



**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 U.S. Environmental Protection Agency (EPA) together implement Section 404 of the Clean Water Act (CWA). Section 404 regulates the discharge of dredged or fill material into navigable waters, which the CWA defines as “waters of the United States.” 33 U.S.C. 1344; 40 C.F.R. § 230. As part of Section 404 implementation, the Corps and EPA determine which aquatic resources meet the definition of “waters of the United States” as well as the extent of those waters. 33 C.F.R. § 328.3; 40 C.F.R. § 120.2. The U.S. Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) implements certain Wetland Conservation Provisions (Sections 1221-1224) of the Food Security Act of 1985, as amended (FSA). 16 U.S.C. 3821-3824. 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 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 a converted wetland or to convert a wetland to make possible the production of an agricultural commodity unless an exemption 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 C.F.R. 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 purposes of those laws. This memorandum provides procedures for use by the agencies' personnel that will facilitate their efforts to ensure that federal wetland programs are administered in an efficient and effective manner. It defines common terms used by the agencies in implementing their respective programs and discusses the agencies' implementation procedures.

This memorandum hereby rescinds the 2020 Memorandum to the Field² and reflects the agencies' approach outlined in the final rule "Revised Definition of 'Waters of the United States.'" See 33 C.F.R. § 328.3; 40 C.F.R. § 120.2. 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.

II. DEFINITIONS

- A. *Agricultural Commodity*: As defined by USDA, any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters, or sugarcane. 7 C.F.R. § 12.2.
- B. *Change In Use*: Interpreted by the Corps and EPA for CWA implementation, as an action that would make the prior converted cropland no longer available for the production of an agricultural commodity, as explained in the discussion of the prior converted cropland exclusion from the preamble to the final rule "Revised Definition of 'Waters of the United States'" in section IV.C.7.a.
- C. *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.
- D. *Certified Wetland Determination (CWD)*: A decision by NRCS regarding the presence of wetlands, including identification of wetland type (exemptions to the Wetland Conservation Provisions of the FSA) and size, based on the procedures in the NRCS National Food Security Act Manual (including amendments and related guidance).
- E. *Jurisdictional Determination (JD)*: A written Corps determination that a wetland and/or water body is subject to regulatory jurisdiction under Section 404 of the CWA or a

² July 2020, "Memorandum to the field between the U.S. Department of Agriculture, Natural Resource 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)."

written Corps determination that a water body is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899. 33 C.F.R. § 331.2.

1. *Approved Jurisdictional Determination (AJD)*: A Corps document stating the presence or absence of “waters of the United States” on a parcel or a written statement and map identifying the limits of “waters of the United States” on a parcel. AJDs are clearly designated appealable actions and will include a basis of the AJD with the document. 33 C.F.R. § 331.2.
2. *Preliminary Jurisdictional Determination (PJD)*: A Corps written indication that there may be “waters of the United States” on a parcel or indications of the approximate location(s) of “waters of the United States” on a parcel. PJDs are advisory in nature and may not be appealed. PJDs include compliance orders that have an implicit JD, but no AJD. 33 C.F.R. § 331.2.

F. *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 to reduce delays in actions related to their wetland programs.

G. *Prior Converted Cropland*:

1. A wetland type identified by NRCS in CWDs, as defined by USDA pursuant to the FSA at 7 C.F.R. § 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.
2. As stated by the Corps and EPA pursuant to the CWA and the definition of “waters of the United States”: Prior converted cropland is designated by the Secretary of Agriculture. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA. 33 C.F.R. § 328.3(b)(2); 40 C.F.R. § 120.2(b)(2).

III. PRIOR CONVERTED CROPLAND

In the final rule “Revised Definition of ‘waters of the United States,’” (33 C.F.R. § 328.3(b)(2); 40 C.F.R. § 120.2(b)(2)), the Corps and EPA have repromulgated the regulatory exclusion for prior converted cropland first codified in 1993. The preamble of the final rule “Revised Definition of ‘Waters of the United States’” in section IV.C.7.a provides additional information regarding implementation of prior converted cropland and change in use, as summarized below.

