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## CIRCULAR 180-20-1

Title 180, National Food Security Act Manual, Fifth Edition Part 514 (Subpart A and C)

**SUBJECT:** ECS – Highly Erodible Land and Wetland Conservation

**Purpose.** To provide updated policy and guidance for the wetland and highly erodible land conservation policy in Title 180, National Food Security Act Manual (NFSAM), Fifth Edition.

**Effective Date.** This circular is effective on September 1, 2020.

**Background.** On July 17, 2020, the Natural Resources Conservation Service (NRCS) along with the Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers (USACE), signed a Memorandum to the Field concerning implementation of Section 404 of the Clean Water Act (CWA) and the Food Security Act of 1985, as amended (FSA). The memorandum (Attachment A) provides procedures for use by all three agencies' personnel and will facilitate the agencies' efforts to ensure that federal wetland programs are administered in an efficient and effective manner that minimizes their impacts on affected landowners and operators while continuing to fulfill the missions of the respective agencies. The agencies strive 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.

This circular establishes revised policy in two areas affecting NRCS implementation of the WC provisions. The **first** is related to a new icon which will be placed on certified wetland determination (CWD) maps to alert USDA participants of potential CWA jurisdictional waters on their properties, which may require CWA permitting if manipulated. In addition, the language issued to USDA participants regarding non-applicability of NRCS wetland determinations to CWA jurisdiction and permitting requirements has been revised. The **second** is to clarify NRCS' role when providing CWA-related technical assistance to USDA clients. Under certain circumstances, NRCS may provide technical assistance on CWA jurisdictional determinations. NRCS may also provide technical assistance on prior converted cropland abandonment determinations which may affect CWA exclusion applicability. This circular clarifies when such NRCS technical assistance is appropriate.

This circular provides guidance on how the following two actions are to be accomplished:

1. Beginning on the effective date of this circular, NRCS staff are to use a cautionary icon on CWD maps which indicates water features that are not subject to the WC provisions but are potentially subject to the CWA. The NRCS will also inform the USDA participant that such water features may be under jurisdiction of the CWA for any proposed discharges which may occur in those water features, and direct them to the USACE for more information.
  - a. NRCS will utilize a triangle with a dot in the center (▲) as a cautionary icon on CWD maps to identify water features potentially subject to the CWA (Attachment B). 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. The NRCS will not delineate (place a boundary around) these water features but will place the icon on the approximate center of the water feature(s). If the water feature is lengthy or continuous, icons can be placed approximately every one-half mile within the water feature(s) to aid in ensuring the awareness of USDA participants. Attachment B provides an example of an FSA CWD map containing the cautionary icon (Figure 1) and general guidance to aid in identifying areas potentially subject to the CWA.
  - b. The CWD map legend will include the cautionary icon with the identifier: "Potential Jurisdictional Waters (P JW)". The following note will be included within the "remarks" section of the form NRCS-CPA-026 which provides caution that the area flagged by the

icon could be within the jurisdiction of the CWA, and beyond the scope of the FSA CWD. "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, might also be subject to the Clean Water Act."

- c. NRCS will include the following language in the transmittal letter for all CWDs provided to clients: "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." Note that this language has been revised from the version that was previously in place at NFSAM Part 514.1(J).
2. 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.
    - a. If a USDA program participant invites NRCS to a joint field visit with the USACE/EPA in writing, and the USDA program participant has provided a signed document waiving the protection of private information, then NRCS involvement will be limited to the technical information required for the CWD or site visit for FSA purposes.
    - b. In some cases, it may be helpful to a USDA client to share information NRCS gathered during a previously conducted CWD or site visit for FSA purposes with the USACE or EPA. The primary role of NRCS is to provide information to the client who can then provide that information to the USACE or EPA. However, if a client wishes NRCS to share information directly with the USACE or EPA, it will be done only with the expressed written consent of the person. Attachment C provides a USACE/EPA form which may be used for this purpose. This information will be limited to technical information on existing CWDs or previously conducted site visits for FSA purposes, which may have value in the client's pursuit of a CWA exclusion or Section 404 permit.

In addition, the memorandum provides means for clients to effectively utilize information about their operations to aid the USACE and/or the EPA in making determinations of the prior converted cropland exclusion for CWA purposes. The memorandum provides a consent form (Attachment C), which a USDA client can utilize to provide protected (personally identifiable) information to the USACE and/or the EPA. This form is to be completed by the USDA client/requestor who is authorizing information relating to him/herself for the purpose of determining applicability of the prior converted cropland exclusion for CWA purposes. The release of NRCS prior converted cropland determinations and the previous 5 years of information from NRCS conservation plan of operations or Farm Service Agency crop acreage reports, may aid in the USACE and/or the EPA decision on whether an area labelled prior converted cropland meets the CWA exclusion. USDA clients should understand that the consent form to release protected information is not a requirement for participation in any USDA program, and the USACE and/or the EPA are not required to protect the client's private information according to USDA statute, regulation, or policy.

In evaluating the status of agricultural lands as prior converted cropland for purposes of applying a CWA exclusion, the USACE and/or EPA may request to consult with USDA staff. This type of request can only be granted when the applicable USDA client has given written permission to do so (such as via the consent form).

