



**MEMORANDUM TO THE FIELD BETWEEN
THE U.S. DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION
SERVICE (NRCS),
THE U.S. DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS (CORPS),
AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)
CONCERNING ISSUES RELATED TO IMPLEMENTATION OF
SECTION 404 OF THE CLEAN WATER ACT (CWA)
AND THE FOOD SECURITY ACT OF 1985, AS AMENDED (FSA)**

I. INTRODUCTION

The U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) implement Section 404 of the Clean Water Act (CWA), which regulates the discharge of dredged or fill material into navigable waters. 33 U.S.C. 1344. The U.S. Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) implements Sections 1221-1224 of the Wetland Conservation Provisions of the Food Security Act of 1985, as amended (FSA). 16 U.S.C. 3821-3824. The Corps and EPA determine the extent of “waters of the United States” (*see* 33 CFR 328 and 40 CFR 120.2) subject to CWA jurisdiction. NRCS delineates, determines, and certifies wetlands in a manner sufficient for making determinations of ineligibility for certain USDA program benefits.¹ The Corps, EPA, and NRCS (together, the agencies) recognize that similarities between certain aspects of their respective programs, such as wetland delineations conducted by the Corps and EPA and wetland determinations conducted by NRCS, have the potential to lead to duplicative effort and uncertainty for the regulated community in program authority and requirements.

¹ The FSA requires producers participating in most programs administered by USDA to agree not to plant an agricultural commodity on converted wetland or to convert a wetland to make possible the production of an agricultural commodity, unless an exception applies. Producers participating in these programs, and any person or entity considered to be an “affiliated person” of such a producer, are subject to these conditions. The regulations covering the conditions are set forth in the Code of Federal Regulations at 7 CFR Part 12. To be in compliance with the FSA wetland conservation provisions, producers must agree, by certifying on Form AD-1026 (Highly Erodible Land Conservation and Wetland Conservation Certification), that they will not plant or produce an agricultural commodity on a converted wetland and will not convert a wetland to make the production of an agricultural commodity possible.

The agencies strive to minimize duplication of efforts pursuant to the CWA Section 404 program and the FSA Wetland Conservation Provisions, while recognizing the inherent differences in the purpose and language of those laws. This memorandum provides procedures for use by the agencies' personnel that will facilitate the agencies' efforts to ensure that federal wetland programs are administered in an efficient and effective manner, minimizing their impacts on affected landowners and operators while continuing to fulfill the missions of the respective agencies.

The contents of this memorandum do not have the force and effect of law and are not meant to bind the public in any way. This memorandum is intended only to provide clarity to the agencies and the public regarding existing requirements under the law or agency policies.

II. DEFINITIONS

Clean Water Act Delineation (DL): Document identifying the presence of wetlands and/or non-wetland waters and providing the boundary limits of such aquatic resources.

FSA Certified Wetland Determination (CWD): Determination of the presence of wetlands, their delineation, and the appropriate Wetland Conservation designation subject to the Wetland Conservation Provisions of the FSA, based on the procedures in the National Food Security Act Manual (including amendments and related guidance).

Jurisdictional Determination (JD): As defined at 33 CFR 331.2, the term means a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the CWA or a written Corps determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899.

Local Level Agreement (LLA): Agreements developed between two or more of the agencies at the district, regional, and/or state office levels to promote business process efficiencies in order to reduce delays in actions related to their wetland programs.

Prior Converted Cropland:

- a. As defined by NRCS pursuant to the Food Security Act at 7 CFR 12.2: a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and did not meet the hydrologic criteria for a farmed wetland.
- b. As defined by the Corps and EPA pursuant to the Clean Water Act at 33 CFR 328.3(c)(9) and the Navigable Waters Protection Rule (NWPR; 85 FR 22339): any area that prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered prior converted cropland for purposes of the Clean Water Act

when the area is abandoned and has reverted to wetlands, as defined in paragraph (c)(16) of this section. 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. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

