



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D C 20240



In Reply Refer To:
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MAR 16 2009

John Glover, Acting Director
Easements Program Division
United States Department of Agriculture
Natural Resources Conservation Service
Wetlands Reserve Program Comments
P.O. Box 2890, Room 6819-S
Washington, D.C. 20013

Dear Mr. Glover:

The Fish and Wildlife Service (Service) has reviewed the Natural Resources Conservation Services (NRCS) interim final rule amending regulations for the Wetlands Reserve Program (WRP) and offers the attached comments for your consideration. The comments are submitted in response to the publication and request for public comments on the WRP interim final rule in the *Federal Register* on January 15, 2009, (Vol. 74, No. 10, Pages 2317-2337). The interim final rule sets forth how NRCS will implement WRP in response to program changes resulting from enactment of the Food, Conservation and Energy Act of 2008 and for clarification and program administration improvement.

We appreciate the opportunity to review and comment on the proposed rule and to work closely with NRCS on the implementation of WRP since its establishment in the 1990 Farm Bill. Please contact me at (703) 358-2161, or Dave Walker, Farm Conservation Programs Coordinator at (703) 358-2310, if you have any questions or need further information.

Sincerely,

David J. Stout
Chief, Division of Habitat and Resource
Conservation

Attachments

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**Fish and Wildlife Service Comments on the Interim Final Rule for the
Wetlands Reserve Program
Docket Number NRCS-IFR-08013**

March 16, 2009

GENERAL COMMENTS

The Wetlands Reserve Program (WRP) is one of the most successful landowner conservation programs addressing the loss and restoration of our nation's wetlands, with more than two million acres of primarily drained or degraded wetlands and associated upland buffer enrolled in the program since 1990. Based on a 2006 report by the Fish and Wildlife Service (Service) on the status and trends of wetlands in the U. S. (Dahl 2006), the WRP has been a critical tool in achieving for the first time a reported net gain of wetlands associated with agricultural lands. The societal and fish and wildlife benefits derived from the protection and restoration of wetlands through the WRP are significant and include reduced flood damage and increased flood-storage capacity, improved water quality and quantity, and restored and enhanced fish and wildlife habitat for many species, including waterfowl, shorebirds, neotropical and migratory forest birds, and many species at-risk, such as the Louisiana black bear. The program's reauthorization in the 2008 Farm Bill will provide opportunities for the nation's farmers, ranchers and private landowners to protect and restore the functions and values of wetlands on their property.

The Service has worked closely with the Natural Resources Conservation Service (NRCS) at the national, state and local levels to maximize the fish and wildlife benefits of the WRP since the program was established in the 1990 Farm Bill. The Service appreciates and supports the continued interagency coordination between the NRCS and the Service described in the interim final rule.

The Service offers the following page-specific comments in an effort to ensure that lands enrolled in the program can achieve the resource benefits for which they were selected and that opportunities for landowners to restore and protect wetlands through enrollment in the WRP are not missed. To that end we are urging flexibility in program implementation and a broader interpretation of the statute in the rule. We also want to ensure that efforts to clarify or improve administration of the program that are unrelated to implementation of statutory changes to the program will contribute to, and not detract from, achieving the purposes of the WRP.

The Service recommends that NRCS monitor the impact of the new program rules on landowner interest and participation in the program and assess the effectiveness of the WRP in restoring and protecting high priority wetlands.

SPECIFIC COMMENTS

Page 2329, Section 1467.2(f) – Administration

We appreciate recognition of the important role the Service plays throughout the WRP implementation process and we are committed to continuing the interagency coordination with NRCS that has helped to make this program a success for both landowners and the restoration of fish and wildlife habitat. We also want to encourage consultation with State fish and wildlife agencies, other Federal or State agencies, conservation districts, and other organizations with special expertise related to the program implementation process.

