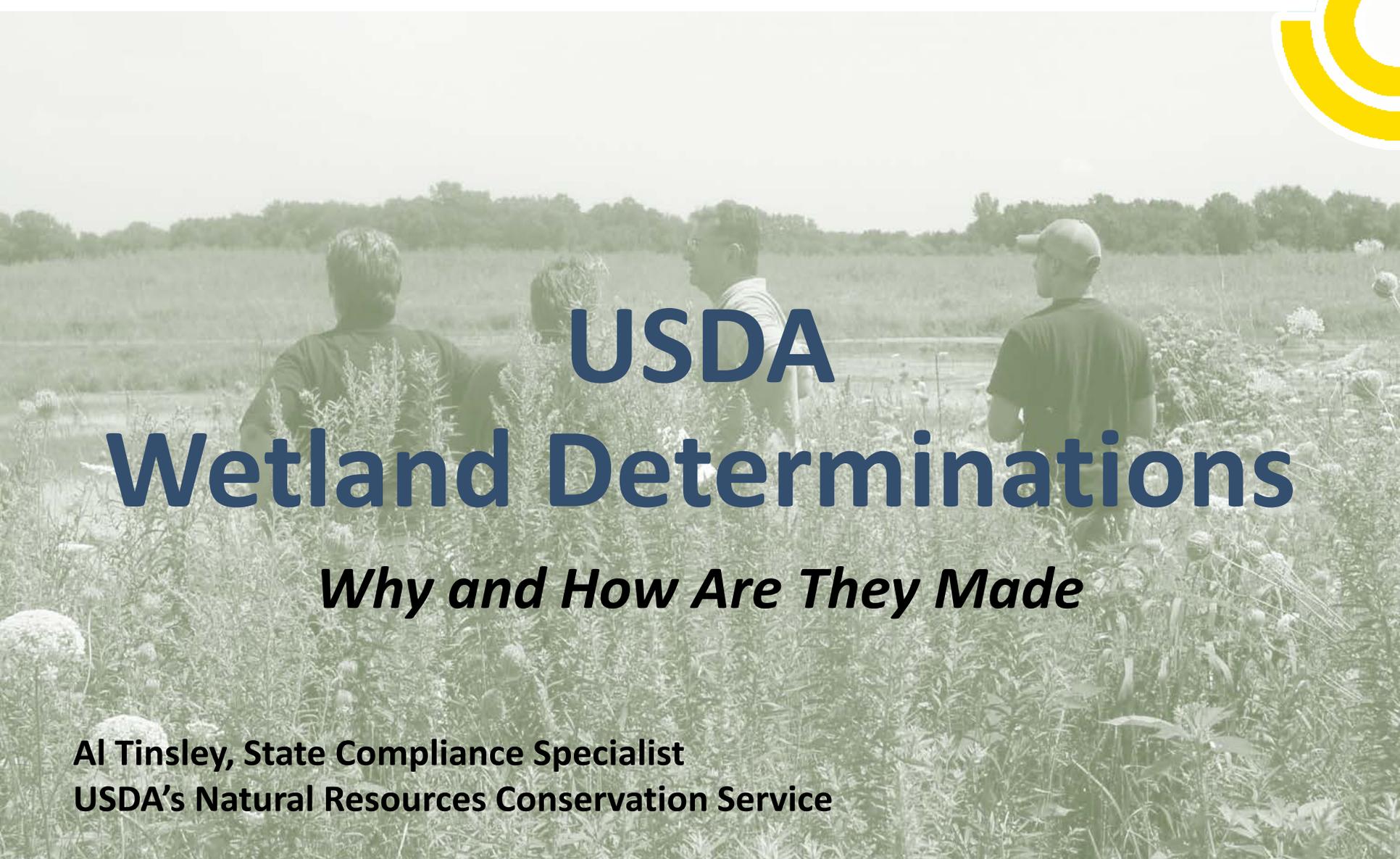




United States Department of Agriculture

A background image showing four people standing in a field of tall grasses and wildflowers, looking towards the horizon. The image is semi-transparent, allowing the text to be overlaid.

USDA Wetland Determinations

Why and How Are They Made

**Al Tinsley, State Compliance Specialist
USDA's Natural Resources Conservation Service**

As with anything the government does, it is important to understand the justification for the action, the role of Congress, how the process, works, and the ability to appeal against an action with which you disagree

Is Agriculture Becoming Extinct?