III. PROCEDURES

- A. Development of LLAs. The agencies encourage the development of LLAs to improve overall communication, coordination, and partnering to reduce duplication of efforts, to improve efficiency, and to provide as much consistency as possible for landowners, USDA program participants, and the regulated community. The LLAs may be developed as agreements addressing a single issue or umbrella agreements covering multiple issues. The objectives of LLAs are to provide procedures to facilitate efficient JDs, CWDs, and DLs within the provisions of applicable regulations, as well as to identify any permitting and compensatory mitigation efficiencies. The LLAs may also be used to develop outreach materials and other sources of information to aid agricultural landowners/operators in better understanding the presence of wetlands or other water features on their lands and the land management activities which may fall under the CWA and/or FSA authorities. The LLAs may further refine the procedures included herein and address other concerns or interests that will improve service to the public.
- B. Maps and Designation of Non-Wetland Waters. To provide additional clarity following signature of this memorandum, the NRCS intends to use designations on their wetland determination maps for owners or operators which indicate water features that are not subject to the Wetland Conservation Provisions of the FSA. If these features are designated, it may be with a cautionary icon to communicate that they may potentially be subject to the CWA for any proposed discharges which may occur.
- C. Informing Affected Landowners or Operators of Other Potential Statutory Obligations. The Corps intends to include the following language in all written DLs as well as any JD: “The delineation included herein has been conducted to identify the location and extent of the aquatic resource boundaries and/or the jurisdictional status of aquatic resources for purposes of the Clean Water Act for the particular site identified in this request. This delineation and/or jurisdictional determination may not be valid for the Wetland Conservation Provisions of the Food Security Act of 1985, as amended. If you or your tenant are USDA program participants, or anticipate participation in USDA programs, you should discuss the applicability of a certified wetland determination with the local USDA service center, prior to starting work.” The NRCS intends to include the following language in all written CWDs: “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.”

- D. Coordination. In cases where the agencies need to make separate CWDs and DLs on a single site, the agencies intend to, with the landowner’s/operator’s concurrence, coordinate and provide both documents in an efficient manner and in the same time frame so that a landowner/operator receives documents that cover all waters on the site. If this coordination cannot be accomplished for a particular site, the agencies will advise the landowner/operator accordingly.
- E. Reliance on Other Agency’s Information. The Corps intends to provide a completed DL conducted for purposes of the CWA to NRCS upon request by NRCS for their use in conducting CWDs on the same site. In addition, the Corps may obtain and rely on NRCS CWD information received from a landowner/operator regarding their subject property to inform the Corps when conducting DLs for purposes of the CWA.
- F. Points of Contact. Each agency intends to designate within 30 days of the date of this memorandum a lead representative at each of their respective district, region, and state level offices for technical issues involving agricultural activities and the joint activities prescribed in this memorandum to provide consistency to landowners/operators and between agencies. This may include issues such as CWDs, DLs, JDs, prior converted cropland determinations, conservation practice standards, construction methods of agricultural activities, and activity-based exemptions under Section 404(f) of the CWA.
- G. Technical Assistance. The agencies intend to continue to provide appropriate technical assistance for all field personnel involved in CWDs, DLs, and JDs. Any onsite NRCS assistance in specific DLs on agricultural lands will be limited to instances where there is also a need to conduct a CWD or site visit for FSA purposes, and will occur only upon receiving written permission from a landowner/operator providing consent for NRCS to access their property jointly with the agencies or as otherwise permitted by law.
- H. Dispute Resolution. The agencies intend to make every reasonable effort to resolve any concerns or disputes related to these procedures at the district, region, and state level offices. Issues that cannot be resolved at the local level, however, should be elevated to the appropriate headquarters office by the Corps District Engineer, EPA Regional Administrator, or NRCS State Conservationist. The receiving headquarters office will transmit the elevated issue to the other relevant headquarters offices electronically. The date of electronic transmission serves as the notification of elevation and initiates timeframes for dispute resolution. The relevant headquarters offices should engage and try to resolve the matter within 21 calendar days upon notification. Should any deadline in this dispute resolution process fall on a weekend or federal holiday, the deadline will be the next business day.

