



Prior Converted Wetlands

Office of Water Quality

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Background:

- Wetland regulation is the responsibility of several federal agencies, specifically the Natural Resource Conservation Service (NRCS), the Environmental Protection Agency (EPA) and United States Army Corps of Engineers (USACE), as well as state water quality programs.
- The term “prior converted wetland” has primarily been a term used by the Farm Service Agency (FSA).
- The definition of wetlands used by the NRCS is roughly the same as the definition used by USACE under the Clean Water Act (CWA), but the processes used by the NRCS and the USACE to distinguish a wetland from upland are not the same.
- The Highly Erodible Land Conservation and Wetland Conservation Compliance provisions of the Food Security Act, introduced in the 1985 Farm Bill with amendments in 1990, 1996 and 2002 are most known as “Swampbuster”. Swampbuster provides incentives for the preservation of lands from excessive soil erosion in agricultural settings, including the protection or the manipulation of wetlands.
- The NRCS considers areas which were converted from wetland prior to December 23, 1985, and have remained in agricultural use, to be “prior converted”. Prior converted wetlands may not be regulated under the Food Security Act, however, some wetlands previously designated as prior converted wetlands, when they are abandoned or no longer farmed, may no longer satisfy the prior converted designation.

Description:

- Activities in and around wetlands may be evaluated and/or regulated by different (federal and state) agencies for different reasons.
 - The NRCS under the U.S. Department of Agriculture (USDA) may evaluate wetland areas for conservation funding under the Food Security Act.
 - The U.S. Army Corps of Engineers regulates impacts to wetlands for a number of reasons under Section 404 of the CWA.
 - The Indiana Department of Environmental Management (IDEM) provides state regulatory authority over permits issued by the USACE to ensure compliance with state water quality standards under Section 401.
 - IDEM also regulates wetlands the USACE has determined are not Waters of the U.S. under the State Regulated Wetland Law.
- The Clean Water Act (CWA), recognizing the importance of ongoing agricultural activities, provides certain exemptions under Section 404 (f) of the Act.¹
- A key first step is to get an official determination of the extent of wetlands at a site. These determinations are called wetland delineations.
- Wetland determinations conducted by the NRCS are for the purposes of the Food Security Act only². While the NRCS may determine there are no wetlands regulated by the Food Security Act, there may be wetlands that are regulated by the Clean Water Act.
- Most activities that impact wetlands that are determined to be Waters of the U.S. are regulated by the U.S. Army Corps of Engineers under Section 404 of the CWA. When a Section 404 permit is required, a Section 401 Water Quality Certification is needed from the IDEM.

¹ 40 CFR §232.1-232.3

https://www.epa.gov/sites/production/files/201503/documents/2004_10_21_wetlands_40cfrpart232.pdf

² NRCS Manual <https://directives.sc.egov.usda.gov/RollupViewer.aspx?hid=29340>

- While a wetland may be considered prior converted by the NRCS, if it is abandoned from farming, it may still be regulated by CWA Sections 404 and 401 in its current state, even if it does not meet all three wetland criteria (soils, vegetation and hydrology).
 - Abandoned means the wetland has not been used in at least one of the previous five years to produce an agricultural commodity
- The final determination of prior converted status for CWA purposes resides with the USACE.
- For the purposes of the Food Security Act regulations, only NRCS needs to make a determination. This determination is not valid for CWA purposes.

IDEM's Role:

- IDEM is responsible for preserving and protecting the chemical, physical and biological integrity of Indiana's waters, including wetlands.
- IDEM is responsible for the implementation of the State Regulated Wetland Law, including upholding the goal of no net loss of remaining wetlands.
- IDEM is responsible for the implementation of the state 401 Water Quality Certification process and will review projects impacting wetlands for compliance with the state's water quality standards.

Citizen's Role:

- Property owners enrolled in farm conservation programs through or funded by the NRCS should coordinate with the NRCS on the applicability of the Swampbuster provisions.
- Property owners should always seek out confirmation of regulation applicability through the USACE and IDEM.

More Information:

- For information about IDEM's wetland regulations visit: www.idem.IN.gov/wetlands/index.htm.
- For additional information regarding Swampbuster visit: www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/water/wetlands/?cid=stelprdb1043554
- For information about the U.S. Army Corps of Engineers visit:
 - Louisville District: www.lrl.usace.army.mil/Missions/Regulatory.aspx
 - Detroit District: www.lre.usace.army.mil/Missions/Regulatory-Program-and-Permits/
 - Chicago District: www.lrc.usace.army.mil/Missions/Regulatory.aspx