent asked whether other potentially applicable environmental laws, such as section 404 of the Clean Water Act, would require NRCS to prepare an EA or EIS if the Environmental Protection Agency (EPA) or the United States Army Corps of Engineers (USACE) determined that there were significant impacts or extraordinary circumstances associated with a project.

*Response:* NRCS uses its site-specific environmental evaluation (EE) process and assessment to make the appropriate determination of whether extraordinary circumstances exist which require preparing an EA or EIS. However, NRCS will consider any input received from EPA or USACE when determining the need for an EA or EIS.

*Comment:* The respondent also questioned whether there would be a lessening of the environmental studies needed to proceed with the implementation of conservation practices and queried whether recommended mitigation by outside regulatory agencies, such as EPA or USACE, would require more in-depth analysis under NEPA.

*Response.* NRCS will still undertake an EE for all projects and determine whether there is a need to prepare an EA or EIS. Appropriate environmental reviews would be undertaken, and there would be no less stringent environmental review performed regardless of any recommendation received from regulatory agencies.

The conservation planning and EE process is designed to minimize any adverse impacts to resources. Thus, any mitigation that is proposed as an integral part of the project, whether that mitigation is recommended by NRCS as part of the planning process or an outside regulatory agency, is considered during preparation of the EE which is used to determine if there are extraordinary circumstances and the appropriate level of environmental review. The proposed action and all its integral parts will be reviewed, and if approved, implemented.

*Comment:* Several comments were received requesting clarification on how NRCS will determine any extraordinary circumstances and the need for an EA or EIS. Also, a comment was raised that extraordinary circumstances were being referenced in the interim final rule and whether the list of extraordinary circumstances could be provided in the final rule.

*Response.* As described in the preamble language of the interim final rule, NRCS prepares an EE for all assistance actions. Through this EE, NRCS assesses the project and any alternatives to the project as proposed. Specifically, a determination is made regarding whether there are extraordinary circumstances that may be present for a proposed action, and if any extraordinary circumstances exist, then a determination is made on the need to prepare an EA or EIS.

NRCS evaluates each action using its list of special environmental concerns, along with the significance factors listed by the CEQ at 40 CFR 1508.27, to determine whether an action has extraordinary circumstances. NRCS has included the list of extraordinary circumstances in this rule at § 650.6(c)(2).

*Comment:* Four respondents commented that the final regulation should include language that specifies NRCS will comply with other applicable environmental laws and executive orders when categorical exclusions under NEPA are applied. The specific comments focused on the compliance for the National Historic Preservation Act (NHPA), Native American Graves and Repatriation Act, and the Archaeological and Historic Preservation Act.

*Response.* NRCS has modified the regulatory language to include the following statement into the NEPA regulation language of § 650.6(d): “The use of the following categorical exclusions for a proposed action does not waive NRCS compliance with any applicable legal requirement including, but not limited to, the National Historic Preservation Act or the Endangered Species Act.”

*Comment:* One respondent commented that the EE process and documentation was not explained in great detail in the interim final rule and requested that clarification be provided.

*Response.* The interim final rule indicated and referred the public to 7 CFR 650.5 which provides detailed information on the process and documentation required for an EE. The reference to 7 CFR 650.5 is considered sufficient because it requires the following:

“§ 650.5 Environmental evaluation in planning.

(a) General. The EE integrates environmental concerns throughout the planning, installation, and operation of NRCS-assisted projects. The EE applies to all assistance provided by NRCS, but planning intensity, public involvement, and documentation of actions vary according to the scope of the action. NRCS begins consideration of environmental concerns when information gathered during the EE is used:

(1) To identify environmental concerns that may be affected, gather baseline data, and predict effects of alternative courses of actions;

(2) To provide data to applicants for use in establishing objectives commensurate with the scope and complexity of the proposed action;

(3) To assist in the development of alternative courses of action (40 CFR part 1502.14). In NRCS-assisted project actions, nonstructural, water conservation, and other alternatives that are in keeping with the Water Resources Council’s Principles and Standards are considered, if appropriate;

(4) To perform other related investigations and analyses, as needed, including economic evaluation, engineering investigations, *etc.*; and

(5) To assist in the development of detailed plans for implementation and operation and maintenance.”