Page 2329, section 1467.3 – Definitions

The Service recommends the following changes or additions to the definitions in the interim final rule

The change in the statute specifying maintenance as eligible for cost-share assistance should be incorporated in the definition for *maintenance*. The second sentence of the definition could include the following:

“**maintenance activities are eligible for cost-share assistance and include** actions and work to manage, prevent deterioration, repair damage, or replace conservation practices on enrolled lands, as approved by NRCS.”

Although the rule does not include a definition of tribal lands eligible for WRP, the definition of *landowner* includes “... trust holders of acreage owned by Indian tribes.” *Indian tribes* and acreage owned by Indian Tribes are defined in the rule, but trust lands are not. The Service recommends the addition of a definition for *trust lands* that includes Hawaiian Homelands and Pacific Insular Areas. Section 6105 of the Farm Bill, entitled Substantially Underserved Trust Areas, refers to the definition of trust lands found in 38 USC Section 3765 (Veteran's Benefits).

Trust lands means land that:

(A) is held in trust by the United States for Native Americans as that term is defined in 38 U.S.C. 3765 (3);

(B) is subject to restrictions on alienation imposed by the United States on Indian lands (including native Hawaiian homelands);

(C) is owned by a Regional Corporation or a Village Corporation, as such terms are defined in section 3(g) and 3(j) of the Alaska Native Claims Settlement Act, respectively (43 U.S.C. 1602 (g), (j)); or

(D) is on any island in the Pacific Ocean if such land is, by cultural tradition, communally-owned land, as determined by the Secretary of the Interior.

Page 2331, Section 1467.4 (c) – Landowner Eligibility

The rule describes the statutory provisions allowing the State Conservationist to waive the 7-year ownership requirement. The Service supports the State Conservationist retaining the flexibility to grant waivers to the ownership requirement under 1467.4(c)(2)(iii) as soon as a determination

is made that the land was not acquired for purposes of placing it in the program. This is especially important if enrollment would facilitate recovery of species listed under the Endangered Species Act, benefit declining species so they do not need to be listed, or otherwise address high priority resource objectives consistent with program purposes.

Page 2331, section 1467.4(e)(1) – Land Eligibility

The Service recommends adding “**trust land**” after “private land” to accommodate Hawaiian Homelands and Pacific Island Insular Areas as lands that may be considered for enrollment in WRP.

Page 2331, 1467.4(e)(5) – Land Eligibility

Section 1467.4(e)(3)(ii)(B) of the rule incorporates the statutory change to WRP that expanded program eligibility to cropland or grassland flooded by the natural overflow of a closed basin lake or pothole. However, section 1467.4(e)(5) further restricts this eligibility to the Prairie Pothole Region (PPR). Although the statute requires an annual survey of demand for enrollment under this criterion in the PPR and an annual adjustment of state WRP allocations based on the survey, the statute does not appear to restrict enrollment under the criteria to the PPR. Land outside the PPR that is subject to the overflow of a closed basin lake or pothole should be eligible for enrollment provided it meets other program requirements.

Page 2332, Section 1467.4(e)(6) – Land Eligibility

The interim final rule requires all other eligible lands to be adjacent or contiguous to lands eligible under 1467.4 (e)(3) and (e)(5). This is not a statutory requirement and is a change in the interpretation from the previous WRP rule of the same statutory language allowing enrollment of other lands that maximize wildlife benefits “... together with land that is eligible under subsection (c)....”. This discretionary change by NRCS restricts enrollment of riparian areas, farmed wetland enrolled in CRP, and other wetlands to only those contiguous or adjacent to the primary eligible lands under 1467.4 (e)(3) on a particular easement offer (i.e., these wetlands can no longer be offered for enrollment as stand alone areas). For example, riparian areas that link protected wetlands are now ineligible unless one of the wetland areas is eligible for enrollment under 1467.4(e)(3) as a farmed or converted wetland. This change will remove an important tool for protecting and restoring wetlands and riparian areas important to many species of wildlife.

