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March 17, 2010

NEBRASKA BULLETIN NO. 180-0-7

SUBJECT: CPA – NE-CPA-FSA-WORKSHEET 11 (NRCS CLIENT REFERRAL FOR SECTION 404 OF CWA)

Purpose: Field Office guidance on projects that may be regulated under the Clean Water Act

Expiration Date: September 30, 2010

**A MEM has been scheduled for March 25 at 9:30 am to address questions related to this bulletin, provide guidance using Worksheet 11, and assembling permit applications to submit to USACE.** Information on this MEM will be sent out soon.

### **Categorizing Projects for US Army Corps of Engineers Nationwide Permit 43**

There are several projects which contain ponds, grade stabilization structures, etc. within existing EQIP and WHIP contracts along with those signed up under NRD cost share programs that need to have permit issues addressed before NRCS can continue with implementation. These projects need to be categorized as soon as possible to determine the extent NRCS will be further involved. NE-CPA-FSA-Worksheet 11 has been developed to assist the field staff in determining the appropriate category for all projects that may be regulated by the U.S. Army Corps of Engineers under the Clean Water Act.

Category 1 – No Referral Circumstances

Category 2 – Potential Nationwide Permit Needed (Without Mitigation)

Category 3 – Potential Nationwide Permit Needed (With Mitigation)

Category 4 – Potential Individual Permit

**Existing NRCS EQIP/WHIP Program Projects** - Once the project is categorized the following applies to the extent in which NRCS will be involved.

#### Category 1:

NRCS will proceed with the implementation of the project as scheduled without contact made to USACE.

#### Category 2:

NRCS will proceed with the implementation of the project and the landowner will submit an application to USACE for consideration under a Nationwide Permit.

#### Category 3:

1. NRCS will determine if the project can be re-located or designed to still meet the identified resource concern but eliminate the need for mitigation. If so, then NRCS will proceed with implementation of the project as noted under Category 1 or 2.

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2. If project re-location or design alterations are not feasible and mitigation is needed, NRCS will contact the landowner to discuss potential time requirements and costs along with the following options:
  - a. Landowner may choose to develop a proposed mitigation plan, either independently using a template provided by NRCS or through the private sector using a consultant, provided it can be accomplished within 6 months. This may result in a more expedited process. Once this mitigation plan is accepted by USACE, NRCS will then proceed with project planning and implementation.
  - b. NRCS provides assistance on the development of a site-specific proposed mitigation plan which may be delayed due to workload demand associated with other projects. This plan would be submitted to USACE and NRCS would proceed with implementation once approval is obtained. Note: A priority system will need to be developed by NRCS State Office to determine when and how to provide this assistance once it is known how many existing projects will require mitigation.
  - c. Landowner in consultation with NRCS decides to cancel the project either due to the inability to develop a suitable mitigation plan, approaching deadlines within the contract (i.e. beyond the 5<sup>th</sup> year), or other factors including cost, easements, etc. NRCS will then determine the affect this project had on the scope of the contract.
    1. If project does not affect the scope of the contract, NRCS will complete modification to remove the scheduled practice.
    2. If project does affect the scope of the contract or the end of the contract is approaching, NRCS will proceed with the termination of the contract.

#### Category 4:

1. If the project is part of an established watershed plan funded by NRCS or the NRD, we may consider continuation of the project if there are others in the watershed that fit this same category. NRCS, in cooperation with the NRD, where appropriate, will then proceed with necessary Environmental Assessment needed to meet the needs of the individual permits. The landowner would be required to develop a proposed mitigation plan independently using the NRCS provided template or through the private sector using a consultant. Once this is all completed, NRCS would proceed with project planning and implementation as scheduled.
2. If an individual or "stand alone" project is not part of an existing watershed plan funded by NRCS or the NRD, the NRCS will provide the following alternatives for consideration by the landowner:
  - a. Landowner may choose to seek assistance through the private sector using a consultant to complete the necessary actions to obtain a permit (design alterations, mitigation plan, alternatives analysis, etc.).
  - b. NRCS can no longer service this project and we will complete a modification to remove the scheduled practice and/or termination of the contract, as appropriate.

