

# Module 6: Making a “FSA Wetland” Decision – Step 1 in the FSA Wetland Determination Process

# 2011

In this Model the course participants will be provided with the final process in the wetland identification process – deciding if the site in question is a FSA wetland. The three steps in the FSA wetland determination process are reviewed (wetland identification, assignment of WC label, and determining the size of the FSA wetland type). The delivery of the final product (determination and delineation) will be discussed and the appeals process will be introduced so the course participant will understand the purpose/role of issuance of a Certified Wetland Determination.

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## Module 6- Making a Decision if the Area Under Consideration (“Sampling Unit”) Meets the FSA Wetland Definition.

### Objectives

Upon completion of this module, the student will:

- ❖ Understand that for FSA purposes, the critical decision making level is at the factor -level and the decision at the wetland-level is based rapidly from the decisions rendered at the factors-level. The use of best professional judgment and consideration of normal circumstance is part of the decision-making process at the factor-level, not at the wetland level.
- ❖ Understand that wetland identification decisions (Step 1 of the FSA wetland determination process) are based on current conditions, under normal circumstances and NOT 1985 conditions. The 1985 conditions are sometimes used in the 2<sup>nd</sup> Step – Determination of FSA wetland type (assignment of WC labels).
- ❖ Have an awareness that wetland identification decisions are made at the sampling-unit level (i.e the factor-level), but each sampling-unit might be further subdivided or combined with other sampling units, during the second and third steps in the FSA Wetland Determination process (2<sup>nd</sup> step: assignment of a WC type or label and 3<sup>rd</sup> step: determining the size).
- ❖ Have an awareness of what is meant by a preliminary technical decision, final technical decision, and final USDA technical decision and understand the importance of the concept of a certified wetland determination.

## Key Concepts

- ❖ In an effort to (1) streamline the wetland ID process, (2) assure statutory/regulatory integrity, and (3) facilitate better decision-making; the FSA Procedures may require a higher level of consideration at the factor-level than is provided in the Corps Methods. This consideration (at the diagnostic factor –level) requires that the agency expert consider (1) normal circumstances and (2) the FSA definition for each factor being considered - prior to rendering any decision pertaining to the FSA wetland diagnostic factor.
- ❖ A phrase “certified wetland determination” is a term specific to the FSA and its use provides USDA program participants the assurances that the decision and delineation will not be changed in the future regardless of hydrologic changes within the watershed or onsite (if the site is drained for example). This phrase is not suggestive of a quality mandate, but rather is suggestive of an “administrative decision” based on the law after appeal rights are provided and exhausted.

This module is designed to take 10-15 minutes and does not include required exercises.

## **Learning Concept 6-1: Rendering a decision (determination) if the sampling-unit meets the requirements of a FSA Wetland.**

This Learning Concept is designed to take 5 minutes and does not include required exercises.

This is the point in the process where all data have been collected and analyzed, consideration of normal circumstances (including NEC) has been made at each diagnostic factor-level, and a decision has been rendered for each of the three wetland diagnostic factors. So you might ask: What is left?

What is left is a simple review of the FSA wetland definition.

- ***Land that has a predominance of hydric soils and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances does support, a prevalence of hydrophytic vegetation typically adapted to life in saturated soil conditions.***
- ***For the purposes of this Act, and any other Act, this term shall not include lands in Alaska identified as having a high potential for agricultural development and predominance of permafrost soils.***

**Note:** “and any other Act” – this is the only place in the FSA, where a part of the FSA is expanded to any other federal statute.

Because the Agency Expert has gone to such an extent at the factor level to assure that the FSA definitions for each of the three diagnostic factor levels have or have not been met, the only other process to consider is the Alaska exception. If each of the three FSA wetland diagnostic factors has been affirmed and the site does not meet the Alaska exception, then the sampling-unit is a FSA wetland. If any of the three diagnostic factors were not affirmed, then the sampling unit is not a FSA jurisdictional wetland. It might be a wetland for other purposes, but not for compliance for the WC provisions.