The screenshot shows a search interface with a sidebar on the left containing options: New, Open, Save, Save As, Save as Adobe PDF, Print, and Share. The main search bar contains the word "Corn" and a magnifying glass icon. A red circle highlights the word "Corn" in the search bar, and a red arrow points from it to a search result card. The search result card is titled "Triceratops Herds" and features an image of three Triceratops dinosaurs. The card includes a "Food Description" section with text: "The most recent fossilized discoveries suggest that Triceratops congregated and foraged in small groups, especially as juveniles, perhaps with their herds. There's little evidence to show they feed in large herds." Below the image, the text "Triceratops - The three horned d..." is visible. A red exclamation mark is placed to the right of the search result card.

An interesting note on the role of agriculture in our society. In looking for a PowerPoint template to use for this presentation, I could find none, even when searching using common words associated with agriculture. The one exception was the word “corn”, which brought up a picture of a triceratops. Is agriculture becoming extinct or were Triceratops the first species to discover the value of field corn?

Though it's a mouthful, we use the term "1985 Food Security Act, as amended" because the wetland conservation provisions were first included in an agricultural farm bill called the 1985 Food Security Act and then amendments have been made in each subsequent Farm Bill that is typically passed every five years.

Fun fact - Congress did provide what was called cost-share for farmers installing (back then) clay tile systems up through the early 1980's. If you think about it, Congress and USDA changed course pretty quickly as the science on the value of wetlands became more clear.

The Food Security Act is Different from the Clean Water Act

- The Clean Water Act regulates the ecological integrity of wetlands connected to other waters of the United states
- Enforcement mechanism is judicial enforcement of administrative orders
- Farmers can be regulated just like anybody else wanting to do something in a regulated wetland
- The Wetland Conservation Provisions are used to determine if persons are eligible to participate in USDA programs.
- Enforcement mechanism is ineligibility to participate and returning any financial support received after the violation occurred.
- Program participants are affected only if they have wetlands that were in place on 12/23/85.



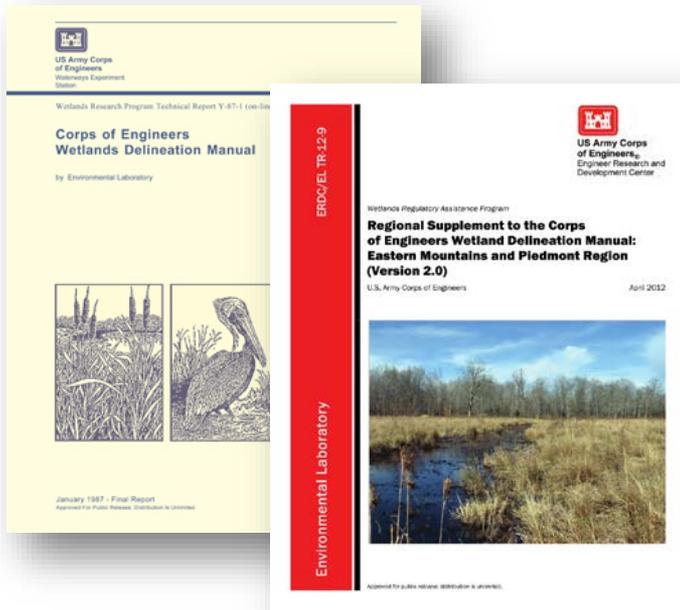
**US Army Corps
of Engineers®**



United States Department of Agriculture

NRCS is actually prevented by legislation (Sec. 1619 of the 2008 Farm Bill) from providing wetland determinations, and the data used to make them, with any other agency or person unless authorized by the person. One of the downsides of having Congress create two different kind of wetland “protection” programs is that our agencies don’t always agree on whether a wetland is affected by both agency’s programs.

