



The Association of State Wetland Managers, Inc.

"Dedicated to the Protection and Restoration of the Nation's Wetlands"

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Public Comments Processing

Attn: National Leader for Wetland and Highly Erodible Land Conservation
USDA Natural Resources Conservation Service
1400 Independence Ave SW
Washington, DC 20250

Re: Wetland Conservation Compliance Interim Rule, Docket ID USDA-2018-0010

To Whom It May Concern:

These comments were prepared by the Association of State Wetland Managers (ASWM) in response to the interim rule published by the USDA's Natural Resources Conservation Service (NRCS) regarding the wetland conservation compliance provisions of the Food Security Act of 1985, as amended. ASWM is a nonprofit professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland programs. We appreciate the opportunity to provide these comments on the interim rule that would significantly affect our member states and tribes.

Pre-1996 Wetland Determinations

Many of the pre-1996 wetland determinations are known to be deficient, lacking documented quality control assurances. These determinations were based on inventory maps, which NRCS regarded as unacceptable for almost 20 years prior, and ASWM believes strongly that the USDA change in practice that occurred in 2013 that allows for certification of pre-1996 wetland determinations was unwise. The arguments against certifying these wetland determinations are well-documented. In February 1997, representatives of NRCS, the Environmental Protection Agency, and the U.S. Fish and Wildlife Service signed an interagency report entitled, *Quality Assessment for Existing Wetland Determinations as provided on CPA-026/026E*. This assessment found that the quality for over 90 percent of the wetland determinations issued in North Dakota between 1990 and 1996 were deficient for implementing the wetland conservation provisions of the Food Security Act. Federal agency partners involved in the assessment cited several reasons why these wetland determinations failed to meet USDA's quality standards, including incorrect or missing labels, poor boundary delineations, and lack of adequate Farm Service Agency slides. Furthermore, in a July 1997 memo to Secretary of Agriculture Dan Glickman, NRCS Chief Paul Johnson stated that over 3 million wetland determinations were made using pre-1996 determinations, and that 60 percent of these determinations were inaccurate. The results of these and other assessments led to the creation of USDA's Wetland Mapping Conventions used today and supported the change to require certified wetland determinations in the 1996 Farm Bill.

Our concerns are further supported by the January 2017 Office of Inspector General (OIG) audit report of the Wetland Conservation Provisions in the Prairie Pothole Region. That report explained that the decision by the USDA to certify wetland determinations made between November 28, 1990, and July 3, 1996, demonstrated that pre-1996 determinations are not of sufficient quality to determine eligibility for USDA program benefits. That report found that, of the cases reviewed, 75% of wetlands that should have been protected were not, and became subject to drainage, degradation, and loss. Allowing the certification of pre-1996 wetland determinations in the manner implemented by USDA in 2013 weakened the disincentive for draining wetlands and eroded the public benefits that were the intent of Congress when Wetland Conservation Compliance provisions were enacted into law.

In light of these findings, the Association requests that the USDA discontinue the certification of pre-1996 wetland determinations and resume the use of up-to-date, technically rigorous methods for wetland determinations, consistent with the recommendations of the OIG report and the Congressional intent of Wetland Conservation Compliance provisions of the Farm Bill. The ASWM acknowledges the pressure on USDA to complete wetland determinations in a timely manner; however, it is imperative that the quality and accuracy of these determinations not be compromised.

Definitions

The interim rule adds a number of definitions to the regulation, including those for pothole, playa, and pocosin. The NRCS has indicated its intention to define these wetland types in the regulation for the first time to provide consistency and transparency in wetland identification, as these wetland types exhibit unique hydrologic characteristics that require corresponding criteria to properly identify them. In addition to these wetland types, the interim rule also includes proposed definitions for “best drained condition,” “normal climatic conditions,” and “wetland hydrology.” These definitions must be science-based and, where applicable, consistent with U.S. Fish and Wildlife Service and National Wetlands Inventory definitions, protocols, and practices. The definitions in the interim rule appear to be consistent with those standards.

Minimal Effects

Both the Food Security Act and 7 CFR part 12 provide for an exemption from the wetland compliance provisions if an action has only minimal effects on the hydrological and biological functions of the subject wetland and other wetlands in the area. As stated in the interim rule, previous regulatory language required an on-site evaluation for both the subject wetland and all wetlands in the area to determine minimal effects, a requirement the agency found “overly burdensome.” To address this issue, the interim rule removes the requirement for an on-site evaluation of other wetlands in the area, instead allowing for this assessment to be based on “a general knowledge of wetlands in the area.” ASWM strongly recommends defining “general knowledge” as it relates to assessing the ecological functions and values of related wetlands in the area for the purposes of minimal effects determinations, as well as retaining the requirement for an on-site evaluation of the subject wetland. This assessment should be a scientifically sound process that utilizes defensible measurements of the related wetland functions and values, while also considering the highly dynamic nature of wetlands across time and space as affected by climatic change within and between years.

Again, the ASWM acknowledges that completing an on-site functional assessment of wetlands in the area is not always possible. At the same time, it is vital that off-site minimal effects assessments of these related wetlands be science-based and technically defensible. Therefore, in addition to having “a general knowledge” of wetlands in the area, the ASWM encourages NRCS to put in place a consistent, science-based methodology and process for completing off-site assessments of these wetlands.

