

## Part 2

# Clean Water Act Special Environmental Concern

# Clean Water Act

This presentation is intended to:

- provide an overview of Clean Water Act requirements
- assist NRCS personnel to know when a landowner may need a CWA permit
- encourage close and early coordination with State and Federal regulatory agencies in your area

# Federal Water Pollution Control Act of 1972

- The purposes of the Act are to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

# NRCS Water Quality Policy

- Ensure actions and programs conform with state nonpoint source water quality plans (DR 9500-007)
- Direct assistance towards prevention and correction of agricultural or other non-point source water quality problems (GM 460, Part 401)
- Develop conservation plans that minimize pollution problems (GM 460, Part 401)

# Principal Clean Water Act Sections for NRCS

**404** Dredge and Fill Permits

*USACE  
States  
EPA*

**401** State Water Quality Certification

*States  
Tribes  
EPA*

**303** Water Quality Standard & Total Maximum Daily Loads (TMDL/303d waters = impaired waters)

*States  
Tribes  
EPA  
FWS*

**402** National Pollutant Discharge System Permits (NPDES) (CAFO's)

*States  
EPA*

# Section 404 of the Clean Water Act

Regulates the *discharge of dredged or fill material* into *Waters of the U.S.*



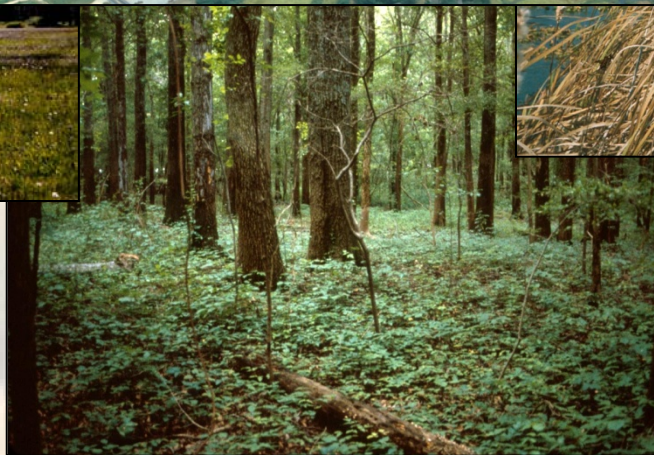
# “Waters of the U.S.” include:

- The territorial seas
- Traditionally navigable waters (TNWs)
- All interstate waters including wetlands
- **All intrastate waters (lakes, rivers, streams, wetlands, playas, mudflats, etc that could affect interstate commerce.)**
- **Tributaries of jurisdictional waters above**
- **Impoundments of jurisdictional waters**
- **Wetlands adjacent to jurisdictional waters**

# CWA Jurisdictional Determinations



- **SWANCC v. US Army Corps of Engineers**
- **Rapanos v. United States**



## CWA- Waters of the United States

# What areas are not Waters of the US?

- **Waste treatment systems**
- **Prior Converted Cropland (if not “abandoned” or change in use)**

**(Note: discharges from Waste Treatment systems are usually regulated under Section 402 of the CWA. Also PCC can and often is determined to be “waters” if abandoned or there is a change of use.)**

# Geographic Features- Generally Not Considered Jurisdictional Waters

- **Swales**, erosional features (e.g. gullies) and small washes characterized by low volume, infrequent, and short duration flow, farm ponds (not impoundments).
- **Ditches** (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water. (“ditches” do not include channelized streams.)
- **Uplands** transporting overland flow generated from precipitation (i.e., rain events and snowmelt).
- **Waters lacking a “significant nexus”** where one is required for CWA jurisdiction to apply.

# Ditches, Swales, Erosional Features



# Is this a “waters of the US”?



# Is this a “waters of the US”?



Only the Corps and/or  
EPA can make “Waters  
of the United States”  
determinations.



# Section 404 Activities (Discharges)





Bank Stabilization, land clearing, water control structures, and land leveling may involve “discharges of dredged or fill material”.

# CWA Guide Sheet

Are there potential *Waters of the U.S* ? And if so:  
 Could the proposed work involve *discharge of dredged  
 or fill material* into those waters?

## SECTION I

### Federally Administered Regulatory Program - Section 404 of the CWA

#### STEP 1.

Will the action(s) involve or likely result in the discharge or placement of dredged or fill material or other pollutants into areas that could be considered to be waters of the United States (Including, but not limited to wetlands, lakes, streams, channels, and other water conveyances, including some small ditches)? *More detailed information regarding waters of the United States and Federal permitting programs under CWA is found in the NECH 610.22.*

- No    If "No," document on the NRCS-CPA-52, or notes section below, the finding, rationale, and information sources used and proceed with Section II below.
- Yes    If "Yes," go to Step 2.

# Exempt Activities

- Certain agricultural activities have statutory and regulatory exemptions from the permit requirements of the Clean Water Act.
  - Exemption for Ongoing Agricultural, Silvicultural, and Ranching Activities.
  - Exemption for Construction or Maintenance of Farm Ponds, Stock Ponds, and Irrigation Ditches, and the Maintenance of Drainage Ditches.
  - Exemption for Construction or Maintenance of Farm, Forest, and Temporary Mining Roads.