The 1985 FSA does not protect the same wetlands as the CWA



A Clean Water Act wetland is identified using the 1987 USACE Wetlands Delineation Manual and Regional Supplements

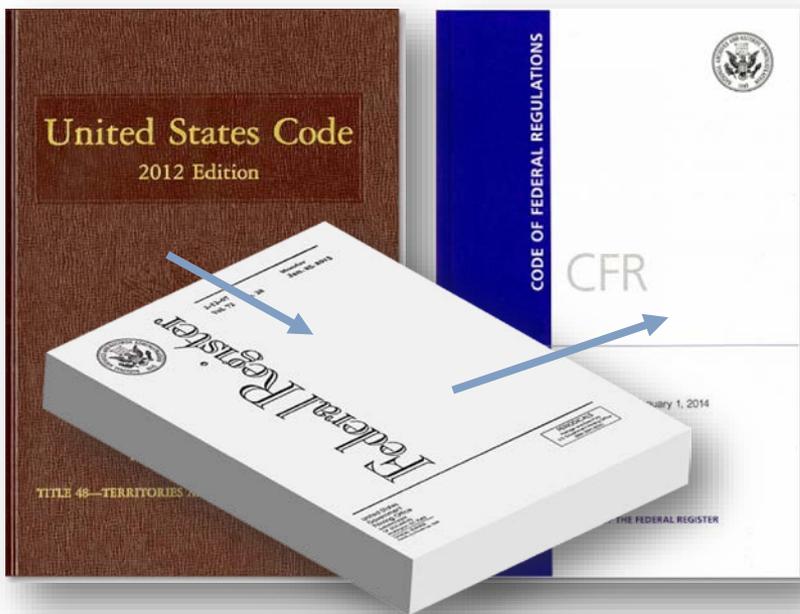
USDA uses the National Food Security Act Manual which incorporates the 2019 Wetland Identification Procedure. Parts of the USACE manuals are included in the procedure.



The NRCS National Food Security Act Manual, is used as the day-to-day interpretation of the Code of Federal Regulations. Both the Code and the manual are submitted into the Federal Register for public comment. Congress has passed specific laws that require NRCS to make use of definitions and procedures that do not coincide with what EPA and USACE have developed for the Clean water Act so NRCS cannot just simply use their manuals.



What the 1985 Food Security Act, As Amended, is About:



7CFR12.1“(a) Scope. This part sets forth the terms and conditions under which a person . . . plants an agricultural commodity on a converted wetland, or converts a wetland shall be determined to be ineligible for certain benefits provided by the United States Department of Agriculture (USDA) . . .”

“(b) Purpose. The purpose of the provisions of this part are to remove certain incentives for persons to produce agricultural commodities on highly erodible land or converted wetland . . .”

The Code of Federal Regulations is the orderly arrangement of all the rules and regulations published in the Federal Register after an Act of Congress is made Law.



The Food Security Act actually starts by stating that all wetland conversions (past, present , and future) make a person ineligible to participate unless they can qualify for one of the exemptions. The 1985 Food Security Act is all about not making wetlands suitable for crop production in an improper manner.



7CFR12.2 Definitions

A wetland determination may include the following types of wetland:

- (1) Artificial wetland
- (2) Commenced-conversion wetland
- (3) Converted wetland . . .
- (4) Farmed wetland . . .
- (5) Farmed-wetland pasture . . .
- (6) Not-inventoried land . . .
- (7) Non-wetland . . .
- (8) Prior-converted cropland . . .
- (9) Wetland . . .

7CFR12.5(b) Exemptions

- (1)(i)(ii) a prior-converted cropland
- (iii) Farmed wetland or pastures
- (iv) for non-commodity crop production uses
- (v) minimal effect actions
- (vi) Clean Water Act permits issued by USACE
- (vii)(A) An artificial wetland
- (B) Wet area created by water delivery systems
- (C) Irrigation ditches in non-wetlands
- (D) Third parties and governmental entities
- (2) Commenced conversion wetlands
- (3) farmed under natural conditions
- (4) Mitigation
- (5) Good faith violations
- (6) Reliance upon NRCS wetland determination

The 1985 Food Security Act, as amended, provides very specific definitions and identification criteria for nine different kinds of wetlands. These nine wetlands are listed again as exemptions in addition to an additional five exemptions for 14 in total.

NRCS is required to make use of any applicable exemption, whether the producer asks for it or not.

The most important exemptions are these labels . . .



PC Prior Converted cropland exemption that allows wetland converted before 12/23/85 to remain drained and in cropland use.

