

# Wetland Conservation Compliance

The Food Security Act was enacted on December 23, 1985. Title XII of this Act introduced 3 conservation provisions to address environmental concerns associated with soil erosion and wetland conversion.

## The three provisions were:

- Highly Erodible Land (HEL) Conservation
- “Sodbuster” provision
- Wetland Conservation, or “Swampbuster”

The Swampbuster provision was in response to studies (Frayner, 1983; Tiner, 1984) which showed the annual loss of wetlands in the U.S. to be approximately 460,000 acres, or one-half the area of Rhode Island.

The Swampbuster provision stated that any person who produced an agricultural commodity on a converted wetland after December 23, 1985, was ineligible for certain USDA benefits unless specific exemptions applied.

## The 1985 Act defined a wetland as land that:

- has a predominance of hydric soils;
- is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
- under normal circumstances does support a prevalence of such vegetation.

In the Urgent Supplemental Appropriation Act, 1986, Congress added the following to the wetland definition:

“except that this term does not include lands in Alaska identified as having a high potential for agricultural development and predominance of permafrost soils.”

- Rule was published in 1987, assigning Natural Resources Conservation Service (NRCS) responsibility for making wetland determinations.
- Rule listed the 7 exemptions which were addressed in the Statute.



# Exemptions

- Prior Converted Cropland
- Commenced Conversion
- Artificial Wetlands
- Irrigation Induced Wetlands
- Farming Wetlands under Natural Conditions
- Minimal Effect
- Third Party Conversion

# Wetland Determination Process

- NRCS Field Offices began making wetland determinations for USDA participants.
- A majority of these determinations were completed offsite, utilizing remote sensing tools.

# Remote Sensing Tools

- NRCS Soil Surveys
- Farm Service Agency crop compliance slides
- U.S. Weather Service data
- U.S. Fish and Wildlife National Wetland Inventory maps
- U.S. Geological Survey topographic maps

- USDA participants received wetland determinations on Form CPA-026 with an aerial photo attached.
- USDA participants could appeal the determination and the NRCS staff would conduct an onsite visit.
- Some refer to these determinations as “official” determinations.

# Food, Agriculture, Conservation, and Trade Act of 1990

- The trigger for the violation was changed from planting a commodity crop on the converted wetland to “making the production of an agricultural commodity crop possible”.

- The term “certification” of a wetland was added and defined as “of sufficient quality for the purpose of making a determination of ineligibility”.
- Increased the penalty of non-compliance to prohibit participation in USDA programs for all subsequent years until the wetland was restored.
- Good Faith exemption was added.

# 1994 Memorandum of Agreement (MOA)

- MOA signed by USDA, Army Corps of Engineers, Environmental Protection Agency, and the U.S. Fish and Wildlife Service.
- Developed to streamline wetland delineation process and promote consistency between the Clean Water Act and the Food Security Act.

# 1994 National Food Security Act Manual Procedures

- Provided NRCS staff policy for reviewing and certifying wetland determinations. NRCS would develop state “mapping conventions” that were agreed to by the Corps of Engineers, EPA, U.S. Fish and Wildlife Service, and NRCS.



# USDA Secretary Moratorium April 6, 1995

- Secretary Glickman suspended the wetland certification process and announced that NRCS would make certified wetland determinations only upon written request.
- NRCS developed the CPA-038 form on which landowners could request a certified wetland determination.

# Federal Agriculture Improvement and Reform Act of 1996

- Removed the abandonment provision for prior converted cropland (PC), as long as the area is devoted to agricultural use.
- “Once a PC, always a PC”

# Farm Security and Rural Investment Act of 2002

- Added “The Secretary shall have, and shall not delegate to any private person or entity, authority to determine whether a person has complied with this subtitle”.

# USDA withdraws from the MOA January 18, 2005

- Amendments to the Food Security Act (1996, 2002) produced inconsistencies between the Food Security Act and the Clean Water Act.

## Rationale for USDA withdrawing:

- The 1996 Farm Bill eliminated the concept of “abandonment” for prior converted (PC) cropland. Land could be considered non-wetland for Swampbuster purposes, and wetland for Clean Water Act purposes.

- As a result of the Supreme Court's SWANCC (Solid Waste Agency of Northern Cook County) decision, a wetland may be subject to Swampbuster, but no longer regulated by the COE for Clean Water Act purposes.

- Per the MOA, NRCS agreed to conduct wetland determinations on agricultural land for the purpose of obtaining a Clean Water Act (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 Food Security Act.

- The MOA stated 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.



- The Farm Security and Rural Investment Act of 2002 prohibited NRCS from sharing confidential producer information to agencies outside of USDA.

