

Izaak Walton League of America

Defenders of Soil, Air, Woods, Waters and Wildlife



February 5, 2019

Attention: Jason Outlaw, National Leader for Wetland and Highly Erodible Land Conservation
Natural Resources Conservation Service
United States Department of Agriculture
1400 Independence Avenue SW
Washington, DC 20250

Docket Number NRCS-2018-0010

Dear Mr. Outlaw,

Thank you for the opportunity to review and comment on the U.S. Department of Agriculture (USDA) interim rule for the Highly Erodible Land and Wetland Conservation Compliance provisions of the 1985 Farm Bill, and the proposed changes made in the way USDA delineates, determines, and certifies wetlands subject to the Farm Bill's "Swampbuster" provisions. In its interim rule, USDA asks for "comments from the public about these clarifications that will be considered prior to issuing a final rule," and we appreciate the opportunity to provide such comments.

The Izaak Walton League of America

The Izaak Walton League of America, chartered in 1922 in Chicago, has been working for nearly a century to protect and restore wetlands and conserve America's soils. During much of that time, the League has been at the forefront of wetland conservation policy, working to create the Upper Mississippi River Wildlife and Fish Refuge and Everglades National Park, to pass the Clean Water Act and numerous Farm Bills, and to ensure federal laws will continue to conserve and protect wetlands nation-wide. Our members hunt, fish, hike, camp, canoe, kayak, and generally enjoy the outdoors, and they represent a broad swath of the American political spectrum.

Swampbuster

In 1954, the League called on Congress to make farm program subsidy payments contingent upon farmers adopting soil conservation practices on their land. Three decades later, Congress enacted the Highly Erodible Land and Swampbuster provisions of the 1985 Farm Bill, requiring that soil conservation plans be in place for farmers growing crops on highly erodible land, and that farmers refrain from draining or filling wetlands to grow crops, in order to remain eligible for Farm Bill commodity program, crop insurance, conservation, and farm loan benefits.

This pact between farmers and taxpayers has endured for more than three decades, providing farmers with hundreds of billions of dollars' worth of Farm Bill payments and other benefits, and giving taxpayers assurances that their tax dollars were not subsidizing the destruction of wetlands. To date, it has been a

good deal for both farmers and taxpayers. It is the primary mechanism for conserving several million acres of wetlands on farms around the country, and it provides critical protection to wetlands in the Prairie Pothole Region, North America's Duck Factory. The public benefits provided by the wetlands protected by the Swampbuster provision are enormous: reduced flooding, increased groundwater recharge, improved water quality, reduced erosion, increased wildlife habitat, increased hunting and other recreational opportunities, and carbon sequestered in wetland soils. These benefits accrue to the rural areas surrounding the wetlands, as well as to our nation as a whole.

To continue to serve the interests of taxpayers, farmers, and rural areas, Swampbuster needs to remain a program grounded in good science, implemented consistently across the nation using the most modern technology, and that fully meets the intent of Congress to protect wetlands on farms.

We have been pleased to see recent advancements in technological tools for identifying and delineating wetlands, including the availability of high quality spring imagery, an updated National Wetlands Inventory, and LiDAR data. We recently learned that the Natural Resources Conservation Service has taken a leadership role in Nebraska in developing an application that brings together spring and summer aerial imagery, National Wetlands Inventory maps, soil maps, and other data layers that will make identifying and delineating wetlands easier in the field and in NRCS offices. This is the kind of technology that should be used in every state, to tackle current delineations and to confirm or update inaccurate pre-1996 delineations.

Normal Climactic Conditions and the 1971-2000 Precipitation Data Set

The interim rule provides language implementing the statutory provision requiring that to be considered a wetland, an area must support a prevalence of hydrophytic vegetation "under normal circumstances"¹, along with having "a predominance of hydric soils" and must be "inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions."² The interim rule's discussion indicates that NRCS policy uses the notion of normal circumstances for all three considerations (soils, hydrology, and vegetation.).

The interim rule proposes to continue NRCS use of the now-outdated 1971-2000 precipitation data set in wetland determinations now and in the future, even though a more current precipitation data set is available. We are concerned about the implications of this decision as USDA moves forward. With climate change and projected changes in precipitation that differ from region to region, continued use of the 1971-2000 data set means the data will reflect actual conditions less and less. We believe it is an issue ripe for an environmental assessment by USDA, but USDA failed to perform one.

NRCS rules should be based on the best science. We think 30 years is the minimum length of precipitation data that would be scientifically appropriate, and we would strongly urge USDA to resist suggestions to use a shorter data set.

¹ 16 USC 3801(a)(27)(C).

² 16 USC 3801(a)(27)(A) and (B).

