

THE WHITE HOUSE

EXECUTIVE ORDER 11990

PROTECTION OF WETLANDS

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in furtherance of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), in order to avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative, it is hereby ordered as follows:

Section 1. (a) Each agency shall provide leadership and shall take action to the destruction, loss or degradation of wetlands, and to preserve and enhance natural and beneficial values of wetlands in carrying out the agency's responsibilities (1) acquiring, managing, and disposing of Federal lands and facilities; and (2) providing Federally undertaken, financed, or assisted construction and improvement; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities.

(b) This order does not apply to the issuance by Federal agencies of permits, licenses, or allocations to private parties for activities involving wetlands on non-Federal

Sec. 2. (a) In furtherance of Section 101(b)(3) of the National Environmental Policy Act of 1969 (42 U.S.C. 4331(b)(3)) to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may attain the widest range of beneficial uses of the environment without degradation risk to health or safety, each agency, to the extent permitted by law, shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use. In making this finding the head of the agency may take into account economic, environmental and other pertinent factors.

(b) Each agency shall also provide opportunity for early public review of any plans or proposals for new construction in wetlands, in accordance with Section 2(b) of Executive Order No. 11514, as amended, including the development of procedures to accomplish this objective for Federal actions whose impact is not significant enough to require the preparation of an environmental impact statement under on 102(2)(C) of the National Environmental Policy Act of 1969, as amended.

Sec. 3. Any requests for new authorizations or appropriations transmitted to the Office of Management and Budget shall indicate, if an action to be proposed will be located in wetlands, whether the proposed action is in accord with this Order.

Sec. 4. When Federally-owned wetlands or portions of wetlands are proposed for loan, easement, right-of-way or disposal to non-Federal public or private parties, the Federal agency shall (a) reference in the conveyance those uses that are restricted under identified Federal, State or local wetlands regulations; and (b) attach other appropriate restrictions to the uses of properties by the grantee or purchaser and any successor, except where prohibited by law; or (c) withhold such properties from disposal.

Sec. 5. In carrying out the activities described in Section 1 of this Order, each agency shall consider

factors relevant to a proposal's effect on the survival and quality of the wetlands. Among these factors are:

- (a) public health, safety, and welfare, including water supply, quality, recharge and discharge; pollution; flood and storm hazards, and sediment and erosion;
- (b) maintenance of natural systems, including conservation and long term productivity of existing flora and fauna, species and habitat diversity and stability, hydrologic utility, fish, wildlife, timber, and food and fiber resources; and
- (c) other uses of wetlands in the public interest, including recreational, scientific, and cultural uses.

Sec. 6. As allowed by law, agencies shall issue or amend their existing procedures in order to comply with this Order. To the extent possible, existing processes, such as those of the Council on Environmental Quality and the Water Resources Council, shall be utilized to fulfill the requirements of this Order.

Sec. 7. As used in this Order:

(a) The term "agency" shall have the same meaning as the term "Executive agency" in Section 105 of Title 5 of the United States Code and shall include the military departments; the directives contained in this Order, however, are meant to apply only to those agencies which perform the activities described in Section 1 which are located in or affecting wetlands.

(b) The term "new construction" shall include draining, dredging, channelizing, filling, diking, impounding, and related activities and any structures or facilities begun or authorized after the effective date of this Order.

(c) The term "wetlands" means those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds.

Sec. 8. This Order does not apply to projects presently under construction, or to projects for which all of the funds have been appropriated through fiscal Year 1977, or to projects and programs for which a draft or final environmental impact statement will be filed prior to October 1, 1977. The provisions of Section 2 of this Order shall be implemented by each agency not later than October 1, 1977.

Sec. 9. Nothing in this Order shall apply to assistance provided for emergency work, essential to save lives and protect property and public health and safety, performed pursuant to Sections 305 and 306 of the Disaster Relief Act of 1974 (88 Stat. 148, 42 U.S.C. 5145 and 5146).

Sec. 10 To the extent the provisions of Sections 2 and 5 of this Order are applicable to projects covered by Section 104(h) of the Housing and Community Development Act of 1974, as amended (88 Stat. 640, 42 U.S.C. 5304(h)), the responsibilities under those provisions may be assumed by the appropriate applicant, if the applicant has also assumed, with respect to such projects, all of the responsibilities for environmental review, decision making, and action pursuant to the National Environmental Policy Act of 1969, as amended.

