How Changes to NRCS Wetland Determination Rules Could Benefit Your Operation

by Zachary C. Burmeister & Kale R. Van Bruggen
Attorneys at Law – Rinke Noonan, Ltd.

Improvements to USDA regulations finalized in 2020 could provide farmers an opportunity to improve NRCS-certified wetland determinations and provide exemptions from Clean Water Act oversight by the EPA and Army Corps.

Farmers who produce an agricultural commodity on a converted wetland, or convert a wetland to make the production of an agricultural commodity possible, risk losing USDA farm program benefits and their federal crop insurance premium subsidies. Acres determined by NRCS to be prior converted cropland or non-wetland on certified wetland determinations are exempt from USDA wetland conservation compliance provisions (commonly called "Swampbuster") and can be drained or tiled without risk of losing benefits. Acres certified by NRCS as prior converted cropland are also more likely to be exempt from Clean Water Act oversight. The Biden Administration recently announced its intention to revisit the ever-litigated "waters of the United States" rule ("WOTUS"). Recent improvements to Swampbuster regulations and the upcoming changes to the WOTUS rule make now a prime time for farmers to investigate whether areas labeled wetland and farmed wetland on their fields should be recertified as prior converted cropland or non-wetland.

On August 28, 2020, the USDA finalized three new regulations that have improved the wetland determination process:

1. First, USDA clarified whether prior wetland determinations are "certified." A "certified" NRCS wetland determination remains binding unless a person affected by the recertification requests review or the tract is no longer used for agricultural production.

   Determinations made after November 28, 1990 and before July 3, 1996 are considered "certified" if the determination was issued on the June 1991 version of form NRCS-CPA-026 or SCS-CPA-026, the person was notified that the determination had been certified, and the map document was of sufficient quality to determine ineligibility for program benefits.

   If a determination during that time period was issued on a different version of the form, a determination may still be considered certified if there is other documentation that the person was notified of the certification, provided appeal rights, and the map document was of sufficient quality to make the determination.

   All wetland determinations made after July 3, 1996 are considered certified wetland determinations.

2. Second, USDA regulation now allows a farmer to request review of a specific wetland site without granting NRCS authority to conduct a new determination on the entire tract or field. This means a person can request recertification of an error on specific wetland sites without opening the entire certified wetland determination for review and without risk of new wetland acres being added or expanded.

3. Finally, the agency also codified the "best-drained condition" rule. When a wetland is affected by a drainage manipulation that occurred prior to December 23, 1985, the wetland hydrology will be identified on the basis of the best-drained condition resulting from the drainage manipulation.

   Sites previously labeled by NRCS as "farmed wetland" or "farmed wetland pasture" may qualify for the prior converted cropland exemption if the site was cropped under normal climate conditions following a pre-1985 drainage manipulation. Application of the "best-drained condition" rule is likely to increase the number of acres exempt as prior converted cropland on a farmer's field.

On June 9, 2021, the EPA announced its intent to revise the definition of WOTUS. The exact language of the pending WOTUS Rule is not yet known; however, the EPA's goal behind revisiting the rule is to "better protect our nation's vital water resources that support public health, environmental protection, agricultural activity, and economic growth."

Both Swampbuster and the Clean Water Act include exemptions for prior converted cropland and while both agencies define prior converted cropland similarly, how each agency makes a determination of prior converted cropland has diverged and converged over time.

In June 2020, the EPA codified a new definition of prior converted cropland with its Navigability Rule for WOTUS, which matches USDA's definition. The final rule states, the "EPA and Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture." Therefore, if an area was certified as prior converted cropland by NRCS, the area is also more likely to be exempt from Clean Water Act regulation by the EPA and U.S. Army Corps of Engineers. Relabeling an area prior converted cropland on an NRCS wetland determination now could help prevent the area from falling under Clean Water Act regulation.

These recent regulatory changes and the pending WOTUS rule make now an opportune time for farmers to request review of NRCS certified wetland determinations issued prior to 2021 and to request certifications of tracts that have not been reviewed.

If you would like help determining whether your property has a certified wetland determination, reviewing certified wetland determinations for accuracy, or requesting changes to an NRCS certified wetland determination, please contact one of our agricultural and environmental attorneys for more information.

Zachary C. Burmeister
(320) 656 – 3516
zburmeister@rinkenoonan.com

Kale R. Van Bruggen
(320) 656 – 3522
kvanbruggen@rinkenoonan.com

Rinke Noonan Attorneys at Law