

U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C. 20250

DEPARTMENTAL REGULATION		NUMBER: 9500-3
SUBJECT: Land Use Policy	DATE: March 22, 1983	
	OPI: Land Use Staff Soil Conservation Service	

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1 PURPOSE

The Nation's farmlands, forest lands, rangelands, flood plains, and wetlands are unique natural resources providing food, fiber, wood, and water necessary for the continued welfare of the people of the United States and protection from floods. Each year, large amounts of these lands are converted to other uses. Continued conversion of the Nation's farmlands, forest lands, and rangelands may impair the ability of the United States to produce sufficient food, fiber, and wood to meet domestic needs and the demands of export markets. Continued conversion of the Nation's wetlands may reduce the availability of adequate supplies of suitable-quality water, indigenous wildlife species, and the productive capacity of the Nation's fisheries. Continued encroachments on flood plains decrease the natural flood-control capacity of these land areas, create needs for expensive manmade flood-control measures and disaster-relief activities, and endanger both lives and property.

Land use allocation decisions are matters of concern to USDA. Decisions concerning land use arise from needs to accommodate needed growth and development; prevent unwarranted and costly sprawl; avoid unwarranted conversion of farm, range, and forest lands and wetlands from existing uses and unwarranted encroachment on flood plains; maintain and enhance agricultural and forest production capabilities; maintain wildlife, fish, and seafood habitat; provide or improve community services and facilities; assure appropriate environmental quality; and assure adequate supplies of suitable-quality water. These needs are highly interdependent and often compete with each other for the limited supply of available land and water.

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It is Departmental policy to promote land use objectives responsive to current and long-term economic, social, and environmental needs. This policy recognizes the rights and responsibilities of State and local governments for regulating the uses of land under their jurisdiction. It also reflects the Department's responsibility to (a) assure that the United States retains a farm, range, and forest land base sufficient to produce adequate supplies, at reasonable production costs, of high-quality food, fiber, wood, and other agricultural products that may be needed; (b) assist individual landholders and State and local governments in defining and meeting needs for growth and development in such ways that the most productive farm, range, and forest lands are protected from unwarranted conversion to other uses; and (c) assure appropriate levels of environmental quality.

In accordance with the authority contained in 7 U.S.C. 1010 and 7 U.S.C. 2204 and consistent with 7 C.F.R. 2.19 (f) and provisions of the Farmland Protection Policy Act, Subtitle I, Title XV, P.L. 97-98, the Department sets forth this statement of policy on land use.

2 CANCELLATIONS

This regulation supercedes Secretary's Memorandum 9500-2 dated March 10, 1982.

3 POLICY

Federal agencies, in implementing programs, make decisions that affect current and potential uses of land. The Department will:

- a Promote and support planning procedures that allow landholders, interest groups, and State and local governments to have input at all appropriate stages of the decisionmaking process for public projects, programs, or activities; that recognize the rights and responsibilities of landholders in making private land use decisions; and that recognize the responsibility of governments in influencing how land may be used to meet public needs.
- b Assure that programs of the agencies within the Department discourage the unwarranted conversion to other uses of prime and unique farmlands, farmlands of statewide or local importance, and prime rangelands, as defined in appendix A; the unwarranted alteration of wetlands or flood plains; or the unwarranted expansion of the peripheral boundaries of existing settlements.
- c Manage both its land use-related programs and USDA-administered land in such manner as to (1) demonstrate leadership in meeting short- and long-term needs for growth and development, while assuring adequate supplies of needed food, fiber, and forest products; (2) assure appropriate levels of environmental quality

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and adequate supplies of water; and (3) discourage unwarranted expansion of peripheral boundaries of existing settlements. Whenever practicable, management of USDA-administered lands shall be coordinated with the management of adjacent private and other public lands.

- d Conduct multidisciplinary land use research and education programs responsive to identified State, local, and national needs and, when requested, assist State and local governments, citizens groups, and individual landholders in determining alternative land use values, thereby enabling local officials to make judicious choices to meet growth and development needs and to protect the community's farm- and forest-related economic base.
- e Assist landowners and State and Federal agencies in the reclamation of abandoned surface-mined lands. This reclamation will help eliminate safety, health, and environmental problems.
- f Assist in planning for the extraction of coal and other nonrenewable resources in such manner as to facilitate restoration. This restoration would reestablish or enhance food, fiber, or forest productivity or contribute to other beneficial uses of the land as mining is completed in defined areas or sites.
- g Advocate among Federal agencies:
 - (1) The retention of important farmlands, rangelands, forest lands, and wetlands, whenever proposed conversions to other uses (a) are caused or encouraged by actions or programs of a Federal agency or (b) require licensing or approval by a Federal agency, unless other needs clearly override the benefits derived from retention of such lands; and
 - (2) Actions that reduce the risk of flood loss and soil erosion; that minimize impacts of floods on human safety, health, and welfare; that preserve natural flood-control and other beneficial functions and values of wetlands and flood plains; and that reduce future need for expensive manmade flood-control systems, disaster-relief assistance, or Federal rehabilitation assistance in the event of flooding.

4 ABBREVIATIONS

USDA - U.S. Department of Agriculture
NRE - Natural Resources and Environment Committee

5 DEFINITIONS

Complete definitions for the terms "farmlands," "forest lands," "rangelands," "wetlands," and "flood plains" are found in appendix A.

6 RESPONSIBILITIES

- a The Office of the Secretary is responsible for (1) encouraging, assisting, and coordinating efforts of other Federal departments and agencies to implement policies and procedures supportive of the objectives of this regulation; (2) resolving issues and acting on recommendations raised to the Secretary's Policy and Coordination Council by the Departmental committees; and (3) raising unresolved issues and recommending actions to the appropriate Cabinet Council.