*Comment:* One respondent stated that several of the categorical exclusions may have the potential to affect cultural resources and queried whether those actions should be listed as categorical exclusions.

*Response.* NRCS prepared an extensive supporting document citing previous environmental reviews and experience with the actions listed as categorical exclusions and believes that the actions are appropriate as categorical exclusions. A copy of the supporting document can be reviewed on the following Web site: [http://www.nrcs.usda.gov/programs/Env\\_Assess/index.html](http://www.nrcs.usda.gov/programs/Env_Assess/index.html). NRCS will also prepare a site-specific EE which assesses whether the proposed action meets the agency’s criteria to be categorically excluded, or if an EA or EIS should be prepared. NRCS will not consider an action to be categorically excluded if the EE reveals that there may be extraordinary circumstances which entails an assessment of impacts to resource issues, including cultural resources. Furthermore, the regulation at 7 CFR part 650.6(c)(2)(B) stipulates that the proposed action cannot significantly affect cultural resources.

*Comment:* NRCS received a comment disagreeing with the NRCS determination that there would not be any compliance costs imposed on States. The respondent stated that there could be an increase in the workload for State Historic Preservation Office (SHPO) staff related to educating NRCS on the differences between NEPA and NHPA because of the increase in categorical exclusions.

*Response:* The increased number of categorical exclusions will not increase the workload on SHPOs since the magnitude of projects would not change. All projects will still be evaluated to determine the need to comply with NHPA, in addition to NEPA, for documenting the use of categorical exclusions. The project action being evaluated determines the level of work and consultation under section 106 of NHPA, not the level of NEPA documentation. Therefore, we disagree with the comment and believe that there would not be any compliance costs incurred by States.

NRCS has extensive on-line and field classes on NHPA and NEPA for NRCS staff. In addition, NRCS has an annual training plan to educate State and field offices on all environmental laws. NRCS also has held five training sessions across the Nation to educate staff on the new categorical exclusions and sent out bulletins to field offices. NRCS has planned an additional five training sessions for fiscal year 2010 to further educate field offices on the utilization of these categorical exclusions.

*Comment:* NRCS received a comment that NRCS did not consult or coordinate with tribal governments during the process of developing the interim final rule and requested that the regulation be withdrawn.

*Response:* NRCS remains committed to seeking advice, guidance, and counsel from Indian tribes in regard to natural resource concerns and issues. Indian tribes interested in providing input regarding conservation program policies may submit their request directly to the Chief of NRCS. As part of this rulemaking, NRCS has assessed the impact of the interim final rule and this final rule on Indian tribal governments, and has concluded that these rulemakings will not have substantial direct effects on 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 rule affects NRCS’ administrative procedures for preparing environmental reviews of NRCS actions that provide restoration and conservation assistance to

landowners, applicants, tribal governments, and others. Specifically, the rule provides for an expanded list of categorical exclusions which should assist the agency in funding and implementing proposed conservation actions for landowners, applicants, Indian tribal governments, and others. As a result, the rule does not meet the threshold for requiring consultation as specified by Executive Order 13175. NRCS remains committed to seeking advice, guidance, and counsel from Indian tribes in regard to natural resource concerns and issues.

*Comment:* NRCS received a comment requesting clarification of the term adapted species. The respondent noted that adapted species could connote the use of invasive and noxious species. The respondent also requested that the categorical exclusion in § 650.6(d)(1) concerning planting of vegetation be modified to remove the term adapted species and replaced with “native species.”

*Response:* NRCS’ General Manual Title 190 part 414 subpart D does not allow the agency to utilize invasive or noxious species in conservation actions. While NRCS promotes the use of native species, it is not always feasible or practicable to utilize native species in some NRCS activities; therefore, NRCS is not making changes to the rule in response to this comment. However, the categorical exclusion in § 650.6(d)(1) has been modified to state only appropriate herbaceous and woody vegetation will be used which does not include invasive or noxious weeds.