Jimmy Carter

The White House

May 24, 1977

**ENVIRONMENTAL PROTECTION
AGENCY****DEPARTMENT OF AGRICULTURE****Soil Conservation Service****DEPARTMENT OF DEFENSE****Corps of Engineers, Department of the
Army****DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****Interagency Memorandum of
Agreement Concerning Wetlands
Determinations for Purposes of
Section 404 of the Clean Water Act and
Subtitle B of the Food Security Act**

AGENCIES: Environmental Protection Agency; Soil Conservation Service, USDA; Army Corps of Engineers, DoD; Fish and Wildlife Service, DoI.

ACTION: Notice.

SUMMARY: On January 6, 1994, the Departments of the Army, Agriculture, the Interior, and the Environmental Protection Agency signed a Memorandum of Agreement (MOA) that recognizes the Soil Conservation Service (SCS) as the lead Federal agency for wetlands delineations on agricultural lands. Specifically, the MOA articulates the policy and procedures to be used in the determination of wetlands jurisdiction for purposes of both Section 404 of the Clean Water Act and Subtitle B of the Food Security Act (also known as the Swampbuster program). The MOA, which establishes minimum training requirements and requires the use of standard interagency approved methods, will improve the quality and consistency of wetlands determinations on agricultural lands. The actual text of the MOA is published as part of this notice.

DATES: The effective date of this MOA is January 6, 1994.

ADDRESSES: Copies of this MOA are available from:

EPA Wetlands Hotline, (800) 832-7828.
U.S. Soil Conservation Service
Conservation Planning Division,
Washington, DC 20013.
U.S. Army Corps of Engineers CECW-
OR, 20 Massachusetts Ave., NW,
Washington, DC 20314-1000.
U.S. Fish and Wildlife Service Division
of Habitat Conservation (400ARLSQ),
1849 C. St., NW, Washington, DC
20240

FOR FURTHER INFORMATION CONTACT: The
EPA Wetlands Hotline, (800) 832-7828;
Gregory Peck of the Environmental

Protection Agency, 202/260-8794;
Michael Davis of the Office of the
Assistant Secretary of the Army (Civil
Works), 703/695-1376; Warren Lee of
the Soil Conservation Service, 202/720-
1845; or Stephen Forsythe of the Fish
and Wildlife Service, (703) 358-2161.

SUPPLEMENTARY INFORMATION: On August 24, 1993, the Clinton Administration announced a comprehensive package of wetlands policy reforms that will improve the protection of wetlands and make wetlands programs more fair and flexible for landowners. The MOA signed on January 6, 1994, implements one of the more than 40 initiatives in the Administration's Wetlands Plan. The MOA signatory agencies recognize the important contribution of agricultural producers to society, our economy, and our environment. The agencies are committed to ensuring that Federal wetlands programs are administered in a manner that minimizes the impacts on affected landowners to the extent possible consistent with the important goal of protecting wetlands. The MOA was developed in response to concerns that previous practices may have led to confusion and inconsistent application of Federal wetlands programs and policies on agricultural lands.

The MOA will minimize duplication and inconsistencies between Swampbuster and the Clean Water Act wetlands programs and articulate clearly the procedures by which the Nation's farmers can rely on SCS wetlands jurisdictional determinations on agricultural land for purposes of both the Clean Water Act and Swampbuster programs. The MOA includes provisions to ensure that agency personnel are properly trained, that standard agreed-upon methods are utilized in making wetlands determinations, and that appropriate monitoring and oversight is undertaken. The MOA also places emphasis on local cooperation between the signatory agencies and the improvement of analytical methods for making wetland determinations.

While the MOA became effective on January 6, 1994, full implementation will vary from state to state depending on the level of training required and the development of state wetlands mapping conventions. The signatory agencies will take appropriate action to expedite implementation of the MOA consistent with such prerequisites.

The full text of the MOA follows.

Dated: January 7, 1994.

Approved:

James R. Lyons,

*Assistant Secretary for Natural Resources and
Environment, Department of Agriculture.*

Dated: January 12, 1994.

Approved:

Robert Perciasepe,

*Assistant Administrator for Water
Environmental Protection Agency.*

Dated: January 7, 1994.