IV. PRIOR CONVERTED CROPLAND

The USDA is responsible for making determinations as to whether land is prior converted cropland for FSA purposes, whereas the Corps and EPA are responsible for determining applicability of the prior converted cropland exclusion for CWA purposes, consistent with the government's longstanding interpretation of those agencies' authority under the CWA. The USDA's regulatory definition of "prior converted cropland" and the definition established in the Navigable Waters Protection Rule (NWPR; 85 FR 22339) have different purposes and they are substantively different. A determination of the applicability of the prior converted cropland exclusion for CWA purposes does not affect the USDA's administration of the FSA or a landowner's/operator's eligibility for benefits under USDA programs.

The NWPR excludes prior converted cropland from the definition of "waters of the United States" under the CWA and defines the term "prior converted cropland" for CWA purposes. The definition of "prior converted cropland" in the NWPR clarifies that the exclusion is no longer applicable when the subject cropland is abandoned *and* the land has reverted to wetlands, as that term is defined under the NWPR. If the prior converted cropland exclusion does not apply, the Corps and EPA are responsible for determining whether the wetlands are "adjacent wetlands" and therefore "waters of the United States," consistent with the NWPR. For purposes of the CWA, prior converted cropland is considered abandoned if it is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. *See* NWPR, 85 FR 22339; 33 CFR 328.3(c)(9). Prior converted cropland may not be subject to CWA regulation even after it is abandoned because the land does not revert to wetlands or because the land reverts to wetlands but those wetlands are not "adjacent wetlands" as defined in the NWPR. However, in some instances abandoned prior converted cropland may, under normal circumstances, meet the definition of "wetlands" under the NWPR. In all cases, the burden to prove that such wetlands are "adjacent wetlands" and therefore a "water of the United States" remains with the Corps and EPA.

When determining the extent of "waters of the United States" subject to CWA jurisdiction, the Corps and EPA will exclude waters meeting the definition of "prior converted cropland" under the NWPR. 85 FR 22326. The Corps and EPA will defer to any USDA determination as to whether a parcel or tract of land is prior converted cropland when the Corps and EPA determine the applicability of the prior converted cropland exclusion under the NWPR. *Id.* Once eligibility is determined based on a determination made by USDA, the Corps and EPA will evaluate the land to determine if the exclusion under the NWPR currently applies, or if the land has been abandoned, as described in the NWPR. A landowner/operator seeking eligibility for USDA loans and payments without an existing prior converted cropland determination from USDA may seek a new determination from USDA. *See* 85 FR 22326. To allow the Corps and EPA to rely on a USDA prior converted cropland determination, the landowner/operator may provide a copy of the USDA determination to the Corps and/or EPA.² The landowner/operator would need to determine which information is relevant to submit to the Corps and/or EPA for prior converted cropland purposes. The USDA can assist the landowner/operator in determining what information may be relevant. In the absence of a USDA determination as to whether a parcel or

² The USDA is subject to specific statutes [*see, e.g.*, 7 U.S.C. 8791] designed to protect landowner privacy and, as such, is prohibited from making certain parcel-specific information available without the landowner's consent.

tract of land is prior converted cropland for FSA purposes, the Corps and EPA will evaluate any relevant information or documentation provided by the landowner/operator, as well as relevant additional sources of information as appropriate, to determine whether an area meets the definition of “prior converted cropland” under the NWPR and is excluded from the definition of “waters of the United States.” In evaluating the status of such lands as prior converted cropland for purposes of applying the NWPR exclusion, the Corps and/or EPA will consult with USDA as appropriate.

“Agricultural purposes” under the NWPR includes land use that makes the production of an agricultural product possible, including but not limited to crop production, grazing and haying. 85 FR 22341. The NWPR also clarifies that cropland that is left idle or fallow for conservation or agricultural purposes for any period or duration of time remains in agricultural use (*i.e.*, it is used for, or in support of, agricultural purposes), and therefore maintains the prior converted cropland exclusion. 85 FR 22341. Agricultural purposes include, but are not limited to, idling land for conservation uses (*e.g.*, habitat; pollinator and wildlife management; and water storage, supply, and flood management); irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; and idling land for soil recovery following natural disasters like hurricanes and drought. The uses listed above, in addition to crop production, grazing and haying, fall within the term “agricultural purposes” and, if documented, may maintain the prior converted cropland exclusion from the definition of “waters of the United States.” Conservation practices, including those required or supported by USDA, state, and local programs (including recognized private sector programs that partner with government programs or that can provide verifiable documentation of participation) are critical to the success of agricultural systems across the country. Conservation practices and programs also are conducted “for or in support of agricultural purposes” and are appropriate to maintain the prior converted cropland exclusion from the definition of “waters of the United States.” 85 FR 22321.