- b The NRE Committee, created under the Secretary's memorandum dated July 22, 1981, will provide departmentwide leadership for the implementation of this policy statement. In implementing this policy, the NRE Committee will:
 - (1) Recommend Departmental guidelines to the Secretary and schedule reviews of each agency's procedures for implementation;
 - (2) Monitor implementation of this policy;
 - (3) Encourage, support, and provide guidance to State- and local-level USDA committees in implementing this policy;
 - (4) Coordinate the work of USDA agencies in carrying out the provisions of this regulation; and
 - (5) Advise the Secretary annually as to progress and problems encountered.

- c Each USDA agency will review and make the necessary administrative changes in existing and proposed rules, regulations, guides, practices, or policies and propose needed legislative changes to bring agency programs into compliance with the provisions of this regulation.

- d Each USDA agency having programs that will be affected by this regulation shall develop implementing procedures, consistent with the guidelines provided by the NRE Committee, and shall provide to all offices of the agency copies of this policy statement, Departmental guidelines, and agency procedures to implement this policy.

- e USDA agencies will encourage State and local governments and individual landholders to retain important farmlands, rangelands, forest lands, and wetlands and to avoid encroachments on flood plains when practicable alternatives exist to meet developmental needs. Appropriate agencies will assist State and local governments, citizens groups, and individual landholders in identifying options and determining alternative land use values

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as the basis for making judicious choices in meeting growth and development needs.

- f USDA agencies will encourage other Federal, State, and local government agencies to exchange information on plans or projects that may impact on important farmlands, rangelands, forest lands, wetlands, or flood plains and to involve appropriate USDA agencies early in the planning process. USDA agencies will participate in a timely manner at appropriate stages in the planning process on Federal or federally assisted projects or activities when requested. Where opportunity for such participation is not forthcoming, the Department may intercede, consistent with policy contained in this regulation, at appropriate stages in the decisionmaking process through review and comments on plans, as provided for in authorized administrative review procedures for such projects, activities, or actions.
- g When land held either in public or private ownership will be directly affected by USDA actions, the implementing agency will notify the affected landholders at the earliest time practicable of the proposed action and provide such landholders an opportunity to review the elements of the action and to comment on the action's feasibility and alternatives to it.
- h Agencies of USDA will assure that their actions, investments, and programs on nonfederal lands will conform, to the extent practicable, with the uses permitted under land use regulations adopted by State or local governments.
- i When land use regulations or decisions are inconsistent with USDA policies and procedures for the protection of important farmlands, rangelands, forest lands, wetlands, or flood plains, USDA agencies shall not assist in actions that would convert these lands to other uses or encroach upon flood plains, unless (1) there is a demonstrated, significant need for the project, program, or facility, and (2) there are no practicable alternative actions or sites that would avoid the conversion of these lands or, if conversion is unavoidable, reduce the number of acres to be converted or encroached upon directly and indirectly.

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SUBTITLE A--OFFICE OF THE SECRETARY OF AGRICULTURE

Subtitle A--Office of the Secretary of Agriculture is amended by adding a new Part 12, Highly Erodible Land and Wetland Conservation, as follows:

PART 12 - HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION.*

Subpart A--General Provisions

- Sec.
- 12.1 General.
 - 12.2 Definitions.
 - 12.3 Applicability.
 - 12.4 Determination of ineligibility.
 - 12.5 Exemptions.
 - 12.6 Administration.
 - 12.7 Certification.
 - 12.8 Affiliated persons.
 - 12.9 Landlords and tenants.
 - 12.10 Scheme or Device.
 - 12.11 Action based upon advice or action of Department.
 - 12.12 Appeals.

Subpart B--Highly Erodible Land Conservation

- 12.20 SCS responsibilities regarding highly erodible land.
- 12.21 Identification of highly erodible lands criteria.
- 12.22 Highly erodible field determination criteria.
- 12.23 Conservation plans and conservation systems.

Subpart C --Wetland Conservation

- 12.30 SCS responsibilities regarding wetlands.
- 12.31 Wetland identification criteria.
- 12.32 Converted wetland identification criteria.
- 12.33 Use of wetland and converted wetland

Authority: 16 U.S.C. 3801-3823, 3841-3844

Subpart A--General Provisions

§ 12.1 General.

(a) This part sets forth the terms and conditions under which a person, who, after December 23, 1965, produces an agricultural commodity on highly erodible land or converted wetland, shall be determined to be ineligible for certain benefits provided by the United States Department of Agriculture and agencies and instrumentalities of the Department.

(b) The purpose of the provisions of this part are to remove certain incentives for persons to produce agricultural commodities on highly erodible land or converted wetland and to thereby--

- (1) Reduce soil loss due to wind and water erosion.
- (2) Protect the Nation's long term capability to produce food and fiber.
- (3) Reduce sedimentation and improve water quality.
- (4) Assist in preserving the Nation's wetlands, and
- (5) Curb production of surplus commodities.

§ 12.2 Definitions.

(a) The following definitions shall be applicable for the purposes of this part:

- (1) "Agricultural commodity" means any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters or sugarcane.

*Includes amendments appearing in 53 FR 3997, dated February 11, 1988.

(2) "ASCS" means the Agricultural Stabilization and Conservation Service, an agency of the United States Department of Agriculture which is generally responsible for administering commodity production adjustment and certain conservation programs of the Department.

(3) "Conservation District" (CD) means a subdivision of a State or local government organized pursuant to the applicable law to develop and implement soil and water conservation activities or programs.

(4) "Conservation plan" means the document containing the decisions of a person with respect to the location, land use, tillage systems and conservation treatment measures and schedule which, if approved, must be or have been established on highly erodible cropland in order to control erosion on such land.

