



United States Department of Agriculture



OFFICE OF INSPECTOR GENERAL



NRCS: Wetland Conservation Provisions in the Prairie Pothole Region

Audit Report 10601-0003-31

OBJECTIVE

Our objective was to evaluate NRCS' administration of the wetland conservation provisions in the prairie pothole region. Specifically, we evaluated whether NRCS established adequate guidance and procedures to administer the wetland conservation provisions.

REVIEWED

We selected a non-statistical sample of 35 wetland determinations for two States in the prairie pothole region that were identified by the complainants and suggested by NRCS State office officials. We also reviewed State-level policies and guidance in the other two prairie pothole States.

RECOMMENDS

We recommend that NRCS issue official guidance reinforcing correct and current rules and clarifying procedures for making wetland determinations and certifications, including the status of pre-1996 determinations.

OIG reviewed how NRCS administers the wetland provisions in the “prairie pothole region” to evaluate if NRCS established adequate guidance and procedures.

WHAT OIG FOUND

According to the Natural Resources Conservation Service (NRCS), if farmers are receiving a wide range of USDA benefits, then they may not bring wetlands into agricultural production. NRCS is responsible for making technical determinations regarding whether a wetland exists on a given tract of land. If farmers convert wetlands to production, then a violation may be issued, and the farmer can lose USDA farm program payments.

After receiving a complaint concerning recent changes in how NRCS makes these determinations, the Office of Inspector General (OIG) reviewed determinations made in the “prairie pothole region” (Iowa, Minnesota, North Dakota, and South Dakota). We found that, in response to a backlog of requests for wetland determinations, NRCS made significant changes in its process for wetland determinations that allowed producers to drain and farm more wetlands. The process for making this change was not carried out in a transparent manner.

NRCS generally agreed with our finding, and we accepted management decision on both recommendations.



United States Department of Agriculture
Office of Inspector General
Washington, D.C. 20250



DATE: January 19, 2017

AUDIT
NUMBER: 10601-0003-31

TO: Jason Weller
Chief
Natural Resources Conservation Service

ATTN: Leon Brooks
Director
Compliance Division

FROM: Gil H. Harden
Assistant Inspector General for Audit

SUBJECT: NRCS: Wetland Conservation Provisions in the Prairie Pothole Region

This report presents the results of the subject audit. Your written response, dated January 10, 2017, is included in its entirety at the end of the report. Excerpts from your response and the Office of Inspector General's position are incorporated in the relevant sections of the report. Based on your written response, we are accepting management decision for all audit recommendations in the report, and no further response to this office is necessary.

In accordance with Departmental Regulation 1720-1, final action needs to be taken within 1 year of each management decision to prevent being listed in the Department's annual Agency Financial Report. Please follow your internal agency procedures in forwarding final action correspondence to the Office of the Chief Financial Officer.

We appreciate the courtesies and cooperation extended to us by members of your staff during our audit fieldwork and subsequent discussions. This report contains publicly available information and will be posted in its entirety to our website (<http://www.usda.gov/oig>) in the near future.

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Background and Objectives

Background

Wetlands are the link between land and water. They are some of the most productive and dynamic habitats in the world, comparable to rain forests and coral reefs. Wetlands are a source of substantial biodiversity in supporting numerous species from all the major groups of organisms—from microbes to mammals. Wetlands also provide essential ecological functions and values that significantly benefit society. These functions include surface and subsurface water storage, nutrient cycling, particulate removal, maintenance of plant and animal communities, water filtration or purification, and groundwater recharge. Wetland values include providing habitats for a wide variety and number of wildlife and plants, collecting and holding flood waters, absorbing wind and tidal forces, buffering shorelines from wave damage, and providing recreation sites for boating and fishing. Approximately 221 million acres of wetlands existed in the conterminous United States at the time of European settlement in the early 1600s,¹ and by 1984, over half of these wetlands were drained or filled for development or agriculture production.² In 2004, it was estimated that only 107.7 million acres of wetlands existed in the conterminous United States.³ In 2009, there were an estimated 6.4 million acres⁴ of wetlands in the prairie pothole region (Iowa, Minnesota, North Dakota, and South Dakota).⁵