*Comment:* One respondent commented that vegetating disturbed areas should not result in conversion of native forest or grassland.

*Response:* The areas to which the categorical exclusion will apply have already been disturbed or were in prior agricultural use. All categorical exclusions are intended to maintain or restore ecological functions and do not include conversion of native vegetation. The exception might be small areas requiring stabilization, but conversion in these cases would not be extensive. The categorical exclusion in section 650.6(d)(1) requires that the established vegetative community maintain the sites ecological functions and services, which could not be accomplished by converting native forests or grasslands.

*Comment:* NRCS received a comment recommending that a condition be placed on the use of categorical exclusions. Specifically, the respondent suggested that categorical exclusions should not result in increased threats to populations of at risk-species. Further, the respondent recommended including

the following in the definition of at-risk species: species listed as endangered or threatened under the Endangered Species Act (ESA); proposed or candidate species for listing under the ESA; species likely to become candidates in the near future; species listed as endangered or threatened (or similar classification) under State law; and State species of conservation concern.

*Response:* Significant adverse effects to threatened and endangered species as defined by the ESA is one of the extraordinary circumstances listed in § 650.6(c). Therefore, the use of a categorical exclusion is conditioned on no significant effects to threatened and endangered species.

Although non-ESA-listed species do not constitute extraordinary circumstances, NRCS does take into consideration species which have been identified as at risk or as “species of concern” by tribal, State, or other entities in its conservation planning and EE processes. Specifically, NRCS works with partners at the State and local levels to set priorities for conservation of species and habitats of special conservation concern. As part of the conservation planning process, the presence of priority “species of concern” is evaluated, and any potential impacts or risks to such species or their habitats would be determined. NRCS General Manual Title 190 part 410 provides guidance on consultation and coordination procedures, and defines “species of concern” as “any species officially designated by law or administrative rule by a State or tribe as endangered, threatened, rare, declining, sensitive, or otherwise at risk.”

Although NRCS is not adding effects on these species of concern as a condition to whether an action can be considered eligible for a categorical exclusion, NRCS, in accordance with its conservation planning process, ensures that implementation of conservation practices are protective of these species.

If a protected species or designated critical habitat were present in the proposed action area and would potentially be adversely affected, then the appropriate consultation with the Department of Interior’s Fish and Wildlife Service, the Department of Commerce’s National Marine Fisheries Service, or State or tribal agency with jurisdiction for such species would be initiated to ensure limited effects to species and habitats in the area.

*Comment:* One respondent noted that the categorical exclusions in §§ 650.6(d)(8) and 650.6(d)(11) should ensure consistency with efforts to

restore, maintain, or enhance ecosystem functions and values.

*Response:* NRCS believes that the identification of these categorical exclusions in the interim final rule for lands disturbed by human alteration or by natural disasters accomplishes the results desired by the respondent. The agency mission and policies encompass restoring, maintaining, and enhancing ecosystem functions and values. Accordingly, NRCS has not modified the language for these categorical exclusions.

#### *Changes to Final Rule Based on Comments*

The interim final rule amended 650.6(b) and added a new section 650.6(c) that expanded the agency’s list of categorical exclusions. Based on public comments expressing the need for the agency to add a list of conditions under which a proposed action would not be eligible for a categorical exclusion, the final rule has amended section 650.6(c) to add in the list of extraordinary circumstances at 650.6(c)(2) that outlines the conditions under which a categorical exclusion may make a proposed action not eligible for a categorical exclusion. The final rule has also added language at 650.6(c)(3) which outlines certain additional criteria that a proposed action must satisfy to be eligible for a categorical exclusion even when no extraordinary circumstances are present.

In this final rule, the list of 21 categorical exclusions was moved from section 650.6(c) in the interim final rule to a new section 650.6(d). Based on public comments, NRCS added language in 650.6(d) to specify that categorical exclusions under NEPA do not waive NRCS compliance with any applicable legal requirement including, but not limited to, the NHPA or the ESA.