It should be made clear that best professional judgment is restricted to decisions at the factor-level. At the FSA wetland decision-making level, it is either yes or no based exclusively on the findings at the factor-level and consideration of the Alaska exception.

## Learning Concept 6-2: What Now?

This Learning Concept is designed to take 5-10 minutes and does not include required exercises. Links are provided as optional learning opportunities.

Remember in Module 2 that the term *wetland determination* was defined by the Secretary in the rule as:

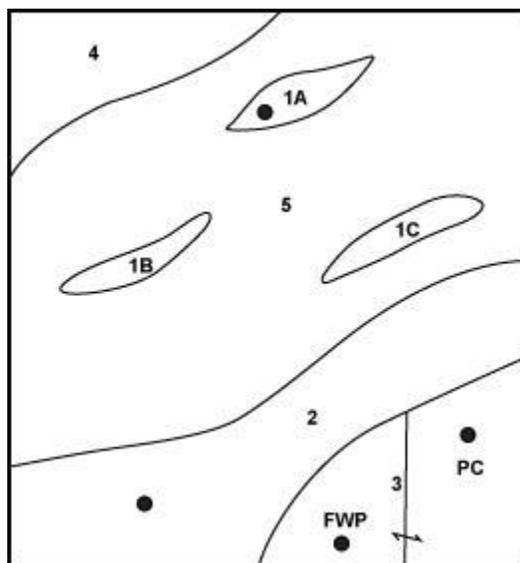
***“A decision regarding whether or not an area is a wetland, including identification of wetland type and size.”***

We discussed in Module 2 that the FSA wetland determination process has three distinct and separate steps.

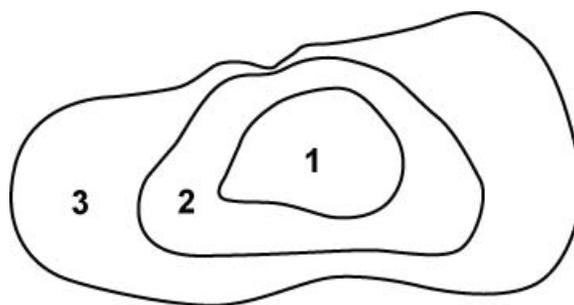
**S** **tep 1:** Wetland identification. You have completed the 1<sup>st</sup> step in the FSA wetland determination process, as you have decided if the sampling unit meets the FSA definition of a wetland.

**S** **tep 2:** Determine the FSA wetland type. Step two is a very critical step in the FSA wetland determination process and requires the consideration of each of the 14 exemptions provided in 12.5(b) of the rule and then the assignment of the appropriate WC labels provided for in the NFSAM. Note that we use “WC labels” not “WC wetland” labels” as some of the WC labels are not wetlands. In Step 1 all decisions were made based on the conditions within the projects sub-unit(s) referred to as sampling-units. In most cases, there are more than one sampling unit for each request. The decision(s) of the boundaries between sampling-units were based on unique physical site characteristics (vegetation, soils, hydrology, landscape position, and disturbance). In Step 2, each sampling-unit might be further subdivided based on an exemption (past landuse), or might be combined with other sampling-units.

Example 1: In the sampling-unit map below (HGM RIVERINE CLASS), if a portion of the field is determined to be a FSA wetland (sampling-unit 3 in the example) and ½ of the area had pre-1985 cropping history and the other ½ was used for hay production or pasture prior to 1985, then the wetland identified as a single sampling unit in Step 1 (sampling unit 3) is subdivided into two units based on past land use. In this example, one portion is determined to be Prior Converted Cropland (PC) and the other determined to be Farmed Wetland Pasture (FWP) (the FWP portion of the field did not have pre-1985 cropping history, but was used as hayland instead).



