USDA-Natural Resources Conservation Service
Office of the Chief
Washington, D.C. 20250

United States Department of the Army
Office of the Assistant Secretary of the Army (Civil Works)
Washington, D.C. 20310-0103

February 25, 2005

MEMORANDUM TO THE FIELD

SUBJECT: Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and Section 404 of the Clean Water Act.

We are pleased to distribute the enclosed Joint Guidance on conducting wetland determinations for the Clean Water Act and the Food Security Act. This guidance provides procedures for use by the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) personnel. This procedure replaces the coordination procedures between COE and NRCS that are outlined in the 1994 Memorandum of Agreement between the Departments of Agriculture, Interior, Army, and the Environmental Protection Agency concerning wetland delineations.

We encourage COE Districts and NRCS State offices to develop local partnerships to provide the most timely and accurate information to the public, and to address other wetland issues. We are strongly committed to protecting wetlands, and this guidance will allow us to do that while ensuring that Federal wetland programs are administered in a manner that minimizes their impacts on affected landowners.

Please feel free to call your respective Headquarters wetlands and regulatory program contacts with any questions.

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Attachment

JOINT GUIDANCE FROM THE NATURAL RESOURCES CONSERVATION SERVICE (NRCS) AND THE ARMY CORPS OF ENGINEERS (COE) CONCERNING WETLAND DETERMINATIONS FOR THE CLEAN WATER ACT AND THE FOOD SECURITY ACT OF 1985

I. INTRODUCTION

On January 6, 1994, the Departments of Agriculture (USDA), the Interior, the Army, and the Environmental Protection Agency entered into a Memorandum of Agreement (MOA), concerning the delineation of wetlands for the purposes of Section 404 of the Clean Water Act (CWA) and Subtitle C of the Food Security Act (FSA). The MOA was developed to streamline the wetland delineation process on agricultural lands, to promote consistency between CWA and FSA, and to provide predictability and simplification for USDA program participants. In January 2005, the Department of the Army and the Department of Agriculture withdrew from the MOA.

This joint guidance reaffirms our commitment to ensuring that Federal wetlands programs are administered in a manner that minimizes the impacts on affected landowners consistent with the important goal of protecting wetlands. We will continue to strive to minimize duplication between the FSA Wetland Conservation Provisions, which are referred to as 'Swampbuster,' and the CWA Section 404 Program, while recognizing the inherent differences in the purpose and statutory language of those laws.

Because of the differences now existing between CWA and FSA on the jurisdictional status of certain wetlands (e.g., prior converted or isolated wetlands may be regulated by one agency but not the other), it is frequently impossible for one lead agency to make determinations that are valid for the administration of both laws. The following guidance will apply to cases where sufficient overlap exists to enable the wetland delineation made by one agency to be accepted for determining the jurisdiction of the other.

II. DEFINITIONS

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

Agricultural use refers to open land planted to an agricultural crop, used for the production of food or fiber, used for haying or grazing, left idle per USDA programs, or diverted from crop production to an approved cultural practice that prevents erosion or other degradation.

Approved jurisdictional determination means a COE document stating the presence or absence of waters of the United States on a parcel, or a written statement and map identifying the limits of waters of the United States on a parcel. Approved jurisdictional determination is clearly

designated appealable actions, and will include a basis of jurisdictional determination with the document.

Certified wetland determination means a wetland determination made by the Natural Resources Conservation Service (NRCS) that is of sufficient quality to make a determination of ineligibility for program benefits under the Food Security Act of 1985.

Jurisdictional determination (JD) means a written COE determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344), or a written determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq.). Additionally, the term includes a written reverification of expired JDs and a written reverification of JDs where new information has become available that may affect the previously written determination. For example, such geographic JDs may include, but are not limited to, one or more of the following determinations: the presence or absence of wetlands; the location(s) of the wetland boundary, ordinary high water mark, mean high water mark, and/or high tide line; interstate commerce nexus for isolated waters; and adjacency of wetlands to other waters of the United States. All JDs will be in writing and will be identified as either preliminary or approved. JDs do not include determinations that a particular activity requires a DA permit.

Preliminary Jurisdictional Determinations are written indications that there may be waters of the United States on a parcel, or indications of the approximate location(s) of waters of the United States on a parcel. Preliminary JDs are advisory in nature and may not be appealed. Preliminary JDs include compliance orders that have an implicit JD, but no approved JD.