**BEWARE of “RECAPTURE”**

# Exemptions – Recapture Clause

The “recapture clause” found at Section 404(f)(2), states that otherwise exempt activities that:

1. Bring a **water into a use it was not previously subject**, and
2. Impairs the **flow or circulation or reduces the reach**, of waters of the US.

Are **NOT EXEMPT**

# Recapture Provision

(Section 404(f)(2) CFR 323.4, and  
Corps RGL 07-02)

- For example a permit may be required for a discharge of dredged or fill material related to:
  - Construction of a farm pond or grade stabilization structure affecting “waters of the US”.
  - Conversion of wetland from silvicultural to agricultural use.
  - An irrigation ditch that cuts through (or across) a natural or man-altered water body.

# “Exempt” Activities often “Recaptured”

Stock Ponds

Farm Ponds

Farm Roads

Sediment Control Structures

# CWA Guide Sheet

Is the activity EXEMPT? or Can **discharges** into **waters** be avoided?

## STEP 2.

Is the action(s) an activity exempt from section 404 regulations (40 CFR Part 232)?

Note: the exemption should be verified with the local U.S. Army Corps of Engineers (Corps) district.

- No If "No," go to Step 3.
- Yes If "Yes," document on the NRCS-CPA-52, or notes section below, the finding, rationale, and information sources used to verify the exemption applies and proceed with Section II below.

## STEP 3.

Can the action(s) be modified to avoid the discharge of dredged or fill material or other pollutants into waters of the United States?

- No If "No," go to Step 4.
- Yes If "Yes," modify the action to avoid discharge. Document on the NRCS-CPA-52, or notes section below, the finding, rationale, and information sources used and proceed with Section II below.

# Types of Permits

- **General Permits** (minimal adverse impacts)
  - Nationwide Permits
  - Regional General Permits
- **Standard Individual Permits**
  - Larger impacts, NEPA analysis, public hearings, controversial

# Nationwide Permits (NWP)

## Commonly Used in Agricultural Areas

- NW-3: Maintenance** (for previously authorized work)
- NW-13: Bank Stabilization** (< 500 linear ft,  $\leq$  1 cu yd/running ft)
- NW-23: Categorical exclusions for NRCS**
- NW-27: Aquatic Habitat Restoration, Establishment, and Enhancement Activities.**
- NW-37: Emergency Watershed Protection**
- NW-40: Agricultural Activities**
- NW-41: Reshaping Existing Drainage Ditches**

Be aware of: added special conditions, "Pre-Construction Notification", and "Reporting".

# NWP 3 Maintenance



- Repair, rehabilitation, or replacement of previously authorized, currently serviceable structures or fills.
- Limit stream channel modification to the minimum necessary.
- Authorizes minor deviations for maintenance.
- PCN required for sediment removal.

# NWP 13 Bank Stabilization



- No material placed in excess of minimum needed for erosion control.
- No more than 500 linear feet unless waiver granted by Corps.
- No more than 1 cubic yard per linear foot, unless waiver granted by Corps.
- Pre-construction notification if limits are exceeded or if discharge is into a special aquatic site, including wetlands.

# Draft NWP 23 Categorical Exclusions for NRCS (Soon to be approved?)



30 days prior to work in waters of U.S., the following must be submitted to Corps:

1. Project plans and location map
2. NRCS CPA-52



# NWP 27 Aquatic Habitat Restoration/ Establishment/Enhancement



**Projects are authorized, provided activities result in net increases in aquatic resource functions and services.**

# NWP 37 Emergency Watershed Protection



# NWP 40 Agricultural Activities

- Up to 1/2 acre of waters/wetlands.
- Up to 300 linear feet of stream bed (Corps District can waive for intermittent and ephemeral streams).
- Pre-Construction Notification required



Grade Control Structure in Grassed Waterway



Levee construction

# NWP-41 reshaping existing drainage ditches



- Cannot increase capacity of ditch or drain additional waters of the U.S.
- Does not authorize relocation of drainage ditches constructed in waters of the U.S.
- PCN if > 500 linear feet.

# NWP Reminder:

- Not all of the NWPs are valid in all districts/states or they have special conditions added, that reduce their applicability.
- Mitigation may be required.
- NRCS does not make CWA determinations.
- The landowner is responsible.

# Regional General Permits

• Developed by the Corps District for particular categories of activities specific to a region, such as:

- NRCS programs and conservation practices (Iowa: RGP 34 for CREP, WREP, and CRP structures)
- Mining activities
- Transportation Projects

# Standard (Individual) Permits

- Generally reserved for projects with potential for substantial environmental impacts and/or which do not qualify for a general permit
- Public Notice
- Coordination with involved agencies, interested parties, and the general public
- Evaluation time up to 120 days or longer

# CWA Guide Sheet

Has the client obtained a 404 permit, or an exemption determination?

## STEP 4.

Has the client obtained a section 404 permit (individual, regional, or nationwide) or a determination of an exemption from the appropriate Corps office?