We understand USDA's position that the 1971-2000 data set generally reflects the climactic conditions present in 1985, when farmers who were growing crops on farmland became subject to Swampbuster and obtained the accompanying statutory exemptions for Swampbuster coverage of farmed wetlands and prior converted wetlands. We understand and share USDA's concern about creating a situation where a large number of farmers with existing wetland determinations and delineations would return and ask for new wetland determinations or delineations every 10 years, should USDA choose to update its data set and adopt a new precipitation data set every 10 years for all decisions. That would seem to create unnecessary work for NRCS staff, with little public benefit. We also agree that farmers in similar situations should be treated similarly. A farmer who was growing crops on a field in 1985 but just now asks for a wetland determination (e.g., perhaps to decide whether and how to install drain tiles) should be treated similarly to his or her neighbor who was growing crops in 1985 but asked for a determination years ago.

We believe both can be accomplished, while maintaining the scientific integrity of wetland determinations and delineations.

We believe USDA should continue to use the 1971-2000 precipitation data sets for all determinations and delineations that have been made to date based on that data set. That would provide certainty for farmers who have obtained a wetland determination or delineation, and would avoid the potential administrative costs of USDA fielding requests for new delineations or determinations every ten years. Farmers who are requesting determinations or delineations now and in the future, for fields that were cropped in 1985 and where at issue are farmed wetlands or prior converted wetlands, should similarly be processed using the 1971-2000 data set. Those farmers had an obligation to protect the wetlands in place in 1985 that continues to this day, and were exempt (or not exempt) based on whether farmed wetlands or wetlands converted prior to 1985 were involved. The 1971-2000 data set which reflects 1985 conditions makes sense for those situations.

However, take the case of *new* determinations and delineations, such as for grassland which was not cropped in 1985 but is now being put into crop production, and the producer needs a wetland delineation from USDA to identify which wetlands must be protected from future actions, such as the installation of drainage tile. In those cases, the relevant standard for protection should be what wetlands are now on the land, not what was there in 1985, and so the relevant precipitation data set would be the one with the most current data. Asking USDA to go back and assess what wetlands were likely in place more than 30 years ago, when there is no question of a prior-converted wetland or farmed wetland at issue, is a waste of USDA resources, results in inaccurate wetland delineations, and serves neither the farmer nor the taxpayer.

We believe this interpretation is supported by the plain language of the statute. 16 USC 3832(e) says (*emphasis ours*):

“(e) Nonwetlands – The Secretary shall exempt from the ineligibility provisions of section 3821 of this title any action by a person upon lands in any case in which the Secretary determines that any one of the following does not apply with respect to such lands:

(1) Such lands *have* a predominance of hydric soils.

(2) Such lands *are* inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.

(3) Such lands, under normal circumstances, *support* a prevalence of such vegetation.”

The statute does not use the past tense (e.g., “*had* a predominance” or “*were* inundated...” or “*supported* a prevalence of such vegetation *in 1985...*”). On its face, it appears the intent of the statute is to protect wetlands that are in place at the time a wetland determination or delineation is made, or the time actions are taken by a farmer that would violate Swampbuster with respect to wetlands then in place. The exemptions with respect to wetlands converted prior to 1985 are the cases where the circumstances on the land in 1985 are relevant. By using the 1971-2000 data set for those circumstances, but not for more recent wetland conversions nor for decisions about what lands are protected by Swampbuster from future conversions, USDA could provide for science-based wetland determinations and delineations that meet the intent and purpose of the statute.

At a minimum, we believe USDA should carry out an assessment of the environmental impact of using the current 30-year precipitation data set, versus the 1971-2000 data set, for future determinations of land newly converted to cropland where wetland conversions prior to 1985 are not at issue. This is exactly the kind of assessment of viable alternatives that the National Environmental Policy Act contemplates, but that USDA did not carry out with respect to this interim rule.

Wetland Definitions

With respect to the definitions of playa, pocosin, and pothole wetlands included in the interim rule, we appreciate the effort to base these definitions on sound science. We would note that there are a significant number of playa wetlands in Colorado, Nebraska, and Kansas, and would suggest the language be revised to read: “They occur primarily in the Great Plains.”

Hydrology Criteria

The interim rule reflects a decision by USDA to move away from hydrology criteria for identifying wetlands based on a minimum number of days of inundation or saturation, and to a standard based on observable conditions. This general approach appears to conform to the approach of the broader wetland science community, and should result in better decisions considering the diverse kinds and locations of wetlands protected by Swampbuster throughout the country.

However, the language of the rule (Wetland Determination, (4)(i)(C)) includes observance of conditions resulting from inundation during the growing season observed on aerial imagery, which is determined to represent normal or drier than normal climatic conditions. What the interim rule and the USDA explanation fails to mention is that, at least in some NRCS offices, USDA relies on aerial imagery taken in July or August, the hottest part of the growing season, rather than spring imagery from the early part of the growing season. The result is that a large share of the wetlands on the landscape that provide important flood control, groundwater recharge, wildlife habitat, water quality, and other benefits lose their protection under Swampbuster.

