



United States Department of Agriculture

Office of the Secretary  
Washington, D.C. 20250

JUN 19 2017

Mr. Brandon Butler  
Executive Director  
Conservation Federation of Missouri  
728 West Main Street  
Jefferson City, Missouri 65101

Dear Mr. Butler:

Thank you for your letter of April 14, 2017 regarding the results of the Office of Inspector General (OIG) Audit Report 10601-0003-31 titled "NRCS: Wetland Conservation in the Prairie Pothole Region." I apologize for the delayed response.

This report identified inconsistent implementation of existing wetlands compliance policy as a major concern in the Prairie Pothole Region. The focus of the report is the certification status of wetland determinations previously issued by the Soil Conservation Service of the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS). NRCS national policy on certification previously stated that, "Determinations made 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" (National Food Security Act Manual, Fifth Edition, November 2010).

NRCS addressed the report's findings by issuing clarifications to the policy regarding the certification status of previously issued wetland determinations (National Food Security Act Manual, Fifth Edition, Amendment 4, January 2017). These clarifications include additional criteria and supplemental guidance for the evaluation of previously issued determinations. This additional NRCS policy clarification, which assumes the underlying regulatory and policy requirements are also met, can be summarized as follows:

- Determinations made after July 3, 1996, certified as defined in the July 3, 1996, regulation. This is consistent with previous policy (National Food Security Act Manual, Fifth Edition, November 2010).
- Determinations made between November 28, 1990, and July 3, 1996, are certified as defined in the April 23, 1991, regulation provided the procedural and quality mandates contained in 7 C.F.R. section 12 are also met. This is consistent with the previous policy; however, additional quality criteria have been added which 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.
- Determinations made before November 28, 1990, are not certified. Previous policy made no distinction between pre- and post-1990 determinations.

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Detailed information on the Agency's response to this audit is contained in the enclosure. This response is also posted, along with the OIG audit report you referenced, on the OIG Web site at <https://www.usda.gov/oig/webdocs/10601-0003-31.pdf>.

Again, thank you for writing and for your interest in natural resource conservation.

Sincerely,

A handwritten signature in black ink that reads "Sonny Perdue". The signature is written in a cursive, flowing style with a large initial "S".

Sonny Perdue  
Secretary

Enclosure



January 10, 2017

**SUBJECT:** ESD - Natural Resources Conservation Service (NRCS) Wetland Conservation Provisions in the Prairie Pothole Region Audit Report 10601-0003-31

**TO:** Gil H. Harden  
Assistant Inspector General for Audit  
Office of Inspector General

File Code: 190

Attached is the NRCS response to the subject audit report. This report has undergone dramatic improvements since the first draft was originally transmitted in April 2016. NRCS is appreciative of the Office of Inspector General (OIG) audit team for working through these many changes. Apart from the official agency response, NRCS retains several concerns that the report's content has failed to include or within the report's language that could be misconstrued or misleading. Additional opportunities to clarify the report scope, context, and complete information are also identified in the attached version of the report provided by OIG with comments from NRCS.

The following is a summary of the agency's major concerns with this version of the audit report

- Despite the audit executive summary, the report fails to evaluate if wetland determinations in the prairie pothole region were in accordance with laws and regulations. By omitting reference to the legal status of pre-1996 determinations, the link to the report's findings and recommendation on the need for policy clarification is not clear. Without this legal context, evidence presented also may confuse the lay reader. For example, the report cites a historic (1997) internal study that recommended that wetland determinations in North Dakota should not be considered certified. However, by that time Congress had changed the law regarding certification, making this recommendation irrelevant.
- Throughout the report, OIG cites to NRCS making a significant change in procedural implementation of wetland policy without clarifying that any change was limited to specific States. The report language infers the scope of the change was national and the change itself was to agency national policy. The report also cites several State-issued documents as evidence; however, these State issued guidance documents are not reflective of national NRCS opinion or guidance. This evidence provides additional examples of inconsistent policy application by States.
- In regard to the change in the implementation of policy, the report does not reflect that in some prairie pothole region States NRCS was incorrectly rejecting pre-1996 determinations without first evaluating their certification status, as is required by

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current national policy. Omitting this fact fails to provide the context in which NRCS directed States to follow current policy.

