

Regulatory Updates: Changing Land Use, Farmland and Wetlands

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The Issue

As land use changes from agricultural to commercial, residential or some other use, the regulatory programs controlling potential wetlands on the land also change. There is considerable confusion with this shift in regulatory agency responsibility that has the potential to significantly affect the development of the land. Agricultural areas once considered non-wetland under U.S. Department of Agriculture (USDA)/Natural Resources Conservation Service (NRCS) farm program can now be classified as wetlands by the U.S. Army Corps of Engineers (USACE) as soon as the property is no longer regulated by USDA farm program rules. Unless a landowner or developer understands and manages this transition, there is the potential to create severe problems as “new” wetlands can suddenly appear.

This white paper focuses on NRCS and USACE wetland regulations and the potential impact. You should be aware, however, that several states in the Great Lakes region have state wetland regulations that may also be involved. As a result, similar issues apply that will not be directly addressed in this paper.

Background

The NRCS is the lead agency with regards to regulating farm programs, farmers and farm management. This is generally done through the Food Security Act (FSA), which, among other things, provides subsidies for farmers if they follow certain program rules. Some of these rules protect wetlands. The USACE also has regulatory authority to enforce the Clean Water Act (CWA) for wetlands, which creates an overlap in program responsibility. In the past, the USACE and NRCS managed this overlap through a 1994 Memorandum of Agreement (MOA). This agreement basically stated that the NRCS (at that time called Soil Conservation Service) would be the lead agency for wetland determinations on agricultural lands and that the USACE would accept these determinations for making CWA jurisdictional determinations. It further stated that NRCS determination would be accepted by the USACE for a period of five years. This greatly simplified the regulatory landscape for landowners by providing consistency between the Food Security Act and Clean Water Act wetland laws.

One relevant aspect of NRCS wetland rules for our discussion is how agricultural lands are classified:

- Non-wetland (NW)—Self explanatory, these areas are not wetlands.
- Prior Converted (PC)—Areas that were converted from wetlands to non-wetlands prior to December 23, 1985, produced a commodity crop at least once since December 23, 1985 and, as of that date, did not support woody vegetation. This is a very important category.
- Farmed Wetland (FW)—Wetlands that were manipulated (e.g., ditched, tilled, cleared of woody vegetation) prior to December 23, 1985; produced a commodity crop before December 23, 1985; wetland hydrology was not eliminated; and the area had not been abandoned (five years with no management unless in a set-aside program).

An understanding of these classifications is important. For NRCS purposes, once land is classified as PC it retains that classification forever and, under the 1994 MOA, the USACE accepted this designation. Farmed Wetlands, however, are considered wetlands by the NRCS. While the FW designation allows farmers to continue to farm these areas, the designation only allows the drainage to be maintained but not improved. The USACE also considers farmed wetlands to be wetlands and require CWA permits for regulated activities in the wetland.

All this program consistency came to an end when both agencies withdrew from the MOA in January 2005. The agencies withdrew for several reasons, including changes in the farm bills of 1996 and 2002 that affected wetland program rules making it difficult and perhaps even impossible for the NRCS to follow the 1994 MOA. Perhaps most important of all was the Supreme Court ruling that withdrew most isolated wetlands from CWA jurisdiction. These isolated wetlands continue to be bound by FSA program rules (some states have also isolated wetland regulations). Both agencies determined that the differences between the two programs were too great to continue under the 1994 MOA. In February 2005, the USACE and NRCS issued a Joint Guidance (JG) document to replace the old MOA.

In a nut shell, the JG document says that each agency will run its own program but cooperate when opportunities for cooperation exist. Some of the specific provisions of the JG include:

- NRCS wetland determinations are for FSA purposes, not CWA.
- USACE wetland determinations are for CWA purposes, not FSA.
- The extent of jurisdiction for a given feature may differ for each agency.
- PC determinations remain valid while a property is under agricultural use but are not applicable under CWA if the land use changes.