Approved:

G. Edward Dickey,

*Acting Assistant Secretary of the Army for
Civil Works, Department of the Army.*

Dated: January 7, 1994.

Approved:

George T. Frampton, Jr.,

*Assistant Secretary for Fish and Wildlife and
Parks, Department of the Interior.*

Memorandum of Agreement Among the Department of Agriculture, the Environmental Protection Agency, the Department of the Interior, and the Department of the Army Concerning the Delineation of Wetlands for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act.

I. Background

The Departments of the Army, Agriculture, and the Interior, and the Environmental Protection Agency (EPA) recognize fully that the protection of the Nation's remaining wetlands is an important objective that will be supported through the implementation of the Wetland Conservation (Swampbuster) provision of the Food Security Act (FSA) and Section 404 of the Clean Water Act (CWA). The agencies further recognize and value the important contribution of agricultural producers to our society, our economy, and our environment. We are committed to ensuring that Federal wetlands programs are administered in a manner that minimizes the impacts on affected landowners to the fullest possible extent consistent with the important goal of protecting wetlands. We are also committed to minimizing duplication and inconsistencies between Swampbuster and the CWA Section 404 program. On August 24, 1993, the Administration announced a comprehensive package of reforms that will improve both the protection of wetlands and make wetlands programs more fair and flexible for landowners, including the Nation's agriculture producers. This Memorandum of Agreement (MOA) implements one of over 40 components of the Administration's Wetland Plan.

II. Purpose and Applicability

A. Purpose

The purpose of this MOA is to specify the manner in which wetland delineations and certain other determinations of waters of the United States made by the U.S. Department of Agriculture (USDA) under the FSA will be relied upon for purposes of CWA Section 404. While this MOA will promote consistency between CWA and FSA wetlands programs, it is not intended in any way to diminish the protection of these important aquatic resources. In this regard, all signatory agencies to this MOA will ensure that wetlands programs are administered in a manner consistent with the objectives and requirements of applicable laws, implementing regulations, and guidance.

B. Applicability

1. The Administrator of EPA has the ultimate authority to determine the geographic scope of waters of the United States subject to jurisdiction under the CWA, including the Section 404 regulatory program. Consistent with a current MOA between EPA and the Department of the Army, the Army Corps of Engineers (Corps) conducts jurisdictional delineations associated with the day-to-day administration of the Section 404 program.

2. The Secretary of the USDA, acting through the Chief of the Soil Conservation Service (SCS), has the ultimate authority to determine the geographic scope of wetlands for FSA purposes and to make delineations relative to the FSA, in consultation with the Department of the Interior, Fish and Wildlife Service (FWS).

III. Definition of Agricultural Lands

For the purposes of this MOA, the term "agricultural lands" means those lands intensively used and managed for the production of food or fiber to the extent that the natural vegetation has been removed and cannot be used to determine whether the area meets applicable hydrophytic vegetation criteria in making a wetland delineation.

A. Areas that meet the above definition may include intensively used and managed cropland, hayland, pasture land, orchards, vineyards, and areas which support wetland crops (e.g., cranberries, taro, watercress, rice). For example, lands intensively used and managed for pasture or hayland where the natural vegetation has been removed and replaced with planted grasses or legumes such as ryegrass, bluegrass, or

alfalfa, are considered agricultural lands for the purposes of this MOA.

B. "Agricultural lands" do not include range lands, forest lands, wood lots, or tree farms. Further, lands where the natural vegetation has not been removed, even though that vegetation may be regularly grazed or mowed and collected as forage or fodder (e.g., uncultivated meadows and prairies, salt hay), are not considered agricultural lands for the purposes of this MOA.

Other definitions for the purposes of this MOA are listed below in section VI.

IV. Allocation of Responsibility

A. In accordance with the terms and procedures of this MOA, wetland delineations made by SCS on agricultural lands, in consultation with FWS, will be accepted by EPA and the Corps for the purposes of determining Section 404 wetland jurisdiction. In addition, EPA and the Corps will accept SCS wetland delineations on non-agricultural lands that are either narrow bands immediately adjacent to, or small pockets interspersed among, agricultural lands. SCS is responsible for making wetland delineations for agricultural lands whether or not the person who owns, manages, or operates the land is a participant in USDA programs.