(5) "Conservation system" means the part of a cropland resource management system applied to a field or group of fields that provides for cost effective and practical erosion reduction based upon the standards contained in the SCS field office technical guide. A conservation system may include a single practice or a combination of practices.

(6) "Converted wetland" means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) that makes possible the production of an agricultural commodity without further application of the manipulations described herein if (i) such production would not have been possible but for such action; and (ii), before such action such land was wetland and was neither highly erodible land nor highly erodible cropland.

(7) "CCC" means the Commodity Credit Corporation, a wholly-owned government corporation within the United States Department of Agriculture organized under the provisions of 15 U.S.C. 714 *et seq.*

(8) "Department" means the United States Department of Agriculture.

(9) "Erodibility index" means a numerical value that expresses the potential erodibility of a soil in relation to its soil loss tolerance value without consideration of applied conservation practices or management.

(10) "ES" means the Extension Service, an agency of the United States Department of Agriculture which is generally responsible for coordinating the information and educational programs of the Department.

(11) "FmHA" means the Farmers Home Administration, an agency of the United States Department of Agriculture which is generally responsible for providing farm loans and loan guarantees under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*) and other laws.

(12) "FCIC" means the Federal Crop Insurance Corporation, a wholly-owned government corporation within the United States Department of Agriculture organized under the provision of 7 U.S.C. 1501 *et seq.*

(13) "Field" means a part of a farm which is separated from the balance of the farm by permanent boundaries such as fences, roads, permanent waterways, woodlands, croplines (in cases where farming practices make it probable that such cropline is not subject to change) or other similar features.

(14) "Highly erodible land" means land that has an erodibility index of 8 or more.

(15) "Hydric soils" means soils that, in an undrained condition, are saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation.

(16) "Hydrophytic vegetation" means plants growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(17) "Landlord" means a person who rents or leases farmland to another person.

(18) "Local ASCS office" means the county office of the Agriculture Stabilization and Conservation Service serving the county or a combination of counties in the area in which a person's land is located for administrative purposes.

(19) "Operator" means the person who is in general control of the farming operations on the farm during the crop year.

(20) "Owner" means a person who is determined to have legal ownership of farmland and shall include a person who is purchasing farmland under contract.

(21) "Person" means an individual, partnership, association, corporation, cooperative, estate, trust, joint venture, joint operation, or other business enterprise or other legal entity and, whenever applicable, a State, a political subdivision of a State, or any agency thereof and such person's affiliates as provided in § 12.8 of this part.

(22) "Secretary" means the Secretary of the United States Department of Agriculture.

(23) "Sharecropper" means a person who performs work in connection with the production of a crop under the supervision of the operator and who receives a share of such crop for such labor.

(24) "SCS" means the Soil Conservation Service, and agency within the United States Department of Agriculture which is generally responsible for providing technical assistance in matters of soil and water conservation and for administering certain conservation programs of the Department.

(25) "Soil map unit" means an area of the landscape shown on a soil map which consists of one or more soils.

(26) "State" means each of 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, or the Trust Territory of the Pacific Islands.

(27) "Tenant" means a person usually called a "cash tenant", "fixed-rent tenant", or "standing rent tenant" who rents land from another for a fixed amount of cash or a fixed amount of a commodity to be paid as rent; or a person (other than a sharecropper) usually called a "share tenant" who rents land from another person and pays as rent a share of the crops or proceeds therefrom. A tenant shall not be considered the farm operator unless the tenant is determined to be the operator pursuant to this part and 7 CFR Part 719.

(28) "Wetland", except when such term is part of the term "converted wetland", means land that has a predominance of hydric soil and that is inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic

vegetation typically adapted for life in saturated soil conditions, except that this term does not include lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soils.

(b) In the regulations in this part and in all instructions, forms, and documents in connection therewith, all other words and phrases specifically relating to ASCS operations shall, unless the context of subject matter or the specific provisions of this part otherwise requires, have the meanings assigned to them in the regulations governing reconstitutions of farms, allotments and bases (7 CFR Part 719).

§ 12.3 Applicability.

(a) 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 Trust Territory of the Pacific Islands.

(b) The provisions of this part apply to all agricultural commodities planted after, and to determinations made after or pending or September 17, 1987. For those agricultural commodities planted prior to such date and for all determinations made prior to such date, the regulations published at 51 FR 23496, June 27, 1986, as amended on June 29, 1987 (52 FR 24132) shall apply.

§ 12.4 Determination of ineligibility.

(a) Except as provided in § 12.5, any person who, after December 23, 1985, produces an agricultural commodity on a field in which highly erodible land is predominant or on converted wetland shall be ineligible:

(1) As to any commodity produced during that crop year by such person:

(i) For any type of price support or payment made available under the Agricultural Act of 1949, the CCC Charter Act, or any other Act;

(ii) For a farm storage facility loan made under Section 4(h) of the CCC Charter Act;

(iii) For any disaster payments made under the Agricultural Act of 1949;

(iv) For crop insurance under the Federal Crop Insurance Act;

(v) For a farm loan made, insured, or guaranteed by the FmHA, if FmHA determines that the proceeds of such loan will be used for a purpose that will contribute 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) or to conversion of wetland for agricultural commodity production; or

(2) For a payment made under section 4 or 5 of the CCC Charter Act during such crop year for the storage of an agricultural commodity owned by CCC.

(b) A person shall be determined to have produced an agricultural commodity on a field in which highly erodible land is predominant or on converted wetland if:

(1) SCS has determined that—

- (i) Highly erodible land is predominant in such field or
- (ii) All or a portion of the field is converted wetland;

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

(3) ASCS has determined that the land is or was planted to an agricultural commodity or was planted to an agricultural commodity during the year for which the person is requesting benefits.