Wetland Hydrology Criteria

In an effort to clarify the process used to determine whether hydrology criteria are met for certain wetland types, the interim rule would amend the regulation to reflect the decision by NRCS to move from a strict, number-based approach applied across multiple geographic regions to one based on “more readily observable and easily quantifiable criteria.” ASWM acknowledges that moving from a specific “number of days” standard to this approach places the agency’s process for identifying wetlands more in line with the wider wetland scientific community, and we support this clarification.

In addition, the interim rule specifically includes observations from aerial imagery to indicate “the presence of conditions resulting from inundation or saturation during the growing season.” With observations from aerial imagery now specifically included as hydrologic indicators, the ASWM strongly urges NRCS to incorporate the use of spring imagery when making wetland determinations. The current wetland determination process does not consistently utilize spring imagery, and instead largely relies on imagery from late summer, typically the driest part of the year. The vast majority of wetlands in the Prairie Pothole Region, as well as in several other regions of the country, are seasonal in nature and are critical to the production of waterfowl, upland game birds, and the protection of water quality and flood attenuation. Traditional aerial images obtained in later summer months mostly fail to consistently capture these important seasonal wetlands. To address this, ASWM strongly recommends that National Wetlands Inventory data be a required source in the wetland determination process. Spring imagery, used in combination with traditional late summer FSA imagery, National Wetlands Inventory data, updated soils maps, LiDAR data, and physical site visits, will ensure that the wetland determination process is as accurate and technically robust as possible, serving farmers, our nation’s natural resources, and American taxpayers.

Precipitation Data

The interim rule relies on precipitation data from a historically dry period (1971-2000), further limiting the number and size of seasonal wetlands subject to the wetland conservation compliance requirements. Coupled with the mid-summer imagery, this focus on drier rather than wetter conditions significantly skews wetland maps towards excluding seasonal wetlands. Even more concerning is that the interim rule contains no scientific analysis of the impacts of using this outdated information. At a minimum, for NRCS to rely on outdated 1971-2000 precipitation data to determine wetland hydrology under normal climatic conditions, NRCS should have to limit the use of this outdated precipitation data to any very limited situations where the producer can demonstrate special circumstances in which using current normal climatic conditions would create a demonstrably unfair result. ASWM recommends that NRCS utilize 30-year precipitation data (WETS tables) that reflects current conditions as that would seem to be the appropriate data set to employ.

Environmental Assessment

ASWM also is concerned that NRCS failed to prepare an Environmental Assessment (EA) when it began certifying pre-1996 wetland determinations in 2013. While an EA was prepared for this interim rule, its scope was limited only to the changes being made in the regulation, which are referred to as “clarifications” in the rule. The EA itself states that, “[u]nder the No Action Alternative, USDA would not update its regulations,” and points out that the changes in the interim rule “merely clarify some aspects of technical procedures already being used by USDA.” In other words, without this rule, NRCS would continue to follow these procedures, which lack transparency about its standard practices. While we appreciate NRCS providing this increased transparency now on changes made in the past, it is gravely concerning that there appears to have been no formal analysis or review of the environmental impacts of NRCS certifying pre-1996 wetland determinations, despite the fact that pre-1996 wetland determinations have been shown to significantly reduce the number of valuable wetlands protected under Swampbuster.

ASWM believes that NRCS must meet the reasonable expectation to describe why the current and future use of pre-1996 determinations is a valid approach in implementing Swampbuster consistent with the public's interest.

Summary

For the reasons explained above, ASWM urges USDA to discontinue the certification of pre-1996 wetland determinations and resume the use of up-to-date, technically rigorous methods for wetland determinations. As the OIG report clearly demonstrated, those pre-1996 determinations are inadequate for determining eligibility for USDA program benefits, and the data and methods used to complete them do not meet the current, technically rigorous requirements that NRCS now uses to complete certified wetland determinations. Those actions would ensure that Swampbuster is implemented as it was intended and that the public benefits of wetlands are retained and protected. Allowing the certification of pre-1996 wetland determinations greatly weakens the integrity of Swampbuster and erodes the public and private benefits that were the intent of Congress when conservation compliance was enacted into law.

Over its 30-year history, conservation compliance under the Farm Bill has saved tons of soil from erosion and protected millions of wetland acres, resulting in healthier soil, improved wildlife habitat, and cleaner rivers, lakes, and streams. It is absolutely critical that any actions that NRCS takes related to wetland conservation compliance are done in a manner that ensures that the positive legacy of conservation compliance is not diminished. Unfortunately, this interim final rule undermines protections for seasonal wetlands, encourages wetland drainage, and ignores the letter and spirit of the Farm Bill wetland conservation compliance provisions. Conservation compliance was intended to provide the public with assurances that producers receiving taxpayer support for voluntary federal farm programs are adhering to basic conservation standards. This long-standing federal policy and conservation compact has worked well for over 30 years. These goals cannot be accomplished without accurate, science-based wetland determinations that serve as the foundation for Swampbuster.

In closing, ASWM greatly appreciates the opportunity to comment the interim rule published by NRCS. While these comments have been prepared with input from the ASWM Board of Directors, they do not necessarily represent the views of all individual states and tribes. We also encourage you to seriously consider the comments of individual states and tribes and other state associations.

Given our concerns, we urge USDA to withdraw the interim final rule and instead propose a rule that promotes accurate wetland determination and that is subject to robust environmental review and public comment.

Sincerely,



Marla J. Stelk
Executive Director
Association of State Wetland Managers