

PENNSYLVANIA GUIDANCE FOR PROTECTING WETLANDS

December 2009

A. BACKGROUND

1.) Summary of NRCS national policies

Wetlands are protected by NRCS national technical assistance policy and other federal, state, and local laws and regulations including the National Environmental Policy Act of 1969 (NEPA) and Executive Order 11990 (May 1977), even when not subject to the Wetland Conservation provisions of the Food Security Act. To protect wetlands while providing technical and/or financial assistance, NRCS will avoid direct or indirect support of activities that **may** adversely impact wetlands wherever a practicable alternative exists - NRCS General Manual Title 190, Part 410, Subpart B, Sec. 410.26, F. <http://policy.nrcs.usda.gov/viewerFS.aspx?hid=21088>
{Scroll down to F.}

2.) Wetland definition (federal & state)

An area of any size that is inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. The NRCS National Food Security Act Manual (NFSAM) also requires a predominance of hydric soils.

3.) Delivery of Technical or Financial Assistance

NRCS employees will only proceed to deliver technical assistance for planning or implementing conservation practices or activities after they have determined the participant or applicant is in compliance with Wetland Conservation provisions of the Food Security Act; and/or, they have determined the presence or absence of wetlands in order to comply with NRCS national wetland protection technical assistance policy and other federal, state, and local laws and regulations.

B. DETERMINING PRESENCE OR ABSENCE OF WETLANDS ON AGRICULTURAL LANDS

If an employee suspects the presence of wetlands within either the area being planned or an area that will be impacted by implementing a conservation practice or activity, the employee will verify if a wetland determination exists for the area or complete a determination as follows.

For programs covered by the Food Security Act*:

If a certified Wetland Conservation (WC) compliance determination has not been completed, the employee will require the participant to complete a new Form AD-1026 [Highly Erodible Land Conservation (HELC) and Wetland Conservation

(WC) Certification] and indicate ‘Yes’ for either A. or B. in Item 10, as appropriate.

- 1.) For existing participants the employee will notify them that depending on the results, the plan may need to be revised before the practice can be implemented.
- 2.) For applicants the employee will notify them that the determination needs to be completed before their application may be accepted as eligible.

* Listed in 510.02, b of the NFSAM.

<http://policy.nrcs.usda.gov/viewerFS.aspx?hid=20162>

For Owner/operators not participating in or applying to programs covered by the Food Security Act

Form AD-1026 is not applicable. If a wetland determination has not been previously documented on an Environmental Evaluation Worksheet, a preliminary determination of whether or not wetlands are present will be made using guidance in the NFSAM (see Section D below) and Pennsylvania Off-Site Wetland Determination Methods (FOTG, Sec. II, D.). Document the results in the Special Environmental Concerns section of the Pennsylvania Environmental Evaluation Worksheet.

Proceed with assistance in accordance with NRCS policies contained in GM-190 Part 410, Subpart B - 410.26 (Technical Assistance)

<http://policy.nrcs.usda.gov/viewerFS.aspx?hid=21088>

and GM-450, Part 405, Subpart A (Complying With Other Federal, State, and Local Laws and Regulations).

<http://policy.nrcs.usda.gov/viewerFS.aspx?hid=19434>

C. DETERMINING PRESENCE OR ABSENCE OF WETLANDS ON NON-AGRICULTURAL LAND AND FOREST LAND

- 1.) When NRCS employees are providing technical assistance on the following lands and they identify *potential wet areas* on those lands, they will make a *preliminary determination* of the presence or absence of wetlands based on soils maps:

- not used for the production of food, fiber, or horticultural crops
- not used for haying or grazing
- not left idle in accordance with USDA program requirements
- forest land

The results will be documented and certified on Form NRCS-CPA-026E (Highly Erodible Land Conservation and Wetland Conservation Determination) only for participants in programs covered by the Food Security Act. When the owner/operator is not a participant, the *preliminary determination* results will be documented in the Special Environmental Concerns section of the Pennsylvania Environmental Evaluation Worksheet.

- 2.) If the *preliminary wetland determination* on non-agricultural or forest land indicates a wetland may be present and NRCS determines at any time that

there may be an adverse impact, NRCS will recommend avoidance of the impact. If avoidance of an adverse impact is not practicable, NRCS will take no further action until the owner/operator obtains a *jurisdictional wetland determination* to satisfy the federal Clean Water Act and/or state Chapter 105 regulations.