On February 25, 2005, NRCS and COE issued joint guidance on conducting wetland determinations for the Food Security Act of 1985 and Section 404 of the Clean Water Act. This guidance directed NRCS to inform landowners that wetland determinations performed by NRCS may not be valid for Clean Water Act.

## The following language is included in all USDA wetland determinations:

“This certified wetland determination/delineation has been conducted for the purpose of implementing the wetland conservation provisions of the Food Security Act of 1985. This determination/delineation may not be valid for identifying the extent of the COE’s Clean Water Act jurisdiction for this site. If you intend to conduct any activity that constitutes a discharge of dredged or fill material into wetlands or other waters, you should request a jurisdictional determination from the local office of the COE prior to starting the work.”

# Food, Conservation, and Energy Act of 2008

- Good Faith determination has to be reviewed by the FSA State Executive Director with technical concurrence by the NRCS State Conservationist. These responsibilities can be delegated to the FSA District Director and the NRCS Area Conservationist.

# National Food Security Act Manual (NFSAM)

- Contains general conservation compliance policy; and parts specific for Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC).
- Certified determinations will be made in response to:

# FSA Form AD-1026

<p>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:</p> <p>A Create new drainage systems, or conduct land leveling, filling, dredging, land clearing, excavation, or stump removal that has <b>NOT</b> been evaluated by NRCS? <i>If "YES", indicate year(s):</i> _____</p>		
<p>B Improve or modify an existing drainage system that has <b>NOT</b> been evaluated by NRCS? <i>If "YES", indicate year(s):</i> _____</p>		
<p>C Maintain an existing drainage system that has <b>NOT</b> been evaluated by NRCS? <i>If "YES", indicate the year(s):</i> _____</p> <p><i>Note: Maintenance 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.</i></p>		
<p>11 If YES to Items 5, 10A and/or 10B or 10C enter the following for the land the answer applies to:</p>		
<p>A Farm and/or tract/field number: _____</p>		
<p>B Activity: _____</p>		
<p>C Current land use (specify crops): _____</p>		
<p>D County: _____</p>		

A "YES" answer in Items 5, 9 or 10 authorizes FSA to refer this AD-1026 to NRCS. If you check "YES" to Item 10C, NRCS does not have to conduct a certified wetland determination. (Contact your County FSA Office if you are unsure about the answers to Items 5, 9 and 10.)

# NRCS Form CPA-38

## NRCS-CPA-38 Request for Certified Wetland Determination or Delineation

**Request for Certified Wetland Determination or Delineation**  
(for use only when the USDA program participant request a certified wetland determination or delineation)

1. OWNER NAME AND ADDRESS:

2. AGENT- (OPERATOR) NAME AND ADDRESS:

1 a. Phone Number:

2 a. Phone Number:

3. Have you previously received a wetland determination or delineation on this tract from the Natural Resources Conservation Service (formerly Soil Conservation Service), or the Corps of Engineers:

YES  NO

4 Location of Property (description):

4 c. Farm No : \_\_\_\_\_ 4 d. Tract No : \_\_\_\_\_


4 e Acres in Tract: \_\_\_\_\_

4 f. Map or aerial photograph with the tract or acres outlined:

4 a. County or Parish: \_\_\_\_\_

4 b. State: \_\_\_\_\_

# FSA Form 569

PART B - TYPE OF DETERMINATION		PART C - TO BE COMPLETED BY NRCS (Check this block if NRCS was refused access to the land to verify compliance).			
FSA Enter a "check" for the type of determination requested		1. Check If Reviewed		2. Field Nos.	3. Acres
		1	HELIC Compliance Determination	<input type="checkbox"/> The field does NOT meet requirements of the HELIC provisions.	<input type="checkbox"/> The field meets the requirements of the HELIC provisions.
2	Verify wetland classification on land that was planted to an agricultural commodity	<input type="checkbox"/> The area identified is a CW.	<input type="checkbox"/> The area identified is NOT a CW.		
3	Determine whether an area is a wetland that was converted after 11/28/90.	<input type="checkbox"/> The area identified is a wetland that was converted after 11/28/90.	<input type="checkbox"/> The area identified is NOT a wetland that was converted after 11/28/90.		
		<b>NRCS Certification:</b> NRCS reviewed the field(s) or area(s) requested for the subject farm that are entered in Part C, Items 2 and 3.			
		4. Signature, NRCS Representative			Date (MM-DD-YYYY)



- NRCS developed Food Security Act Wetland Identification Procedures that utilize methods found in:
  - Part IV of the 1987 COE Wetland Delineation Manual;
  - COE Regional Supplements; and
  - Variances based on statutory and regulatory authorities provided by the Food Security Act, as amended.