The Natural Resources Conservation Service's (NRCS) conservation programs and initiatives help producers reduce soil erosion, enhance water supplies, improve water quality, increase wildlife habitat, and reduce the damage caused by natural disasters. According to NRCS, the first protection of wetlands⁶ occurred in 1977, when President Jimmy Carter issued Executive Order 11990.⁷ This Order stated that each agency shall provide leadership and take action to minimize the destruction, loss, or degradation of wetlands, and to preserve and enhance natural and beneficial values of wetlands in carrying out the agency's responsibilities. NRCS formalized

¹ Thomas E. Dahl & Gregory J. Allord, *Technical Aspects of Wetlands: History of Wetlands in the Conterminous United States* (U.S. Geological Survey 1997), <http://water.usgs.gov/nwsum/WSP2425/history.html> (describing history of wetlands).

² USDA-NRCS, *Wetlands*, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/water/wetlands/> (last visited Apr. 8, 2016) (describing wetlands).

³ T.E. Dahl, *Status and Trends of Wetlands in the Conterminous United States 1998 to 2004* (U.S. Department of the Interior, U.S. Fish and Wildlife Service, 2014), <http://www.fws.gov/wetlands/Documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-1998-to-2004.pdf>.

⁴ T.E. Dahl, *Status and trends of prairie wetlands in the United States 1997 to 2009*, at 32 (U.S. Department of the Interior, Fish and Wildlife Service, Ecological Services, 2014).

⁵ The glaciated prairie region is an area located in the central portion of the North American continent and extends from central Iowa, north to the Canadian border, and includes portions of the States of Iowa, Minnesota, Montana, North Dakota, and South Dakota. As a result, there are numerous small landscape depressions left behind as the glaciers receded from this part of the continent. These landscape depressions, termed "potholes," collect rainfall and snowmelt, forming small shallow wetlands and ponds. *Id.* at 6.

⁶ Wetland is defined as land that has a predominance of hydric soils that are inundated or saturated in duration to support prevalence of hydrophytic vegetation and under normal circumstances does support prevalence of hydrophytic vegetation. See 16 U.S.C. § 3801(a)(27).

⁷ Exec. Order 11990 (May 24, 1977).

its implementation of Executive Order 11990 and policy for protection of wetlands in NRCS' general manual.⁸

Title XII of the 1985 Farm Bill, as amended, established protections for our nation's existing wetlands and highly erodible land.⁹ The purpose of the wetland conservation provisions is to remove incentives for producers¹⁰ to convert wetlands for agricultural purposes. NRCS is designated as the lead technical agency responsible for establishing regulations, policies, and procedures for making wetland and highly erodible¹¹ land determinations.¹² The Farm Service Agency (FSA) determines eligibility for program benefits based on NRCS' technical determinations.¹³ The 1985 Farm Bill dramatically changed NRCS' technical assistance functions and responsibilities. It authorized conservation compliance (commonly referred to as "sodbuster") and wetlands compliance (commonly referred to as "swampbuster") activities, transforming many technical assistance functions that NRCS historically performed by requiring enforcement of conservation under certain circumstances.¹⁴

Swampbuster provisions prohibit participation in numerous specified Department of Agriculture (USDA) programs when annually tilled commodity crops¹⁵ are produced, or land is drained to make production possible. Sodbuster provisions prohibit participation in numerous specified USDA programs when annually tilled commodity crops are produced on highly erodible land without adequate erosion protection.¹⁶

The 1985 Farm Bill requires producers participating in most USDA programs administered by NRCS, FSA, and the Risk Management Agency (RMA) to abide by wetland and highly erodible land conservation compliance provisions on any land owned or farmed that is determined by NRCS to be a wetland or highly erodible. Therefore, producers are required to preserve wetlands if they want to receive USDA program benefits. Originally, Federal crop insurance premium subsidies were included as a benefit that could be denied under the conservation compliance provisions; however, crop insurance premium subsidies were removed in the

⁸ USDA NRCS, *General Manual*, tit. 190, pt. 410, subpt. B, § 410.26(A)(2), "Protection of Wetlands" (Aug. 2012).