#### **Future EQIP/WHIP applications**

All applications with a potential practice that may fall under the Nationwide Permit 43 (pond, grade stabilization structure, etc.) will be handled in the following manner:

1. All Local Work Groups will have a High, Medium, Low priority system set up in their ranking process starting in 2011:
  - a. Projects not categorized prior to the ranking cutoff date will be considered "Low" priority.
  - b. Projects which are in Category 3 or 4 and do not meet quality criteria of the primary resource concern (i.e. grade stabilization vs. recreational pond) will be considered "Low" priority.
  - c. If the project has been categorized, then assign appropriate priority level with consideration of input from Local Work Group. Projects deemed to occur under Category 1 or 2 can receive higher priority. Projects in Category 3 and 4 should be considered "Low" priority unless steps have been taken by the landowner to address the applicable mitigation plan or alternatives analysis needed.

## **Existing NRD Projects (NSWCP)**

### Category 1:

NRCS will proceed with the implementation of the project as scheduled without contact made to USACE.

### Category 2:

NRCS will proceed with the implementation of the project and the landowner will submit an application to USACE for consideration under a Nationwide Permit.

### Category 3:

1. NRCS will determine if the project can be re-located or designed to still meet the identified resource concern but eliminate the need for mitigation. If so, then NRCS will proceed with project planning and implementation as noted under Category 1 or 2.
2. If project re-location or design alterations are not feasible and mitigation is needed, NRD will contact the landowner to discuss the following options:
  - a. Landowner may choose to develop a proposed mitigation plan, either independently using a template provided by NRCS or through the private sector using a consultant, provided it can be accomplished within 6 months. This may result in a more expedited process. Once this mitigation plan is accepted by USACE, NRCS will then proceed with project planning and implementation.
  - b. NRCS provides assistance on the development of a site-specific proposed mitigation plan which may be delayed due to workload demand associated with other projects. This plan would be submitted to USACE and NRCS would proceed with implementation once approval is obtained. Note: A priority system will need to be developed by NRCS State Office to determine when and how to provide this assistance once it is known how many existing projects will require mitigation.
  - c. Landowner in consultation with the NRD decides to cancel the project. NRD will then determine status of the application/contract.

### Category 4:

NRCS will notify the NRD of the status of the project and inform the NRD we can no longer provide technical assistance due to the time extent needed to fulfill the requirements of the individual permit. The NRD can coordinate with the landowner on possible methods to accommodate the permitting process.

## **NRD Projects (NSWCP) Applications**

NRCS will proceed with categorizing all applications for the NRD. The NRD will then need to determine which applications are funded. NRCS will then proceed with those that are determined to be in Category 1 or 2 with the guidelines stated above for Existing NRD Projects (NSWCP). For those in Category 3, the landowner will assume responsibility to develop a proposed mitigation plan (independently or via consultant). Projects in Category 4 will not receive NRCS assistance.

**NRD Projects** – These are projects where the NRD has sole responsibility for implementation. On existing projects where NRCS has been involved, we will fulfill our obligations as agreed to with the NRD. On new projects, NRCS assistance will not be offered or provided without approval from the State Conservationist.

## **Categorizing Projects for US Army Corps of Engineers Nationwide Permit 27**

All WRP, WHIP and other Farm Bill program projects that involve wetland restoration and/or enhancement will need review to determine the need for a Nationwide Permit 27 before NRCS proceeds with the project.

### Category 1:

NRCS will proceed with the implementation of the project as scheduled without contact made to USACE only for projects that are either completely wetland creation on a non-wetland site or where the only activity is excavation and disposal on an upland site.

Category 2 and 3:

NRCS will proceed with the implementation of the project and the landowner will submit an application to USACE for consideration under a Nationwide Permit.

