Congressional Research Service
Informing the legislative debate since 1914

IN FOCUS

March 14, 2019

Prior Converted Cropland Under the Clean Water Act

For decades, the value of wetlands and efforts to protect them have been recognized in different ways through national policies, federal laws, and regulations. The central federal regulatory program, authorized in Section 404 of the Clean Water Act (CWA), requires permits for the discharge of dredged or fill material (e.g., sand, soil, excavated material) into wetlands that are considered "waters of the United States" (WOTUS). Also, the Food Security Act (FSA) of 1985—enacted on December 23, 1985—included a wetland conservation provision (Swampbuster) that indirectly protects wetlands by making producers who farm or convert wetlands to agricultural production ineligible for select federal farm program benefits. Both FSA and CWA Section 404 regulations include exceptions to their requirements for *prior converted cropland* (PCC). PCC determinations are complex. While both programs include exceptions for PCC, determinations are made under separate authorities and for different programmatic purposes. This has created confusion for affected landowners, who argue that greater consistency among PCC determinations is needed. It has also generated congressional interest in clarifying the issue.

What Is PCC?

The CWA Section 404 permitting and "Swampbuster" programs both require the administering agencies to make certain determinations about wetland areas, including whether an area qualifies as PCC. While historically the agencies defined PCC similarly, the way the agencies have determined what qualifies as PCC has diverged over time.

Clean Water Act

Under the CWA, discharges of pollutants into WOTUS are unlawful unless authorized by a permit. Section 404 permits authorize discharges of dredged or fill material into WOTUS, including wetlands (33 U.S.C. §1344). The Army Corps of Engineers and the U.S. Environmental Protection Agency (EPA) are both responsible for implementing aspects of the CWA Section 404 permitting program.

Most routine, ongoing farming activities do not require CWA Section 404 permits. CWA Section 404(f) exempts normal farming, silviculture, and ranching from permitting requirements. However, if a farming activity is associated with bringing a WOTUS into a new use where the flow, circulation, or reach of that water might be affected (e.g., bringing a wetland into agricultural production or converting an agricultural wetland into a non-wetland area), that activity would require a permit.

The CWA does not define or mention PCC explicitly. However, CWA regulations exclude PCC from the definition of WOTUS and therefore the act's permitting requirements. In 1990, the Corps issued Regulatory Guidance Letter 90-07, which created one of the first direct links to Swampbuster. It clarified that PCC, as defined by U.S. Department of Agriculture's (USDA) Natural Resources Conservation Service (NRCS) in its 1988 National FSA Manual, are not subject to regulation under CWA Section 404. The manual defines PCC as "wetlands which were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before 23 December 1985, to the extent that they no longer exhibit important wetland values."

In 1993, the Corps and EPA codified the existing policy that PCC are not WOTUS (58 *Federal Register* 45008). In addition, in the preamble to the rule, the agencies referenced the definition of PCC from the National FSA Manual. They also indicated that any PCC that were abandoned, per the NRCS provisions on abandonment, and reverted back to wetlands could be "recaptured" and again subject to CWA regulation. Specifically, per the preamble, PCC that "now meets wetland criteria is considered to be abandoned *unless*: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes, or pasture production." Although the definition and abandonment criteria were included in the rule's preamble, they are not included in Corps and EPA regulations.

In 2015, the Corps and EPA promulgated the Clean Water Rule (80 *Federal Register* 37054), which established a new definition for WOTUS. It maintained the PCC exclusion as it existed in the 1993 rule and similarly did not define the term or include abandonment criteria in the rule itself. However, in February 2019, the Corps and EPA proposed to revise the definition of WOTUS, including revisions to how PCC is defined and determined. (See "PCC in Proposed Rule to Revise WOTUS.")

Food Security Act, Swampbuster Provision

The Swampbuster provision is administered by USDA with technical determinations made by NRCS. Originally authorized in Title XII of the 1985 FSA (16 U.S.C. §§3801 *et seq.*), Swampbuster makes USDA program participants ineligible to receive select USDA program benefits if they farm on or alter wetlands. Thus, Swampbuster does not prohibit the altering of a wetland but rather disincentivizes doing so by withholding a number of federal payments that benefit agricultural production.

Generally, farmers who plant a program crop on a wetland converted after December 23, 1985, or who convert wetlands making agricultural commodity production possible after November 28, 1990, would be in violation of

the Swampbuster provision and ineligible for certain USDA benefits (e.g., farm program support payments, disaster assistance, loans, and conservation programs). In addition, farmers who plant or produce an agricultural commodity on a wetland or make agricultural production possible after February 7, 2014, are in violation and also ineligible for federal crop insurance premium subsidies. A number of exemptions to Swampbuster exist, including land determined to be PCC. PCC is defined in regulation (7 C.F.R. 12.2(a)) as "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 farmed wetland."