If you have questions, please contact me at (202) 720-7246, or have a member of your staff contact Leonard Jordan, Associate Chief for Conservation, at (202) 720-7246.

/s/

Jason A. Weller  
Chief

Attachments

cc: (w/attachments)  
Val Dolcini, Administrator, Farm Service Agency

Wetland Conservation Provisions in the Prairie Pothole Region—10601-0003-31  
Agency Response

Summary

NRCS generally accepts the two audit recommendations in the Wetland Conservation Provisions in the Prairie Pothole Region—10601-0003-31; however, there remain inaccuracies in the report text that misportray key facts and have potential to confuse the reader. In this response, we refine key points to ensure that the public is provided with the most complete information on this important topic.

The report has taken an important step to identify that the evidence presented and conclusions drawn relate to the implementation of policy; however, the report does not state unequivocally that the audit clearly found that NRCS staff in the Prairie Pothole Region were applying inconsistent procedures regarding the certification status of wetland determinations conducted prior to July 3, 1996 (1996). For example, the report correctly presents the current policy that determinations made prior to 1996 are certified if they met procedural appeal rights and quality mandates; however fails to provide the context that States were found to be incorrectly following that policy by automatically rejecting the certification status of all pre-1996 determinations. NRCS has also provided evidence that pre-1996 determinations were provided with appeal rights on the back side of the "Person Copy," page in the carbon set form used at the time; however, this fact is not recognized in the report. Recommendation 1 signals that the implementation inconsistency is the key finding from the audit, which is strengthened if this line of discussion is clearly identified.

There are several areas where the report scope is not clear in the text, suggesting that the presented evidence may apply beyond the narrow, non-statistically drawn sample used as the foundation for the audit. For example, the report states that NRCS implementation of policy was "to not consider wetland determinations completed from 1990 to 1996 to be certified unless the determination was appealed and upheld, a process which required field visits and supporting documentation." This was the case in North Dakota, one State in the Prairie Pothole Region; however, this criteria is not contained in national policy and there is no evidence of it being applied on a broad scale. In another example, the report cites Wisconsin State guidance that incorrectly asserts that all pre-1996 determinations were based on inventories. Again, a single State although that is not evident in the discussion.

There are several areas in the report where the evidence presented is not complete and could be misleading to the lay reader. For example, the report cites internal studies that judged the quality of pre-1996 determinations, but does not provide the context (i.e., studies conducted to assess the determination quality for implementation of the Clean Water Act, as well as the Food Security Act provisions at a time that USDA was operating in accordance with a memorandum of agreement with the Army Corps of Engineers). Recommendation 1 is more

clearly understood by identifying that the changing requirements and policies during the late 1990s contributed significantly to the inconsistent application of wetland certification policy.

The report includes a comparison of determinations from North Dakota made using pre-1996 approved procedures and those using a set of post-2009 procedures. The report concludes that more wetlands and more wetland acres were identified on the more recent determinations. This comparison is irrelevant to the legal standing of certified wetland determinations and merely demonstrates that technical tools and capabilities have improved over time and that regional weather patterns have become wetter. However, as presented, the comparison poses the risk that an uninformed reader may conclude that older determinations are not valid.

The report presents a 2012 NAD case as evidence that NRCS disputed the certification status of pre-1996 determinations. However, does not indicate this to be a single case in one State and that the particular determination could not be considered certified because it did not contain the certification statement signed by USDA.

Finally, the report includes quotations from the complaint alleging that NRCS actions were “un-ethical,” “fraudulent,” and “illegal.” These are inflammatory statements and do not belong in an audit, particularly since their veracity was not evaluated in light of the statute and regulation.

#### Recommendation 1

Issue official guidance reinforcing correct and current rules and clarifying procedures for making wetland determinations and certifications, including the status of pre-1996 determinations.

#### **Agency Response**

NRCS accepts this recommendation. This report identifies that NRCS staff in certain States in the prairie pothole region were incorrectly implementing existing policy concerning the certification status of previously issued wetland determinations, specifically wetland determinations conducted prior to July 3, 1996.