⁹ Food and Security Act of 1985, Pub. L. No. 99-198, tit. XII, subtit. A-C, 99 Stat. 1354, 1504-08 (1985 Farm Bill).

¹⁰ For purposes of this audit report, we define producers as persons who participate in USDA programs as an individual, partnership, corporation, or other legal entity. See generally 7 C.F.R. § 12.2 (definition of "person"); USDA NRCS, *National Food Security Act Manual* § 510.1(F) (5th ed. Nov. 2010) (table definition of "persons," which includes individuals and various entities that participate in USDA programs).

¹¹ Highly erodible land is cropland, hayland, or pasture that can erode at excessive rates and contain soils with an erodibility index of eight or more. USDA-NRCS, *Conservation Compliance on Highly Erodible Land and Wetlands* (last visited March 9, 2016), http://www.nrcs.usda.gov/wps/portal/nrcs/detail/ny/programs/?cid=nrcs144p2_027057.

¹² 7 C.F.R. § 12.30 (NRCS responsibilities regarding wetlands).

¹³ 7 C.F.R. § 12.4 (determination of eligibility for USDA program benefits).

¹⁴ Congressional Research Serv., *Technical Assistance for Agriculture Conservation*, CRS Report RL34069, at 26 (2011); see also 1985 Farm Bill, tit. XII, subtit. A-C, 99 Stat. 1504-08.

¹⁵ An agricultural commodity is any commodity (corn, soybeans, etc.) planted and produced by annual tilling of soil or planting of sugarcane. See *National Food Security Act Manual*, § 514.2(A) (5th ed. Dec. 2015); see also 1985 Farm Bill, § 1201(a)(1), 99 Stat. 1504.

¹⁶ Practices that protect soil erosion are crop rotation, grassed waterways, and using cover crops during non-crop periods.

1996 Farm Bill.¹⁷ The 2014 Farm Bill once again made crop insurance premium subsidies subject to swampbuster and sodbuster provisions.¹⁸

Producers who intend to participate in USDA programs must complete the AD-1026, “Highly Erodible Land Conservation and Wetland Conservation Certification,” which documents their compliance with highly erodible land and wetland compliance provisions. By completing the form, producers agree not to produce or make production possible on converted wetlands and also not to convert a wetland by draining, dredging, filling, removing woody vegetation, or any other activity affecting water regimen that would allow the planting of agriculture commodities. When a producer completes the AD-1026 and indicates on the form that manipulation has or is intended to be completed that has not been evaluated by NRCS, then a certified wetland determination will be completed by NRCS. NRCS can also perform a certified wetland determination in response to a complaint.

Certification of a wetland determination means that the wetland determination is of sufficient quality to make a determination of ineligibility for program benefits.¹⁹ NRCS policy is that all wetland determinations after passage of the 1996 Farm Bill are considered certified, and those determinations made prior to that date are certified if they met procedural appeal rights and quality mandates.²⁰

After 1996 and the completion of many internal studies,²¹ NRCS’ implementation of its policy was to not consider wetland determinations completed from 1990 to 1996 to be certified unless the determination was appealed and upheld, a process which required field visits and supporting documentation.²² NRCS published many factsheets explaining wetland conservation compliance that stated that most wetland determinations completed prior to July 3, 1996, are not considered certified and therefore may not be valid for determining compliance with wetland conservation provisions.²³ NRCS also reported that in the 1996 Farm Bill, Congress decided that

¹⁷ Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, §§ 311(2)(B), 321(a)(2), 110 Stat. 888, 982, 986 (1996 Farm Bill).