FW Wetlands in fields or pastures that were partially drained before 12/23/85 can remain so drained unless they are abandoned to non-agricultural use for five consecutive years.

FWP

Wetlands that NRCS erroneously label as an exemption cannot be changed back to a wetland label. Call it the “exemption” exemption.



You get a
“I followed the rules”
 card!

NRCS will change a wetland label to a non-wetland label if an error is made or new information is submitted. NRCS cannot change a non-wetland label to a wetland because Congress requires them to use a certification process that cannot be reversed except for changing wetland determination to non-wetland determinations.

So how do we know that a wetland is there?



This form is available electronically. (See Page 2 for Priority Act and Paperwork Reduction Act Statements)

AD-1026 (10-30-14)

U.S. DEPARTMENT OF AGRICULTURE
Farm Services Agency

HIGHLY ERODIBLE LAND CONSERVATION (HELIC) AND WETLAND CONSERVATION (WC) CERTIFICATION

Read attached AD-1026 Appendix before completing form.

PART A - BASIC INFORMATION

1. Name of Producer _____ 2. Tax Identification Number (Last 4 digits) _____ 3. Crop Year _____

4. Names of all other persons with farming interests. Enter Name, if applicable _____

All other persons with farming interests must also file an AD-1026. (See Item 7 in the Appendix for a definition of an affiliated person.)

5. Check one of these boxes if the assessment applies; otherwise continue to Part E.

A. The producer in Part A does not have interest in land devoted to agriculture. (Examples include late harvesters who plow their lives or another person's land, producers of crops grown in greenhouses, and producers of agriculture AND these producers do not cultivate any agriculture and themselves. **Note:** Do not check this box if the producer raises a crop.)

B. The producer in Part A meets all three of the following:

- does not participate in any USDA program that is subject to HELIC and WC compliance except Federal Crop Insurance, and
- only has interest in land devoted to agriculture which is exclusively used for perennial crops, except sugarcane, and
- has not converted or reseeded after February 1, 2014.

Perennial crops include, but are not limited to, tree fruit, tree nuts, grapes, olives, native pasture and perennial forage. If producer that produces alfalfa should contact the Natural Resources Conservation Service at the nearest USDA Service Center to determine whether such production qualifies as production of agricultural crops.

Note: If either box is checked, and the producer in Part A does not participate in Rural Service Agency (RSA) or Natural Resources Conservation Service (NRCS) programs, the full tax identification number of the producer must be provided, but establishment of database records with FSA is not required. Go to Part D to sign and date.

PART B - HELIC COMPLIANCE QUESTIONS

Indicate "YES" or "NO" in each question.

If you are unsure of whether a HELIC determination, wetland determination, or NRCS evaluation has been completed, contact your local USDA Service Center.

Question	YES	NO
6. Having the crop year entered in Part A or the land of a requested USDA loan, did or will the producer in Part A plant or produce an agricultural commodity (including sugarcane) on land for which an HELIC determination has not been made?		
7. Has anyone performed (since December 31, 1982, or will anyone perform any activities to:		
A. Create new drainage systems, conduct land leveling, filling, dredging, land clearing, or excavation that has NOT been evaluated by NRCS? If "YES," indicate the year(s) _____		
B. Improve or modify an existing drainage system that has NOT been evaluated by NRCS? If "YES," indicate the year(s) _____		
C. Repair an existing drainage system or replacement of the capacity of existing drainage systems, or allow for the construction of wetlands, currents in agricultural production and the distributed management of other areas, as they enter associated drainage system (December 31, 1982). 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 require fewer maintenance or costs.		

Note: If "YES" is checked for item 7C or 7B, then Part C must be completed to determine NRCS or maintain HELIC (CNS) and/or wetland determination on the identified land. If "YES" is checked for item 7C, NRCS also not have to conduct a certified wetland determination.

8. Check one or both boxes, if applicable; otherwise, continue to Part C or E.

A. Check this box only if the producer in Part A has FQI (insured crop insurance and filing this form represents the producer in Part A, including any affiliated person, has been subject to HELIC and WC provisions.