Category 4:

NRCS will evaluate the project to determine if it will: result in a conversion of a stream or wetland; or disrupt movements of aquatic life; or not be able to show an increase in wetland function. If any of these circumstances occur, the following sequence will occur:

1. NRCS will determine if project can be designed to still meet the needs of the resource but eliminate the need for individual permit. If so, then NRCS will proceed with implementation of the project as noted under Category 2/3.
2. If the project cannot be modified to meet Category 2/3, NRCS conservation planner will contact State Wildlife Biologist to determine how to proceed.

/s/ Doug Wagner, Acting

STEPHEN K. CHICK  
State Conservationist

Attachment: NE-CPA-FSA-Worksheet 11

## **NRCS Client Referral for Section 404 of CWA**

**Do not finalize planning or designs until Clean Water Act issues are resolved. Proceed with caution so that the planning process does not progress to the point that potential mitigation and wetland planning concerns can't be addressed as part of the planning process and alternative analysis documented on the final NE-CPA-52.**

The following information is divided into two separate sections: Nationwide 27 and Nationwide 43. Use the appropriate section to determine which category of action your project fits into:

- No Referral Circumstances
  - Potential Nationwide Permit Needed (Without Mitigation)
  - Potential Nationwide Permit Needed (With Mitigation)
  - Potential Individual Permit
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### ***Nationwide Permit 27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities***

Activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas and the restoration and enhancement of non-tidal streams and other non-tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

Activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or establish stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities.

#### **No Referral Circumstances**

- Generally not applicable since wetlands are almost always affected unless project is purely wetland creation on an upland site.
- Excavation ONLY and disposal in upland site. Note: a permit may be needed for actions such as temporary construction fill or return water resultant for adjacent sediment disposal, de-watering or stockpiling.

#### **Potential Nationwide Permit Needed**

- Project associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas and the restoration and enhancement of non-tidal streams and other non-tidal open waters, provided those activities result in **net increases** in aquatic resource functions and services.

**AND**

Only native plant species should be planted at the site. All areas disturbed by construction shall be vegetated with appropriate perennial, native grasses and forbs and maintained in this condition.

**AND**

- Project will NOT result in conversion of stream or natural wetlands to another aquatic habitat type (e.g., stream to wetland or vice versa) or uplands. This NWP does not authorize stream channelization.

### **Potential Individual Permit**

- Project will result in conversion of stream or natural wetlands to another aquatic habitat type.  
**OR**
- Project substantially disrupts lifecycle movements of indigenous aquatic life ( i.e. multiple water control structures on linear, free-flowing water courses).  
**OR**
- Functional Assessment does NOT show an increase in functions and services.

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### **Nationwide Permit 43. Stormwater Management Facilities**

Discharges of dredged or fill material into non-tidal waters of the United States for the construction and maintenance of stormwater management facilities, including the excavation of stormwater ponds/facilities, detention basins, and retention basins; the installation and maintenance of water control structures, outfall structures and emergency spillways; and the maintenance dredging of existing stormwater management ponds/facilities and detention and retention basins.

### **No Referral Circumstances**

No stream bed filled or excavated in perennial, intermittent, or ephemeral streams or wetlands.

- The stream bed is the substrate of the stream channel between the ordinary high water marks.

**AND**

- No wetlands impacted by any of the following: filling, flooding, excavation, or drainage. Wetlands include NFSAM prior converted cropland (PC) and artificial (AW) delineated wetlands that still meet the three criteria.

**In uplands** (e.g. including the following features: Swales, gullies, erosional features and ditches excavated wholly in and draining only uplands).

### **Potential Nationwide Permit Needed (Without Mitigation)**

- Not greater than 300 linear feet of stream bed impacted: include filled or excavated. This does not include flooding (inundation) of streambed. Mitigation of stream bed impacts may still be required on a case by case basis.

**AND**

- Not greater than 0.10 acre of wetlands impacted (includes impoundment area).

**AND**

- Not a new project in a perennial stream.