The interim final rule also deletes the following categories from the list of lands eligible for enrollment under the previous WRP rule:

- Other wetlands that would not otherwise be eligible but would significantly add to the wetland function and values (previously under section 1467.4(d)(3)(v)), and
- Wetlands that have been restored under a private, State, or Federal restoration program with an easement or deed restriction with a duration of less than 30 years (previously under section 1467.4(d)(3)(vi)).

As indicated on page 2324 of the interim final rule, reorganization of the language and inclusion of restored wetlands in 1467.4(e)(6) is not intended to preclude the enrollment of restored agricultural wetlands that are eligible under 1467.4(e)(3), but to facilitate the enrollment of restored adjacent non-agricultural wetlands. However, the Service believes that the change will reduce opportunities to achieve the program purpose of restoring and protecting wetlands, and we disagree with NRCS that eliminating these two sections "...more clearly comports with statutory intent...". The Service recommends restoring these two sections in the final rule

The Service offers two alternatives to address the issues identified above for sections 1467.4(e)(5) and (e)(6) by recommending that NRCS consider:

1. Using language from the previous rule (paragraph (d) Eligible land) and add eligibility for cropland or grassland subject to the overflow of a closed basin lake or pothole currently described under 1467.4(e)(3)(i)(B), or
2. Revising the interim final rule at 1467.4(e)(3), (e)(5) and (e)(6) as follows:

1467.4 (e)(3) Land shall only be considered eligible for enrollment in the WRP if NRCS determines, in consultation with the FWS, that:

(i) The enrollment of such land maximizes wildlife benefits and wetland values and functions;

(ii) Such land is—

(A) farmed wetland or converted wetland, together with adjacent lands that are functionally dependent on the wetlands; or

(B) cropland or grassland that was used for agricultural production prior to flooding from the natural overflow of a closed basin lake or pothole, together with the adjacent land, where practicable, that is functionally dependent on the cropland or grassland; or

(C) Other land described in paragraph (e)(6); and

(iii) The likelihood of the successful restoration of such land and the resultant wetland values merit inclusion of such land in the program, taking into consideration the cost of such restoration

~~1467.4 (e) (5) Prairie Pothole Region.~~ Land under paragraph (e)(3)(ii)(B) of this section may be considered for enrollment into 30-year easements if it meets the criteria under (e)(3), ~~it is located in the Prairie Pothole Region as defined under §1467.3 of this part and the size of the parcel offered for enrollment is a minimum of 20 contiguous acres.~~ Such land meets the requirement of likelihood of successful restoration only if the soils are hydric and the depth of water is 6.5 feet or less at the time of enrollment.

~~1467.4 (e) (6) "If land offered for enrollment is determined eligible under paragraph (e)(3) and (e)(5) of this section, then NRCS may also enroll land adjacent or contiguous to such eligible land together with the eligible land, if such land that maximizes wildlife benefits and:"~~

(i) Is farmed wetland and adjoining lands enrolled in CRP, with the highest wetland functions and values, and is likely to return to production after it leaves CRP;

(ii) Is a riparian area along streams or other waterways that links or, after restoring the riparian area, will link wetlands which are protected by an easement or other device or circumstance that achieves the same objectives as an easement; or

(iii) Land adjacent to the eligible land that would contribute significantly to wetland functions and values, such as buffer areas, wetland creations, non-cropped natural wetlands, and restored wetlands, but not more than the State Conservationist, in consultation with the State Technical Committee, determines is necessary for such contribution.

(iv) Wetlands that have been restored under a private, state or federal restoration program with an agreement, easement or deed restriction with a duration of less than 30 years.

(v) Other wetlands that would not otherwise be eligible but would significantly add to the wetland functions and values of the eligible land.