The NRCS 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 the agencies' authorities under the CWA. When determining whether a feature meets the definition of "waters of the United States" and is subject to CWA jurisdiction, the Corps and EPA will recognize any NRCS CWD as to whether a land area is prior converted cropland when evaluating the applicability of the prior converted cropland exclusion. The Corps and/or EPA will then evaluate the eligible land area to determine whether the exclusion currently applies or if the exclusion is not applicable due to a "change in use." *Id.*

The final authority regarding CWA jurisdiction and exclusion applicability remains with the EPA Administrator; however, the Corps administers the day-to-day CWA Section 404 program including completion of JDs and permitting. A Corps or EPA determination of the applicability of the prior converted cropland exclusion for CWA purposes does not affect the USDA administration of the FSA or a landowner's/operator's eligibility for USDA program benefits. 33 C.F.R. § 328.3(b)(2); 40 C.F.R. § 120.2(b)(2).

A landowner/operator seeking a determination of whether waters are jurisdictional under the CWA may demonstrate that a wetland has been designated as prior converted cropland through an NRCS CWD. To allow the Corps or EPA to utilize information from an NRCS CWD, the landowner/operator should provide a copy to the Corps or EPA. In circumstances where the landowner/operator wants to provide the Corps or EPA direct access to their USDA records regarding an NRCS CWD, 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. In signing the consent form the landowner/operator authorizes the Corps or EPA to access their complete record with USDA.³ Once eligibility is determined based on an NRCS CWD, the Corps or EPA will evaluate the land to determine if the exclusion under the CWA applies to the land as it is currently or proposed to be used. In the absence of an NRCS CWD as to whether a land area is prior converted cropland for FSA purposes, the Corps or EPA will be unable to determine that an exclusion of prior converted cropland from "waters of the United States" is applicable.

The CWA exclusion for prior converted cropland only excludes wetlands and does not exclude other types of non-wetland aquatic resources (e.g., tributaries, ponds, ditches) that are located within a land area designated as prior converted cropland. The exclusion for prior converted cropland does not apply to areas designated by USDA as meeting other Food Security Act exemptions, including exemptions for farmed wetlands, or areas that meet the USDA definition of wetlands and do not have a prior converted cropland designation. *See* the preamble to the final rule "Revised Definition of 'Waters of the United States'" section IV.C.7.a. Wetlands in NRCS-designated prior converted cropland areas that are jurisdictional traditional navigable waters,

³ The USDA is subject to specific statutes [see, e.g., 7 USC 8791] designed to protect landowner privacy and, as such, is prohibited from making certain parcel-specific information available without the landowner's consent.

territorial seas, or interstate waters under the definition of “waters of the United States” are not excluded from CWA jurisdiction.

IV. CHANGE IN USE PRIOR CONVERTED CROPLAND EXCLUSION REQUIREMENTS

As explained in the discussion of the prior converted cropland exclusion in the preamble of the final rule “Revised Definition ‘Waters of the United States,’” the Corps and EPA will implement the prior converted cropland exclusion as lasting so long as an area is available for the production of agricultural commodities, but ceasing upon a “change in use.” The agencies view a “change in use” as an action that would make the prior converted cropland no longer available for the production of an agricultural commodity. For example, commodity crop production could not reasonably be reestablished in an area that has been filled for development, so such an area would have changed use. The Corps and EPA will also interpret agricultural commodities consistent with the USDA definition, which encompasses “any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters, or sugarcane.” 7 C.F.R. § 12.2.

Areas that are intended to be modified or developed for purposes, including but not limited to, residential, commercial, or industrial use; mining; energy infrastructure; or other non-agricultural uses do not meet this standard of availability for commodity crop production. Plans or proposals for development may include applications for CWA Section 404 permits or other federal, state, or local permits for residential, commercial, industrial development, mining purposes, or other non-agricultural uses. The Corps and EPA recognize that plans and proposals do not themselves change the characteristics of an area, and that some do not come to fruition. However, the agencies would like to provide certainty and fair notice of prior converted cropland exclusion applicability changes during the planning stage rather than waiting until a possible CWA violation has occurred. *See* the preamble to the final rule “Revised Definition of ‘Waters of the United States’” section IV.C.7.a.