(c) Persons who produce agricultural commodities and wish to participate in any of the USDA programs described in paragraph (a) of this section are responsible for contacting the appropriate agency of the Department well in advance of intended participation 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.

§ 12.5 Exemptions.

(a) *Highly erodible cropland in production or in Department 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 the SCS to determine if such land is highly erodible, no person shall be determined to be ineligible for benefits as provided in § 12.4(a) as the result of the production of a crop of an agricultural commodity on any highly erodible land:

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

(2) 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.

(b) *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(a) as the result of production of an agricultural commodity on highly erodible land if such production is in compliance with an approved conservation plan or conservation system.

(1) With respect to the production of an agricultural commodity on any land identified under paragraph (a) of this section, if, as of January 1, 1980, or the date that is 2 years after the date SCS has completed a soil survey of the cropland on the tract or farm, whichever is later, a person is actively applying a conservation plan based on the local SCS field office technical guide and approved by the CD, in consultation with the local ASC committees and SCS, such person shall have until January 1, 1995, to fully comply with the plan without being determined to be ineligible for benefits under § 12.4.

(2) Persons who had, during each of the 1961 to 1965 crop years, alfalfa on highly erodible land in a crop rotation determined by SCS to be adequate for the protection of highly erodible land shall have until June 1, 1968 to fully implement an approved conservation system without being subject to program ineligibility under § 12.4. Failure to fully implement an approved conservation system by June 1, 1968 shall cause a person to be determined to have been ineligible for program benefits for the 1966 crop year, and to be ineligible for each following crop year that an agricultural commodity is produced on such land without an approved conservation system.

(3) A person shall not be ineligible for program benefits under § 12.4(a) as the result of the production of an agricultural commodity which was produced on highly erodible land in an area:

(i) Under a conservation system that has been approved by the CD after the CD determined that the conservation system is in conformity with technical standards set forth in the SCS field office technical guide for such district; or

(ii) Not within a CU, under a conservation system that has been approved by SCS, to be adequate for the production of such agricultural commodity on highly erodible land.

(c) *Reliance upon SCS determination for highly erodible land.* A person shall not be ineligible for program benefits as the result of the production of an agricultural commodity which was produced on highly erodible land in reliance on a determination by SCS that such land was not highly erodible land, except that paragraph (b)(3) of this section shall not apply to any agricultural commodity that was planted on any land after SCS determines that such land is highly erodible land, and the person is notified of such determinations.

(d) *Exemptions for wetland.* (1) A person shall not be determined to be ineligible for program benefits under § 12.4 as the result of the production of an agricultural commodity on:

(i) Converted wetland if the conversion of such wetland was commenced or completed before December 23, 1965; or

(ii) An artificial lake, pond or wetland created by excavating or diking non-wetland to collect and retain water for purposes such as water for livestock, fish production, irrigation (including subsurface irrigation), a settling basin, cooling, rice production, or flood control; or

(iii) A wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation; or

(iv) Wetland on which production of an agricultural commodity is possible as a result of a natural condition, such as drought, and is possible without action by the person that destroys a natural wetland characteristic; or

(v) Converted wetland if SCS has determined that the actions of the person with respect to the production of an agricultural commodity on the converted wetland, individually and in connection with all other similar actions authorized by SCS in the area, would have only a minimal impact on the hydrological and biological aspect of wetlands.

(vi) Wetlands converted by actions of persons other than the person applying for USDA program benefits or any of the person's predecessors in interest after December 23, 1965, if such conversion was not the result of a scheme or device to avoid compliance with this part. Further drainage improvement on such lands is not permitted without loss of eligibility for USDA program benefits, unless the SCS determines under paragraph (d)(1)(v) of this section that further drainage activities applied to such lands would have minimal effect on any remaining wetland values. In applying this paragraph, converted wetlands shall be presumed to have been converted by the person applying for USDA program benefits unless the person can show that the conversion was caused by a third party with whom the person was not associated through scheme or device as described under § 12.10. In this regard, activities of water resource district, drainage district or similar entity will be attributed to all persons within the jurisdiction of the district or other entity who are assessed for the activities of the district or entity. Accordingly, where a person's wetlands are converted due to the actions of the district or entity, the person shall be considered to have caused or permitted the drainage.

(2) The conversion of a wetland, for purposes of this section, is considered to have been completed before December 23, 1985 if before that date, the draining, dredging, leveling, filling or other manipulation, (including any activity that resulted in the impairing or reducing the flow, circulation, or reach of water) was applied to the wetland and made the production of an agricultural commodity possible without further manipulation described herein where such production on the wetland would not otherwise have been possible.

(3) Except as provided under paragraph (d)(4) of this section, the conversion of a wetland is considered to have been commenced before December 23, 1985 if before such date:

(i) Any of the activities described in § 12.2(a)(6) were actually started on the wetland; or

(ii) The person applying for benefits has expended or legally committed substantial funds either by entering into a contract for the installation of any of the activities described in § 12.2(a)(6) or by purchasing construction supplies or materials for the primary and direct purpose of converting the wetland; and

(4) Notwithstanding paragraph (d)(3) of this section, for lands which are within the boundaries of a drainage district or similar entity which has the authority to levy an assessment for any of the activities described in § 12.2(a)(6) on wetlands, the conversion of a wetland in conjunction with the activities of such district or other entity is considered to have been commenced before December 23, 1985, if before such date:

(i) A project drainage plan setting forth in detail the planned drainage measures or other works of improvement had been officially adopted by the district or other entity; and

(ii) The district or other entity started installation of the drainage measures, or legally committed substantial funds toward the conversion of wetlands by entering into a contract for the installation of any of the activities described in § 12.2(a)(6) or by purchasing construction supplies and materials for the primary and direct purpose of converting wetland; and

(iii) The person applying for benefits can show that the wetland conversion with which the person is associated was

the basis of a financial obligation to the district or other entity prior to December 23, 1985, and that a specific assessment for the project construction or a legal obligation to pay a specific assessment was made as to the person's wetlands prior to December 23, 1985.

