

Guidance on Conducting Wetland Determinations for the Food Security Act and Section 404 of the Clean Water Act

Key Points – February 28, 2005

- In 1994, the Departments of Agriculture, Interior and Army and the Environmental Protection Agency entered into a Memorandum of Agreement (MOA) concerning the delineation of wetlands for purposes of Section 404 of the Clean Water Act (CWA) and the Food Security Act (FSA). The MOA was developed to streamline the wetland delineation process on agricultural lands, to promote consistency between the CWA and the FSA, and to provide predictability and simplification for USDA program participants.
- The 1996 and 2002 FSA amendments changed the wetland conservation provisions, producing inconsistency between them and the CWA, and making the 1994 MOA obsolete and illegal for NRCS to follow. Specific reasons for withdrawing from the MOA are listed on page 2 of this document.
- USDA withdrew from the MOA on January 18, 2005 and the Corps of Engineers (COE) withdrew from it on January 24, 2005.
- NRCS has been working with the COE to develop joint guidance for both agencies to use when conducting wetland determinations. This will replace the procedures in the former MOA.
- Highlights of the Joint Guidance:
 - NRCS will conduct wetland determinations for the purpose of implementing the swampbuster provisions of the FSA, and in providing other financial and technical assistance authorized by law.
 - The COE will conduct wetland determinations for CWA purposes.
 - Both agencies will inform landowners that their wetland determinations may not apply to the other agency's wetland programs.
 - NRCS may not disclose confidential information regarding a producer's personal information, such as objectives or decisions, conservation compliance determinations (HEL/WC), natural resource inventories, or environmental assessments to agencies outside of USDA. This includes wetland delineations and labels. If a wetland determination made by NRCS is needed for CWA purposes, NRCS may encourage the producer to provide a copy directly to the COE, or the COE will request a copy from the landowner, but NRCS will not provide it to the COE.
 - The COE and NRCS will coordinate as much as possible on wetland determinations and violations that involve both agencies' jurisdiction, to maximize consistency and minimize delay and inconvenience for the landowner.
 - The guidance encourages interagency coordination on training, wetland delineation procedures and developing local operating agreements to improve service to the public.

NRCS's Rationale for Withdrawing from the 1994 Memorandum of Agreement (MOA)

- The MOA, which was signed by the EPA, COE, FWS and NRCS in 1994, was developed to streamline the wetland delineation process on agricultural lands and to provide predictability and “one-stop shopping” for USDA program participants.
- The 1996 and 2002 FSA amendments changed the wetland conservation provisions, producing inconsistency between them and Section 404 of the Clean Water Act (CWA).
- The procedures used by NRCS in accordance with the MOA are no longer consistent with current statute and regulations for the following reasons:
 - The 2002 amendments prohibit NRCS from sharing confidential producer information to agencies outside USDA. This makes it illegal for NRCS to provide wetland delineations and determinations to the COE and EPA for CWA permitting and enforcement.
 - 1996 amendments eliminated the concept of “abandonment” for prior converted (PC) cropland. As a result, land may be considered non-wetland for Swampbuster purposes, and wetland for CWA purposes. Further, as a result of the Supreme Court’s “SWANCC” decision, a wetland may be subject to Swampbuster, but no longer regulated by the COE for CWA purposes. These inconsistencies in jurisdiction defeat a major purpose of the MOA, which was to ensure that wetland determinations performed by one agency would be relied upon by the other.
 - The MOA states that NRCS wetland determinations shall not be revised without interagency coordination. However, NRCS is required to comply with the decisions of the USDA National Appeals Division, which may overturn a previous wetland determination without coordination among the agencies.
 - Per the MOA, NRCS agreed to conduct wetland determinations on agricultural land for the purpose of obtaining a CWA permit. Regulations at 7 C.F.R. §12.30 state that NRCS’s responsibilities regarding wetlands extend only to implementing the wetland conservation provisions of the FSA.
- For these reasons, NRCS cannot comply with the MOA and the MOA has lost its usefulness for the agency, the other signatory agencies, and the owners of agricultural land that is subject to it.