Certification of wetland determinations first was enacted in the Food, Agriculture, Conservation, and Trade Act of 1990, with corresponding changes made in the regulation at that time. Since June 1991, certified wetland determinations were provided with the inclusion of appeal rights on the back side of the “Person Copy” of the SCS-CPA-026 form. Additional clarification of the certification issue was made in the Federal Agricultural Improvement and Reform Act of 1996, when Congress made it clear that certifications made prior to that date remain valid unless a new certification is requested by a person. Certified wetland determinations are provided by NRCS to persons so that they can make informed decisions about the management of their lands to remain eligible for USDA program assistance.

As part of this process, policy is developed that must be consistent with the statutory and regulatory provisions. The policy regarding certification has varied through the years and has contributed to general misunderstanding. For example, there was a period of time when USDA operated in accordance with a memorandum of agreement with the Army Corps of Engineers to make determinations that would be valid for the Food Security Act and the Clean Water Act

(CWA). During this time, there were internal USDA studies that found some determinations lacked the quality required for implementation of the CWA, which led to further confusion.

Policy in place since 2010 specifies that wetland 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. USDA's Office of the General Counsel (OGC) has confirmed that this policy is in alignment with statute and regulation. However, staff in some prairie pothole region States were rejecting all wetland determinations conducted prior to July 1996 without considering if the determinations met requirements in accordance with established policy. In some cases staff in prairie pothole region States were incorrectly requiring evidence of an appeal, which resulted in a field visit at the time the original determination was completed; however, by policy all that was required was that the operator had received appeal rights—there was no obligation to exercise those rights.

NRCS attempted to correct these inconsistent implementation issues in 2013 by instructing NRCS staff in prairie pothole region States to follow existing policy and begin to examine determinations conducted prior to 1996 to determine if they met procedural and quality mandates and should be correctly identified as certified determinations. These actions, to bring States in alignment with national policy, are referred to in the report as being a significant change in policy. In addition, the instruction to NRCS State offices only occurred in specific States where it was identified that policy was not being followed, which led to the complaint that initiated the audit.

The audit also highlights a large determination backlog in the prairie pothole region, suggesting that the direction to follow existing policy may have been driven in part by the backlog. Since 2009, the combination of expired Conservation Reserve Program acres returning to crop production and the changing economics of corn and soybean production led to a surge in producer interest in drainage improvements and the need for NRCS completed wetland determinations. NRCS responded to this increased demand, and beginning in 2011, has dedicated an additional \$10.5 million of funding aimed at completing determinations, which has resulted in completing approximately 60,000 new certified determinations in the prairie pothole region, and reducing the backlog by 70 percent. The focus on wetlands determinations helped to reveal that some NRCS staff in the prairie pothole region were not following existing policy, but the affirmation and direction to adhere to policy was not for the purposes of reducing the backlog.

Additional policy clarification regarding the quality aspect of determinations is needed, as demonstrated in this report. Additional policy clarification providing specific guidance to evaluate the certification status of determinations issued prior to 1996 will be developed. The estimated completion date is April 28, 2017.

### Recommendation 2

Review all NAD decisions in the prairie pothole region from January 1, 2010, to the present to

determine whether the decisions were implemented. In those cases where the NAD final determination was set-aside or modified instead of implemented as directed by NAD, require the State office to implement the NAD decision in accordance with applicable law.

### **Agency Response**

NRCS accepts this recommendation. In carrying out its responsibilities for wetland compliance NRCS completes wetland determinations that are issued with appeal rights. One of the appeal options for a person affected by the determination is the opportunity to request a hearing with NAD. At the conclusion of the NAD hearing, the Administrative Judge issues a decision that rules on whether the determination was conducted according to policy and procedures. If the agency is upheld, the determination becomes final. The regulation at 7 CFR section 12.11 also provides NRCS the responsibility to determine if the affected person's action was taken in good faith reliance on advice or information provided by an agency employee. When NRCS determines that noncompliance is due to reliance on employee provided advice or information, appropriate relief can be provided. This relief may be requested, considered, and potentially granted at any time. In these cases, a new final technical determination becomes the legal certification, and by statute can only be modified at the request of the person. NRCS will review all NAD decisions and ensure that States take appropriate action in accordance with applicable law. The estimated completion date is April 28, 2017.