- State Offsite Methods are developed by NRCS to supplement the offsite methodology in the Corps Manual.
- State Technical Committees provide recommendations in the adoption process for the State Offsite Methods.

## Wetland determinations are made onsite for the following instances:

- Before withholding any USDA benefits
- When a USDA participant requests an onsite visit
- When there is an appeal

- In response to an FSA-569 or whistleblower complaint
- In conjunction with a compliance status review
- If there is inadequate information to make determination onsite
- When a USDA program participant requests a pre-conversion minimal effect determination

# Landowner is provided the wetland determination via NRCS Form CPA-026

## Section II - Wetlands

Are there hydric soils on this farm?	-
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Fields in this section have had wetland determinations completed. See the Definition of Wetland Label Codes for additional information regarding allowable activities under the wetland conservation provisions of the Food Security Act and/or when wetland determinations are necessary to determine USDA program eligibility.

<u>Field(s)</u>	<u>Wetland Label*</u>	<u>Occurrence Year (CW)**</u>	<u>Acres</u>	<u>Determination Date</u>	<u>Certification Date</u>
	-				
	-				
	-				
	-				
	-				

Upon receipt of a CPA-026,  
the USDA participant is provided appeal  
rights that include:

- Field visit,
- Appeal to the FSA County Office  
Committee,
- Appeal to the NRCS State  
Conservationist,
- Mediation,
- Appeal to the USDA National Appeals  
Division (NAD).

# **Current Wetland Labels, Criteria, Authorized Uses, and Authorized Maintenance**

# Wetlands (W)

Areas that meet all 3 wetland criteria

Wetlands can be farmed if:

- Production is possible as result of a natural condition (drought);
- Water regimes are not manipulated;
- Woody vegetation is not removed; and
- Normal tillage does not fill, level, drain, or otherwise cause conversion.



## Manipulated Wetlands (WX)

Wetlands that are manipulated beyond allowable maintenance if:

- The manipulation was not for the purpose of producing an agricultural commodity; and
- The manipulation did not make the production of an agricultural commodity possible.

# Manipulated Wetlands

- Trees cut with stumps left in place
- Piles of trees or stumps covering an area
- Roads, buildings
- Conversion for orchards, groves, vineyards
- Spring development
- Agricultural waste management facilities



## Artificial Wetlands (AW)

- Non-wetland under natural conditions, but now exhibits wetland characteristics due to the influence of human activities
- Exempt from the WC provisions of the Act

## Non-Wetlands (NW)

- Land that does not meet wetland criteria under normal conditions

## Prior Converted Cropland (PC)

- Conversion occurred before December 23, 1985; an agricultural commodity has been produced at least once before 12/23/85; as of 12/23/85, the area was capable of producing an agricultural commodity; and does not meet FW or FWP criteria.
- No restrictions on maintenance
- Abandonment is not an issue

## Farmed Wetlands (FW)

- Wetlands that were drained, dredged, filled, leveled, or otherwise manipulated and used for producing an agricultural commodity before December 23, 1985, and meet all of the following criteria:

- If the area is not a pothole, playa, or pocosin, is inundated for at least 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years
- If the area is a pothole, playa, or pocosin, is inundated for at least 7 consecutive days, or saturated for at least 14 consecutive days during the growing season in most years



- Production was made possible or enhanced by the manipulation
- The area has not been abandoned

- Farmed Wetland may be maintained to the extent that existed on 12/23/85. Additional hydrologic manipulation after 12/23/85 may result in non-compliance.
- If the participant wants to restore wetland characteristics to an FW, baseline conditions must be documented with NRCS to prevent the area from being labeled abandoned.

## Farmed Wetland Pasture or Hayland (FWP)

- Wetlands that were drained, dredged, filled, leveled, or otherwise manipulated and used for pasture and hayland as of December 23, 1985, and meet all of the following criteria:

- The area is inundated for at least 7 consecutive days during the growing season, or saturated for at least 14 consecutive days during the growing season in most years.
- The area has not been abandoned.

- May be maintained to the extent that existed on 12/23/85. Additional hydrologic manipulation after 12/23/85 may result in non-compliance.
- If the participant wants to restore wetland characteristics to an FWP, baseline conditions must be documented with NRCS to prevent the area from being labeled abandoned.

## Abandonment

- Defined as the cessation for five consecutive years of management or maintenance operations related to the production of agricultural commodities or forage on FWs or FWPs.
- Areas of FW or FWP determined to be abandoned will be labeled Wetland (W).

