

SECTION 1619 QUESTIONS AND ANSWERS #1

GENERAL

Q: It would be easier for the field if we had a standardized form to give the producer to sign to release his cooperator case file information. Will one be developed?

A: Yes, SD-ADS-6 – Information Release Request was issued on April 1, 2009.

The SD-ECS-17 – Landowner Permission for Informal Consultation - already has existed since 2002 to authorize us to consult with other agencies on threatened and endangered species and NEPA consultations. After Section 1619 was made law, we needed something in place for cultural resources and NEPA consultations as well. Because NRCS is required by law to consult with these agencies in certain circumstances, this form gives the option to the landowners to consult with these agencies themselves or allow NRCS to facilitate the process with those agencies by releasing the cooperator case file information directly to them. This way, we are not mandating that they sign the form in order to participate in our program. As these situations are more complex and require more language, the SD-ECS-17 will remain separate from the SD-ADS-6 to minimize confusion. A revised form SD-ECS-17 entitled “Authorization for NRCS Release of Cooperator Case File Information for Threatened and Endangered Species, Cultural Resource, and National Environmental Policy Act (NEPA) Consultations” will be issued in April 2009.

Q: What can we give out geospatially?

A: Section 1619 states that USDA cannot give out geospatial information “about agricultural land or operations” given to us “by an agricultural producer or owner of agricultural land ... in order to participate in programs of the Department.”

The CLU layer may not be given out without permission. We can give out other information as long as it doesn’t have protected information in it like:

- State identification and county number (where reported and where located);
- Producer/landowner and business entity name, full address, phone number, identification type, and Social Security Numbers;
- Farm tract, field, and contract numbers
- Production shares and share of acres for each Farm Serial number (FSN) field;
- Acreage information including crop code
- Practice code;
- Attributes for CLU’s

Q: What's the big deal about keeping practice codes secret? Anyone can drive down the road and see what practices are being installed.

A: Practice codes have been determined to be pieces of information that are protected by the Privacy Act. Therefore it is information we cannot give out without permission.

Q: If a producer hires a dirt contractor and gives the plans directly to the contractor, does the contractor have to sign an Attachment C?

A: No, the producer released his own information directly to the contractor. However, if the producer wants the contractor to come into NRCS to get a copy of the plans, then the producer would have to write a release of information request to NRCS to give the information to the contractor. He could also use the optional form SD-ADS-6 for this purpose.

Q: When Section 1619 explains what kind of information is to be protected, it says we have to protect "information that has been provided to the NRCS by an agricultural producer to participate in our program". For wetland or HEL determinations, the producer doesn't give us information. The NRCS employee gets information directly from the land. So wetland or Hel determinations are exempt from Section 1619, right?

A: No, "information that has been provided to the NRCS by an agricultural producer to participate in our programs" includes information directly provided to an NRCS employee OR information developed by NRCS based on information obtained from the property of the producer. Examples of documents that can be withheld under Section 1619 include (but are not limited to) conservation plans, wetland determinations, HEL determinations, acreage amounts, assistance notes, NRI point data, flood damage surveys, and program contract information.

OWNER/RENTER ISSUES

Q: Can an operator or renter have a copy of wetland information on the land they rent without written permission from the land owner? Can this same renter/operator request a certified wetland determination or an AD-1026 to clean out ditches or tile with FSA without the land owners permission?

A: Cooperator case files pertain specifically to the cooperator, not necessarily to the owner. The person whose name goes on the cooperator case file is the person who NRCS has an agreement/contract with. Many times the landowner is the one who we are working with and signs the contract. In that case the owner is the one who decides what information can be released from our cooperator case file. Other times there is a renter or other operator who we are working with and who signs the contract. In that case the renter is the one who decides what information can be released from the file. The landowner DOES NOT have an automatic right to the information in a cooperator case file for someone who is renting his/her land. So to answer your question, yes, a renter can obtain wetland information from his cooperator case file without permission from the landowner.

Q: There are grazing tours in my county every year. Do we need written permission from the land owner that has agreed to do the tour to have other producers come to the tour and learn about what this person is doing on their operation?

A: No, no written permission is needed. The landowner has consented to be showcased on the tour and s/he will be in control of what information s/he gives out to those on the tour.

Q: When land is sold to a new owner, do we have to get permission from the old landowner to show the new landowner information in the old cooperator case file?

A: Yes, the new owner does not have automatic access to the old owner's cooperator case file. At the time we do the transfer agreement or modification to the contract changing participants, the old owner should sign an SD-ADS-6 giving the new owner access to the information the new owner needs (plan maps, wetland determinations, or anything that should transfer to the new owner's cooperator case file). Obviously, the new owner should not have access to the old owner's Personally Identifiable Information (PII).

Q: When a renter or operator signs a 1026 request for ditch maintenance or certified wetland determinations the scope and effect worksheet and the 026 is actually sent out to the landowner, not the operator. So the operator can request it, but the land owner is the one who signs. Who do we have to get permission from in this case?

