

## **NRCS' Responsibilities for Conducting Certified Wetland Determinations and Use of the Revised Form AD-1026**

**Explanation of Previous National Guidance.** NRCS and Corps. of Engineers (COE) "Memorandum to the Field", dated February 25, 2005: Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and Section 404 of the Clean Water Act (CWA).

In 1994, the Department of Agriculture (USDA), Interior, Army and the Environmental Protection Agency (EPA) entered into a Memorandum of Agreement (MOA) concerning the delineation of wetlands for purposes of both Section 404 of the Clean Water Act and the Food Security Act. The 1996 and 2002 Food Security Act amendments changed the wetland provisions, producing inconsistencies between the CWA and the Food Security Act. In January 2005, USDA and COE withdrew from the MOA and the authority for NRCS to make wetland determinations pursuant to the Clean Water Act was terminated.

The NRCS and COE issued a "Memorandum to the Field" on February 25, 2005, that outlines the responsibilities of each agency. This document provides that NRCS will only make wetland determinations on land for participants, or persons intending to become participants in USDA programs when the proposed activity involves draining, dredging, filling, leveling, or otherwise manipulating the land, as defined in the Food Security Act, for the purpose of, or to have the effect of making possible the production of an agricultural commodity.

An agricultural commodity means any crop planted and produced by annual-tilling of the soil, including tilling by one-trip planters, or sugarcane. For wetland determinations solely for CWA purposes, participants should be referred to the COE.

According to this guidance, NRCS has responsibility for conducting certified wetland determinations for Food Security Act purposes when:

- It is for a USDA program participant (or persons intending to become a participant).
- The manipulation activity is for the purpose of, or has the effect of, making possible the production of an agricultural commodity. This means that, in some cases, NRCS is not required to conduct certified wetland determinations for USDA participants/applicants. The trigger for a certified wetland determination is whether or not production of an agricultural commodity (i.e., annually-tilled crop) could be made possible by manipulation.

NFSAM 514.2D states that "making production possible" means manipulation:

- allows or would allow production of an agricultural commodity where such production was not previously possible, or
- making an area farmable than previously possible, or
- which reduces crop stress and allows increased crop yields, or
- after November 1990 that allows forage production or pasture and hayland use. On sites with woody vegetation, trees and stumps must be removed to constitute "making production possible"

For example:

NRCS is not required to conduct a certified wetland determination when:

- Participant tiles an existing orchard or vineyard without additional activity to clear the woody vegetation. In this instance, the manipulation did not make possible the production of an annually-tilled crop.
- Participant wants to develop a spring to supply livestock water on a farm. This is not a Food Security Act issue because production of an annually-tilled crop was not made possible.
- Participant excavates a wetland to create a pond for livestock and wildlife and places spoils on uplands. This is not a Food Security Act issue because production of an annually-tilled crop was not made possible.

Conversely, NRCS is required to conduct a certified wetland determination when:

- Participant clears woody vegetation and removes stumps in order to change land uses and grows an annually-tilled crop, hay or pasture. This is a Food Security Act issue because the manipulation was for the purpose of making production possible.
- Participant fills and levels a wetland on a pasture. This is a Food Security Act issue because the manipulation had the effect of making production possible even though the participant is not currently growing an annually-tilled crop.

The Food Security Act, as amended, does not restrict all manipulations in wetlands on agricultural lands. However, many of these activities may be regulated by the Clean Water Act, Maine Department of Environmental Protection's (DEP) Natural Resources Protection Act, Maine Land Use Regulation Commission's (LURC) Requirements for Wetland Alterations, and participants should be referred to the DEP/LURC whenever wetland impacts are unavoidable. In some cases where wetland manipulations are not within the purview of the Food Security Act, NRCS is not required to conduct certified wetland determinations and participants may have to work solely with COE/DEP/LURC to delineate wetlands and obtain necessary permits.

#### **Guidance on Form AD-1026:**

**Question #5** - For farm loan applicants only: Will you conduct any activities for fish production, trees, vineyards, shrubs, building construction, or other non-agricultural purposes on lands for which a wetland determination has not been completed by NRCS?

According to FSA Handbook 6-CP Par. 456, if participants answers "**Yes**" to **Question #5** and "**No**" to **Questions 10A, B, C**, on the Form AD-1026, NRCS is not required to conduct a certified wetland determination. This issue does not impact eligibility under the Food Security Act and NRCS no longer has responsibility for making determinations that are strictly for CWA purposes.

Procedures: If NRCS receives a referral for a certified wetland determination when only **Question #5** has been marked "**Yes**", NRCS District Conservationists will return the Form AD-1026 to FSA with a letter citing FSA Handbook 6-CP, Par. 456, that is not a

Food Security Act issue and recommend that the participant be referred to the COE and DEP/LURC. A copy of this correspondence shall be filed in the appropriate tract file.