III. PROCEDURES

A. Wetland Determinations and Delineations:

1. NRCS Responsibility

(a) 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 FSA, for the purpose of, or to have the effect of making possible the production of an agricultural commodity. This includes alteration of the land necessary to enable or maintain agricultural production (e.g., ditching and mechanized land clearing). This does not include new or ongoing silvicultural activities or other activities undertaken for a purpose that does not make production of an agricultural commodity possible. Persons who intend to become participants in USDA programs must submit USDA Form AD-1026, *Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification* to the Farm Service Agency.

(b) NRCS will inform landowners that wetland determinations performed by NRCS may not be valid for CWA jurisdiction and permitting requirements. NRCS will include the following language in all written wetland determinations provided to the

landowner: "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."

(c) This guidance pertains to compliance with the Food Security Act for USDA program participants. Policy concerning NRCS technical and financial assistance and the protection of wetlands is located in the NRCS General Manual at Title 190, Part 410.26, and is not applicable to the joint guidance. States are encouraged to work with the applicable COE Districts to develop guidance for wetland delineations made for other purposes.

2. COE Responsibility

(a) Wetland determinations solely for CWA purposes, including determinations on forest lands.

(b) Determining the geographic scope of COE jurisdiction over other waters, besides wetlands, located on agricultural land (e.g., rivers, streams, lakes, artificial waters, channelized waters, ditches, etc).

(c) COE will inform the landowner, or person requesting a jurisdictional determination, that wetland determinations performed by COE on land which the landowner or requesting person intends to convert for agricultural production, may not be valid for FSA determinations. COE will include the following language in all written wetland determinations: "This delineation/determination has been conducted to identify the limits of COE's Clean Water Act jurisdiction for the particular site identified in this request. This delineation/determination may not be valid for the wetland conservation provisions of the Food Security Act of 1985. If you or your tenant are USDA program participants, or anticipate participation in USDA programs, you should request a certified wetland determination from the local office of the Natural Resources Conservation Service, prior to starting work."

3. Coinciding Responsibilities. In cases where both agencies need to make separate determinations of the extent of wetlands or waters on a site, the agencies will promptly consult with each other and attempt to conduct joint onsite determinations, or provide both determinations in the same time frame so that a landowner receives determinations that cover all waters on the site. When this cannot be accomplished in a timely manner, each agency will advise the person receiving its determination that the determination does not apply for the other agency or include the extent of that agency's jurisdiction.

4. Reliance on Responsible Agency's Wetland Determinations. To the maximum extent permissible by current statute and regulation, NRCS and COE will rely on each other's wetland determinations. If there are areas on the site that are not included in the responsible agency's delineation, yet may be regulated by the other agency (e.g., isolated wetlands, abandoned prior-converted cropland or other waters), the responsible agency will inform the landowner in writing and the other agency (to the extent allowed by law) that additional areas on the site may also be under Federal jurisdiction.

5. Prior-Converted Cropland. Prior-converted cropland (PC) is identified for the purpose of implementing the FSA, and refers to wetlands that were converted from a non-agricultural use to cropland prior to December 23, 1985. While a PC area may meet the wetland hydrology criterion, production of an agricultural commodity or maintenance or improvement of drainage systems on the PC area, is exempt from the swampbuster provisions. A certified PC determination made by NRCS remains valid as long as the area is devoted to an agricultural use. If the land changes to a non-agricultural use, the PC determination is no longer applicable and a new wetland determination is required for CWA purposes. Specific guidance will be provided by the Corps in the near future addressing how the Corps will treat PC designations for land that changes from agricultural to non-agricultural use.

6. Expiration of Wetland Determinations. Certified wetland determinations made by NRCS remain valid for swampbuster purposes as long as the land is devoted to agricultural use or until such time as the person affected by it requests review of the certification. A certified wetland determination made by NRCS that is determined valid for CWA purposes by COE will be effective for CWA purposes for a period of five years from the date it is final, in accordance with COE Regulatory Guidance Letter 94-01, unless new information warrants its revision before the expiration date.