D. COMPLYING WITH WETLAND CONSERVATION PROVISIONS OF THE FOOD SECURITY ACT

- 1.) Complete certified WC compliance determinations following guidance in the NFSAM** and Pennsylvania Off-Site Wetland Determination Methods. Document results on Form NRCS-CPA-026E. If the certified WC compliance determination indicates there are no wetlands, or only wetland areas that will not be impacted (positively or adversely), no further action is needed. If there is no certified WC compliance determination and the owner/operator elects not to request one, NRCS will terminate assistance.

** Subpart A - Wetland Determination and Delineation

<http://policy.nrcs.usda.gov/viewerFS.aspx?hid=21546>

Subpart B - Labels: Natural and Artificial Wetlands

<http://policy.nrcs.usda.gov/viewerFS.aspx?hid=21547>

Subpart C - Labels: Non-Wetlands

<http://policy.nrcs.usda.gov/viewerFS.aspx?hid=21548>

Subpart D - Labels: Wetlands Converted to Agricultural Use Before December 23, 1985

<http://policy.nrcs.usda.gov/viewerFS.aspx?hid=21549>

Subpart E - Labels: Wetlands Converted to Agricultural Use After December 23, 1985

<http://policy.nrcs.usda.gov/viewerFS.aspx?hid=21550>

- 2.) If wetlands are present that will be impacted, NRCS will proceed in accordance with the NFSAM and NRCS policies contained in GM-190 Part 410, Subpart B - 410.26 (Technical Assistance)
<http://policy.nrcs.usda.gov/viewerFS.aspx?hid=21088>
and GM-450, Part 405, Subpart A (Complying With Other Federal, State, and Local Laws and Regulations).
<http://policy.nrcs.usda.gov/viewerFS.aspx?hid=19434>
- 3.) When a certified WC compliance determination indicates an area is Prior Converted cropland (PC), treat the area as non-wetland – but only for purposes of programs covered by the Food Security Act. Other federal, state, and local laws and regulation may apply if the PC was abandoned (no annual crops planted in the most recent five consecutive years). NRCS will inform the owner/operator of this situation, following the guidance in Section E. below.
- 4.) In accordance with the interagency guidance in a national Memorandum To The Field issued jointly to NRCS and U.S. Army Corps of Engineers offices on February 25, 2005, NRCS will only complete wetland determinations on land for participants, or persons intending to become participants, in USDA programs when the proposed activity involves manipulating the land for the purpose of, or to have the effect of making possible the production of an agricultural commodity. This does not include other activities undertaken for

a purpose that does not make production of an agricultural commodity possible.

<ftp://ftp-fc.sc.egov.usda.gov/NWMC/USACE/NRCS-USACEJointMemo.pdf>

E. COMPLIANCE WITH OTHER FEDERAL, STATE, AND LOCAL LAWS AND REGULATIONS

NRCS will inform the owner/operator that wetland determinations performed by NRCS for either Food Security Act or the NRCS National Wetland Protection Policy purposes may not be valid for the federal Clean Water Act (CWA) and/or state Chapter 105 regulations. NRCS will include the following language in the documentation of all wetland determinations provided to landowners or operators: **“This wetland determination/delineation may not be valid for identifying the extent of the federal Clean Water Act or state Chapter 105 jurisdiction for this site. If you intend to conduct any activity that constitutes a discharge of dredged or fill material, or other encroachment into a wetland, you should request a jurisdictional determination from the local office of the U.S. Corps of Engineers and/or Pennsylvania Department of Environmental Protection prior to starting the work.”**

Whenever a jurisdictional wetland determination is required, it is the owner/operator’s responsibility to contact the United States Army Corps of Engineers (U.S. COE) and/or the Pennsylvania Department of Environmental Protection (PA DEP) to obtain one. After the jurisdictional wetland determination is completed, NRCS will coordinate with these agencies and the landowner and any operator to determine if a practicable alternative exists.

