

Summary of Public Comment: Revised Swampbuster Wetland Determination Procedures in the Prairie Pothole States, including State Offsite Methods (SOSM)

September 10, 2015

USDA conservation compliance wetland determinations (also known as Swampbuster determinations) are used by USDA participants to avoid adverse wetland conversions and retain eligibility for certain voluntary USDA programs (most Farm Service Agency and Natural Resources Conservation Service (NRCS) programs and Federal crop insurance premium subsidies). State offsite methods (SOSM) are state developed offsite procedures for making Swampbuster determinations. The Swampbuster provisions were first identified in the 1985 Farm Bill – the Food Security Act.

In the Prairie Pothole States of Iowa, Minnesota, North Dakota and South Dakota, NRCS staffs have been using offsite procedures for Swampbuster determinations since August 1988. To improve efficiency and implement consistent procedures, NRCS proposed the development and implementation of consistent SOSM procedures for these four states using current technology.

To maximize transparency NRCS conducted a series of public listening sessions in the four states and in Washington, DC, to solicit comments from producers and conservation and agricultural groups, reviewed the revised draft procedures with each states' State Technical Committees and posted the procedures in the Federal Register on November 5, 2014, with a 90-day comment period that was extended through February 20, 2015.

The SOSM procedures is not a rule making action and does not involve any changes to the existing regulatory language for the conservation compliance provisions found in 7 CFR Part 12. NRCS received approximately 300 comments from individual producers, agriculture and conservation groups and others. The comments showed that there remains confusion over the purpose and scope of the revised SOSMs and whether or not the federal register posting indicated SOSMs were a regulatory action. To clarify the use of SOSM procedures NRCS has renamed them "State Guidance for Swampbuster Wetland Determinations Including State Offsite Methods."

Summary of Public Comments

1. **NRCS received a list of concerns expressed by individuals about wetland losses in the Prairie Pothole Region who cautioned about moving forward with the SOSM improvements. Concerns included the following:**
 - a. Ensure that methods of identifying wetlands are accurate and comprehensive. Commenters requested that NRCS ensure the accuracy of these new methods in identifying and conserving shallow seasonal (or temporary) wetlands that provide critical habitat for wildlife. Commenters expressed that over half of the Prairie Pothole wetlands of the Great Plains have been drained for agriculture--destroying breeding habitat for migrating waterfowl and shorebirds and increasing flood risks in the region. USDA should adopt off-site determination methods only after ensuring that these methods accurately identify and protect the shallow, seasonal and seep wetlands of the Prairie Pothole Region.

NRCS Response: NRCS agrees that the new procedures need to be accurate. Offsite methods have been in use by NRCS since 1988. The revised procedures continue long-standing agency wetland identification procedures which have proven to be effective at identifying the seasonal and temporary wetlands that are important and prevalent in the Prairie Pothole Region (PPR). SOSMs continue to use a broad range of remote sensing data, including the evaluation of USDA aerial photography as an integral and “tested” part of the process of identifying wetlands subject to the Swampbuster provisions.

- b. Ensure that farmers receiving taxpayer funds are not paid to destroy wetlands that provide critical wildlife habitat as well as flood storage. Commenters are concerned that USDA's proposed, untested, "off-site" wetland identification methods in the Prairie Pothole Region will sacrifice tens of thousands of shallow wetlands by relying on summertime aerial photos that fail to identify many early season wetlands.

NRCS Response: The Swampbuster provisions are meant to encourage the retention of wetland functions and values. The 1985 Farm Bill's Swampbuster provisions make producers ineligible for many USDA program benefits if the producer adversely affects wetlands identified by USDA. As stated in “1. a.” above, offsite methods have been in use by NRCS since 1988 and SOSMs continue to use a broad range of remote sensing data, including the evaluation of USDA aerial photography as an integral and “tested” part of the process of identifying wetlands subject to the Swampbuster provisions. When information is insufficient to make a determination remotely, NRCS continues to have the ability to go on-site to make determinations.

2. NRCS received many individually-signed template letters that recognized that, while the purpose of SOSMs is to improve efficiency, they still had the following concerns:

- a. Procedures should be optional. The off-site procedure needs to be an option, not a mandate, for landowners who depend on the land for their family's livelihood. Commenters are concerned that some areas simply have too many variables to have a determination done via imagery and deserve a trip to the field.
- b. Improve trust through producer notification. Commenters advised that NRCS should notify farmers prior to wetland determination work being done to explain each process and ask for additional documentation on a given plot. Giving landowners a choice will improve the trust that has been broken between farmers and the NRCS and will certainly lessen the number of appeals that would rise from farmers concerned with the off-site procedures.
- c. Producer stewardship effort and customer service. Commenters expressed that producers care for the land and strive for good land stewardship. They want answers in a reasonable timeline and deserve a fair and honest answer using sound science under the technical guidelines enacted by law.

