

(2) Notwithstanding the provisions of paragraph (c)(1) of this section, wetlands which are created in order to mitigate the loss of other wetlands as a result of irrigation, recreation, municipal water, flood control or other similar projects shall not be considered to be artificial wetland for the purposes of § 12.5(d)(1)(ii) and (iii) of this part.

(d) For the purposes of § 12.5(d)(1)(v) of this part, SCS, in consultation with the Fish and Wildlife Service, U.S. Department of the Interior, shall determine whether the effect of any action of a person associated with the production of an agricultural commodity on converted wetland has a minimal effect on the hydrological and biological aspect of wetlands. Such determination shall be based upon an environmental evaluation analyzing the effect of the action on the maintenance of wetland values of the particular wetland under consideration and other related wetlands, and will be made through an on-site evaluation. A request for such determination will be made prior to the beginning of activities that would convert the wetland. If a person has converted a wetland and then seeks a determination that the effect of such conversion on wetland was minimal, the burden will be upon the person to demonstrate to the satisfaction of SCS that the effect was minimal. The production of an agricultural commodity on any portion of a converted wetland in conformance with a minimal effect determination by SCS is exempt under § 12.5(d) of this part. However, any additional action of a person that will change the hydrological or biological characteristics of a wetland for which a minimal effect determination has been made shall be reported to SCS for a determination of whether the effect continues to be minimal. The loss of a minimal effect determination will cause a person who produces an agricultural commodity on the converted wetland after such change in status to be ineligible, under § 12.4, for program benefits.

§ 12.32 Converted wetland identification criteria.

(a) Converted wetland shall be identified by determining whether the wetland was altered so as to meet the definition of converted wetland set forth in § 12.2(a)(6). In making this

determination, the following factors are to be considered:

(1) Where hydric soils have been used for production of an agricultural commodity and the drainage or other altering activity is not clearly discernable, SCS will compare the site with other sites containing the same hydric soils in a natural condition to determine if the hydric soils can or cannot be used to produce an agricultural commodity under natural conditions. If the soil on the comparison site could not produce an agricultural commodity under natural conditions, the subject wetland will be considered to be converted wetland.

(2) Where woody hydrophytic vegetation has been removed from hydric soils which permits the production of an agricultural commodity, and wetland conditions have not returned as the result of abandonment under § 12.33(b), the area will be considered to be converted wetland.

(3) A pothole or a playa shall not be determined to be converted wetland despite manipulations that occurred prior to December 23, 1985, if that area continues to meet wetland criteria. Any other wetland area that is seasonally flooded or ponded (surface water is present for extended periods especially early in the growing season even though it may be absent by the end of the season in most years) which has been manipulated prior to December 23, 1985 but otherwise continues to meet wetland criteria, shall not be determined to be converted wetland.

(b) A wetland shall not be considered to be converted if:

(1) Production of an agricultural commodity on such land is possible as a result of a natural condition, such as drought, and

(2) It is determined that the actions of the person producing such agricultural commodity does not permanently alter or destroy natural wetland characteristics. Destruction of herbaceous hydrophytic vegetation, (i.e., plants other than woody shrubs or trees) as a result of the production of an agricultural commodity shall not be considered as altering or destroying natural wetland characteristic if such vegetation could and has been allowed to return following cessation of the natural condition which made

production of the agricultural commodity possible.

§ 12.33 Use of wetland and converted wetland.

(a) The provisions of § 12.32(a)(3) are intended to protect remaining functional values of the wetlands described therein. Persons may continue to farm such wetlands under natural conditions or as they did prior to December 23, 1985. However, no action can be taken to increase effects on the water regime beyond that which existed on such lands on or before December 23, 1985 unless SCS determines the effect on remaining wetland values would be minimal under § 12.5(d)(1)(v).

(b) Unless otherwise provided in this part, the production of an agricultural commodity on wetlands that were converted before, or for which the conversion was commenced before, December 23, 1985 is exempt by law from these regulations for the area which was converted or the minimum area the commenced activity could convert. Maintenance or improvement of these converted wetlands for the production of agricultural commodities are not subject to this rule so long as such actions do not bring additional wetland into the production of an agricultural commodity. Additional wetland means any natural wetland or any converted wetland that has reverted to wetland as the result of abandonment of crop production. Abandonment is the cessation of cropping, management or maintenance operations related to the production of agricultural commodities on converted wetland. Where the cessation of such cropping, management or maintenance operations has occurred, converted wetland is considered to be abandoned unless it is shown that there was no intent to abandon; provided, however, that at the end of five successive years during which there was no crop production, such land shall be determined to be abandoned if the land meets the wetland criteria of § 12.31. Participation in a USDA set-aside, diverted acres, or similar programs shall not be deemed to constitute abandonment.

Signed at Washington, DC, on September 10, 1987.

Peter C. Myers,
Acting Secretary.

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