(5) The purpose of the determination of conversion commencement made under paragraphs (d)(3) and (d)(4) of this section is to implement the legislative intent that those persons who had actually started conversion of wetland or obligated funds for conversion prior to the effective date of the Act (December 23, 1985) would be allowed to complete the conversion so as to avoid unnecessary economic hardship. Accordingly, the following requirements shall apply to all determinations of commencement made under paragraphs (d)(3) or (d)(4).

(i) All persons who believe they have a wetland or converted wetland for which conversion began but was not completed prior to December 23, 1985, must, before September 19, 1988, request ASCS to make a determination of commencement in order to be considered for exemption under § 12.4(d)(1)(i).

(ii) A person must show that the commenced activity has been actively pursued or the conversion will not be exempt under this section. In this context, "actively pursued" means that efforts toward the completion of the conversion activity have continued on a regular basis since initiation of the conversion, except for delays due to circumstances beyond the person's control. With regard to wetland conversion by a person that is related to the project activities of a drainage district or other similar entity, the application of "actively pursued" begins when the project works are functional for connection and use by the person.

(iii) Any conversion activity considered to be commenced under this section shall lose its exempt status if not completed on or before January 1, 1995.

(iv) Only those wetlands for which the construction has begun or to which the contract or purchased supplies and materials relate may qualify for a determination of commencement. However, in those circumstances where the conversion of wetland does not meet the specific requirements of this paragraph, the person may request a commencement of conversion

determination from the Deputy Administrator, State and County Operations, ASCS (the "Deputy Administrator"), upon a showing that undue economic hardship will result because of substantial financial obligations incurred prior to December 23, 1985, for the primary and direct purpose of converting the wetland.

(e) The provisions of § 12.4 shall not apply to any loan as described in § 12.4(a) that was made before December 23, 1985.

(f) A person shall not be determined to be ineligible in accordance with the provisions of this part for any benefits listed in § 12.4(a) with respect to the production of an agricultural commodity on highly erodible land which was planted before or in any crop year that began before December 23, 1985.

(g) It is the responsibility of the person seeking an exemption under paragraph (d)(1)(i) of this section to provide evidence, such as receipts, crop history data, drawings, plans or similar information, that the conversion was started or completed before December 23, 1985, for purposes of determining whether the conversion is exempt in accordance with this section.

§ 12.6 Administration.

(a) *General.* A determination of ineligibility for benefits in accordance with the provisions of this part shall be made by the agency of the Department to which the person has applied for benefits. All determinations required to be made under the provisions of this part shall be made by the agency responsible for making such determinations, as provided in this section.

(b) *Administration by ASCS.* (1) The provisions of this part which are applicable to ASCS will be administered under the general supervision of the Administrator, ASCS, and shall be carried out in the field in part by State ASC committees (STC) and county ASC committees (COC).

(2) The Deputy Administrator may determine any question arising under the provisions of this part which are applicable to ASCS and may reverse or modify any determination of eligibility with respect to programs administered by ASCS made by an STC or COC or any other ASCS office or ASCS official (except the Administrator) in connection with the provisions of this part.

(3) ASCS shall make the following determination which are required to be made in accordance with this part:

(i) Whether a person produced an agricultural commodity on a particular field as determined under § 12.4(b);

(ii) The establishment of field boundaries as described in § 12.2(a)(13);

(iii) Whether land was planted to an agricultural commodity in any of the years, 1981 through 1985, for the purposes of § 12.5(a)(1);

(iv) Whether to allow a person to exchange certain crop acreage bases (CAB) between CAB's with crops that leave a high residue, if recommended by SCS for inclusion in the conservation plan.

(v) Whether land was set aside, diverted or otherwise not cultivated under a program administered by the Secretary for any crop to reduce production of an agricultural commodity under § 12.5(a)(2);

(vi) Whether the agricultural commodity planted on a particular field was planted before December 23, 1985, or during any crop year which began before December 23, 1985, in accordance with § 12.5(f);

(vii) Whether for the purposes of § 12.9, the production of an agricultural commodity on highly erodible land or converted wetland by a landlord's tenant or sharecropper is required under the terms and conditions of the agreement between the landlord and such tenant or sharecropper and

(viii) Whether the conversion of a particular wetland was commenced before December 23, 1985, for the purposes of § 12.5(d) (3) or (4).

(ix) Whether the conversion of a wetland was caused by a third party under § 12.5(d)(1)(vi).

(4) A representative number of farms selected in accordance with instructions issued by the Deputy Administrator shall be inspected by an authorized representative of ASCS to determine compliance with any requirement specified in this part as a prerequisite for obtaining program benefits.

(5) ASCS will consult with U.S. Fish and Wildlife Service on pending commenced or third party determinations.

(c) *Administration by SCS.* (1) The provisions of this part that are applicable to SCS shall be administered under the general supervision of the Chief of the SCS and carried out in the field by the state conservationist, area conservationist, and district conservationist.

(2) SCS shall make the following determinations which are required to be made in accordance with this part:

(i) Whether land is highly erodible or is a wetland or a converted wetland in accordance with the provisions of this part;

(ii) Whether highly erodible land is predominant on a particular field under § 12.4(b);

(iii) Whether the conservation plan that a person is actively applying is based on the local SCS field office technical guide and is approved by—

(A) The CD, in consultation with local ASC committees and SCS, or

(B) By SCS;

(iv) Whether the conservation system that a person is using has been approved by the CD under § 12.5(b)(3) or, in an area not within a CD, a conservation system approved by the SCS to be adequate for the production of an agricultural commodity on highly erodible land;

(v) Whether production of an agricultural commodity on a wetland is possible as a result of natural conditions and is possible without action by the producer that destroys a natural wetland characteristic; and

(vi) Whether the actions of a person with respect to the production of an agricultural commodity on converted wetland would have only a minimal impact on the hydrological and biological aspects of wetland.