B. Enforcement. Per the Food Security Act, USDA is required to make onsite determinations of noncompliance prior to withholding benefits from a landowner. In addition, the activities that result in a violation of the CWA and swampbuster may differ (e.g., per the CWA, a violation involves an unauthorized and non-exempt discharge of dredged or fill material into waters of the U.S. regardless of the purpose, whereas a swampbuster violation occurs only if the conversion is for the purpose of or makes possible the production of an agricultural commodity). Therefore, potential enforcement and/or compliance cases must be independently evaluated by each agency. The agencies will, however, coordinate their site visits as much as possible to minimize delay and inconvenience to the landowner and will attempt to make both determinations concurrently. Each agency will make a reasonable effort to inform the other agency of any significant actions taken to resolve a noncompliance or violation. The agencies will also explicitly state in any written correspondence to the landowner that actions taken to resolve a violation or noncompliance for that agency may not resolve the violation or noncompliance for the other agency.

C. Local Agreements. NRCS State offices and COE District offices are encouraged, in coordination with and approval from the Agencies' Headquarters, to develop local agreements to further refine these procedures, define Federal agency lead roles for wetland determinations that differ from those above to the extent practicable, or address other concerns or interests that will improve service to the public. Such local agreements shall seek to provide landowners with a single point of Federal contact and shall provide for technically accurate, consistent and timely determinations.

D. Methods of Conducting Wetland Determinations.

1. On-Site Determinations and Documentation. In most cases, wetland determinations will require an on-site assessment. Where available, data collected off-site, such as relevant satellite and low-altitude photography, will be used to supplement on-site methods in accordance with jointly approved mapping conventions. In all cases, the data and analyses used in the wetland determination will be documented sufficiently to demonstrate clearly the basis for the determination and the boundaries of the wetland, both for the person who requested the determination and to provide for interagency review, if appropriate.

2. The agencies will use the appropriate procedures in the current National Food Security Act Manual or the current COE or Federal wetland delineation manual applicable to the region, including current national guidance, to make wetland determinations.

E. Notification. Landowners will be notified in writing of all final wetland determinations. The written wetland determination will include the language provided in Part III. A. (1) and (2), above.

F. Appeals and/or Litigation: Wetland determinations conducted for FSA purposes may be appealed through the USDA appeals process. When an appeal or litigation results in a change to a wetland determination prepared by NRCS, NRCS will so notify the local COE District, and shall advise the landowner in writing that changes in the wetland determination resulting from the appeal or litigation are not valid for CWA purposes until accepted by COE. COE will determine whether the change in wetland status is valid for CWA purposes and advise the landowner and NRCS in writing of their conclusion. For the purposes of the CWA and COE Administrative Appeals Regulations, NRCS certified wetland determinations on agricultural lands, where COE has not verified the wetland boundary onsite, will be considered Preliminary Jurisdictional Determinations, as defined in 33 CFR §331.2.

G. Training. The agencies agree to continue to provide joint training opportunities for their field personnel involved in wetland determinations and delineations. This will include training in the wetland delineation methods of the National Food Security Act Manual, the current COE or Federal wetland delineation manual, wetland plant identification, hydrology tools for wetland delineation, and hydric soils identification.

H. Technical Assistance. The agencies agree to continue to provide appropriate technical assistance for all field personnel involved in wetland determinations and delineations.

IV. DISPUTE RESOLUTION

The agencies will make every reasonable effort to resolve any concerns or disputes related to these procedures at the local or regional level. Issues that cannot be resolved at the local or regional level, however, should be elevated to the appropriate headquarters office by the NRCS State Conservationist or COE District Engineer.

V. GENERAL

A. The policy and procedures contained within this guidance do not create any rights, either in substance or procedure, that are enforceable by any party. Deviation or variance from the administrative procedures included in this guidance will not constitute a defense for violators or others concerned with any CWA enforcement action.

B. As noted above, nothing in this guidance is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of either the Corps or NRCS

C. Nothing in this guidance is intended, in any way, to affect the authority of a State or tribe to delineate or regulate wetlands pursuant to an approved Section 402 or Section 404 program. States and Tribes are encouraged to develop similar agreements for their programs to ensure clear and reliable determinations for both CWA and Swampbuster purposes.

D. Nothing in this guidance will be construed as indicating a financial commitment by NRCS or COE for the expenditure of funds except as authorized in specific appropriations.

E. Duration. This guidance remains effective unless revised or rescinded by the Corps or NRCS, upon written notice to the other agency.