B. Lands owned or operated by a USDA program participant that are not agricultural lands and for which a USDA program participant requests a wetland delineation, will be delineated by SCS in coordination with the Corps, or EPA as appropriate, and in consultation with FWS. Final wetland delineations conducted by SCS pursuant to the requirements of this paragraph shall not be revised by SCS except where an opportunity for coordination and consultation is provided to the other signatory agencies.

C. SCS may conduct delineations of other waters for the purposes of Section 404 of the CWA, such as lakes, ponds, and streams, in coordination with the Corps, or EPA as appropriate, on lands on which SCS is otherwise engaged in wetland delineations pursuant to paragraphs IV.A or IV.B of this MOA. Delineations of "other waters" will not be made until the interagency oversight team convened pursuant to Section V.B.2 has agreed on appropriate local procedures and guidance for making such delineations.

D. For agricultural lands, the signatory agencies will use the procedures for delineating wetlands as described in the National Food Security Act Manual, Third Edition (NFSAM). For areas that are not agricultural lands, SCS will use the 1987 Corps Wetland Delineation Manual, with current

national Corps guidance, to make wetland delineations applicable to Section 404.

E. Delineations on "agricultural lands" must be performed by personnel who are trained in the use of the NFSAM. Delineations on other lands and waters must be performed by personnel who are trained in the use of the 1987 Corps Wetland Delineation Manual. This MOA includes provisions for the appropriate interagency delineation training below in Section V.E.

F. In the spirit of the agencies' commitment to develop agreed upon methods for use in making wetland delineations, subsequent revisions or amendments to the Corps 1987 manual or portions of the NFSAM affecting the wetland delineation procedures upon which this agreement is based will require the concurrence of the four signatory agencies.

G. A final written wetland delineation made by SCS pursuant to the terms of this MOA will be adhered to by all the signatory agencies and will be effective for a period of five years from the date the delineation is made final, unless new information warrants revision of the delineation before the expiration date. Such new information may include, for example, data on landscape changes caused by a major flood, or a landowner's notification of intent to abandon agricultural use and the return of wetland conditions on a prior converted cropland. In accordance with Section 1222 of the FSA, SCS will update wetland delineations on this five-year cycle. Circumstances under which SCS wetland delineations made prior to the effective date of this agreement will be considered as final for Section 404 purposes are addressed in Paragraph V.C.

H. Within the course of administering their Swampbuster responsibilities, SCS and FWS will provide landowners/operators general written information (i.e., EPA/Corps fact sheets) regarding the CWA Section 404 program permit requirements, general permits, and exemptions. The SCS and FWS will not, however, provide opinions regarding the applicability of CWA Section 404 permit requirements or exemptions.

I. USDA will maintain documentation of all final written SCS wetland delineations and record the appropriate label and boundary information on an official wetland delineation map. USDA will make this information available to the signatory agencies upon request.

J. In pursuing enforcement activities, the signatory agencies will rely upon delineations made by the lead agency, as clarified below, providing a single

Federal delineation for potential violations of Section 404 or Swampbuster. Nothing in this MOA will diminish, modify, or otherwise affect existing EPA and Corps enforcement authorities under the CWA and clarified in the 1989 "EPA/Army MOA Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act." EPA, the Corps, and SCS may gather information based on site visits or other means to provide additional evidentiary support for a wetland delineation which is the subject of a potential or ongoing CWA Section 404 or Swampbuster enforcement action.

K. For those lands where SCS has not made a final written wetland delineation, and where the Corps or EPA is pursuing a potential CWA violation, the lead agency for the CWA enforcement action will conduct a jurisdictional delineation for the purposes of Section 404 and such delineations will be used by SCS for determining Swampbuster jurisdiction and potential Swampbuster violations. For those lands where the Corps has not made a final written wetland delineation, and where SCS is pursuing a potential Swampbuster violation, SCS will make a final written wetland delineation consistent with Sections IV.A, IV.B, and IV.C of this MOA and provide copies to the Corps and EPA. Such delineations will be used by the Corps and EPA for the purpose of determining potential violations of the CWA. In circumstances in which either the Corps or EPA is pursuing a potential CWA violation on land that is subject to an ongoing SCS appeal, a wetland delineation will be conducted by the Corps or EPA in consultation with SCS and FWS.