B. Check this box if either of the following applies to the producer and crop year entered in Part A:

- is a tenant on a farm that is subject to compliance with HELIC and WC provisions because the landlord refuses to allow compliance, but all other lands not associated with that tenancy are in compliance. (AD-1026B, "tenant exemption request," must be completed.)
- is a landlord of a farm that shall not be in compliance with HELIC and WC provisions because of a violation by the tenant on that farm, but all other lands not associated with that tenancy are in compliance. (HELIC 1026C, "landlord or landowner exemption request," must be completed.)

PART C - ADDITIONAL INFORMATION

9. If "YES" was checked in item 7 or 8, provide the following information for the land to which the answer applies:

A. Farm and/or tracthead number: _____
If unknown, contact the Farm Services Agency at the nearest USDA Service Center.

B. Activity: _____

C. Current land use (specify crop): _____

D. County: _____

Establishing eligibility under the Wetland Conservation provisions is a self-certifying act using the AD-1026 form required by the Farm Services Agency.

You are certifying that

- your tract has no wetlands
- no conversion activities have been carried out.

Guess what happens if you make a mistake??

SO . . .

If you think you have a wetland where you want to clear or drain or fill-in, request from FSA that NRCS make a determination.

Guess what happens if NRCS makes a mistake??



NRCS only makes a wetland determination when a program participant requests them to make a determination on their tract or when FSA requests NRCS make a determination to identify a possible violation.



DEPENDS ON THE PURPOSE

Any kind of wetland can be converted as long as it is not used for commodity crop production and It is not capable of being used for commodity crop production



Before it was a Farmed Wetland



Afterwards it's duck habitat

USDA may provide financial assistance in converting wetlands into a conservation use if application is made to the program before the conversion takes place. NRCS is not allowed to provide such assistance if a wetland is improperly converted and must be restored or mitigated before program eligibility is regained. Simply put, USDA financial resources cannot be used to restore a violation activity.

What Can a Farmer Do with Their Wetland?



DEPENDS ON THE PURPOSE

Any kind of wetland can be converted as long as it is not used for commodity crop production and It is not capable of being used for commodity crop production



Buildings

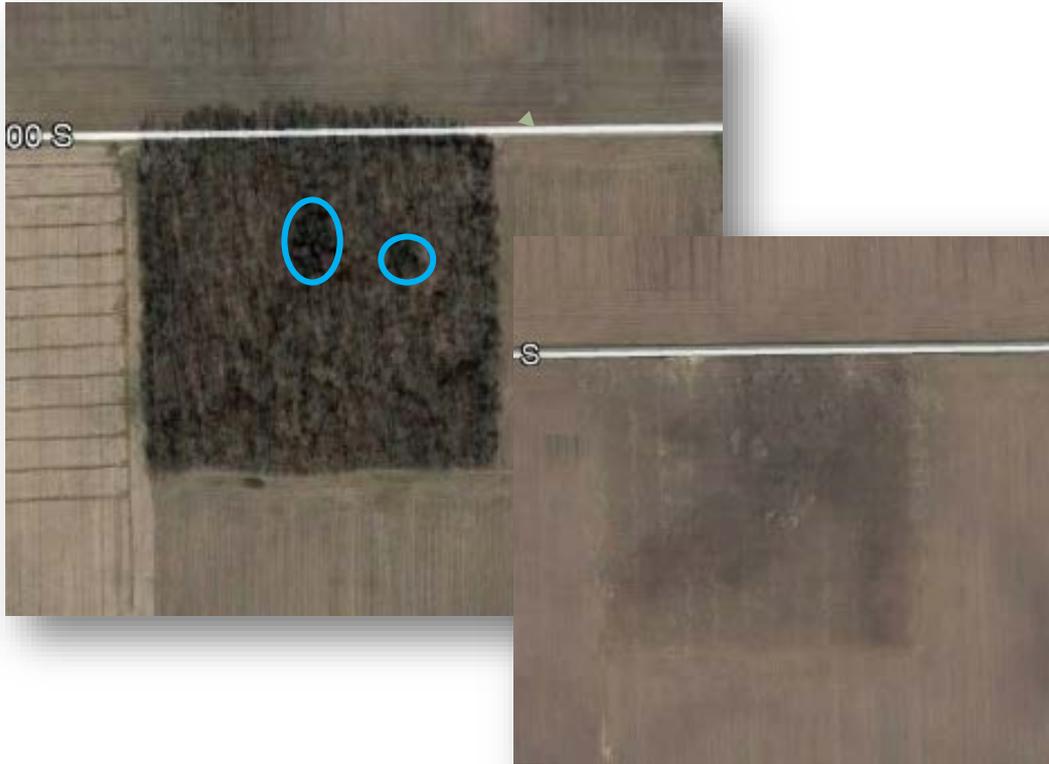


Silviculture, Farm Lanes, and Pivot Tracks

For USDA programs, making a wetland wetter (deeper) or making a wetland drier (fill and a house, a road, replacing the trees) is not a violation as long as no suitable cropland is left behind. But don't forget those Clean Water Act permits!