#### **List of Subjects in 7 CFR Part 650**

Environmental impact statements, and Flood plains.

■ For the reasons stated in the preamble, NRCS adopts the interim rule published on July 13, 2009 (74 FR 33319) as final and further amends Title 7 CFR part 650 as set forth below:

■ 1. The authority citation for Title 7 CFR part 650 is amended to read as follows:

**Authority:** 42 U.S.C. 4321 *et seq.*; Executive Order 11514 (Rev.); 7 CFR 2.62, unless otherwise noted.

■ 2. Section 650.6 is amended by revising paragraph (c) and adding a new paragraph (d) to read as follows:

**§ 650.6 Categorical exclusions.**

\* \* \* \* \*

(c)(1) The NRCS restoration and conservation actions and activities identified in paragraph (d) of this section are eligible for categorical exclusion and require the RFO to document a determination that a categorical exclusion applies. Agency personnel will use the EE review process detailed in § 650.5 to evaluate proposed activities for extraordinary circumstances and document the determination that the categorical exclusion applies. The extraordinary circumstances address the significance criteria provided in 40 CFR 1508.27.

(2) The extraordinary circumstances identified in paragraph (c)(1) of this section include:

(i) The proposed action cannot cause significant effects on public health or safety.

(ii) The proposed action cannot significantly affect unique characteristics of the geographic area such as proximity to historic properties or cultural resources, park lands, prime farmlands, floodplains, wetlands, wild and scenic rivers, or ecologically critical areas.

(iii) The effects of the proposed action on the quality of the human environment cannot be highly controversial.

(iv) The proposed action cannot have highly uncertain effects, including potential unique or unknown risks on the human environment.

(v) The proposed action cannot include activities or conservation practices that establish a potential precedent for future actions with significant impacts.

(vi) The proposed action is known to have or reasonably cannot be expected to have potentially significant environment impacts to the quality of the human environment either individually or cumulatively over time.

(vii) The proposed action cannot cause or promote the introduction of invasive species or have a significant adverse effect on any of the following special environmental concerns not previously identified in paragraph (c)(2)(B) of this section, such as: endangered and threatened species, environmental justice communities as defined in Executive Order 12898, wetlands, other waters of the United States, wild and scenic rivers, air quality, migratory birds, and bald and golden eagles.

(viii) The proposed action will not violate Federal or other applicable law and requirements for the protection of the environment.

(3) In the absence of any extraordinary circumstances as determined through NRCS' EE review process, the activities will be able to proceed without preparation of an EA or EIS. Where extraordinary circumstances are determined to exist, the categorical exclusion will not apply, and the appropriate documentation for compliance with NEPA will be prepared. Prior to determining that a proposed action is categorically excluded under paragraph (d) of this section, the proposed action must:

(i) Be designed to mitigate soil erosion, sedimentation, and downstream flooding;

(ii) Require disturbed areas to be vegetated with adapted species that are neither invasive nor noxious;

(iii) Be based on current Federal principals of natural stream dynamics and processes, such as those presented in the Federal Interagency Stream Corridor Restoration Working Group document, "Stream Corridor Restoration, Principles, Processes, and Practices;"

(iv) Incorporate the applicable NRCS conservation practice standards as found in the Field Office Technical Guide;

(v) Not require substantial dredging, excavation, or placement of fill; and

(vi) Not involve a significant risk of exposure to toxic or hazardous substances.