(3) SCS will provide such other technical assistance for implementation of the provisions of this part as is determined to be necessary.

(4) A person may obtain a highly erodible land or wetland determination by making a written request on Form AD 1028. The determination will be made in writing, and a copy will be provided to the person.

(i) A determination of whether or not an area meets the highly erodible land or wetland criteria may be made by the district conservationist based upon existing records or other information and without the need for an on-site determination. This determination will

be made, if practicable, within 15 calendar days after receipt of the written request.

(ii) An on-site determination as to whether an area meets the applicable criteria shall be made by the district

conservationist if the person has disagreed with the determination made under paragraph (c)(4)(i) of this section, or if adequate information is not otherwise available to the district conservationist on which to make a determination.

(iii) An on-site determination, where applicable, will be made as soon as possible, but no later than 60 calendar days following a request for such a determination unless site conditions are unfavorable for the evaluation of soils or vegetation in which case the time period may be extended by the district conservationist until site conditions permit an adequate evaluation.

(iv) With regard to wetland determinations, if an area is continuously inundated or saturated for long periods of time during the growing season to such an extent that access by foot to make a determination of predominance of hydric soils or prevalence of hydrophytic vegetation is not feasible, the area will be determined to be a wetland.

(5) Persons who are adversely affected by a determination made under this section and believe that the requirements of this part were improperly applied may appeal, under § 12.12 of this part, any determination by SCS.

(d) *Administration by FmHA.* (1) The provisions of this part which are applicable to FmHA will be administered under the general supervision of the FmHA Administrator through FmHA's State, district, and county offices.

(2) FmHA shall determine whether the proceeds of a farm loan made, insured or guaranteed by FmHA will be used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetland.

(e) *Administration by FCIC.* The provisions of this part which are applicable to FCIC will be administered under the general supervision of the Manager, FCIC.

(f) *Administration by ES.* The Extension Service shall coordinate the related information and education program for the Department concerning implementation of this rule.

§ 12.7 Certification.

(a) In order for a person to be determined to be eligible for any of the benefits specified in § 12.4:

(1) It must be determined by SCS whether any farm in which the person applying for the benefits has an interest contains highly erodible land, wetland or converted wetland;

(2) The person applying for the benefits must certify in writing on Form AD-1026 that such person will not produce an agricultural commodity on highly erodible land or converted wetland during the crop year in which the person is seeking such benefits, unless such production is exempt under § 12.5, from the provisions of § 12.4 of this part;

(3) The person applying for a FmHA insured or guaranteed farm loan must certify that such person shall not use the proceeds of the loan for a purpose that will contribute to excessive erosion on highly erodible land or to conversion of wetlands to produce an agricultural commodity; and

(4) The person applying for the benefits must authorize and provide representatives of the Department access to all land in which such person has an interest for the purpose of verifying any such certification.

(b) Each agency of the Department shall make all certifications received by such agency and the results of investigations concerning such certifications available to other agencies.

(c) A certification made in accordance with this section does not relieve any person from compliance with the provisions of this part.

§ 12.8 Affiliated persons.

(a) For purposes of this part, the following persons are considered to be "affiliated" and, in addition, the actions of such persons will be considered for the purposes specified in this part to be the actions of the person who has requested benefits from the Department:

(1) The spouse and minor child of such person and/or guardian of such child;

(2) Any corporation in which the person is a stockholder, shareholder, or owner of more than 20 percent interest in such corporation;

(3) Any partnership, joint venture, or other enterprise in which the person has an ownership interest or financial interest; and

(4) Any trust in which the person or any person listed in paragraphs (a)(1) through (a)(3) of this section is a beneficiary or has a financial interest.

(b) If the person who has requested benefits from the Department is a corporation, partnership, or other joint venture, then, for purposes of applying paragraph (a) of this section, any participant or stockholder therein, except for persons with a 20 percent or less share in a corporation, shall also be considered to be the person applying for benefits from the Department.

§ 12.9 Landlords and tenants.

(a) Except as provided in paragraph (b) of this section, the ineligibility of a tenant or sharecropper, for benefits (as determined under § 12.4) shall not cause a landlord to be ineligible for benefits for which the landlord would otherwise be eligible with respect to commodities produced on lands other than those in which the tenant or sharecropper has an interest.

(b) Paragraph (a) of this section shall not be applicable to a landlord if the production of an agricultural commodity on highly erodible land or converted wetland by the landlord's tenant or sharecropper is required under the terms and conditions of the agreement between the landlord and such tenant or sharecropper and such agreement was entered into after December 23, 1985 or if the landlord has acquiesced in such activities by the tenant or sharecropper.

§ 12.10 Scheme or device.

All or any part of the benefits listed in § 12.4 otherwise due a person from the Department may be withheld or required to be refunded if the person adopts or participates in adopting any scheme or device designed to evade, or which has the effect of evading, the provisions of this part. Such acts shall include, but are not limited to, concealing from the Department any information having a bearing on the application of the provisions of this part or submitting false information to the Department or creating entities for the purpose of concealing the interest of a person in a farming operation or to otherwise avoid compliance with the provisions of this part. Such acts shall also include acquiescence in, approval of or assistance to acts which have the effect of, or the purpose of, circumventing these regulations for the production of an agricultural commodity.

§ 12.11 Action based upon advice or action of Department.

The provisions of Part 790 of this Title, as amended, relating to performance based upon the action or advice of a County Committee (COC) or State Committee (STC) shall be applicable to the provisions of this part.