MITIGATE THE CONVERSION

Most any kind of wetland can be converted for commodity crop production as long as it is replaced with a mitigation wetland



Not to scale!

Do the mitigation before the clearing to avoid the penalty

The right way to do this is to request mitigation from NRCS. The wetland woods will be visited and graded as to what functions and values can be seen in the wetland. Then NRCS will visit the site that the producer has selected to serve as the mitigation site. This site must be cropland or pasture that used to be a wetland. NRCS has to decide if the mitigation site can be successfully restored to those functions and values seen in the existing wetland. USDA will require that the mitigation site be larger than the conversion site if the mitigation site cannot be easily restored to a wetland. The person may appeal if NRCS rejects or enlarges the mitigation site.

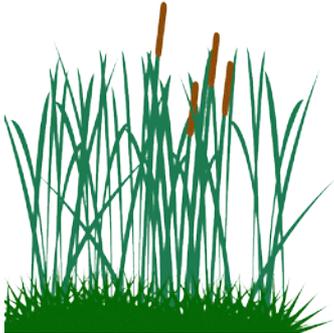


YOU DECIDE



WOODY WETLANDS

- Woody wetlands should stay woody, even if harvested
- Can be planted to a more desirable (smaller) woody species
- Cannot be cleared to make an open area
- Must plant seedlings if stumps rot away



NON-WOODY WETLANDS

- Non-woody wetlands cannot be drained, but can be cropped if it dries out

The total effect of all the activities through time should not convert the wetland.

Your local NRCS office cannot provide advice as to what and how much you can do to your wetland without converting it; there are simply too many activities that are permissible as long as the final result is that it is not capable of being cropped.

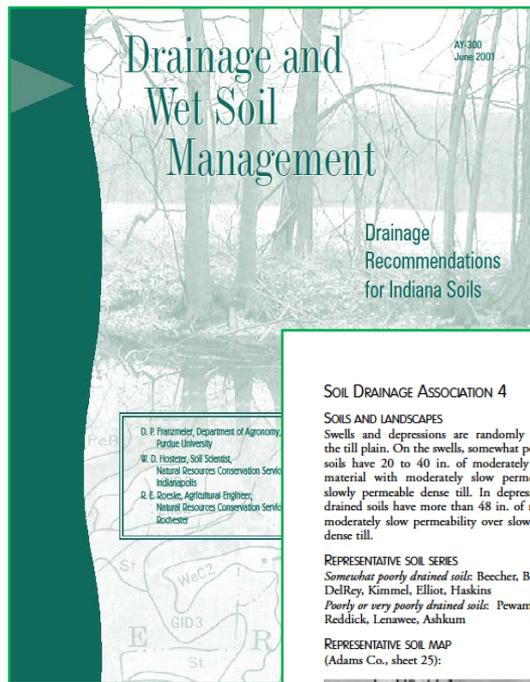
This is very important; a woody wetland that is harvested so that all is left are stumps must return to a woody wetland before the stumps rot away. If the stumps don't sprout or seedlings do not naturally come up, a planting must be done.

NRCS can assist with installing drainage ditches and drainage tiles to avoid draining wetlands

NRCS recognizes Purdue Extension bulletin AY-300, “Drainage and Wet Soil Management – Drainage Recommendations for Indiana Soils” as accepted guidance on installing ditches and tile lines without draining nearby wetlands.

Use the spacing distances in the guide as a “set back” restriction on how far away the installation must be.

NRCS will also accept design plans or documents from drainage contractors that show that the drainage was installed far enough back from the wetland to prevent it from being drained.