¹⁸ Agricultural Act of 2014, Pub. L. No. 113-79, § 2611, 128 Stat. 649, 762-66 (2014 Farm Bill).

¹⁹ 7 C.F.R. § 12.30(c)(1) (NRCS responsibilities regarding wetlands); *see also National Food Security Act Manual* § 514.1(A) (5th ed. Jan. 2010). The Secretary is required to certify whether a map is sufficient for making a determination of ineligibility for USDA program benefits. A final certification remains in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification. 16 U.S.C. § 3822(a); *National Food Security Act Manual* § 514.1(C); *see also In re XXXXX*, No. 2011W000064 (Jan. 26, 2012) (NAD Reconsideration Decision), available at http://www.nad.usda.gov/public_search.html (click “search hyperlink” at bottom of page and then enter the case number on search page).

²⁰ *National Food Security Act Manual* § 514.1(A) (5th ed. Jan. 2010).

²¹ *See, e.g.,* USDA-NRCS, Evaluation of Off-Site Wetland Mapping Conventions and Wetland Determinations in the Prairie Pothole Region (Jan. 1997); USDA-NRCS, Quality Assessment of Existing Wetland Determinations as Provided on CPA-026/026E (Mar. 1997) (assessing wetland determinations in North Dakota).

²² A wetland determination generally included an inventory map delineating the wetlands and a signed CPA-026, “Highly Erodible Land and Wetland Conservation Determination.” NRCS concluded that these determinations were not of sufficient quality to be considered certified. In addition, NRCS was concerned that producer files lacked evidence of appeal rights which are required.

²³ NRCS, “Wetlands and Conservation Compliance: What Every Iowa Farmer Needs to Know” (no date); NRCS, “Wetlands and Conservation Compliance: What Every Georgia Farmer Needs to Know” (no date); NRCS, “Wetlands and Conservation Compliance: What Every Wisconsin Farmer Needs to Know” (no date).

the inventory maps, while providing useful information, were not completely accurate. The inventory maps have been in the process of being replaced by certified wetland determinations.²⁴

In 2009, agricultural commodity prices spiked dramatically, which created an economic incentive to bring more land into production. Consequently, producers made many requests for wetland determinations. The number of requests for certified wetland determinations drastically increased, and NRCS started to experience a significant backlog. In fiscal year 2012, NRCS reported a backlog of over 12,000 wetland determination requests.²⁵ Producers grew frustrated with NRCS' wetland determination process with wait times of up to two years. The frustrated producers held public forums and expressed their desire to receive wetland determinations that were technically and procedurally correct, and completed in a timely manner of less than one year from the date of the request. Producers also expressed frustration with inconsistent treatment across State lines.

In response to producers' frustrations, in fiscal year 2011, NRCS created an initiative called the North Central Wetlands Conservation Initiative comprised of the prairie pothole States (i.e., Iowa, Minnesota, North Dakota, and South Dakota). The initiative was aimed at proposing efficiencies to reduce the growing backlog of wetland determination requests from producers. Special initiative funds of \$10.5 million were dedicated to hire term employees to work exclusively on reducing the backlog of wetland compliance requests. In the spring of 2013, NRCS provided the Secretary with a decision memorandum regarding proposed regulatory changes and clarifications to wetland policy. On April 1, 2013, the Secretary approved the memorandum, which allowed NRCS to move forward with the proposed changes and clarifications to the wetland conservation compliance provisions through a combination of rulemaking and preamble discussion, public notice, and administrative updates to the National Food Security Act Manual.²⁶ According to NRCS National Office officials, in the days following the passage of the 2014 Farm Bill, it was eventually determined to be too controversial to make any changes other than those needed to recouple federal crop insurance benefits to conservation compliance in order to not place in jeopardy the alliance between environmental and agricultural interests which formed to support the statutory change. As of December 2016, NRCS has not published any public notices or made any formal changes to policy or regulations to address the decision memorandum.