**Question #10** – Since December 23, 1985, or during the current crop year, or during the term of a requested USDA loan, has anyone performed, or will anyone perform any activities to:

- A. Create new drainage systems, or conduct land leveling, filling, dredging, land clearing, excavation, or stump removal that has NOT been evaluated by NRCS? (If “**Yes**”, indicate year(s)).
- B. Improve or modify an existing drainage system that has NOT been evaluated by NRCS? (If “**Yes**”, indicate year(s)).
- C. Maintain an existing drainage system that has NOT been evaluated by NRCS? (If “**Yes**”, indicate the Year(s)).

**Question #10** has been revised to differentiate between new drainage or land disturbance **Question #10A**, modification and improvement **Question #10B**, and drainage maintenance **Question #10C**. According to FSA Handbook 6-CP, Par. 456, NRCS assistance is no longer required for normal maintenance of existing drainage systems. Therefore, NRCS is not required to conduct a certified wetland determination when a Form AD-1026 is received that has only **Question #10C** marked “**Yes**”.

Maintenance, as defined on Form AD-1026, is “The repair, rehabilitation, or replacement of the capacity of existing drainage systems to allow for the continued use of wetlands currently in agricultural production and the continued management of other areas as they were used before December 23, 1985. This allows a person to reconstruct or maintain the capacity of the original system or install a replacement system that is more durable or will realize lower maintenance or costs”.

Maintenance that restores the drainage to its original capacity is permitted under the Food Security Act of 1985, as amended. If the drainage maintenance activity might change the scope and effect of the original drainage system and impact wetland, Farmed Wetland (FW), or Farmed Wetland Pasture (FWP), such as those on adjacent property, the participant should be advised to consider requesting an evaluation by NRCS as to whether or not the maintenance activity will result in conversion of those wetlands. If the participant does not request an NRCS evaluation, he or she does this at his or her own risk with regard to Wetland Conservation Compliance.

If FW or FWP has been abandoned (per regulations at 7 CFR 12.33(c)), maintenance is not permitted and can result in ineligibility. Abandonment is defined as the cessation for five consecutive of management or maintenance operation related to the use of Commenced Conversion (CC), FW, or FWP. Land considered to be abandoned must meet wetland criteria.

Procedures: The attached flowchart describes the process for evaluating when drainage system should be considered maintenance. If NRCS receives a referral from FSA for a certified wetland determination because the participant answers “**Yes**” only to **Question #10C** on the Form AD-1026 (regarding maintenance of an existing drainage system), NRCS will return the request to FSA referencing NFSAM 516.12c. This states that producers may, but are not required to, request an on-site evaluation of the drainage maintenance plans prior to performing maintenance plans prior to performing maintenance on FW or FWP. However, NRCS and FSA should remind USDA participants to exercise caution when maintaining their drainage systems, so that they do

not improve the system and inadvertently drain neighboring wetlands or improve drainage on FW or FWP lands. Participants are responsible for their decisions on maintenance and drainage once they are informed using Form AD-1026. FSA offices shall provide NRCS with an informational copy of the Form AD-1026, when the only reason for referral is a “Yes” designation on **Question #10C**. Since a certified wetland determination will not be provided to FSA in these cases, FSA shall not indicate a referral to NRCS is “pending” in the producer’s subsidiary file.

**Question #11** – This question has been added to further assist NRCS in managing the Wetland Conservation Compliance workload. The participant is asked to identify the farm or tract for which he or she answered “Yes” in **Question #5** and/or **Question #10**, the activity that was conducted or is proposed, the current land use, and the county. This will enable NRCS to determine if the activity will constitute conversion, as defined in the Food Security Act (i.e., wetland manipulation that is for the purpose of or has the effect of making possible production of an annually-tilled agricultural commodity). Activities that affect wetlands, but are not conversions, are not subject to the Wetland Conservation Compliance provision.

Procedures: If participant answers “Yes” to **Questions #5, #10A and/or #10B or #10C**, FSA shall request the participant provide as much information as possible when responding to **Question #11** and identify clearly on an aerial photograph the location of the manipulation. It is particularly important to note if the participant is intending to produce an annually-tilled crop on that land at any time.

Upon referral, NRCS Resource Soil Scientists will review information provided on Form AD-1026 to determine if the manipulation activities are for the purpose of, or will have the effect of, making possible the production of an agricultural commodity. In some unique situations, manipulation activities may not make production of an annually-tilled crop possible (e.g., manipulation in orchards/vineyards where woody vegetation has not been cleared). If the manipulation activity is not for the purpose of, or will not have the effect of making production of an agricultural commodity possible, then NRCS is not required to conduct a certified wetland determination because the activity does not affect eligibility for USDA programs under the Food Security Act.

If the Resource Soil Scientist determines that a certified wetland determination is not required, they will assist the District Conservationist in providing a letter to the participant sent by certified mail explaining why the activity described on the Form AD-1026 does not affect eligibility under the Food Security Act. NRCS is not required to conduct a certified wetland determination. In the letter, NRCS shall also refer the participant to COE and DEP/LURC since their activities in wetlands may be regulated by those agencies. Copies of the Form AD-1026 and the letter shall be retained in the appropriate tract file.

If **Questions #10A and/or #10B** are marked “Yes” and the manipulation activity is for the purpose of, or has the effect of, making possible the production of an agricultural commodity, then the designated Resource Soil Scientist is required to conduct a certified wetland determination.