NRCS Response: The SOSM is not optional since the intent of this procedure is to complete determinations more efficiently, consistently and with a high degree of accuracy. However, the agency expert conducting the determination can always choose to make the determination on-site if they feel that use of the off-site SOSM will not yield an accurate result. All determinations are initially issued as “preliminary”. An on-site review with the producer is available with a request for reconsideration. After the producer receives the preliminary determination, he or she can request an onsite field visit to review and reconsider the determination. This appeal process ensures program participants have the option of requesting

an on-site review of their determination. In addition, onsite investigations are required by regulation prior to any producer benefits being withheld. NRCS agrees that producers practice good land stewardship and appreciates their desire to have timely, fair and accurate determinations. The NRCS agrees that an additional emphasis on producer notification would be beneficial to all parties and is exploring means of implementing such a notification.

3. Comments from individual commenters that were not provided through a template response included the following:

- a. Allow private wetland consultants. A significant number of commenters recommend producers have the option to hire private wetland consultants to independently gather and develop on-site data for use in USDA certified wetland determinations.

NRCS Response: By statute NRCS has the sole responsibility to complete, issue, and defend (through the appeal process) all Swampbuster determinations. Producers have the option to hire private consultants to assess and evaluate their lands for wetlands and submit data for consideration by the agency. NRCS will determine how any submitted data will be used in the Swampbuster wetland determination process. Producers can also choose to have their consultant participate in the appeal process.

- b. Opportunities missed with aerial photography. Commenters expressed concern that relying on aerial imagery may result in NRCS missing the opportunity to identify temporary wetlands in the Prairie Pothole region.

NRCS Response: NRCS has been making Swampbuster wetland determinations in the Prairie Pothole Region utilizing offsite procedures since 1988. The changes being implemented are limited in scope, and update current practice.

The large majority of shallow, seasonal wetlands in the PPR reside in cropped fields, areas considered by USDA to be cropland. These are sites where annual tillage, crop production and in many cases previous drainage manipulation has occurred. Making wetland determinations on these sites presents a challenge because on a great many of these cropland sites the onsite wetland indicators have been removed, partially removed, or are masked by cropping activity. Within the wetland identification process, procedures have previously been developed for these situations, many of which use the analysis of aerial photography and other offsite resources to evaluate the presence or absence of wetland indicators

- c. Timing of imagery. NRCS has received concerns about biases associated with the timing of imagery. Early imagery will skew determinations toward more wetland determinations and late imagery will result in fewer wetland determinations missing seasonal and smaller wetlands. Other concerns were raised regarding the region being in a “wet cycle” and the impact climatic conditions may have on remote sensing tools.

NRCS Response: The NRCS Swampbuster wetland determination process uses a broad range of data sources to minimize the potential for data bias based on seasonality of precipitation or variability over time that may be related to one particular data source. Aerial photography is one of many data sources. The Farm Service Agency 35 mm aerial photography used in this process was obtained annually and primarily during the summer months between June and August. The agency has over

25 years of experience in using this data source to remotely identify wetland hydrology indicators. This experience has shown that wetness signatures, suggesting the presence of wetland hydrology, persist on summer imagery and can effectively identify the presence of wetland hydrology. The hydrology signatures provide a clear distinction that for each site either a saturated or inundated condition existed when compared to the surrounding field.

- d. Conduct a comparative analysis between onsite and offsite. Commenters expressed that NRCS should guarantee the proposed changes won't compromise the accuracy of wetland determinations by conducting a comparative analysis between offsite and onsite determinations. Some recommended NRCS delay implementation until this analysis is completed. While a few others recommended NRCS develop an on-line database of wetland hydrology and allow the U.S. Fish and Wildlife Service to independently verify the accuracy of the SOSM.

NRCS Response: NRCS conducted a comparative analysis of the current and revised Swampbuster wetland identification procedures (SOSM) on a limited scale. In South Dakota the evaluation considered 1,115 identified sampling units in 20 counties. Use of the revised procedures resulted in finding differences on 41 of the sampling units, or approximately 3.6 percent of the total. These differences include either wetlands identified where previously they had not been, or vice-versa. NRCS has already developed an on-going quality review process for future wetland determinations in the Prairie Pothole Region (PPR). These reviews will continue to evaluate any change in the amount of wetlands identified and the wetland labels applied.

To comply with Sections 1619 and 1244 of the Farm Bill as well as the Privacy Act, USDA cannot develop a public database of wetland locations and wetland hydrology. In addition the regulations at 7 CFR Part 12 clearly provide that the agency retains full responsibility to independently verify all aspects of each compliance determination. Given these restrictions it would be inappropriate to coordinate Swampbuster wetland compliance activities with any agency outside of USDA.

- e. Use the hydric soils list. A significant number of commenters expressed that NRCS should use the hydric soils list to identify the presence or absence of hydric soils indicators and a limited number indicated the agency should not use the hydric soils list. Those opposed to using the soils list indicated the soil survey is meant for broad planning purposes only.

NRCS Response: By regulation, at 7 CFR Section 12.31 "Onsite Wetland Determination Criteria," the agency has previously established its ability to use the published soil survey for this purpose and the SOSM is not changing that regulatory provision. The soil survey is just one among many data sources used in the Swampbuster determination process.