L. In making wetland delineations, the agencies recognize that discharges of dredged or fill material that are not authorized under Section 404 cannot eliminate Section 404 jurisdiction, and that wetlands that were converted as a result of unauthorized discharges remain subject to Section 404 regulation.

V. Procedures

Accurate and consistent wetland delineations are critical to the success of this MOA. For this reason, the signatory agencies will work cooperatively at the field level to:

(1) Achieve interagency concurrence on mapping conventions used by SCS for wetland delineations on agricultural lands, (2) provide EPA and Corps programmatic review of SCS delineations, and (3) certify wetland delineations in accordance with Section 1222(a)(2) of the FSA, as amended. The

following sections describe the procedures that will be followed to accomplish these objectives.

A. Mapping Conventions

1. Each SCS State Conservationist will take the lead in convening representatives of the Corps, EPA, FWS, and SCS to obtain the written concurrence of each of the signatory agencies, within 120 calendar days of the effective date of this MOA, on a set of mapping conventions for use in making wetland delineations. Only mapping conventions concurred upon by all signatory agencies will be used by SCS for wetland delineations.

2. If interagency consensus on mapping conventions is not reached within 120 days of the date of this MOA, the State Conservationist will refer documentation of the unresolved issues to the Chief of SCS. The Chief of SCS will immediately forward copies of the State Conservationist's documentation of unresolved issues to the Corps Director of Civil Works; the EPA Director of the Office of Wetlands, Oceans, and Watersheds; and the FWS Director. Immediately thereafter, the Chief of SCS or an appropriate designee will lead necessary discussions to achieve interagency concurrence on resolution of outstanding issues, and will forward documentation of the resolution to the State Conservationist and the appropriate Headquarters offices of the signatory agencies.

3. Once interagency concurrence on mapping conventions is obtained, such mapping conventions will be used immediately in place of the earlier mapping conventions.

4. Agreed-upon mapping conventions developed at the state level will be documented and submitted, for each state, through the Chief of SCS to the Headquarters of each of the signatory agencies. State-level agreements will be reviewed by the Headquarters of the signatory agencies for the purpose of ensuring national consistency.

B. Delineation Process Review and Oversight

1. This MOA emphasizes the need to ensure consistency in the manner in which wetlands are identified for CWA and FSA purposes, and provides a number of mechanisms to increase meaningful interagency coordination and consultation in order for the agencies to work toward meeting this goal. In this regard, the agencies believe it is critical that efforts for achieving consistency be carefully monitored and evaluated. Consequently, this MOA establishes a monitoring and review process that will be used to provide for

continuous improvement in the wetland delineation process specified in this MOA.

2. EPA will lead the signatory agencies in establishing interagency oversight teams at the state level to conduct periodic review of wetland delineations conducted under the provisions of this MOA. These reviews will include delineations done by SCS pursuant to Sections IV.A, IV.B, and IV.C of this MOA and delineations done by EPA or the Corps pursuant to Section IV.K. of this MOA. These reviews also will include changes to wetland delineations resulting from the SCS appeals process, as well as disagreements regarding allocation of responsibility. These reviews will occur, at a minimum, on a quarterly basis for the first year, on a semi-annual basis for the second year, and annually thereafter. In addition, a review will be initiated whenever one or more of the signatory agencies believes a significant issue needs to be addressed. The purpose of each review will be to evaluate the accuracy of an appropriate sample of wetland delineations. When feasible, this will include actual field verifications of wetland delineations. Should the interagency oversight team identify issues regarding implementation of this MOA or wetland delineations conducted under the provisions of this MOA, the team will work to resolve those issues and reach agreement on any necessary corrective actions. Each review, and any necessary corrective action, will be documented in a report to be distributed to the signatory agencies' appropriate field and Headquarters offices.

3. In situations in which the interagency oversight team identifies and reports unresolved issues concerning wetland delineations conducted under the provisions of this MOA, including changes to wetland delineations resulting from the SCS appeals process, the Headquarters offices of the signatory agencies will informally review the issue and work to reach agreement on any necessary corrective actions. This informal process notwithstanding, the EPA Regional Administrator or the Corps District Engineer may, at any time, propose to designate a geographic area as a "special case".