It is important to note that some progressive agricultural activities and conservation practices can be difficult to recognize. This is often true for agricultural uses that mimic natural processes and have significant environmental benefits. For example, the USDA promotes soil health practices which emphasize maintaining diverse vegetative covers on soil at all times throughout the year, even on cropland. To some, this may give the appearance of abandoned land. For difficult-to-recognize agricultural use activities that result in instances when soil tillage is reduced or eliminated on cropland (*e.g.*, soil health), or water is stored for re-use on a dedicated area of cropland (*e.g.*, tailwater recovery), the Corps and EPA can rely on USDA for examples of potential documentation of agricultural use (such as a landowner’s/operator’s conservation plan, land use certifications for specific fields with USDA Farm Service Agency, and related documentation). The USDA may assist landowners/operators with information and documentation of agricultural use and other information which may demonstrate that prior converted cropland has not been abandoned or may no longer meet all parameters of wetland criteria. In addition, various other types of documentation may be used to indicate that land is being used for or in support of “agricultural purposes” and that the prior converted cropland exclusion continues to apply to a certain field or tract of land. In making an abandonment determination, the Corps and EPA intend to work closely with the landowner/operator and USDA, as appropriate, to determine whether the land is currently or has been used for or in support of agricultural purposes at least once in the

immediately preceding five years. The Corps and EPA may consider documentation from USDA and other federal or state agencies as well as other relevant sources of information.³

In circumstances where the landowner/operator wants to provide the Corps or EPA direct access to their USDA records regarding a USDA prior converted cropland determination and/or information which may be useful for establishing agricultural purposes, the landowner/operator may provide the Corps or EPA with a signed consent form (*see* Appendix A) to allow those agencies access to the relevant information. 85 FR 22326. The landowner/operator should note that in signing the consent form they are authorizing the Corps and EPA access to their complete record with USDA.

V. TRAINING

In order to promote understanding, to improve communication, and to familiarize personnel involved in developing DLs, CWDs, and JDs, the agencies intend to utilize web-based, and in some cases in-person field-level, training regarding procedures, rules, and policies of each agency. In addition, the agencies are encouraged to explore the possibility of developmental assignments and cooperative agreements where agency personnel work at the other agency for term assignments. The agencies intend to continue to provide joint training opportunities for their field personnel, especially to facilitate awareness of and resolution for inconsistent determination procedures and findings.

VI. GENERAL

- A. The procedures contained within this memorandum do not create any rights, either in substance or procedure, that are enforceable by any party. An agency's deviation or variance from the administrative procedures included in this memorandum will not constitute a defense for violators or others concerned with any CWA enforcement action or determinations of USDA eligibility related to the Wetland Conservation Provisions.
- B. Nothing in this memorandum is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of any signatory agency.
- C. Nothing in this memorandum is intended to affect the authority of a state or tribe pursuant to an authorized CWA Section 401, 402, or 404 program.
- D. Nothing in this memorandum will be construed as indicating a financial commitment by the agencies for the expenditure of funds. All commitments made by the agencies in this memorandum are subject to the availability of appropriated funds and budget priorities. Nothing in this memorandum, in and of itself, obligates the agencies to expend appropriations or to enter into any contract, enter into any assistance agreement, or incur other financial obligations.

³ See the preamble to the NWPR (85 FR 22250, April 21, 2020) for further discussion on agricultural purposes and a discussion on documentation types.

E. This memorandum remains effective unless revised or rescinded by any signatory agency, upon written notice to the other agencies.

DAVID
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