SUBJECT: ECS — Conservation Compliance — Agency Policy of the Certification Status of Wetland Determinations

TO: NRCS State Conservationists and Directors, Pacific Islands and Caribbean Areas

ACTION REQUIRED BY FIELD STAFF IMPLEMENTING WETLAND COMPLIANCE

Background:
The Food Security Act of 1985, as amended, requires NRCS to delineate, determine, and certify wetlands located on land on a farm or ranch subject to the wetland conservation (WC) provisions in order to establish a producer’s eligibility for certain USDA program benefits. Wetland certification provides USDA program participants certainty with respect to the areas on their operations that are subject to the WC provisions. This memo announces a revision that clarifies existing agency policy for use in evaluating the certification status of previously issued wetland determinations to Title 180, National Food Security Act Manual (NFSAM), Part 514, Subpart A. This memo also provides background information to NRCS personnel concerning various aspects of wetland certification under Title XII of the Food Security Act of 1985, as amended (the 1985 Act).

Certification of Wetland Determinations under the 1985 Act
Beginning in the late 1980s upon enactment of the 1985 Act, NRCS completed and distributed wetland determinations and maps to producers. NRCS based these original determinations on the best technology and reference data available at the time they were produced. Wetlands identified on these maps are commonly referred to as “inventories” or “official” wetland determinations, but are not necessarily “certified.” Wetland certification did not exist as part of the WC provisions until enactment of the Food, Agriculture, Conservation, and Trade Act of 1990 (the 1990 amendments).

In particular, the 1990 amendments required the Secretary to certify wetland delineation maps as “sufficient for the purpose of making determinations of ineligibility for program benefits” and to provide a producer an opportunity to appeal such determination prior to making such certification final. On April 23, 1991, USDA issued regulations concerning the 1990 Act, identifying at 7 CFR Section 12.30(c) (1991) the following:

“Notification of the wetland determination, a copy of the wetland delineation and the SCS appeal procedures shall be provided to each person who completes a Form AD-1026. The wetland determination and wetland delineation shall be certified as final by the SCS official 45 days after providing the person notice or, if appeal is filed with SCS, after a final appeal decision is made by SCS.”
Shortly thereafter in June 1991, a revised SCS-CPA-026 form was put in use that included a signed certification statement and appeal rights to the producer were provided on the back side of the "Person Copy" of a 4-part carbon-pack form.

Certification of wetland determinations was further refined by the amendments to the WC provisions made by the Federal Agriculture Improvement and Reform Act of 1996 (the 1996 amendments). While the 1990 amendments had anticipated that the agency would periodically update certified wetland determinations, the 1996 amendments required that certified wetland determinations would remain in effect except for very limited circumstances. Pursuant to the 1996 amendments, USDA issued revised regulations at 7 CFR Part 12 that specified all wetland determinations made after July 3, 1996, will be considered certified, but that any determinations made prior to that date would be subject to the regulations in place at the time of the determination. No further amendments have been made to the WC provisions with respect to the certification of wetland determinations.

Considerable confusion has been added to the certification issue due to the memorandum of agreement (MOA) that existed from January of 1994 until February of 2005 between the Departments of the Army, Agriculture, and the Interior, and the Environmental Protection Agency. This agreement specified the manner in which wetland determinations made by USDA under the Food Security Act (FSA) could be relied upon for purposes of section 404 of the Clean Water Act (CWA). For the purposes of the agreement, NRCS developed policies that detailed how previously conducted wetland determinations could be deemed acceptable for both the CWA and FSA. After the MOA was dissolved in 2005, NRCS modified policies to remove the criteria that was used to evaluate previously conducted wetland determinations.

The National Food Security Act Manual (NFSAM)

From 2010 until January of 2017, the policy has been that determinations conducted prior to July 3, 1996, “are considered certified if they met the procedural (appeal rights) and quality mandates as provided in 7 CFR Section 12.” However, no specific criteria to evaluate appeal rights or quality has been provided until now. Therefore, this policy is further clarified and affirmed with this update.

Current NRCS procedures for certification of wetland determinations are found in the National Food Security Act Manual (NFSAM) and are attached. In summary, the NFSAM identifies the following:

- Determinations made after July 3, 1996, are certified as defined in the July 3, 1996, regulation.
- Determinations made between November 28, 1990, and July 3, 1996, are certified as defined in the April 23, 1991, regulation, provided that they met the procedural (appeal rights) and quality standard mandates as provided in 7 CFR Part 12. In particular, the quality standard requires that the map document must be legible to the extent that the location of designated wetlands in relation to other ground features can be determined. The determination must also have been provided with a signed certification statement by a USDA official, and have been provided on the June 1991 version of the NRCS-CPA-026 form that provided appeal rights.
• Determinations made before November 28, 1990, are not certified unless they had been subsequently determined certified under the certification criteria post-1990, and provided to the person with a certification statement and appeal rights.

• Where more than one certified determination has been issued for the same land area, NRCS recognizes the most recent certified determination for which appeal rights have been exhausted as the certified wetland determination for the affected land area. However, when conducting an evaluation of past potential noncompliance, consistent with a person’s right to rely upon a prior wetland certification, the evaluation of potential noncompliance will be completed using the certified wetland determination in place at the time the potential noncompliance activity took place.

NRCS believes the information in this memo and the detailed certification criteria will improve transparency and increase consistency in the implementation of the WC provisions.

Questions on this information should be directed to Jason Outlaw, National Wetland and HEL Compliance Specialist.

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