4. Similar to the terms of the current Memorandum of Agreement between the Department of the Army and the EPA Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the CWA, the EPA Regional Administrator or the Corps

District Engineer may propose to designate a geographic area, or a particular wetland type within a designated geographic area, as a special case. A special case may be designated only after the interagency oversight team (EPA, Corps, SCS, and FWS) has reviewed the relevant issues and been unable to reach a consensus on an appropriate resolution. Special cases will be designated by an easily identifiable political or geographic subdivision, such as a township, county, parish, state, EPA Region, or Corps division or district, and will be marked on maps or using some other clear format and provided to the appropriate EPA, Corps, FWS, and SCS field offices. Proposed designations of special cases will not be effective until approved by EPA or Corps Headquarters, as appropriate.

5. Upon proposing a special case, the EPA Regional Administrator or Corps District Engineer, as appropriate, will notify the appropriate SCS State Conservationist in writing. Following notification of the proposed designation, SCS will not make wetland delineations for the purposes of CWA jurisdiction within the proposed special case for a period of 20 working days from the date of the notification. SCS may proceed to make wetland delineations for CWA purposes in the proposed special case after the 20-day period if the SCS State Conservationist has not been notified by the EPA Regional Administrator or Corps District Engineer of approval of the proposed special case designation by EPA Headquarters or the Corps Director of Civil Works, as appropriate.

6. Following approval of the proposed special case, the Corps, or EPA as appropriate, will make final CWA wetland delineations in the special case area, rather than SCS. In addition, the referring field office (i.e., either the EPA Regional Administrator or Corps District Engineer) will develop draft guidance relevant to the specific issues raised by the special case and forward the draft guidance to its Headquarters office. The Headquarters office of the agency which designated the special case will develop final guidance after consulting with the signatory agencies' Headquarters offices. EPA concurrence will be required for final guidance for any special case designated by the Corps. Special cases remain in effect until final guidance is issued by the Headquarters office of the agency which designated the special case or the designation is withdrawn by the EPA Regional Administrator or Corps District Engineer, as appropriate.

C. Reliance on Previous SCS Wetland Delineations for CWA Purposes

1. Section 1222 of the FSA, as amended by the Food Agriculture Conservation and Trade Act, provides that SCS will certify SCS wetland delineations made prior to November 28, 1990. The intent of this process is to ensure the accuracy of wetland delineations conducted prior to November 28, 1990, for the purposes of the FSA. This certification process also will provide a useful basis for establishing reliance on wetland delineations for CWA purposes. All certifications done after the effective date of this MOA that are done using mapping conventions will use the agreed-upon mapping conventions pursuant to Section V.A of this MOA.

2. Written SCS wetland delineations for lands identified in section IV.A of his MOA conducted prior to the effective date of this MOA will be used for purposes of establishing CWA jurisdiction, subject to the provisions of section V.C.3 below. If such SCS wetland delineations are subsequently modified or revised through updated certification, these modifications or revisions will supersede the previous delineations for purposes of establishing CWA jurisdiction. Written SCS wetland delineations for lands identified in sections IV.B and IV.C of this MOA conducted prior to the effective date of this MOA will require coordination with the Corps, or EPA as appropriate, before being used for purposes of determining CWA jurisdiction.

3. As part of the certification effort, SCS will establish priorities to certify SCS wetland delineations. In addition to responding to requests from individual landowners who feel their original wetland determinations were made in error, SCS will give priority to certifying those wetland delineations where at least two of the four signatory agencies represented on the interagency oversight team convened pursuant to section V.B.2 of this MOA agree that SCS wetland delineations in a particular area, or a generic class of SCS wetland delineations in a particular area, raise issues regarding their accuracy based on current guidance. These priority areas will be identified only after mapping conventions are agreed upon pursuant to section V.A of this MOA. Identification of these high priority certification needs shall be made at the level of the SCS State Conservationist, FWS Regional Director, EPA Regional Administrator, and the Corps District Engineer. Following identification of these high priority certification needs, the SCS State Conservationist will

immediately notify the affected landowner(s), by letter, that the relevant SCS wetland delineations have been identified as a high priority for being certified under Section 1222 of the FSA. In addition, the notification will inform the landowner that while previous wetland delineations remain valid for purposes of the FSA until certification or certification update is completed, the landowner will need to contact the Corps before proceeding with discharges of dredged or fill material. This communication by the landowner will enable the Corps to review the wetland delineation to establish whether it can be used for purposes of CWA jurisdiction. The SCS State Conservationist will initiate, within 30 calendar days of landowner notification, corrective measures to resolve the wetland delineation accuracy problem.