§ 12.12 Appeals.

Any person who has been or would be denied program benefits in accordance with § 12.4 as the result of any determination made in accordance with the provisions of this part may obtain a review of such determination in accordance with the administrative appeal procedures of the agency which rendered such determination. Agency appeal procedures are contained in the Code of Federal Regulations as follows: ASCS, 7 CFR Part 780; SCS, 7 CFR Part 614; FmHA, 7 CFR Part 1900, Subpart B; and FCIC, 7 CFR 400.90.

Subpart B—Highly Erodible Land Conservation

§ 12.20 SCS responsibilities regarding highly erodible land.

In implementing the provisions of this part, SCS shall, to the extent practicable:

- (a) Develop and maintain criteria for identifying highly erodible lands;
- (b) Prepare and make available to the public lists of highly erodible soil map units;
- (c) Make soil surveys for purposes of identifying highly erodible land; and
- (d) Provide technical guidance to conservation districts which approve conservation plans and systems, in consultation with local county ASC committees and SCS, for the purposes of this part.

§ 12.21 Identification of highly erodible lands criteria.

(a) Soil map units and an erodibility index will be used as the basis for identifying highly erodible land. The erodibility index for a soil is determined by dividing the potential average annual rate of erosion for each soil by its predetermined soil loss tolerance (T) value. The T value represents the maximum annual rate of soil erosion that could occur without causing a decline in long-term productivity.

(1) The potential average annual rate of water and rill erosion is estimated by multiplying the following factors of the Universal Soil Loss Equation (USLE):

- (i) Rainfall and runoff (R),
- (ii) The degree to which the soil resists water erosion (K), and
- (iii) The function (LS), which includes the effects of slope length (L) and steepness (S).

(2) The potential average annual rate of wind erosion is estimated by multiplying the following factors of the Wind Erosion Equation (WEQ): Climatic characterization of windspeed and surface soil moisture (C) and the degree to which soil resists wind erosion (I).

(3) The USLE is explained in the U.S. Department of Agriculture Handbook 537, "Predicting Rainfall Erosion Losses." The WEQ is explained in the paper by "Woodruff, N.P. and F.H. Siddarway, 1985. "A Wind Erosion Equation," Soil Science Society of America Proceedings, Vol. 29, No. 5,

Pages 602-608. Values for all the factors used in these equations are contained in the SCS field office technical guide and the references which are a part of the guide.

(b) A soil map unit subject to significant erosion by either water or by wind shall be determined to be highly erodible if either the RKLS/T or the CI/T value for the map unit equals or exceeds 8.

(c) Whenever a soil map unit description contains a range of a slope length and steepness characteristics that produce a range of LS values which result in RKLS/T quotients both above and below 8, the soil map unit will be entered on the list of highly erodible soil map units as "potentially highly erodible." The final determination of erodibility for an individual field containing these soil map unit delineations will be made by an on-site investigation.

§ 12.22 Highly erodible field determination criteria.

(a) Highly erodible land shall be considered to be predominant on a field if either:

- (1) 33.33 percent or more of the total field acreage is identified as soil map units which are highly erodible; or
- (2) 50 or more acres in such field are identified as soil map units which are highly erodible.

(b) A person may request the modification of field boundaries for the purpose of excluding highly erodible land from a field. Such a request must be submitted to, and is subject to the approval of, ASCS.

(c) Small areas of noncropland within or adjacent to the boundaries of existing highly erodible crop fields such as abandoned farmsteads, areas around filled or capped wells, rock piles, trees or brush which are converted to cropland are considered to meet the requirement of § 12.5(c) if they are included in an approved conservation plan for the entire highly erodible field.

§ 12.23 Conservation plans and conservation systems.

(a) A conservation plan or a conservation system developed for the purposes of § 12.5(b) must be based on and in conformity with the SCS field office technical guide. For highly erodible croplands which were in production prior to December 23, 1985, the applicable conservation systems in the field office technical guide are designed to achieve substantial reductions in soil erosion, taking into consideration economic and technical feasibility and other resource related factors. For highly erodible lands that are converted from native vegetation, i.e., rangeland or woodland, to crop production after December 23, 1985, the applicable conservation systems in the field office technical guide are designed to control soil losses to a level that will attain or approximate the soil loss tolerance level. Any conservation plans or systems that were approved prior to February 11, 1988, are deemed to be in compliance with this paragraph.

(b) Persons who require SCS assistance for the development of a conservation plan or the installation of a conservation system are encouraged to request this assistance well in advance of deadline dates for compliance; otherwise the person may not be able to comply with these provisions and maintain eligibility for USDA program benefits.

(c) Conservation districts approve or disapprove conservation plans or conservation systems after SCS determines that the plans or systems conform to the SCS field office technical guide. If a conservation district fails, without due cause, to act on a request for conservation plan or conservation

system approval within 45 days, or if no conservation district exists, SCS will approve or disapprove, as appropriate, the conservation plan or system in question.

(d) A person is considered to be actively applying a conservation plan for purposes of § 12.5(b) if the plan is being applied according to the schedule specified in the plan and the applied practices are properly operated and maintained. It is the responsibility of the person to:

(1) Annually certify that the conservation plan is being actively applied after January 1, 1990 and

(2) Arrange for a revision of the conservation plan with SCS, if changes are made in land use, crop rotation or management, conservation practices, or in the original schedule of practice installation.

(e) Persons who are adversely affected by the determinations made under this subpart and believe that the requirements of this subpart were improperly applied may appeal the decision to SCS under § 12.12.

Subpart C—Wetland Conservation

§ 12.30 SCS responsibilities regarding wetlands.