## An area will not be considered abandoned if:

- It is enrolled in a conservation set-aside program (CRP) or a state or federal wetland restoration program other than USDA perpetual easements; or
- NRCS documented hydrologic and vegetative baseline conditions before active maintenance and management ceased.

## Converted Wetlands (CW or CW + Year)

- An area that was formerly a wetland and meets both of the following criteria:



- After December 23, 1985 has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose or to have the effect of making the production of an agricultural commodity possible; and
- Such production would not have been possible but for such action.

## Converted Wetland Labels

- Wetlands converted after December 23, 1985, but before November 28, 1990 will be labeled Converted Wetland (CW). Persons shall be ineligible for USDA benefits if an agricultural commodity is planted on these areas.
- Wetlands converted after November 28, 1990, will be labeled Converted Wetland plus the year the conversion occurred (CW + year). Persons that convert a wetland after November 28, 1990 shall be ineligible for USDA benefits.

- Wetlands converted after December 23, 1985, that are the result of activity by a county, drainage district, or similar entity will be labeled Converted Wetland (CW). Persons that produce an agricultural commodity or a forage crop for harvest by mechanical means on these areas shall be ineligible for USDA benefits.

# Converted Wetland Technical Error (CWTE)

- Occurs if NRCS makes a wetland determination that is incorrect and results in a person's taking action that would place this person in non-compliance.

- The erroneous information from NRCS must meet the following criteria:
  - Be documented on SCS-CPA-026
  - Have preceded the action
  - Have been directly relied upon by the person in the decision to take the action.
- CWTE can only be approved at the State Level.

- CWTE does not apply to Obvious Wetlands.
- Obvious wetland criteria:
  - Area is continuously inundated or saturated for long periods of time during the growing season to such an extent that access by foot is not feasible.
  - Area that is cropped or have had forage harvested by mechanical means less than 5 out of 10 years because of ponding, flooding, or saturation.

- USDA participants may produce an agricultural commodity on CWTE.
- Drainage systems can be maintained.
- Additional manipulation after the effective date of the CWTE may result in the area being labeled CW + year.
- Scope and effect of hydrologic manipulation should accompany a CWTE label.

## Third Party Conversion Exemption (TP)

- Can be granted if an agricultural commodity is produced on a wetland converted after December 23, 1985, and the conversion was not the result of a scheme or device, and either of the following:



- The wetland is converted by actions of persons unassociated or unaffiliated with the USDA participant, or any of the person's predecessors in interest; or
- The wetland conversion is an indirect effect of an action occurring off the tract, whose purpose is other than to convert that particular wetland.

- FSA is responsible for determining whether the party who converts a wetland is a third party.
- FSA will notify NRCS when a third party exemption is approved.
- Further drainage improvement will jeopardize the person's USDA benefits.

# Minimal Effect Exemption (MW)

- Wetland converted through an action that has a minimal effect on the wetland functions.
- Determined by using calculations from the application of approved wetland functional assessment methodology

## **Minimal Effect Evaluation Pre-Conversion**

- Assess functional level of the wetland prior to the conversion and functional level after the conversion.

## **Minimal Effect Evaluation Post-Conversion**

- Burden is on the person to demonstrate that the effect of the conversion was minimal.

# Mitigation Exemption

## Requirements:

- Must replace the wetland functions and acres lost as a result of a wetland conversion.
- Shall be completed in advance or concurrent with the wetland and/or the production of an agricultural commodity.

- Should occur on lands in the same 8-digit Hydrologic Unit Code (HUC) as the converted wetland.
- May not be funded at the expense of the Federal Government.
- Approved mitigation banks may be used to compensate for converted wetlands.

# Mitigation Easement Requirements

- The person must provide a recorded easement to USDA for the mitigation wetland in all cases except for:
  - When the converted site is restored, or
  - When the mitigation is provided as part of a CWA Section 404 permit.
- The easement will be in effect for the length of time that the converted wetland is in agricultural use, or is not restored to its previous wetland condition.

# Sites Ineligible for Mitigation:

- Land enrolled in:
  - Federal conservation programs (Wetland Reserve Program, Healthy Forests Reserve Program, or Conservation Reserve Program for the duration of the contract.)
- Lands on which Federal funds were used to acquire an easement.
- Sites on which Federal funds are directly responsible for wetland creation, restoration, enhancement, or acquisition



# Good Faith Waivers

USDA may grant a waiver for a WC violation if the USDA participant acted in good faith without intent to violate the provision.

## Eligibility can be regained when:

- Farm Service Agency at the State Level determines good faith, with technical concurrence of the NRCS State Level
- NRCS determines that the person within an agreed to period, not to exceed one year, is implementing all practices in a mitigation plan.

# Wetland Conservation Compliance