D. Appeals

Landowners for whom SCS makes wetland delineations for either Swampbuster or Section 404 will be afforded the opportunity to appeal such wetland delineations through the SCS appeals process. In circumstances where an appeal is made and the State Conservationist is considering a change in the original delineation, the State Conservationist will notify the Corps District Engineer and the EPA Regional Administrator to provide the opportunity for their participation and input on the appeal. FWS also will be consulted consistent with the requirements of current regulations. The Corps and EPA reserve the right, on a case-by-case basis, to determine that a revised delineation resulting from an appeal is not valid for purposes of Section 404 jurisdiction.

E. Training

1. SCS, in addition to FWS and EPA, will continue to participate in the interagency wetland delineation training sponsored by the Corps, which is based on the most current manual used to delineate wetlands for purposes of Section 404. Completion of this training will be a prerequisite for field staff of all signatory agencies who delineate wetlands on non-agricultural lands using the 1987 Corps Wetland Delineation Manual.

2. The interagency wetland delineation training will address agency wetland delineation responsibilities as defined by this MOA, including SCS NFSAM wetland delineation procedures.

3. Field offices of the signatory agencies are encouraged to provide supplemental interagency wetland delineation training (i.e., in addition to

that required in paragraph IV.E), as necessary, to prepare SCS field staff for making Section 404 wetland delineations. For training on the use of the 1987 Corps Wetland Delineation Manual, such supplemental training will rely on the training materials used for the Corps delineation training program and will provide an equivalent level of instruction.

VI. Definitions

A. *Coordination* means that SCS will contact the Corps, or EPA as appropriate, and provide an opportunity for review, comment, and approval of the findings of SCS prior to making a final delineation. The Corps, or EPA as appropriate, will review the proposed delineation and respond to SCS regarding its acceptability for CWA Section 404 purposes within 45 days of receipt of all necessary information. SCS will not issue a final delineation until agreement is reached between SCS and the Corps or EPA, as appropriate.

B. *Consultation* means that SCS, consistent with current provisions of the FSA, will provide FWS opportunity for full participation in the action being taken and for timely review and comment on the findings of SCS prior to a final wetland delineation pursuant to the requirements of the FSA.

C. A *wetland delineation* is any determination of the presence of wetlands and their boundaries.

D. A *special case* for the purposes of this MOA refers to those geographic areas or wetland types where the Corps or EPA will make final CWA wetland delineations.

E. *Signatory agencies* means the EPA and the Departments of Army (acting through the Corps), Agriculture (acting through SCS), and Interior (acting through FWS).

F. *USDA program participant* means individual landowners/operators eligible to receive USDA program benefits covered under Title XII of the Food Security Act of 1985, as amended by the Food, Agriculture, Conservation and Trade Act of 1990.

VII. General

A. The policy and procedures contained within this MOA do not create any rights, either substantive or procedural, enforceable by any party regarding an enforcement action brought by the United States. Deviation or variance from the administrative procedures included in this MOA will not constitute a defense for violators or others concerned with any Section 404 enforcement action.

B. Nothing in this MOA is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of any of the signatory agencies. All formal guidance interpreting this MOA and background materials upon which this MOA is based will be issued jointly by the agencies.

C. Nothing in this MOA will be construed as indicating a financial commitment by SCS, the Corps, EPA, or FWS for the expenditure of funds except as authorized in specific appropriations.

D. This MOA will take effect on the date of the last signature below and will continue in effect until modified or revoked by agreement of all signatory agencies, or revoked by any of the signatory agencies alone upon 90 days written notice. Modifications to this MOA may be made by mutual agreement and Headquarters level approval by all the signatory agencies. Such modifications will take effect upon signature of the modified document by all the signatory agencies.

E. The signatory agencies will refer delineation requests to the appropriate agency pursuant to this MOA.

Dated: January 6, 1994.

James R. Lyons,

Assistant Secretary for Natural Resources and Environment, Department of Agriculture.

Robert Perciasepe,

Assistant Administrator for Water, Environmental Protection Agency.

G. Edward Dickey,

Acting Assistant Secretary of the Army for Civil Works, Department of the Army.

George T. Frampton, Jr.,

Assistant Secretary for Fish, Wildlife and Parks, Department of the Interior.

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