If a client does not have a USDA CWD for a particular field and would like an area to be considered for the CWA prior converted cropland exclusion, the client may initiate a wetland determination request with USDA by the means which typically initiates FSA technical determinations (i.e., completion of form AD-1026 with the USDA Farm Service Agency, etc.).

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.

**Policy.** The following NFSAM revised policy will be used when making WC technical determinations.

**NFSAM-514-A-514.1(J) is revised to read as follows:**

J. Assistance to USDA Clients on Clean Water Act Related Issues

(1) Certified wetland determinations performed by NRCS are based on Food Security Act (FSA) definitions and may not be valid for U.S. Army Corps of Engineers (USACE) Clean Water Act (CWA) jurisdiction and permitting requirements. NRCS will include the following language in all wetland determinations provided to the USDA participant:

"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 U.S. Army Corps of Engineers district office prior to starting work."

(2) To provide clarity to USDA participants regarding waters on their lands which could be subject to the CWA, the NRCS will use a cautionary icon on certified wetland determination maps which indicates water features potentially subject to the CWA, but are not subject to the FSA wetland conservation provisions.

(i) NRCS will use a cautionary icon on certified wetland determination maps which indicates water features that are not subject to the wetland conservation provisions but are potentially subject to the CWA. These water features will be designated as Potential Jurisdictional Waters (PJW). Water features located within the area of the certified wetland determination 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. The NRCS will not delineate (place a boundary around) these water features, but will place the icon on the approximate center of the water feature(s). If the water feature is lengthy or continuous, icons can be placed approximately every one-half mile within the water feature(s) to aid in ensuring the USDA participant's awareness.

(ii) The following note will be included within the "remarks" section of the form NRCS-CPA-026 which provides caution that the area flagged by the icon could be within the jurisdiction of the CWA, and beyond the scope of the certified wetland determination:

"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."

(3) NRCS may provide CWA-related wetland determination technical assistance to USDA clients under limited circumstances. Such NRCS assistance will be limited to instances where there also is or has been a need to conduct a certified wetland determination or site visit for FSA wetland conservation purposes. This assistance will only be provided upon receiving written permission from the appropriate USDA client.

(i) If a USDA program participant invites NRCS to a joint field visit with the USACE/EPA in writing, and the USDA program participant has provided a signed document waiving the protection of private information, then NRCS involvement will be limited to the technical information required for the CWD or site visit for FSA wetland conservation purposes.

(ii) If a USDA client wishes to share information NRCS gathered during a previously conducted CWD or site visit for FSA wetland conservation purposes with the USACE or EPA, the primary role of NRCS is to provide information to the client who can then provide that information to the USACE or EPA. However, if a client wishes NRCS to share information directly with the USACE or EPA, it will be done only with the expressed written consent of the person. This information will be limited to technical information on existing CWDs or previously conducted site visits for FSA wetland conservation purposes, which may have value in the client's pursuit of a CWA exclusion or Section 404 permit.

(4) USDA clients may wish to utilize USDA information about their operations to aid the USACE and/or the EPA in making determinations of the prior converted cropland exclusion for CWA purposes, including information which may support that prior converted cropland has continued to be used for, or in support of, agricultural purposes.

(i) The primary role of NRCS is to provide information to the client who can then provide that information to the USACE or EPA. However, if a USDA client wishes NRCS to share information directly with the USACE or EPA, it will be done only with the expressed written consent of the person. The USDA client should be encouraged to use an applicable USACE/EPA release of information form, but regardless of the method of consent, the person should understand and acknowledge that the consent to release private information is not a requirement for participation in any USDA program, and the USACE and/or the EPA are not required to protect the persons private information according to USDA statute, regulation, or policy.

(ii) Persons seeking a CWA prior converted cropland exclusion but who 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.

**NFSAM-514-C-514.20 is revised to read as follows:**

A. Definition

(1) Non-wetland (NW) is land that under normal conditions does not meet wetland criteria.

(2) NW also includes wetlands that were converted to the extent that wetland criteria were not present on December 23, 1985, but an agricultural commodity was not produced. For these NW areas, the wetland criteria have not returned and the area has not been abandoned.

(3) Water features such as streams, lakes or rivers, which do not meet wetland criteria, may be labeled NW if it is necessary to make a determination of eligibility for these areas.

(4) "Potential Jurisdictional Waters" of the Clean Water Act may occur on a tract. Potential Jurisdictional Waters can include streams, lakes, ponds, rivers, and other water features that are not wetlands as defined in the Food Security Act.

(5) Potential Jurisdictional Waters (PJW), including waters which may be identified as NW, will be identified with icons on certified wetland determination maps according to Part 514.1(J)(2). PJW icons are not wetland labels as used in USDA certified wetland determinations and are not appealable to USDA.

**Filing Instructions.** This circular is to be printed in hardcopy and retained in local files until such time as the NFSAM is updated to include this information.

Attachment A – NRCS/Corps/EPA Memorandum to the Field

Attachment B - Use of the Potential Jurisdictional Waters Cautionary Icon

Attachment C – Corps and EPA Release of Information Form