- No     If "No," determine if the client has applied for a permit. If a permit has not been applied for, the client will need to do so. If a permit has been applied for, document this, and continue the planning process in consultation with the client and the regulatory agencies. The permit authorization should be reflected in the final plan and documentation. Continue planning, but a permit is required prior to implementation. Complete Section II below.
- Yes     If "Yes," document on the NRCS-CPA-52, or notes section below, the finding, rationale, and information sources used and complete Section II below. The final plan should not be contrary to the provisions of the permit authorization or exemption. Changes made during the planning process that may impact the applicability of the permit, such as amount or location of fills or discharges of pollutants should be coordinated with the Corps. Complete Section II below.

# CWA Section 303(d)

## **Total Maximum Daily Loads (TMDLs)-**

States, territories, and authorized tribes are required to develop lists of impaired waters that do not meet water quality standards. The law requires that these jurisdictions establish priority rankings for waters on the lists and develop TMDLs for these waters.



# Oklahoma TMDL (sample)

OKWBID	Name	Size	Unit	Designated Uses	Impairments	Potential Sources
OK720500030080_00	Buzzard Creek	10	MILES	F124, F125, I133, F135, N137, I138, X1003, X1005	217	92, 140, 156
OK720510000190_00	Beaver River (North Canadian)	98	MILES	I124, F125, I133, F135, N137, I138, I1003, X1006	215, 217	140
OK720510000275_00	Currumpa Creek!	13	MILES	F124, F125, N133, X135, N137, X1003	91, 322, 215, 217, 400	140, 156
OK720900000010_00	Cimarron River	47	MILES	F124, F125, I133, X135, N137, X1003, X1006, F138	217	140, 156
OK720900000100_00	Cold Springs Creek	33	MILES	I124, I125, N133, X135, I137, I138, X1003	322	140, 156
OK720900000180_00	Cimarron River	19	MILES	I125, N133, X135, N137, F138, X1003, X1006, F124	322, 215, 217, 400	140, 156
OK720900000200_00	Carrizo Creek, South	22	MILES	I124, I125, N133, X135, I137, I138, X1003	322	140

# CWA Guide Sheet

Is the project near a 303(d) listed “impaired water”?

## STEP 1

Is the proposed action or alternative located in proximity to waters listed by the State as “impaired” under Section 303(d) of the CWA?

- No     If “No,” document on the NRCS-CPA-52, or notes section below, the finding, rationale, and information sources used and proceed to Step 2.
- Yes     If “Yes,” insure consistency with any existing water quality or associated watershed action plans that have been established by the State for that stream segment. Even if TMDLs have not been established by the State for that stream segment, ensure that the action will not contribute to further degradation of that stream segment. Document on the NRCS-CPA-52, or notes section below, the finding, rationale, and information sources used and proceed to Step 2.

# CWA SECTION 402

**The National Pollutant Discharge Elimination System (NPDES) Permit Program-** controls water pollution by regulating point sources that discharge pollutants into waters of the United States.

# SECTION 402 NPDES

- Wastewater discharges
- Industrial, urban, and construction-related stormwater runoff
- Concentrated animal feeding operations (CAFOs)
- Active, inactive, and some abandoned mines
- Some ships and other vessels
- Discharges from RCRA remedial action activity meeting point source definition



# CWA Guide Sheet

## Could there be a NPDES discharge?

### STEP 2

Will the proposed action or alternative likely result in point-source discharges from developments, construction sites, or other areas of soil disturbance, or sewer discharges [e.g. projects involving stormwater ponds or point-source pollution, including concentrated animal feeding operations (CAFOs) for which comprehensive nutrient management plans (CNMPs) are being developed]? *Section 402 of the CWA requires a permit for these activities through the National Pollutant Discharge Elimination System (NPDES) program which the States administer.*

- No    **If “No,” document on the NRCS-CPA-52, or notes section below, the finding, rationale, and information sources used and proceed with planning.**
- Yes    **If “Yes,” go to Step 3.**

# CWA Guide Sheet

## Has the client obtained a NPDES permit?

### STEP 3

Has the client obtained a NPDES permit or a determination of an exemption from the appropriate EPA or State-regulatory office?

- No**     **If “No,” determine if the client has applied for any necessary permits. If a permit has not been applied for, the client will need to do so. If they have applied, document this and continue the planning process in consultation with the client and the regulatory agency. Continue the planning process in consultation with the client and the regulatory agencies. The permit authorization should be reflected in the final plan and documentation. Continue planning, but a permit is required prior to implementation.**
  
- Yes**     **If “Yes,” document on the NRCS-CPA-52, or notes section below, the finding, rationale, and information sources used and proceed with planning. The final NRCS conservation plan should not be contrary to the provisions of the permit authorization or exemption. Changes made during the planning process that may impact the applicability of the permit should be coordinated with the appropriate State regulatory agency.**

# Review

- Only the Corps and/or EPA can make “Waters of the United States” determinations
- The Corps makes the final determination on whether an activity is exempt from 404
- NRCS technical and financial assistance shall conform with established TMDLs