A: The person who signs the 1026 can be the operator or the owner. It is typically the operator as he/she is the one receiving USDA benefits and is typically the farm program recipient.

The current version of NFSAM (4th Edition, Amend. 4 January 2008) Part 514.1 E Preparing the Certified Wetland Determination states “A copy of the CPA-026e, along with the delineation map, will be provided to the USDA program participant and the Farm Service Agency. A copy should be retained in the participant’s file located in the NRCS office.”

In old versions of NFSAM it guided us to send the 026e (with certified determination) to the operator and a copy to all associated persons (owners etc.). However, this is no longer policy. **Offices should not violate the Privacy Act by sending a renter’s information to the landowner.**

It is the renter’s responsibility to keep the landowner informed of issues that affect the land.

Q: In regards to servicing 1026's for certified wetland determinations, the landowner would not get a copy of the determination requested by his renter. If this is the case then the landowner would not receive appeal rights for a possible adverse determination on his land. This does not seem right to me. And what would happen if the landowner comes in later requesting a certified determination on the same land?

A: NFSAM (1/2008) Part 514.1A(2) says we make a Certified Wetland Determination (CWD) when a USDA program participant (typically the operator) signs a 1026 at the FSA office. We respond with a CPA-026 to that same producer. Our copy is filed in the wetland folder in the FO for that tract. If the owner comes back later and asks for a copy of the wetland determination, we could provide him a copy of it if the renter would sign an SD-ADS-6 releasing the information to the owner.

I have requested a clarification from NHQ on the fact that wetland and HEL determinations are supposed to go with the land (not the person who requests the determination) per the NFSAM.

CD

Q: What is the process going to be when a District Board doesn’t agree to sign Attachment C as far as getting conservation plans getting signed off on by the Board?

A: For District Board members to have access to cooperator case file information, they must have signed an Attachment C or gotten written authorization from the cooperator releasing information to them. Without either of these, they may not be privy or have access to protected cooperator information. If the Board doesn’t sign off on the plans because they haven’t signed Attachment C or gotten information released to them, then the DC can just make a note of that on the plan.

Q: Our Conservation District Board is kind of 'suspicious' about signing the FOIA MOU, they basically would like some clear explanations as to what signing this would obligate them to. What are the implications/liabilities for signing it or not signing it?

A: It obligates them to protect information that producers have given NRCS to participate in our programs. If they don't sign it or obtain a producer release form for each file they want to look at, then they won't have access to any cooperator case file information. They would not be able to sign off on any plans. The DC makes a note of it and why and the plan moves forward.

If they do sign it and the Board continues to review plans at public Board meetings, procedures will have to be put in place so that names, locations, etc. aren't referred to protect the information. A plan can be assigned a generic identifier like Plan 23 or AAA or whatever and the Board can reference this identifier when discussing it in the public meeting.

Q: What are the penalties for violating Attachment C?

A: If someone knowingly releases information that was protected under Section 1619, this would be considered a violation of the Privacy Act. The person could be charged with a misdemeanor and/or be fined up to \$5,000 per instance.

Q: It's been stated that when having conservation plans reviewed by the District board, especially when non-board members are present, that a "case file number" should be assigned to protect the plan owner's identity/information.

Further, I believe I understood during the teleconference that a specific individual's participation in our programs is not public information until a payment is made.

Therefore, when having conservation plans for programs (EQIP, WHIP, etc) reviewed by the board (which is **STRONGLY** desired if not specifically required), do I infer that a number (or other reference) will need to be used rather than the participants name in the District's meeting minutes? If so, could the contract number be used or is there a way a "not allowed" person can determine the participant's name from the contract number?

A: If there are other people present at a CD public meeting besides those who have signed Attachment C or who are covered by an MOU, then yes, a generic identifier would need to be assigned to that case and reported that way in the minutes. You cannot use the contract number as the identifier as this information is also protected.

Q: My District Board has chosen to not sign the Attachment C and therefore can no longer approve CRP contracts. How do we get these plans approved so that FSA can proceed with the CRP contract?

A: The DC, who has already signed the CRP contract approving the contract from NRCS' view, can note "Cannot sign due to Section 1619 requirements" in their signature block. Then send the plans over to FSA.

Q: We have an individual who contracts fabric installation for the Conservation District. This individual to date has not signed the Attachment "C". Before the passage of the new Farm Bill and section 1619, we would have given this person a copy of an Arc-GIS map showing the location of the tree plot and a copy of the NRCS-CPA-6 (tree plan form). If he does not sign the attachment "C", what are we allowed to give to him?

A: These contractors should not sign an Attachment C. Attachment C is for partners and TSPs who are helping NRCS by providing technical assistance to our customers and helping to implement our programs. For contractors to get cooperator case file information, the cooperator needs to fill out an SD-ADS-6 allowing us to release the information to the contractor.

FSA

Q: Will FSA recognize the Cooperator Certification (Attachment C) that our partners have signed with us?