(d) The use of the following categorical exclusions for a proposed action does not waive NRCS compliance with any applicable legal requirement including, but not limited to, the National Historical Preservation Act or the Endangered Species Act. The following categorical exclusions are available for application to proposed actions provided the conditions described in paragraph (c) of this section are met:

(1) Planting appropriate herbaceous and woody vegetation, which does not include noxious weeds or invasive plants, on disturbed sites to restore and maintain the sites ecological functions and services;

(2) Removing dikes and associated appurtenances (such as culverts, pipes, valves, gates, and fencing) to allow waters to access floodplains to the extent that existed prior to the installation of such dikes and associated appurtenances;

(3) Plugging and filling excavated drainage ditches to allow hydrologic conditions to return to pre-drainage conditions to the extent practicable;

(4) Replacing and repairing existing culverts, grade stabilization, and water control structures and other small

structures that were damaged by natural disasters where there is no new depth required and only minimal dredging, excavation, or placement of fill is required;

(5) Restoring the natural topographic features of agricultural fields that were altered by farming and ranching activities for the purpose of restoring ecological processes;

(6) Removing or relocating residential, commercial, and other public and private buildings and associated structures constructed in the 100-year floodplain or within the breach inundation area of an existing dam or other flood control structure in order to restore natural hydrologic conditions of inundation or saturation, vegetation, or reduce hazards posed to public safety;

(7) Removing storm debris and sediment following a natural disaster where there is a continuing and eminent threat to public health or safety, property, and natural and cultural resources and removal is necessary to restore lands to pre-disaster conditions to the extent practicable. Excavation will not exceed the pre-disaster condition;

(8) Stabilizing stream banks and associated structures to reduce erosion through bioengineering techniques following a natural disaster to restore pre-disaster conditions to the extent practicable, e.g., utilization of living and nonliving plant materials in combination with natural and synthetic support materials, such as rocks, rip-rap, geo-textiles, for slope stabilization, erosion reduction, and vegetative establishment and establishment of appropriate plant communities (bank shaping and planting, brush mattresses, log, root wad, and boulder stabilization methods);

(9) Repairing or maintenance of existing small structures or improvements (including structures and improvements utilized to restore disturbed or altered wetland, riparian, in stream, or native habitat conditions). Examples of such activities include the repair or stabilization of existing stream crossings for livestock or human passage, levees, culverts, berms, dikes, and associated appurtenances;

(10) Constructing small structures or improvements for the restoration of wetland, riparian, in stream, or native habitats. Examples of activities include installation of fences and construction of small berms, dikes, and associated water control structures;

(11) Restoring an ecosystem, fish and wildlife habitat, biotic community, or population of living resources to a determinable pre-impact condition;

(12) Repairing or maintenance of existing constructed fish passageways, such as fish ladders or spawning areas impacted by natural disasters or human alteration;

(13) Repairing, maintaining, or installing fish screens to existing structures;

(14) Repairing or maintaining principal spillways and appurtenances associated with existing serviceable dams, originally constructed to NRCS standards, in order to meet current safety standards. Work will be confined to the existing footprint of the dam, and no major change in reservoir or downstream operations will result;

(15) Repairing or improving (deepening/widening/armoring) existing auxiliary/emergency spillways associated with dams, originally constructed to NRCS standards, in order to meet current safety standards. Work will be confined to the dam or abutment areas, and no major change in reservoir or downstream operation will result;

(16) Repairing embankment slope failures on structures, originally built to NRCS standards, where the work is confined to the embankment or abutment areas;

(17) Increasing the freeboard (which is the height from the auxiliary (emergency) spillway crest to the top of embankment) of an existing dam or dike, originally built to NRCS standards, by raising the top elevation in order to meet current safety and performance standards. The purpose of the safety standard and associated work is to ensure that during extreme rainfall events, flows are confined to the auxiliary/emergency spillway so that the existing structure is not overtopped which may result in a catastrophic failure. Elevating the top of the dam will not result in an increase to lake or stream levels. Work will be confined to the existing dam and abutment areas, and no major change in reservoir operations will result. Examples of work may include the addition of fill material such as earth or gravel or placement of parapet walls;

(18) Modifying existing residential, commercial, and other public and private buildings to prevent flood damages, such as elevating structures or sealing basements to comply with current State safety standards and Federal performance standards;

(19) Undertaking minor agricultural practices to maintain and restore ecological conditions in floodplains after a natural disaster or on lands impacted by human alteration. Examples of these practices include: mowing, haying, grazing, fencing, off-stream watering facilities, and invasive

species control which are undertaken when fish and wildlife are not breeding, nesting, rearing young, or during other sensitive timeframes;

(20) Implementing soil control measures on existing agricultural lands, such as grade stabilization structures (pipe drops), sediment basins, terraces, grassed waterways, filter strips, riparian forest buffer, and critical area planting; and

(21) Implementing water conservation activities on existing agricultural lands, such as minor irrigation land leveling, irrigation water conveyance (pipelines), irrigation water control structures, and various management practices.

