

NAVIGABLE WATERS PROTECTION RULE UPDATE

December 3, 2020

OTAC Annual Meeting

Jericho Winter

Acting State Soil Scientist

BACKGROUND

On July 17, 2020, NRCS along with the EPA and the USACE, signed a **Memorandum to the Field** concerning implementation of Section 404 of the CWA and the Food Security Act of 1985, as amended (FSA).

The Memorandum directs agencies to minimize duplication of efforts, pursuant to the CWA Section 404 program and the FSA Wetland Conservation (WC) provisions, while recognizing the inherent differences in the purpose and language of each law.

NAVIGABLE WATERS PROTECTION RULE (NWPR)

U.S. Environmental Protection Agency (EPA)

Department of the Army, Corps of Engineers (USACE)

Finalized NWPR defining “waters of the United States” (WOTUS) and the scope of federal jurisdiction under the Clean Water Act (CWA)

NWPR -

- defines WOTUS
- identifies those waters and features that are excluded from the definition of WOTUS, including prior converted cropland (PC).
- describes how the EPA and the Corps will rely on USDA Food Security Act (FSA) PC designations
- explains under what circumstances PC might be considered abandoned such that the land no longer meets the PC exclusion for CWA purposes.

**UPDATED POLICY AND GUIDANCE FOR THE
WETLAND CONSERVATION POLICY IN TITLE 180,
NATIONAL FOOD SECURITY ACT MANUAL (NFSAM),
FIFTH EDITION.**

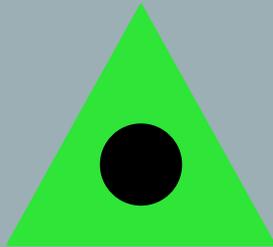
**Revised policy in two areas affecting NRCS implementation of the WC
provisions**

The **first** is regarding identification of potentially jurisdictional waters and communications to USDA participants.

The **second** is clarification of NRCS' role when providing CWA-related technical assistance to USDA clients.

Identification of potentially jurisdictional waters and communications to USDA participants

CAUTIONARY ICON



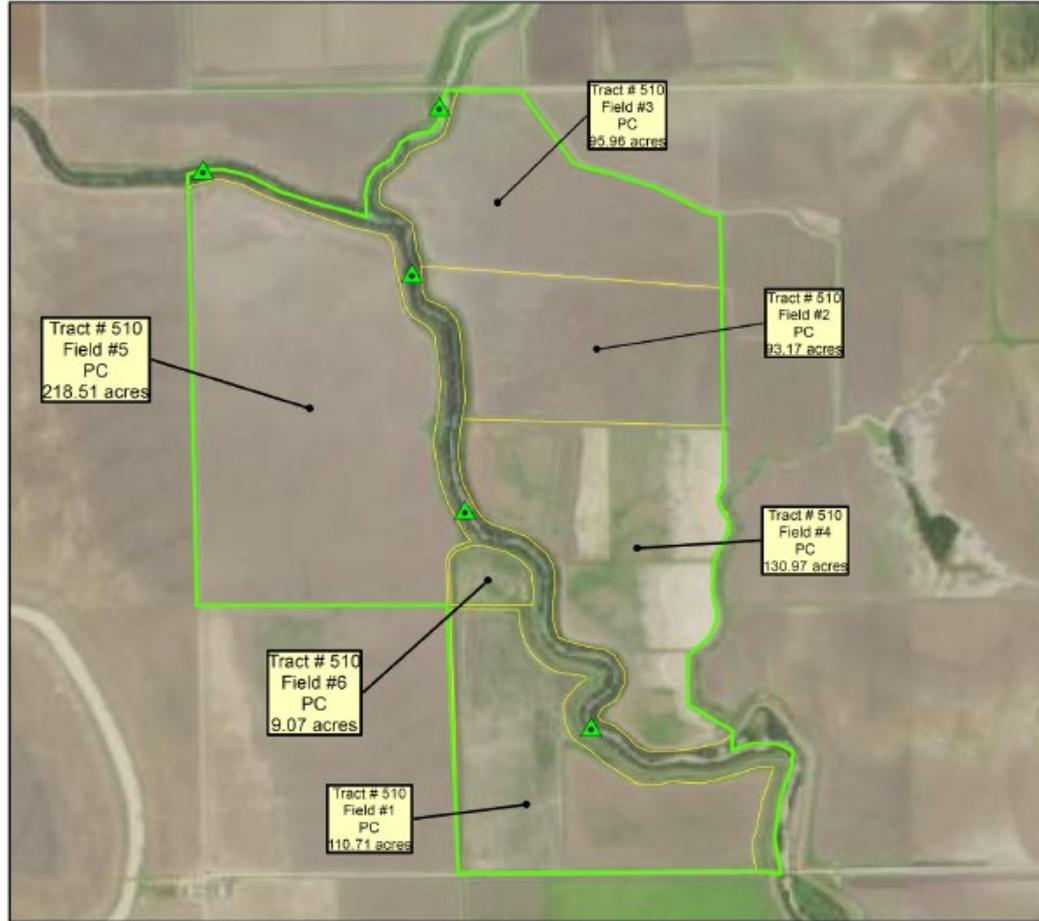
- Beginning on September 1, 2020, NRCS will use a bright green triangle with a black dot in the center on CWD maps which indicates water features that are not subject to the VWC provisions but are potentially subject to the CWA. (PJW)
- Water features located within the area of the CWD map; including, but not limited to streams, lakes, ponds, rivers, and other water features **which do not meet FSA wetland criteria**; will be identified with the icon.
- NRCS will also inform the USDA participant that such water features may be under jurisdiction of the CWA for proposed discharges into those water features and direct them to the USACE for more information.