SOIL DRAINAGE ASSOCIATION 4

SOILS AND LANDSCAPES

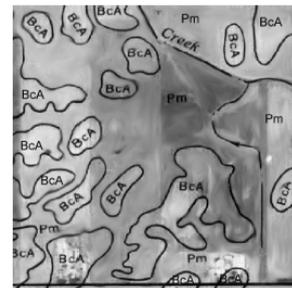
Swells and depressions are randomly arranged on the till plain. On the swells, somewhat poorly drained soils have 20 to 40 in. of moderately fine or fine material with moderately slow permeability over slowly permeable dense till. In depressions, poorly drained soils have more than 48 in. of material with moderately slow permeability over slowly permeable dense till.

REPRESENTATIVE SOIL SERIES

Somewhat poorly drained soils: Beecher, Blount, DelRey, Kimmel, Elliot, Haskins
Poorly or very poorly drained soils: Pewamo, Milford, Reddick, Lenawee, Ashkum

REPRESENTATIVE SOIL MAP

(Adams Co., sheet 25):



Somewhat poorly drained Blount soils (BcA, 0-19% slope) with light-colored surface horizons are on nearly level swells, and dark-colored, poorly drained Pewamo soils (Pm) are in low-lying flats and depressions. In this example Blount occurs as islands in Pewamo, but in other areas the relationship is reversed. The relief within the field for this association varies. In Adams County the slope range for BcA is 0 to 19%. Slopes with these low gradients indicate that the relief within a field is small. The area shown is 160 acres, 1/2 mile by 1/2 mile.

DRAINAGE RECOMMENDATIONS

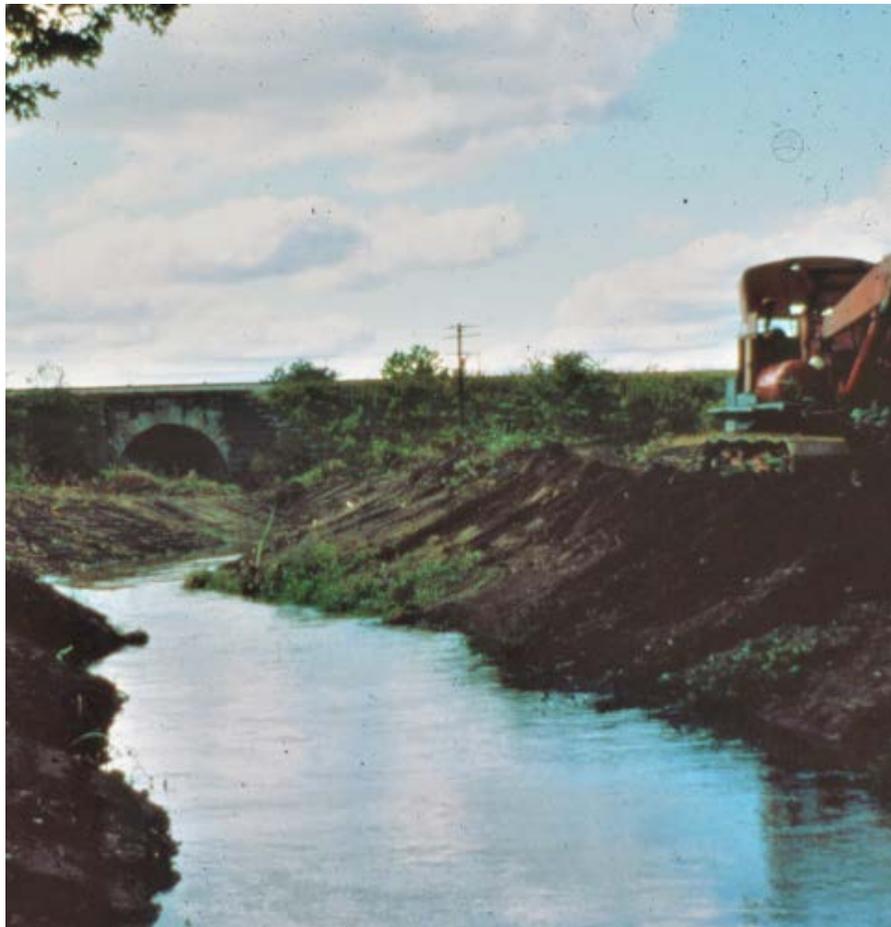
If relief between the surface of the swells and depressions in the field to be drained is less than two ft., one of the parallel systems is often most effective, at a spacing of 40 to 80 ft. If relief is more than two ft., a parallel system is less effective because many of the tile lines would be in slowly permeable dense till, and, therefore, a random system is recommended. The main lines are installed below surface drainageways that follow the depressions. Surface inlets should be installed in the deepest part of the depressions, especially in closed depressions or potholes. Finger lines reach from the mains into the wettest areas of soils on the swells. Minimum tile depth is 36 in. In a few fields, the soils may be deeper than 36 in. to dense till, and the tile can be deeper.