According to research by the U.S. Fish & Wildlife Service, with respect to the Prairie Pothole Region (PPR) “the magnitude of difference between May and July surface hydrology is profound...in the PPR portion of the Dakotas, the number of basins with water declined on average by more than 70% between May and July. Accordingly, using FSA crop compliance photography as the sole source of imagery in an off-site wetland assessment is likely to miss a significant number of temporary and seasonal basins.”³

As noted above, many data layers, including the National Wetlands Inventory, elevation, and spring imagery are now readily available to delineate wetlands. USDA should take this opportunity to require that NRCS state offices use the broad range of available data, including spring imagery, the National Wetlands Inventory, LiDAR, updated soil maps, and other available information to make all wetland determinations and delineations, and to require their use in off-site determinations.

Best Drained Condition

We support USDA’s effort to clarify by rule the term and concept of “best drained condition”, since a farmer with a prior converted wetland maintains an exemption from Swampbuster under 16 USC 3822(b)(2)(D) and (E) to maintain those hydrologic conditions that were in place in 1985. In line with our previous comments concerning the use of precipitation data sets, we think this is an area where the use of the 1971-2000 precipitation data set could be appropriate, and USDA could clarify the appropriateness of using that data set by changing the language regarding hydrologic conditions to read “... that *existed* during the wet portion of the growing season during *then*-normal climatic conditions.”

In addition, we recognize that determining what hydrologic conditions were in place in 1985 (or before) is difficult at best, and grows more difficult each year as people with personal knowledge of the property and documents that can provide important evidence both disappear. We urge USDA to use this opportunity to set a clear standard for the credible evidence needed to establish the pre-1985 hydrologic condition, such as contemporaneous aerial or other photography, to ensure appropriate documentation is provided to justify an exemption.

Wetland Minimal Effect Determinations

The explanation notes that the current language in the rules requires that a USDA ‘minimal effect’ determination be made based on a functional assessment made during an on-site evaluation of the subject wetland and all wetlands in the area. USDA says this requirement is overly burdensome, since it would require access on other land in the area that may not be owned or controlled by the applicant. The proposed interim rule (1) provides that the assessment of the functions and values of the subject wetland be made based on an on-site evaluation, (2) removes the requirement that the evaluation of the impact on other related wetlands in the area be made based on an on-site evaluation, and (3) instead provides that it “may be made based on a general knowledge of wetland conditions in the area.”

We appreciate that completing an on-site evaluation of other wetlands in the area may not always be possible. However, it is vital that the evaluation of these impacts be science-based and technically

³ Communication, US Fish & Wildlife Service Director Daniel Ashe to NRCS Chief Dave White, June 21, 2012, including attachment, *Fish and Wildlife Service Issue-Specific Comments on Natural Resources Conservation Service Recommendations to Revise Policy on Wetland Determination*.

defensible. The provision that such an evaluation be made based on a “general knowledge” of wetland conditions in the area is overly vague and without appropriate standards. We think NRCS should put in place a process for such off-site minimal impact evaluations that is a consistent, science-based methodology and process that uses defensible measurements and considers the full array of wetland benefits in the area including water quality, groundwater recharge, fish and wildlife habitat, flood mitigation, carbon sequestration, recreation, and other benefits.

We support codification of the provision that a request for a minimal effect determination be made before the commencement of wetland conversion activities, and in the event the conversion activities occur prior to seeking approval, the burden would be on the applicant to prove that the effects were indeed minimal.

Tract versus Field

The interim rule’s explanation indicates that USDA will conduct wetland determinations at the tract, field, or sub-field level based on the request of the farm operator. However, in the language of the rule, “tract” is eliminated, replaced with “field or sub-field”, which could appear to eliminate the opportunity for a producer to request and obtain a wetland determination for their whole tract. If so, then that could result in inefficient use of USDA resources, if USDA staff must return to a tract multiple times to complete field-level determination. We suggest the language be revised to read: “All wetland determinations made after July 3, 1996, will be done on a tract, field, or sub-field basis, at the option of the applicant, and will be considered certified wetland determinations.”

Certification of Pre-1996 Wetland Determinations

As USDA is no doubt aware, its 2013 change in practice in at least some states to allow for the certification of pre-1996 wetland determinations without a review of the accuracy of the wetland map has caused great consternation in the conservation community and among federal and state agencies, and with good reason. Pre-1996 wetland determinations are notoriously inaccurate.