Signed this 4th day of February, 2010, in Washington, DC.

**Dave White,**

*Chief, Natural Resources Conservation Service.*

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**BILLING CODE 3410-16-P**

## **NATIONAL CREDIT UNION ADMINISTRATION**

### **12 CFR Part 706**

**RIN 3133-AD47**

#### **Unfair or Deceptive Acts or Practices**

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Final rule; withdrawal.

**SUMMARY:** On January 29, 2009, jointly with the Federal Reserve System Board of Governors (FRB) and the Office of Thrift Supervision (OTS), the NCUA Board (Board) published a final rule and staff commentary amending its credit practices regulations (UDAP Rule). The UDAP Rule also included technical clarifications and was scheduled to become effective on July 1, 2010. The Board is now revising the UDAP Rule because its stipulations became unnecessary due to the enactment of the Credit Card Accountability, Responsibility, and Disclosure Act of 2009 (Credit CARD Act) on May 22, 2009, and amendments to Regulation Z implementing the Credit CARD Act that will become effective on February 22, 2010. For procedural reasons, the substantive requirements of the UDAP Rule will be removed effective July 1, 2010, but it is the Board's intent that only the technical clarifications become effective and that the substantive requirements will not take effect. This final rule applies only to the NCUA Board's regulations and does not affect the rules issued by the OTS and FRB.

**DATES:** This rule is effective July 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Moissette I. Green, Staff Attorney, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428, or telephone: (703) 518-6540.

**SUPPLEMENTARY INFORMATION:** On December 18, 2008, NCUA, along with the Federal Reserve Board (FRB) and the Office of Thrift Supervision, exercised its authority under the Federal Trade Commission Act (FTC Act) to issue a final rule prohibiting unfair acts or practices regarding consumer credit card accounts. The rule was published in the **Federal Register** on January 29, 2009, and the effective date for the amendments was July 1, 2010. 74 FR 5498 (January 29, 2009) (UDAP Rule).

The Credit CARD Act, enacted on May 22, 2009, amended the Truth in Lending Act (TILA) and established new substantive and disclosure requirements to establish fair and transparent practices pertaining to open-end consumer credit plans, including credit card accounts. Public Law 111-24, 123 Stat. 1734 (2009). After consultation with NCUA and other Federal financial regulators, the FRB amended 12 CFR Part 226 and the staff commentary (Regulation Z) to implement the Credit CARD Act. The Credit CARD Act and Regulation Z cover the practices regulated in the UDAP Rule, and in some instances, expand the UDAP Rule's requirements or consumer protections. For example, the UDAP Rule prohibited the financing of security deposits and fees for the availability of a credit card account in excess of 50% of the initial credit limit and limited how fees that did not exceed the 50% limit could be financed. The Credit CARD Act prohibits financing any fees charged within the first year an open-end credit plan in excess of 25% of the credit limit from the available credit. In as much as the UDAP Rule duplicates, overlaps, or conflicts with the Credit CARD Act and recent amendments to Regulation Z, the NCUA Board believes the recent amendments to Part 706 are unnecessary and is withdrawing the substantive requirements of the UDAP Rule. Accordingly, the Board is amending Part 706 to remove the substantive requirements and retain the clarifying technical amendments in the UDAP Rule, such as the addition of an authority, purpose, and scope section and, the removal of the provision for State exemptions.

This revision is applicable only to NCUA's portion of the UDAP Rule. For procedural reasons, the substantive