This means that your understanding of what constitutes a wetland on a property while it is under NRCS farm program rules may change significantly once the property shifts to another use. Previously converted areas that were relatively safe from being considered wetlands by the USACE under CWA now get a second look when the land converts from agricultural production. In many parts of the Midwest, wetland soils are very common, sometimes comprising over 50% of the soils in a given county. Though a hydric (wetland) soil unit may have been farmed successfully for 200 years, these areas could now be considered wetlands if weedy wetland plants start to grow or the site drainage has not been maintained in recent years. We have had several cases recently where areas have been called potential wetlands in locations where this never would have been a question in the past. For example, an aerial photograph that now shows a dark shadow might be questioned. However, the biggest issues occur when a property sits fallow for a growing season or two while waiting for construction to start. There are a number of

wetland plants that are successful agricultural weeds that colonize quickly and spread where spring plowing or herbicide spraying would have controlled them in the past. In most cases, once wetland vegetation develops, a site's prior agricultural history is pretty much irrelevant—the USACE will consider it a wetland. At a minimum, a project can be significantly delayed while the issue is resolved. To compound the problem, there is generally poor guidance from the USACE on identifying and delineating wetlands on farm land for CWA purposes. This makes it very difficult to get consistent jurisdictional determinations between different USACE districts and even between staff within a district. The Chicago Corps District has specific guidelines—NRCS aerial farm photography is reviewed to determine wetland signatures that occur in average precipitation years. A wetland signature that occurs in three out of five years would indicate a jurisdictional farmed wetland.

This photograph is an example of a “typical” quarter section of undeveloped farmland. If you are a farmer there are two obvious problem areas that were not farmed last year and perhaps longer (circled in red). But are they wetlands? Was last year simply an abnormally wet year or are they farmed wetlands or wetlands? The NRCS will tell you the status and if you will be allowed to correct the drainage issue and continue farming. If you are developing the site, however, then the two problem areas



may be considered wetlands and cannot be filled without a permit. The PC classification no longer has meaning. While the farmer could have corrected the drainage issue, you, as a developer, cannot without a permit. What about the dark shadows on the aerial photograph? They get farmed every year and are probably PC, but are they USACE wetlands? They may or may not be. What if you allow the field to go fallow for a year or two while you get set for

development? Will those dark areas develop wetland conditions? These are all questions that should be asked, and the answers are not always easy or straight forward.

Recommendations

Changing potential wetlands from agricultural to another use can create complicated problems. There are, however, some things that can be done to reduce the risk. The following are general recommendations that apply to many situations; however, you should seek site specific advice.

- When buying agricultural land, ask the seller to provide you with a Certified Farmed Wetland Determination from the NRCS. This will tell you how the property is viewed for farm purposes (but not development purposes).
- Carry out your own wetland investigation using the appropriate USACE methodology and compare the two assessments.
- If there are wet spots not currently being farmed but classified as PC, have the current owner/farmer coordinate with the NRCS to correct the drainage issue. If that is not possible, consider continuing to farm the property and work with the NRCS to correct the drainage issues while the site is still being farmed. If this cannot be done, you should assume as a worst case scenario that the USACE will consider these areas wetlands.
- Whenever possible, continue to have the property farmed until you start construction. Do this even if you have to lease it to a farmer at reduced rates. This might allow you to derive some income, but more importantly, make it less likely that wetlands will develop in areas currently being farmed. This may also allow you to take advantage of the greater flexibility in the NRCS wetland rules when correcting drainage problems.
- Always maintain your property's drainage system, surface and subsurface, but make sure that you do this within the limits of the law. Do not fall into the trap of not spending money to fix a tile or ditch problem because the property will not be farmed much longer. The cost will be much greater if you allow wetlands to develop and end up having to permit or avoid them.
- Once you have corrected any drainage issues in PC areas in coordination with the NRCS, have a wetland delineation completed and submitted to the USACE for verification. Requesting and receiving verification of the wetland boundary and a jurisdictional determination may take awhile. The verification is important because once verified, the

wetland delineation is good for five years except under unusual circumstances. You can then rely on it while you plan the use of your property and get ready for construction. A wetland delineation that is unverified will not protect you if conditions on the site change while the site is waiting to be developed.

It is unfortunate that this situation is so confusing and that official guidance is generally poor. The best advice we can give is to ask questions, gather as much information as possible and proceed cautiously.

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