Challenges to Consistent PCC Determinations

Although the agencies overseeing the CWA Section 404 and Swampbuster programs have sought to achieve consistency in the manner that the programs define and designate PCC, the inherently different purposes of the programs—as well as legislative changes and court rulings—have presented challenges in doing so.

In 1994, USDA, the Departments of the Interior and the Army, and EPA entered into a memorandum of agreement to promote consistency in determinations made under the two wetlands programs. However, Congress amended Swampbuster in 1996 to state that USDA certifications of eligibility for program benefits "shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary" (P.L. 104-127). This created inconsistency between the wetlands programs, as the abandonment criteria for each were now different. In addition, 2002 amendments to Swampbuster (P.L. 107-171) prohibited NRCS from sharing confidential producer information to agencies outside USDA, making it illegal for NRCS to provide wetland delineations and determinations to the Corps and EPA for CWA permitting and enforcement. Furthermore, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001), the Supreme Court interpreted the scope of WOTUS subject to the CWA more narrowly than the Corps had previously. The agencies interpreted the ruling to mean that some isolated wetlands may no longer be regulated as WOTUS under the CWA but may still be subject to Swampbuster. These changes and the Court's ruling prompted the agencies to withdraw from the 1994 memorandum in 2005.

Subsequently, in February 2005, USDA and the Army issued joint guidance to reaffirm their commitment to ensuring the wetlands programs are administered in a way that minimizes impacts on affected landowners while protecting wetlands. They acknowledged that "because of the differences now existing between the CWA and FSA on the jurisdictional status of certain wetlands (e.g., prior converted or isolated wetlands may be regulated by one agency but not the other), it is frequently impossible for one lead agency to make determinations that are valid for the administration of both laws."

The 2005 guidance reiterated that a PCC determination made by NRCS remains valid for Swampbuster purposes so long as the area is devoted to an agricultural use. It also stated that if the land changes to a non-agricultural use, the PCC determination is no longer applicable and a new wetlands determination is required for CWA purposes.

In 2009, the Corps Jacksonville District prepared an issue paper declaring that PCC that is shifted to non-agricultural use becomes subject to regulation by the Corps. Corps headquarters affirmed this "change in use policy" as an accurate reflection of the national position of the Corps in a memorandum often referred to as the "Stockton Rules." A federal court set aside the rules in 2010, finding that they were "procedurally improper" because the Corps did not follow required notice-and-comment procedures.

PCC in Proposed Rule to Revise WOTUS

The Trump Administration has taken steps to rescind and replace the 2015 Clean Water Rule with a revised definition of WOTUS. In July 2017, the Corps and EPA published a proposed rule to rescind the 2015 Clean Water Rule and restore the regulatory definition of WOTUS as it existed prior to the rule (82 *Federal Register* 34899). A final rule has not yet been issued. On February 14, 2019, the Corps and EPA published a proposed rule that includes a new definition of WOTUS (84 *Federal Register* 4154).

The 2019 proposed rule would maintain the exclusion of PCC from the definition of WOTUS. In addition, it would define PCC and clarify abandonment criteria. PCC would be defined as "any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible." An area would cease to be considered PCC for purposes of the CWA when both the PCC "is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years" and the land reverts to wetland status, as defined in the rule.

The 2019 proposed revised WOTUS rule text does not define *agricultural purposes* for determining abandonment. However, the rule's preamble states that "agricultural purposes include land use that makes production of an agricultural product possible, including but not limited to grazing and haying." It also states that cropland left idle or fallow for conservation or agricultural purposes for any period of time remains in agricultural use and maintains PCC status. The proposed term *agricultural purposes* appears to broaden the PCC exception for CWA purposes. In contrast, an area was required to be used for the *production* of an agricultural commodity under the abandonment criteria included in the 1993 rule's preamble. The 2019 proposed revised WOTUS rule also states that the Corps and EPA will recognize PCC designations made by the Secretary of Agriculture. It is unclear how this aspect of the proposal would be implemented considering the challenges the agencies currently face in making consistent PCC determinations.

Laura Gatz, Analyst in Environmental Policy

Megan Stubbs, Specialist in Agricultural Conservation and Natural Resources Policy

IF11136

Disclaimer