An example of “change in use” would include a scenario where prior converted cropland is left idle for several years and reverts to wetland, and the property is then sold for conversion to a residential development. The discharge of dredged or fill material from that development into areas that would otherwise qualify as “waters of the United States” would require prior authorization under Section 404 of the CWA, notwithstanding any designation of a prior converted cropland exclusion in a JD or EPA jurisdictional decision that was based on conditions that existed prior to the “change in use.” If the former landowner/operator continues to use the land for the production of an agricultural commodity, or for an agricultural use, even after the sale, the exclusion would continue to apply for their activities, so long as the area remained available for commodity crop production. In this scenario, the Corps and EPA would interpret the prior converted cropland exclusion to continue to apply to a farmer’s use of prior converted cropland for farming purposes even after development plans or proposals have been initiated, and even after land has been sold. Simultaneously, during the permitting process for the developer, once the proposals or plans for development begin, the prior converted cropland

exclusion would not be available to the developer even prior to a discharge occurring in the wetland. *See* the preamble to the final rule “Revised Definition of ‘Waters of the United States’” section IV.C.7.a.

Under the “change in use” standard, an area will not lose prior converted cropland status so long as it is reasonably conceivable that the area in its current condition would still be available for commodity crop production. Generally, this means that the area has not undergone soil disturbance such that significant effort, such as the removal of concrete or permanent structures, would be required to enable the production of agricultural commodities. When land is idled for agriculture or conservation purposes, it is still available for commodity crop production and therefore has not changed use. Changes in use also do not include agricultural activities such as planting of agricultural crops; crop production of food, fiber, or horticultural products; haying or grazing; idling consistent with USDA programs or conservation uses (such as habitat; pollinator and wildlife management; and water storage, supply, and flood management); cropland rotations into long-term agroforestry; idling land for soil recovery following natural disasters such as hurricanes and drought; irrigation tailwater storage; crawfish farming; cranberry bogs or other perennial crops such as vineyards or orchards; nutrient retention; or diversion from crop production for purposes of preventing erosion or other degradation, so long as these uses keep the land available for future production of agricultural commodities. *See* the preamble to the final rule “Revised Definition of ‘Waters of the United States’” section IV.C.7.a.

A Corps or EPA decision that the prior converted cropland exclusion is not applicable to a particular land area due to a planned or proposed “change in use” does not necessarily mean the land area contains “waters of the United States.” Any area that has not reverted to a wetland that meets the rule’s definitions will not be regulated as a “water of the United States.” *Id.* An AJD, or EPA equivalent jurisdictional decision, should demonstrate that an area has reverted to a wetland under present conditions using the applicable agency delineation procedures when determining if it meets the definition of “waters of the United States.”

While Corps approved JDs are only valid for five years under current policy, a landowner/operator may request a JD at any time. To maintain a previously determined prior converted cropland exclusion, the landowner/operator only needs to demonstrate that land use conditions have not changed such that the land area remains available for the production of an agricultural commodity. USDA information may support this decision. In circumstances where the landowner/operator wants to provide the Corps or EPA direct access to their USDA records regarding land use conditions, 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. If the prior converted cropland exclusion no longer applies due to a planned or proposed “change in use” that makes an area unavailable for agricultural commodity production, the Corps or EPA would be responsible for determining whether any wetlands present within the land area previously designated as prior converted cropland meet the definition of “waters of the

United States” and are therefore regulated under the CWA. 33 C.F.R. § 328.3(b)(2); 40 C.F.R. § 120.2(b)(2).