- f. Delay adoption. Similar to the comments raised on the template letter submitted by a number of commenters, some individual commenters urged USDA to delay adoption of offsite procedures until the methods have been confirmed to accurately protect shallow, seasonal and seep wetlands.

NRCS Response: NRCS agrees that the new procedures need to be accurate. Offsite methods have been in use by NRCS since 1988. The revised procedures continue long standing agency wetland identification procedures which have proven to be effective at identifying the seasonal and temporary wetlands that are important and prevalent in the Prairie Pothole Region (PPR). SOSMs continue to use a broad range of remote sensing data including the evaluation of USDA aerial

photography as an integral and “tested” part of the process of identifying wetlands subject to the Swampbuster provisions.

- g. U.S. Army Corp’s of Engineers Manual. A significant number of commenters requested NRCS follow the U.S. Army Corp of Engineers manual more closely as they work on identifying wetlands for conservation compliance purposes. A few commenters expressed that the responsibility of labeling meandering streams should be left to Corps of Engineers.

NRCS Response: The methodology that NRCS uses to conduct Swampbuster wetland determinations is guided by agency policy and procedure. In development of this policy and procedure, NRCS adopted technical principles contained in the U.S. Army Corps Manual and Regional Supplements to the Corps manual, with certain variances due to USDA’s specific statutory and regulatory Swampbuster provisions. NRCS then further modified, with the development of the SOSMs, the offsite procedures to adopt them for the specific process of Swampbuster wetland determinations.

The revised procedures in the SOSM are limited to wetland identification, which is step one of the overall NRCS wetland determination process. The application of wetland labels, which is step two of the process, involves a separate and independent evaluation of the exemptions provided in the Food Security Act of 1985, as amended. There are no changes to the currently listed exemptions and wetland labeling procedures, including those for meandering streams.

- h. Increased appeals. A few commenters expressed that the SOSMs will result in more producer appeals.

NRCS Response: NRCS has no indication that the number of appeals or the appeal rate will change due to use of the revised technical procedures. In addition, the revision of technical wetland identification procedures has no impact on appeal rights, which are defined in regulation at: <http://cfr.regstoday.com/7cfr614.aspx>

- i. Too much subjectivity. A significant number of commenters are concerned that wetland determinations are subject to interpretation by the reviewer and this subjectivity will slant determinations.

NRCS Response: NRCS employees making Swampbuster determinations are technical wetland specialists dedicated to this function. This policy has resulted in an improved quality of work, including less subjectivity of the interpretation of wetness signatures on aerial photography. The use of technical specialists has also increased the efficiency of the determination process, and incorporated improved checks and balances into the process. On October 1, 2012, NRCS instituted policy known as “Separation of Duties.” With this policy Swampbuster wetland determination work is conducted by qualified technical staff outside of the immediate county-based service area from which the request was generated, which further removes potential for outside influence on decision making.

- j. Ensuring accuracy of the 50 percent threshold. A limited number of commenters stated that NRCS should field verify the proposed 50 percent for wetland hydrology threshold before implementing the procedures.

Explanation: The “50 percent threshold” is a new technical procedure put to use in these revisions. Previously, NRCS would analyze aerial photos and if the number of hydrology signatures fell above a certain threshold, the area would be determined to have wetland hydrology. If the number of hydrology signatures fell below a certain threshold, the area would not be determined to have wetland hydrology. Then any analysis that fell between those two thresholds would have to be field verified. These revised procedures eliminate the “middle ground” that used to have to be field verified.

NRCS Response: NRCS follows its policy and procedures for conducting Swampbuster determinations which use the principles of wetland identification identified in the Corps manual and regional supplements, with certain variances due to the unique Swampbuster statutory and regulatory provisions. The use of the 50 percent threshold as a hydrology indicator is included in these procedures. From a technical perspective the use of offsite procedures (remote indicators) in the Regional Supplements has been rigorously vetted by the Corps through public comment and peer review. It also should be noted that the revised SOSM process uses a far greater number of aerial photos than have been used in the past, increasing the confidence in this decision.

- k. Clarification requested regarding workload reductions. A few commenters requested clarification on how the SOSM procedures will reduce the backlog.

NRCS Response: NRCS anticipates being able to address producer requests for Swampbuster determinations more quickly with the SOSM. The estimated time to complete an onsite determination is 12 hours with some taking as long as 40 hours (this time does not include travel hours for teams that may make multiple trips to perform onsite visits), while off-site determinations take an average of only 6 hours. In addition, by consistently using SOSM as the first approach for each wetland determination, NRCS will be able to provide preliminary determinations year around. On-site visits can only be completed during specific seasons.

- l. Producer burden to prove wetland exemptions. One comment was received concerning producers having the “burden of proof and burden of producing evidence” related to application of WC exemptions.

NRCS Response: NRCS encourages producers seeking exemptions to submit their drainage records indicating the existence and extent of pre-1985 manipulation actions prior to the agency issuing a Swampbuster wetland determination.