In carrying out the provisions of this part, SCS shall:

(a) Make available to the public an approved county list of hydric soil map units, which is based upon the National List of Hydric Soils;

(b) Maintain a list of hydrophytic vegetation derived from the National List of Plant Species That Occur in Wetlands;

(c) Consult with the Fish and Wildlife Service on determinations of exemptions made under § 12.5(d)(1) and (d)(2) and on matters relating to the identification of wetland;

(d) Oversee the development and application of criteria to identify hydric soils in consultation with the National Technical Committee for Hydric Soils, and

(e) Consult with the Fish and Wildlife Service and others in developing the National List of Plant Species that Occur in Wetlands and in providing guidance in applying the lists of hydric soils and plant species to matters concerning wetland and converted wetland.

§ 12.31 Wetland identification criteria.

(a) *Hydric soils.* (1) SCS shall identify hydric soils through the use of published soil maps which reflect soil surveys completed by SCS. If a published soil map is unavailable for a given area, SCS may use unpublished soil maps which were made according to the specifications of the National Cooperative Soil Survey or may conduct an on-site evaluation of the land.

(2) SCS shall determine whether an area of a field or other parcel of land has a predominance of hydric soils that are inundated or saturated as follows:

(i) If a soil map unit has hydric soil as all or part of its name, that soil map unit or portion of the map unit related to the hydric soil shall be determined to have a predominance of hydric soils;

(ii) If a soil map unit is named for a miscellaneous area that meets the criteria for hydric soils (i.e., riverwash, playas, beaches, or water) the soil map unit shall be determined to have a predominance of hydric soils; or

(iii) If a soil map unit contains inclusions of hydric soils, that portion of the soil map unit identified as hydric soil shall be determined to have a predominance of hydric soils.

(3) *List of hydric soils.* (i) Hydric soils are those soils which meet criteria set forth in the publication "Hydric Soils of the United States 1985" which was developed by the National Technical Committee for Hydric Soils and which is incorporated by reference. This publication may be obtained upon request by writing the Soil Conservation Service, U.S. Department of Agriculture, P.O. Box 2880, Washington, DC 20013, and is available for inspection at the Office of the Federal Register Information Center, Room 3801, 1100 L Street NW., Washington, DC 20406. Incorporation of this publication by reference was approved by the Director of the Federal Register on June 24, 1986. The materials are incorporated as they exist on the date of the approval and a notice of any change in these materials will be published in the Federal Register.

(ii) An official list of hydric soil map units shall be maintained at the local SCS office and shall include—

(A) All soils from the National List of Hydric Soils that can be found in that field office area, and

(B) Any soil map units or areas which the State conservationist determines to meet such hydric soil criteria.

(iii) Any deletions of a hydric soil unit from the hydric soil map unit list must be made according to the established procedure contained in the publication "Hydric Soils of the United States, 1985" for adding or deleting soils from the National List of Hydric Soils.

(b) *Hydrophytic vegetation.*

Hydrophytic vegetation consists of plants growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(1) A plant shall be considered to be a plant species that occurs in wetland if such plant is listed in the National List of Plant Species that Occur in Wetlands. The publication may be obtained upon request from the U.S. Fish & Wildlife Service, National Wetland Inventory, Monroe Bldg. Suite 101, 9720 Executive Center Drive, Saint Petersburg, Florida 33702.

(2) For the purposes of the definition of "wetland" in § 12.2(a)(26) of this part, land shall be determined to have a prevalence of hydrophytic vegetation if:

(i) SCS determines through the use of the formula specified in paragraph (b)(3) of this section that under normal circumstances such land supports a prevalence of hydrophytic vegetation. The term "normal circumstances" refers to the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed; or

(ii) In the event the vegetation on such land has been altered or removed, SCS will determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil under the same hydrological conditions.

(3) The determination of prevalence of hydrophytic vegetation will be made in accordance with the following provisions:

(i) *Plant classification.* The National List of Plant Species that Occur in Wetlands classifies vascular plant species found in the United States and Puerto Rico into five indicator groups based upon their expected occurrence in wetlands.

Obligate species are expected to occur in wetlands more than 99 percent of the time; facultative wet species, 66-99 percent of the time; facultative species, 33-65 percent of the time; facultative upland species, 1-32 percent of the time; and upland species, less than 1 percent of the time.

(ii) *Ecological indices.* The following ecological index values have been assigned the plant indicator groups for use in the formula to determine prevalence:

Indicator group	Ecological index
Obligate	1.
Facultative wet	2.
Facultative	3.
Facultative Upland	4.
Upland	5 (all plants not on the National List of Plant Species That Occur in Wetlands)

(iii) *Specific criteria.* If the area in question has met the criteria for hydric soils that are inundated or saturated, SCS will either visually or through the use of line transects, estimate the frequency of occurrence of plants within the community identified by indicator group to arrive at a prevalence index to indicate whether or not a prevalence of hydrophytic vegetation exists.

(iv) (A) The following formula shall be used to calculate the prevalence index, where:

- PI = Prevalence Index.
- F = Frequency of Occurrence of Plant Species.
- 1-5 = Ecological Index Values for Indicator Groups.

$$PI = \frac{(1 \times F_1) + (2 \times F_2) + (3 \times F_3) + (4 \times F_4) + (5 \times F_5)}{(F_1 + F_2 + F_3 + F_4 + F_5)}$$

(B) A mean prevalence index (PI) value of less than 3.0 shall indicate that the area exhibits a prevalence of hydrophytic vegetation.

(c) *Artificial wetland.* (1) An area shall be considered to be an artificial wetland for the purposes of § 12.5(d)(1)(ii) and (iii) of this part if such area was formerly nonwetland or wetland on which conversion was started or completed before December 23, 1985, but now meets wetland criteria due to the action of man.

(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.

§ 12.22 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 exempted 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.