V. IMPLEMENTATION

- 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. 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 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. Wetlands, as defined by and subject to the FSA Wetland Conservation Provisions, do not include waters that do not have a predominance of hydric soils or support hydrophytic vegetation. To provide additional clarity, 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 but may potentially be subject to the CWA. If these features are designated, it may be with a cautionary icon to communicate that a CWA permit may be needed to authorize any proposed discharge.
- C. Informing Affected Landowners or Operators of Other Potential Statutory Obligations for Wetlands.
 1. The Corps intends to include the following standard language in all written DLs that are independent from or included as part of Corps JDs: “The delineation included herein has been conducted to identify the location and extent of the aquatic resources for purposes of the Clean Water Act for the particular site identified in this request. This delineation 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 an NRCS Certified Wetland Determination with the local USDA service center, prior to starting work.”
 2. 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. Informing Affected Landowners or Operators of Limitations of Prior Converted Cropland Exclusion Determinations. The Corps intends to use the following language in all AJDs that include a prior converted cropland exclusion: “This approved jurisdictional determination includes areas that meet the USDA NRCS definition of prior converted cropland at 7 C.F.R. § 12.2 and are documented as meeting the Clean Water Act exclusion for prior converted cropland at 33 C.F.R. § 328.3(b)(2). Although AJDs are only valid for five years as a matter of current Corps policy, the Clean Water Act prior converted cropland exclusion for such lands remains valid as long as the covered land area is not subjected to a “change in use” that would make the land unavailable for the production of an agricultural commodity. Any prior converted cropland exclusion in this AJD shall be extinguished for a proposal or plan that would result in a “change in use” of the land to a non-agricultural use, including but not limited to industrial, commercial, mining, energy infrastructure, or residential uses. Recipients may request reverification of prior converted cropland exclusion status for expired AJDs.”
- E. 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 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.
- F. 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 utilize NRCS CWD information received from a landowner/operator regarding their subject property to inform the Corps when conducting DLs for purposes of the CWA.
- G. Points of Contact. Each agency intends to designate or confirm within 30 days 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 designations, conservation practice standards, construction methods for agricultural activities, and activity-based exemptions from permit requirements under Section 404(f) of the CWA.

- H. Technical Assistance. The agencies intend to continue to provide appropriate technical assistance for all field personnel involved in CWDs, DLs, and JDs. Any on-site NRCS assistance in specific Corps or EPA DLs on agricultural lands will be limited to instances where there is also a need for the NRCS 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 Corps and/or EPA as otherwise permitted by law.
- I. Dispute Resolution. The agencies intend to make every reasonable effort to resolve any concerns or disputes related to these procedures at the local level.⁴ Issues that cannot be resolved at the local level, however, should be elevated to the appropriate regional level offices. If this level of coordination is insufficient to resolve the agencies' concerns, then the matter should be elevated to the headquarters office(s) by the Corps Division Engineer, the EPA Regional Administrator, and/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 time frames 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.

VI. TRAINING

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 may work at the other agency for term assignments, where possible. 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.

VII. 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

⁴ For EPA purposes the Regional Water Division Director facilitates the dispute resolution process at the local level, and the Regional Administrator is engaged for the regional level of the dispute resolution process.

constitute a defense for persons found in violation of CWA or FSA provisions, 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, territory, 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.
- E. This memorandum remains effective unless rescinded by any signatory agency, upon written notice to the other agencies.

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BONNIE ROBERT BONNIE
Date: 2022.12.16
08:44:14 -05'00'

Robert Bonnie
Under Secretary of Farm Production and Conservation
U.S. Department of Agriculture



Michael L. Connor
Assistant Secretary of the Army
(Civil Works)



Radhika Fox
Assistant Administrator,
(Office of Water)
U.S. Environmental Protection Agency

**Appendix A: 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 cooperator 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 and current conditions necessary to demonstrate ongoing availability for production of an agricultural commodity) with USDA Natural Resources Conservation Service
- Crop acreage reports (pertaining to the specific field and current conditions necessary to demonstrate ongoing availability for production of an agricultural commodity) 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 the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency are not required to protect this information according to USDA policy.

Signature: _____

Date: _____