Federal Clean Water Act (1977)

http://www.usace.army.mil/CECW/Pages/reg_materials.aspx

Section 404 - Authorizes the U.S. Army Corps of Engineers to regulate discharges of dredged or fill materials into the waters of the United States. 33 CFR Part 323

Dredged Material - means material that is excavated or dredged from waters of the United States. 33 CFR Part 323.2

Discharge of Dredged Material - The Corps and EPA considers use of mechanized earth-moving equipment to conduct land clearing, ditching, channelization, in-stream mining or other earth-moving activity in the waters of the United States **as resulting in a discharge of dredged material** unless project-specific evidence shows that the activity results in only incidental fallback. 33 CFR Part 323.2

Fill Material - Examples of fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, and overburden from mining or other excavation activities. 33 CFR Part 323.2

Discharge of Fill Material - The addition of fill material into waters of the United States. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products. 33 CFR Part 328

Waters of the United States - The definition of Waters of the United States includes wetlands. 33 CFR Part 328

Wetlands - Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 33 CFR Part 328

Discharges require permits - Permits will be required for the discharge of dredged or fill material into waters of the United States. 33 CFR Part 323.3

Discharges require permits (cont'd) - Discharge of fill material where the flow or circulation of waters of the United States may be impaired or the reach reduced must have a permit if the purpose is to convert an area of the waters of the United States into a use to which it was not previously subject. A conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States 33 CFR Part 323.4(c)

Nationwide Permit (NWP) No. 27, Aquatic Habitat Restoration, Establishment, and Enhancement Activities - Permits wetland restoration activities in Waters of the United States. 33 CFR Part 330

NOTE - U.S. Army Corps of Engineers Districts covering Pennsylvania (Philadelphia, Baltimore & Pittsburgh) made "pre-construction notification" to them a requirement for the use of NWP No. 27.

Pennsylvania Dam Safety and Encroachment Act, Chapter 105 (1978)

<http://www.pacode.com/secure/data/025/chapter105/chap105toc.html>

*Regulates water obstructions and **encroachments** located in, along or across, or projecting into a watercourse, floodway or **body of water**, whether temporary or permanent.*

§ 105.3(4)

Encroachment - *A structure or activity which changes, expands or diminishes the **course, current or cross section** of a watercourse, floodway or **body of water**.*

§ 105.1

Body of water - *A natural or artificial lake, pond, reservoir, swamp, marsh or **wetland**.*

§ 105.1

Wetlands - *Areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs and similar areas.*

§ 105.1

Permit requirements - *A person may not construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or **encroachment** without first obtaining a written permit from the Department.*

§ 105.11(a)

Waiver of Permit Requirements - *The requirements for a permit are waived for the following structures or activities:*

- *Maintenance of field drainage systems*
- *Plowing, cultivating, seeding or harvesting for crop production*

§ 105.12 (7) & (8)

Prior Converted Cropland - *Is not regulated as wetlands under the Commonwealth's Wetland Protection Program contained in Chapter 105.*

§105.452

NOTE – *PA's definition of prior converted cropland is based on NRCS's Third Edition (March 1994) of the National Food Security Act Manual, and therefore still includes NRCS's former **Abandonment** provision (five years without an annual crop).*

§105.452(c)(1)

§105.452 does not exempt any other NRCS Wetland Conservation/Swampbuster label that meets wetland criteria other than non-abandoned Prior Converted Cropland (PC); therefore, **NOTE** – *Farmed Wetland Pasture or Hayland (FWP) and Artificial Wetland (AW) are regulated.*

General Permit No. 9, Agricultural Activities - *Authorizes certain agricultural activities that encroach into streams and their floodways or bodies of water: grassed or lined waterways, terraces, diversions, waste storage facilities, spring development and minor drainage that supports these activities and is necessary for contour strips. And shall only be implemented as part of a conservation plan consistent with Chapter 102 (relating to erosion and sediment control) and approved by the County Conservation District: <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-72817/3930-PM-WM0509.pdf>*

Registration of Proposed Use of General Permit - *Prior to construction, the owners shall submit the required information to the DEP Regional Office or the County Conservation District (those with delegated authority from DEP). A copy shall also be sent to the municipalities and county in which the work will be performed.). The owners may not begin work until they have notified the DEP Regional Office or County Conservation District (if appropriate) and received an acknowledgement of that notification. The reply acknowledgement letter serves as registration to use this General Permit.*