Page 2332, Section 1467.4(g)(4) – Land Eligibility

The Service recommends adding language at the end of the paragraph as follows:

“Lands owned in fee title by a State, including an agency or subdivision of a State or a unit of local government **unless held in trust.**”

Page 2334, Section 1467.10(b) – Cost-share payments

Consistent with the statutory change making maintenance activities available for cost-share, the Service recommends the following revision to the paragraph such that it reads:

“Cost-share payments may be made only upon a determination by NRCS that an eligible conservation practice or component of the conservation practice has been implemented in compliance with appropriate NRCS standards and specifications; or an eligible activity, **including maintenance**, has been implemented in compliance with the appropriate requirements detailed in the Wetland Restoration Plan of Operations (WRPO).”

Page 2334, Section 1467.10(a)(3) – Cost-share payments

The Service recommends flexibility in developing restoration cost-share agreements to meet the \$50,000 annual payment cap. Multi-year restoration agreements should be available that can be carried out using up to \$50,000 per year over several years to address large restoration projects or projects in areas with high restoration costs.

Page 2334, Section 1467.10(e) - Cost-share payments

The Service understands the prohibition against providing cost-share assistance to public entities or other ineligible landowners who may acquire property after an easement is perfected but prior to completion of restoration. However, the implementation of this restriction through the contract provisions described in 1467.10(e) may result in reduced participation in the program and WRP easements on which restoration has not been completed. Irrespective of changes in

landownership, the federal investment in the acquisition of a WRP easement should be realized by completion of restoration so that the wetland functions and values for which the lands were originally selected and enrolled in the program can be achieved. The rule should not preclude NRCS from obligating monies to complete the restoration as long as there is no cost-share payment to an ineligible landowner (e.g., the restoration could be accomplished through a federal contract or cooperative agreement). In addition, contract provisions that would make the original landowner responsible for implementing conservation practices and activities after selling the land and potentially having to refund easement payments even though the easement remains in full force and effect may deter many potential program participants.

Page 2335, Section 1467.11 (a)(2)(iii) – Easement and 30-year contract participation

The rule should recognize that some rights are traditionally reserved to the landowner, such as the right to control public access and the right to recreational use, such as hunting and fishing. Hunting and fishing should be removed as an example of compatible uses permitted by NRCS in Section 1467.11(a)(2)(ii).

Page 2335, Section 1467.11 (a)(2)(iv) – Easement and 30-year contract participation

For consistency with Section 1467.11(a)(4)(iv): add “**...in accordance with the terms of the easement and related agreements**” at end of Section 1467.11(a)(2)(iv).

Page 2335, Sections 1467.12(a) – The WRPO development and Section 1467.13(b) - Modifications

The Service appreciates the opportunity to provide site-specific technical input, along with Conservation Districts, to the NRCS during development or modification of the WRPO. We recommend that State fish and wildlife agencies also be given the opportunity to provide site-specific technical input in these processes.

Page 2336, Section 1467.14(a) – Transfer of land

The option available under the previous WRP rule for the State Conservationist to extend the offer of enrollment to the new landowner was removed in the interim final rule and new landowner restrictions were added. The Service recommends retaining the option of extending the offer to a new landowner in the final rule under the same conditions and acknowledging that the new landowner must be an eligible landowner by adding the following language at the end of 1467.14(a):

“At the option of the State Conservationist, an offer can be extended to the new eligible landowner, if the new eligible landowner agrees to the same or more restrictive easement and contract term and conditions.”

Page 2337, Section 1467.20 (b) – Market-based conservation initiatives

The Service supports NRCS retaining the authority to ensure that the requirements of the WRPO, contract, and easement deed are met when program participants pursue ecosystem service credits from WRP lands.

We recommend that paragraph (b)(2) further clarify that wetlands restored with federal funds cannot be used for Farm Bill wetland mitigation purposes or for any other federal wetland mitigation purposes.

Literature Cited

Dahl, I.E. 2006. Status and trends of wetlands in the conterminous United States 1998 to 2004. U.S. Department of the Interior; Fish and Wildlife Service, Washington, D.C. 112pp.