Example 2: Below is an example of an upland DEPRESSIONAL HGM Class site with three separate sampling units. These depressions result in ring shaped sampling units which may be combined depending on the applicable exemptions. For example, in Step 2, they might combine into one polygon with the same FSA wetland label, two polygons with two different labels, or three separate polygons with three separate wetland labels.



**S**tep 3: Determination of the size of each polygon with a different FSA label. Before measurements of size can be made, a line (boundary) must be identified (delineation) either on the land (and size determined by GPS) or on a graphic representation. There is no current policy on what scale should in this step.

**Note:** The scope of this training stops at Step 1. Course participants need to understand that a large requirement of becoming an agency expert is the understanding of the law (FSA), the regulations (7CFR12), and the policy (NFSAM) as they apply to exemptions and determination of FSA wetland types (assignment of WC labels). Some technical staffs might be listed on the State Roster as having the job approval authority (Level 3) to make a decision on a single factor (e.g. hydric soils) but not have the authority to make a decision on the other two factors or on the appropriate WC labels (exemptions). Such a limitation (only having the authority to help with a portion of Step 1 of the FSA wetland determination process) is identified by the State Conservationist on the State Roster (as having job-approval levels of less than 3). Other individuals might have the experience and knowledge to be granted job approval authorities for all three diagnostic factors and the determination of appropriate exemptions .

Quite obviously, the individuals who can function independently (qualified to make decisions on all diagnostic factors and exemptions) will better facilitate efficient use of NRCS staff time and more efficiently defend a decision than those that have skills and abilities for making only a partial decision. This training course (Phase 1) and Phase 2 are both designed to encourage staffs and states to move towards having individuals on staff with the ability and experience to conduct FSA Wetland Determinations (all three factors and all three steps), rather than taking the piece-meal approach to rendering decisions (single diagnostic factor or team approach). This is particularly important for FSA decisions as each diagnostic factor requires independent consideration in the delineation/determination process.

**Why is this important to me?** NRCS is under constant pressure to increase efficiency in the delivery of conservation programs. It has been demonstrated in those states that have “wetland specialists” that motivated individuals can perform at a very high level of proficiency in their ability to render decisions for each of the three diagnostic factors and render decisions on the FSA wetland type.

FSA wetlands do not function or react to disturbance or climatic changes in three nice clean bubbles (by factor). Each diagnostic factor is heavily influenced by the other two factors. Individuals who understand and are proficient in considering all three factors are more efficient in the entire wetland determination process. At the conservation delivery level, States are encouraged to utilize this training course (and Phase 2) to adopt a more efficient staffing strategy to meet their administrative responsibilities related to the WC provisions. This efficiency can be maximized by moving away from the “team” approach at the conservation program delivery level.

**Wetland Determination and Delineation Map:** Following completion of the three steps, the information is provided to the program participant in the form of a preliminary agency decision (*Preliminary Wetland Determination and Delineation Map*). This preliminary agency decision includes the delineation (line on a map) and determination (WC label and size). Along with the “*Preliminary Agency Wetland Determination and Delineation Map*,” the client is provided their appeal rights as provided in the NRCS Interim Final Appeals Procedures rule (NRCS Appeal Procedures) available at <http://www.nrcs.usda.gov/programs/appeals/>. The following is a very general and brief discussion on appeals. It is not designed as training or guidance, but rather to spark the interest of agency experts. More importantly, the following discussion is needed to

understand the ultimate purpose of this entire process: the development and delivery of a ***Certified Wetland Determination and Delineation Map***.

### **General Discussion on Appeals:**

Depending on the circumstances, a Preliminary Wetland Determination could be considered by the participant to be an “Adverse Technical Decision” on the part of the agency. Any time an “Adverse Technical Decision” is rendered by the agency, appeal rights must be issued to the participant along with the decision (determination). There are two different appeal levels for “Adverse Technical Decisions”: The Agency Level (NRCS) and the Department Level (USDA).