### **Potential Nationwide Permit Needed (With Mitigation)**

- Not greater than 300 linear feet of stream bed impacted: include filled or excavated. This does not include flooding (inundation) of streambed.

**AND**

- Greater than 0.10 acre of wetlands impacted BUT is less than or equal to 0.50 acre of waters of the United States impacted. To get the total acre of waters of the U.S. impacted add the surface area of stream bed identified in first bullet PLUS the area of wetland impacted by filling, flooding, excavation, or drainage. If wetland criteria are met in stream bed then address those areas as “wetlands” and do not double count the surface area as both wetland and stream bed.

**AND**

- Not a new project in a perennial stream.

**Potential Individual Permit**

- Greater than 0.50 acres of waters of the United States impacted.  
OR
- Greater than 300 linear feet of stream bed impacted.  
OR
- A new project in a perennial stream.

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**NRCS Client Referral for Section 404 of CWA**

***NRCS only provides this information to the U.S. Army Corps of Engineers (COE) upon request of the landowner.***

**PROJECT INFORMATION**

Landowner: \_\_\_\_\_

Address: \_\_\_\_\_

Location of proposed activity: County \_\_\_\_\_ Sec. \_\_\_\_\_ T \_\_\_\_\_ R \_\_\_\_\_

Tract No. Field No. \_\_\_\_\_ Site No. \_\_\_\_\_

Describe the proposed activity:

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***PROJECTED CWA ACTION (authority for this determination rests with of the U.S. Army Corps of Engineers)***

- No Referral Circumstances
- Potential Nationwide Permit Needed (Without Mitigation)
- Potential Nationwide Permit Needed (With Mitigation)
- Potential Individual Permit

**SIGNATURES**

Landowner signature indicates approval for NRCS to assist with providing this information to the COE.

\_\_\_\_\_  
LANDOWNER

\_\_\_\_\_  
DATE

\_\_\_\_\_  
NATURAL RESOURCES CONSERVATION SERVICE

\_\_\_\_\_  
DATE

## ATTACHMENTS

### Required:

- ENG Form 4345 Application for the Department of Army Permit. NRCS should not be listed as the applicant or authorized agent.
- Digital photo(s) with descriptions of proposed project site and wetland features.
- Aerial photo with project and area of potential effect identifying project components (i.e. centerline and extent of dam structure features, extent of principal spillway flood pool, locations of wetlands and/or stream beds). Include the location for excess spoil placement.
- Table separately noting the linear feet of stream bed and the acres of wetland impacted in project footprint (excavation/fill and permanent inundation).

	Filled (acres)	Flooded (acres)	Excavated (acres)	Drained (acres)	Filled (linear ft)	Excavated (linear ft)	Conservation Pool Flooded (linear ft)
Stream bed							
Wetland							

- NRCS-CPA-026E wetland conservation determination and map
- NE-CPA-FSA-Worksheet-8 and data map with site specific data collection points identified and for every wetland or Waters of the U.S. a Cowardin wetland designation of wetland type as per the *Classification of Wetlands and Deepwater Habitats of the United States*.
- NE-CPA-52 Environmental Evaluation if NRCS technical or financial assistance being provided. Must include required Guide Sheets and applicable attachments.
- Nationwide Permit 27 requires a copy of the signed “Wetland Agreement”

### Supplemental as applicable (check which apply):

NE-CPA-FSA-Worksheet-9\_Nebraska\_Minimal\_Effect\_Procedure

Expedited minimal effect: Check if activity eligible for a Nebraska specific.

- Center Pivot Travel Ways in Wetlands (see Appendix A)
- Grassed Waterway Construction (see Appendix B)
- Invasive Tree Removal (see Appendix C)
- Minor Channel Maintenance (see Appendix D)
- Stream Crossings (see Appendix E)
- Tree Removal from Playa Wetlands (see Appendix F)
- Wetland Pumping – Health and Safety (see Appendix G)

NE-CPA-FSA-Worksheet-10\_Nebraska\_Wetland\_Functional\_Assessment\_Protocol

Proposed Mitigation Plan