In 1997, the North Dakota NRCS, Environmental Protection Agency, and Fish & Wildlife Service agreed on a quality assessment that found over 90% of the North Dakota 1990-1996 wetland determinations were not of sufficient quality to implement Swampbuster appropriately. In July, 1997, NRCS Chief Paul Johnson sent a memo to Secretary of Agriculture Dan Glickman, noting that that over 3 million wetland determinations were made using pre-1996 methods, and 60% of them were inaccurate. A 2017 USDA Office of Inspector General audit report compared certified wetland determinations with earlier pre-1996 wetland determinations on the same land, finding that 75% of wetlands that should have been protected (based on the new determinations) were not under the older, inadequate 1990-1996 determinations.

Despite a clear record of the inaccuracy of 1990-1996 wetland determinations, USDA made a decision to change its procedures, and begin certifying pre-1996 wetland determinations based on the legibility of the maps and the notification process it followed, without regard for whether the maps were accurate or not with respect to the wetlands present. It changed its procedures without carrying out an environmental assessment of the impact of the change, despite the substantial environmental impacts of its decision.

Now that USDA is proposing to codify this major change in its practices, the agency is explaining it away as simply codifying a practice that is already in place. The Environmental Assessment provided includes

no assessment of the environmental impact of the loss of wetland functions and values that would result from the certification of inaccurate 1990-1996 wetland determinations.

Congressional intent on the certification of inaccurate pre-1996 wetland determinations should be clear. In deliberations over both the 2014 Farm Bill and the 2018 Farm Bill, proposals to provide for automatic certification of pre-1996 determinations were considered, and in neither case did Congress approve of that approach.

We strongly object to the language in proposed section 12:30 regarding NRCS responsibilities, including the provision that would consider 1990-1996 determinations as certified if merely done on the appropriate form, and the person was notified, and the map document was of sufficient quality, together with the language defining “sufficient quality” to essentially mean the map is legible, without regard to its accuracy. We strongly object to the language included in section 12:31 that “the determination of wetland hydrology will be made in accordance with the current Federal wetland delineation methodology in use by NRCS *at the time of the determination.*” We believe that, to the extent this language applies to pre-1996 wetland determinations, it violates the letter and intent of provisions of the 1996 Farm Bill, which recognized the inadequacy of the pre-1996 wetland determinations.

New data layers including an updated National Wetlands Inventory, updated soils maps, LiDAR, and aerial imagery from different times of the year should make review and evaluation of wetland accuracy faster and more accurate than in the past.

We urge USDA to immediately cease certifying pre-1996 wetland determinations, and to propose a new rule that would put in place a process to use good science and available technology to efficiently review and assess the accuracy of pre-1996 determinations, allowing USDA to issue certified wetland determinations based on accurate wetland maps.

Lack of Adequate NEPA and ESA Assessment

The National Environmental Policy Act was enacted to ensure that federal agency decisions consider and evaluate the environmental impacts of their actions. The Act requires that agencies use the process to evaluate proposed actions, not merely to justify decisions already made. It also provides that the evaluation include development and comparison of the proposed action and alternatives, allowing for a comparison of alternatives. In the case of the USDA Environmental Assessment (EA) that accompanies the interim rule, the document presents no alternative that is significantly different than the proposed interim rule. The assessment ignores the substantial changes that result in the number of acres protected by the Farm Bill’s Swampbuster provision as a result of the proposed certification of 1990-1996 wetland determinations despite their known inaccuracies and that have not been the subject of previous environmental review by USDA. The EA also rejects offering and assessing an obvious alternative to the use of the 1971-2000 precipitation data set, which could have provided meaningful information on the environmental impacts of using a newer data set for some or all of new determinations. In doing so, USDA fails to meet the standards under the National Environmental Policy Act for a rigorous evaluation of meaningful alternatives to the actions proposed by the agency.

The Endangered Species Act requires federal agencies to consult with the Fish & Wildlife Service to evaluate the impact of their proposed actions on federally protected species. The Environmental Assessment offered by USDA fails to provide such an evaluation. In Section 6 of the EA, USDA provides a list of the persons and agencies consulted in the development of the Environmental Assessment, which included nobody outside of the USDA Natural Resources Conservation Service. No official from the US Fish & Wildlife Service was consulted, nor were any officials with any of the state fish and wildlife agencies. The assessment fails to include a meaningful evaluation of the impact of USDA's action on threatened and endangered species, in part because it fails to provide any meaningful alternatives for evaluation, and in part because it ignores the impact of the certification of pre-1996 wetland determinations.

Thank you for the opportunity to comment on this interim rule. We urge USDA to withdraw the interim rule, immediately cease certifying pre-1996 wetland determinations that have not undergone a review for the accuracy of the wetland map, and develop a new rule that will implement the Swampbuster provision of the Farm Bill in a manner that is consistent, honors the benefits that taxpayers should gain from the provision, and is firmly grounded in wetland science.

Yours in Conservation,

Duane Hovorka

Duane Hovorka, Agriculture Program Director
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