NRCS provides the appeal rights in writing with all options available to the participant – reconsideration or mediation (agency appeals), or going straight to USDA (National Appeals Division - NAD). A participant must appeal within 30 days of the date of the preliminary technical decision/determination. If the participant does not appeal within this timeframe, the determination becomes final (certified).

- ✓ **NRCS Appeal Process (Agency Level Appeal):** At the agency appeal level, the participant is provided with two options: reconsideration or mediation. If the participant selects reconsideration, the agency expert and the participant meet on site to discuss the findings. This is an opportunity for the agency expert to obtain additional information that might not have been available during the original site visit AND to explain the FSA Procedures and how the decision was made. This also provides another opportunity to view the site during different conditions (climatic or disturbance). The participant can waive their agency appeal rights (reconsideration or mediation) and appeal directly to USDA.

If reconsideration or mediation is selected, it is highly recommended that the agency expert provide the FSA Procedures to the client and explain each of the three diagnostic factors and what went into the decision for each factor. Area or zone staff may be requested to assist the agency expert with the reconsideration.

In the agency appeal process (again if selected by the participant), if after further consideration by the agency expert (the individual who made the wetland determination or area/zone staffs) the decision remains adverse, then the NRCS Appeal Procedures rule requires that the agency expert forward the administrative record to the State Conservationist for further consideration and release of the final agency determination (decision). The agency expert (or other area staff) does not provide the final agency decision. It is only released by the State Conservationist.

## *Wetland Identification for FSA Purposes (Foundations to Sound Decision-Making)*

- ✓ USDA Appeal Process (National Appeals Division (NAD)): With the final agency decision, NRCS provides (1) a “*Final Agency Wetland Determination and Delineation Map*”, and (2) USDA Appeal Procedures.

A wetland determination is not “*certified*” until the Department Appeals Procedures is complete (failure of the client to appeal the determination, or a final NAD decision).

The NAD appeal rule can be accessed at

[http://www.nad.usda.gov/lr\\_rules\\_procedures.html](http://www.nad.usda.gov/lr_rules_procedures.html).

The Certified Wetland Determination and delineation map is the final product to the entire wetland determination process. Once certified (end of appeal process), the first step in the wetland determination process (wetland identification) becomes “written in stone” and can only be changed from (1) a request in writing by the participant AND (2) the subsequent agreement that the certified determination was in error or not reflective of current normal circumstances.

Conversely, the FSA wetland type (WC label) is not always fixed. Depending on the original WC label, it can change as a result of inactivity (abandonment of a FW or FWP) or from an action that results in a determination of non-compliance conversion and labeling to CW-year. Prior Converted (PC) would never be change to another WC label.

## **Conclusion**

Each course participant who successfully completed Phase 1 has been presented with the foundations to the FSA Wetland Identification Procedures and should have the knowledge needed to discuss the process with USDA program participants, but not apply the principles. If you desire to become an agency expert, you will need to practice the skills introduced in this course and/or work with local experts (Level 2 or 3 staffs). After you reach the top of Level 1, then it might be advantageous to register for Phase 2: **Wetland Identification for Food Security Act (FSA) Purposes: Phase 2 (Application of the Decision-Making Process)**.

As discussed in the introduction to Phase 1, **Phase 2** is designed for individuals who desire to be granted job approval authority (become agency experts) or to have their authority increased. Phase 2 might be a new course for some, or an “*updated course*” as required by policy (NFSAM) to obtain the job approval authority to make decisions related to the WC provisions. Successful completion of Phase 1 is a pre-requisite to attending Phase 2. But as explained, successful completion of either (or both) Phase 1 and Phase 2, does not qualify you for being granted job approval authority. In addition to training, the State Conservationist will need to be assured that you (through experience while working with others) have demonstrated the proficiency in the application of the FSA Wetland Identification Procedures.