A drainage setback is not needed for a woody wetland. A woody wetland can be drained as long as it is not cleared. A drained woody wetland would be labelled as a Manipulated Wetland (WX) which is not a violation. It can also be harvested but it must grow back up into a woody wetland.



GOVERNMENT UNITS

Do not receive benefits so are not constrained by the 1985 Food Security Act, as amended



This includes:

- a county drainage board, the county surveyor's office, a school, a conservancy district, or a participant working on behalf of a government unit
- Program participants should request a determination completed on any area converted by government unit
- They are not allowed to crop such areas if they are determined to be a wetland
- Permits from the USACE, EPA, IDEM, or IDNR may still be needed

It is the responsibility of the farmer to come into the FSA office to request a determination to see if they can make use of any area that has been cleared of trees or has been drained so well that the site can now be planted. Units of government cannot request wetland determinations as a group project when a ditch is being cleaned up, restored, or even dug out for the first time. All the affected farmers must come in on their own effort.



LANDOWNERS

Non-participating landowners may convert their wetlands as they see fit. However,

- The converted wetland will be identified as a violation
- Any person who crops the site must not be a program participant
- The rest of the farm can be cropped by a participant after a waiver is received from the Farm Service Agency
- The wetland would need to be restored or mitigated before the landowner could later become a participant
- May still need permits from the USACE or IDEM



This is not an actual violation - this is a manipulated wetland

There is no way, under any circumstance, that a farmer who is also a USDA program participant can crop a wetland improperly converted by the landowner. Farmers who help a landowner convert a wetland will become ineligible to participate in USDA programs until the wetland is restored in place or mitigated elsewhere.

This picture is of a manipulated wetland; it has been altered by the removal of woody vegetation but is not yet suited for crop production. This will be a violation if the site is cleaned up, if the stumps are removed, or when the stumps rot away. But no one is penalized if the person who cleared it is not a USDA program participant and it is not cropped by a participant.

Most important slide – The right to appeal

An Act to improve the administration of justice by prescribing fair administrative procedure also known as The Administrative Procedures Act (1946), requires the right of appeal

AN ADVERSE DETERMINATION IS MADE

- That determination can be appealed by requesting a reconsideration from **NRCS – 7CFR614**

THE DETERMINATION IS THEN REVIEWED, BUT IF LEFT AS ADVERSE

- That determination can be appealed by requesting a review by the **Farm Service Agency County Committee and State Committee – 7CFR780**

THAT DETERMINATION IS THEN REVIEWED, BUT IF LEFT AS ADVERSE

- That determination can be appealed by requesting a hearing before the **National Appeals Division – 7CFR11**

THAT DETERMINATION IS THEN REVIEWED, BUT IF LEFT AS ADVERSE

- That determination can be appealed by requesting a **NAD Director Review**

THAT DETERMINATION IS REVIEWED, BUT IF LEFT ADVERSE

- That determination can be taken to **civil court**

NEW INFORMATION REQUIRES **USDA TO START THE PROCESS ALL OVER – 7CFR12. Called a Review of a Certified Determination.**



The right to appeal was established long before there was ever this law that established program eligibility requirements. USDA had to develop appeal rules that met the requirements found in the APA. Does NRCS think that an 8 layer appeal system is overkill? Doesn't matter what NRCS thinks. It is a right established by Congress and it will be used.



United States Department of Agriculture

A background photograph showing four people standing in a field of tall, green plants, possibly cotton. They are looking towards the right side of the frame. The image is semi-transparent, allowing the text to be overlaid.

QUESTIONS??

www.in.nrcs.usda.gov

Al Tinsley, State Compliance Specialist
USDA's Natural Resources Conservation Service

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