Certified Wetland Determination
USDA-NRCS



Client(s):
Approximate Acres:
Quad:
Location:
Map Year:

Assisted By:
USDA-NRCS
County, State:
Field Office:



Legend

- Potential Jurisdiction Water (PJW)
- Tract Boundary
- FSA Wetland Labels



1 inch = 1,320 feet



FSA Certified Wetland Determination

Client(s):
Approximate Acres:
Quad:
Location:
Map Year:

Date:
Assisted By:
USDA-NRCS
County, State:
Field Office:



Legend

- Certified Wetland Determination
- Potential Jurisdictional Waters - (PJW)



CAUTIONARY ICON
LANGUAGE

- Remarks Section of the CPA-026
 - *Areas identified as Potential Jurisdictional Waters (P JW) are not subject to the Food Security Act but are potentially subject to the Clean Water Act. You should contact the U.S. Army Corps of Engineers local district office prior to performing work in areas which may be subject to the Clean Water Act. Areas identified as P JW are for informational purposes only and are not appealable to USDA. Additional areas, not identified by NRCS as P JW, might also be subject to the Clean Water Act.*
- Transmittal Letter
 - *This certified wetland determination has been conducted for the purpose of implementing the Wetland Conservation Provisions of the Food Security Act of 1985, as amended. This determination may not be valid for identifying the extent of Clean Water Act jurisdiction for this site. If you intend to conduct any activity that constitutes a discharge of dredged or fill material into wetlands or other waters, you should contact the local district office of the U.S. Army Corps of Engineers prior to starting work.*

CWA-RELATED TECHNICAL ASSISTANCE

- NRCS may provide CWA-related technical assistance to USDA clients under limited circumstances.
 - NRCS assistance in specific CWA delineations or jurisdictional determinations will be limited to instances where there also is or has been a need to conduct a CWD or site visit for FSA purposes.



- This assistance will only be provided upon receiving written permission from the appropriate USDA client.

USDA clients should understand that the consent form to release protected information:

- is not a requirement for participation in any USDA program
- USACE and/or the EPA are not required to protect the client's private information according to USDA statute, regulation, or policy.

RELEASE OF INFORMATION TO THE U.S. ARMY CORPS OF ENGINEERS/ U.S. ENVIRONMENTAL PROTECTION AGENCY

Authorization to Release Information to Another Person

This form is to be completed by a requestor who is authorizing information relating to him/herself to be released for the purpose of determining applicability of the prior converted cropland exclusion for Clean Water Act purposes, to be released to the U.S. Army Corps of Engineers and/or the U.S. Environmental Protection Agency. Further, pursuant to 5 U.S.C. 552a(b), I, _____ authorize the United States Department of Agriculture to release the following information relating to me:

Specific information in my cooperater case file as checked below:

- Certified Wetland Determination (pertaining to the specific field) with USDA Natural Resources Conservation Service or Farm Service Agency
- Conservation Plan of Operations (pertaining to the specific field for up to the preceding five years) with USDA Natural Resources Conservation Service
- Crop acreage reports (pertaining to the specific field for up to the preceding five years) with USDA Farm Service Agency

Specific Location. Enter the Farm, Tract, and Field location; Section, Township, and Range; property address; and/or see attached map:

The above information may only be released to the following entities (please check one or both):

- U.S. Army Corps of Engineers
- U.S. Environmental Protection Agency

The information may be released to the agencies until _____ (date).

Full Name of Requestor: _____

Current Address: _____

I understand that signing this document is not a requirement for participation in any USDA program. Furthermore, I understand that USACE/EPA is not required to protect this information according to USDA policy.

Signature: _____

Date: _____

DETERMINING APPLICABILITY OF THE PC EXCLUSION FOR CWA PURPOSES.

Determining applicability of the PC exclusion for CWA purposes.

- The release of information such as;
 - certified PC determinations (for the area in question)
- Previous 5 years of information from NRCS conservation plan
- Farm Service Agency crop acreage reports for those fields
 - And similar information

Any of this information may aid in USACE and/or the EPA decision on whether an area labelled PC meets the CWA exclusion. Additionally, NWPR states “Abandonment occurs when *prior converted cropland* is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years.”

CAN A CLIENT REQUEST A
CWD FROM NRCS FOR
CONSIDERATION FOR THE
CWA PC EXCLUSION?

- If a USDA client does not have a USDA CWD for a particular field and would like an area to be considered for the CWA PC exclusion, the client may initiate a wetland determination request via completion of form AD-1026 with the USDA Farm Service Agency.
- Persons seeking a CWA prior converted cropland exclusion but are not USDA program participants or have not made an application for USDA program benefits, and when a USDA certified wetland determination does not exist, should be advised to contact their local USACE District.

In accordance with Federal Civil Rights law and U.S. Department of Agriculture (USDA) Civil Rights regulations and policies, the USDA, its agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior credible activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs).

Remedies and complaint filing deadlines vary by program or incident.

Contact:

Jericho Winter – State Resource Soil Scientist (Acting SSS)

Cell: 971-271-2950