NAVIGABLE WATERS PROTECTION RULE UPDATE

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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.
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.
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.
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 WC 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.

Identification of potentially jurisdictional waters and communications to USDA participants
Remarks Section of the CPA-026

- Areas identified as Potential Jurisdictional Waters (PJW) 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 PJW are for informational purposes only and are not appealable to USDA. Additional areas, not identified by NRCS as PJW, 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.
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.
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.

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