A: FSA will treat disclosures to our partners who have signed Attachment C just like they do NRCS employees.

RC&D

Q: My RC&D office has RC&D project plans that contain information that people have given us to participate in the RC&D program. Who owns these files – the Council or NRCS?

A: The Council owns the files. NRCS has a Cooperative Agreement with each RC&D Council where we provide technical assistance to the Council to implement the RC&D program. Those files would not be subject to Section 1619. However, there are a number of RC&D projects that utilize other funding sources (319 money, EQIP, etc.) so if there is information that a producer has provided USDA to participate in a program then that information would be subject to section 1619 even if it was in the RC&D project plan folder.

Q: Do RC&D Council members need to sign an Attachment C?

A: They do if they view any information that has been provided to NRCS to participate in an NRCS program

OTHER PARTNERS

Q: In the case of SHPO, NRCS is required to cooperate with them on cultural resource issues. Their state procedures allow the release of certain information that NRCS would deem protected under FOIA/Section 1619. If they won't sign an MOU to say that they won't release this protected information and they won't sign Attachment C, then how can we cooperate with them on cultural resources issues?

A: When dealing with a producer who, in order to obtain our technical/financial assistance, must cooperate with SHPO, we can give the producer a choice. NRCS can inform the producer of his or her obligations to cooperate with SHPO directly. NRCS can offer to facilitate this process if the producer agrees to sign an SD-ECS-17 allowing us to consult with SHPO and give them information. This way we aren't mandating that they sign the release in order to participate in our programs. We are giving them the choice – Do they want to deal with SHPO directly OR do they wish us to do it for them.

Q: Is there an MOU being developed with BIA or should we just get an Attachment C signed when we need to cooperate with BIA?

A: There is a national MOU between NRCS and BIA that covers information sharing, but it has not been updated to cover Section 1619. We might need to establish a South Dakota MOU with them covering these issues. Until then, as long as BIA employees sign Attachment C and they are helping us to provide financial or technical assistance to a producer under one of NRCS' programs, then we can share information with that person. Another option is to get the landowner to sign a release of information request allowing us to release information to the BIA

Q: When developing Comprehensive Nutrient Management Plans for CAFO's (operations in excess of 1000 animal units - required to be permitted by SD DENR), we are required to have leaching hazard determinations completed by DENR for the land on which nutrients are being applied. Since the CAFO permit is regulatory, it sounds as if an MOU will not be permissible. Should the NRCS have the landowner/operator sign a "release" or should we have the landowner/operator contact DENR?

A: When dealing with a producer who, in order to obtain our technical/financial assistance, must comply with a permit of some non-USDA entity, we can give the producer a choice. NRCS can inform the producer of his or her obligations to obtain these permits from the permitting agency. NRCS can offer to facilitate this process if the producer agrees to sign a release form (SD-ECS-17) to give the permitting agency the information. This way we aren't mandating that they sign the release in order to participate in our programs. We are giving them the choice – Do they want to deal with the permitting agency directly OR do they wish us to do it for them.

Q: On FOIA and 1619, what do we need to do when joint project information needs to go up to the state DENR and Dept of AG, do they need to sign a certification statement as well? The joint projects usually marry 319 and EQIP dollars together.

A: Information given to NRCS for an EQIP (or other program) contract would be governed by Section 1619. Information given to SDACD on these joint projects would have to comply with their own records laws. So if the joint project would have to go to DENR and/or SD DOA, those employees would have to sign an Attachment C until we get an MOU in place covering section 1619 with those state agencies. Another option is to get the landowner to sign a release of information request allowing us to release information to the DENR or the SD DOA.

TSP

Q: For TSP's, can one person sign for the entire organization or does everyone have to sign it?

A: We can adapt the Attachment C so that it would essentially serve as an MOU with the TSP to cover all employees of the TSP. One person with authority to act for the entire organization could sign it.

Q: Why does a TSP need to sign a FOIA agreement? They will only be dealing with a particular producer, and they are hired by that producer. NRCS deals primarily with the producer and much of our communication with the TSP is/should be done through the producer. The TSP will get nearly all information from the producer. If we need to supply the TSP with some information the producer can't supply, if anything, I would think we would just need a note from the producer giving us permission to release information to their TSP. The way we are explaining it now is kind-of like saying all dirt contractors need to sign a FOIA agreement - even though they are hired by the producer to do a job.

A: The intent of having TSP's sign the Attachment C is to cover the situation when the producer hires a TSP and tells the TSP to go to the FO to look at the conservation plan or something out of the cooperator case file. This will give them access to the files without having to get a specific landowner release form. They wouldn't need Attachment C if the TSP was getting ALL of the information from the producer. It also covers the situations where we have agency selected TSP task orders (Centrol) and we are working directly with them. If the TSP has not signed an Attachment C, then the producer could sign an SD-ADS-6 or write a release of information request to NRCS for us to release the information to the TSP.