In late April 2013, the North Central Wetlands Conservation Initiative held a meeting led by the Regional Conservationist with the State Conservationists of the prairie pothole region. NRCS documented in the meeting notes that it would be revising the definition for certified wetland determinations in the preamble of the proposed rule. NRCS acknowledged in the meeting notes that these changes could not be implemented until the proposed rule was published. However,

²⁴ NRCS inventory maps were made by reviewing soil surveys, topographic maps, and FSA 35 mm aerial slides. These maps only show potential wetlands and were a tool to predict the presence and approximate boundary of wetlands. Pre-July 3, 1996 wetland determinations were based solely on the wetland inventory maps. NRCS, *Release of NRCS Wetland Inventory Maps*, Bulletin 180-V-NFSAM, Amend. WI22 (Apr. 24, 2001) (amending National Food Security Act Manual (3d ed. Amend. 2)).

²⁵ USDA-NRCS, Decision Mem., "Wetland Conservation Compliance Changes and Clarifications" (Apr. 1, 2013) (decision memo from NRCS to the Secretary).

²⁶ The *National Food Security Act Manual* provides NRCS personnel with policy and guidance on the implementation of wetland conservation provisions. *National Food Security Act Manual* (5th ed.).

agency officials directed the States to go forward with the proposed change of accepting wetland determinations made prior to July 3, 1996, while waiting for the proposed rule to be published.²⁷ States were further instructed not to issue any written guidance. As of December 2016, NRCS has not published any public notices or made any formal changes to policy or to regulations.

In April 2014, we received a complaint. The complaint alleged that NRCS State office officials were not following existing NRCS policies and laws allowing farmers to drain wetlands. The complaint specifically alleged that the State office officials are reverting back to wetland determinations, which were deemed to be of insufficient quality (crop years 1990 through 1996), instead of relying on current certified wetland determinations based on detailed technical analysis conducted by NRCS field staff. We reviewed the complaint, and as a result, the Office of Inspector General (OIG) initiated an audit on wetland conservation provisions in the prairie pothole region.

Objectives

Our objective was to evaluate NRCS' administration of the wetland conservation provisions in the prairie pothole region. Specifically, we evaluated whether NRCS established adequate guidance and procedures to administer the wetland conservation provisions, and whether wetland determinations were in accordance with laws and regulations.

As noted in our finding, we question NRCS' process to change its practice for making wetland determinations in the prairie pothole States. Accordingly, our work did not conclude on whether the determinations were in accordance with the underlying laws and regulations.

²⁷ North Central Wetlands Conservation Initiative, "Wetland Summit II Meeting Notes, Action Items and Decisions" (Apr. 25-26, 2013).

Section 1: Wetland Conservation

Finding 1: NRCS Changed its Wetland Determination Process Contradicting Its Prior Implementation of Policy and Practice

In 2013 in the prairie pothole States, NRCS began accepting as certified pre-1996 wetland determinations. These determinations were based on older inventory maps, which NRCS regarded as unacceptable for almost 20 years. Most of these pre-1996 determinations lack evidence of appeal rights and supporting documentation. In making this significant change in the implementation of policy, NRCS did not issue an official directive to communicate its decision to field staff. Furthermore, NRCS did not publicly disclose this change in the implementation of policy.

NRCS officials made this change because they were under pressure to reduce the backlog and because producers complained about the time needed to obtain a determination. This change (accepting the pre-1996 determinations) was successful in reducing the backlog, but it also resulted in inaccurate wetland determinations. As a result of this change in the implementation of policy, many acres of wetlands are being inappropriately drained and converted to agricultural production. Based on the 17 tracts²⁸ OIG reviewed in North Dakota, these changes in the wetland determination process reduced the protection of wetland acreage by nearly 75 percent on 13 tracts.

In order to conserve wetlands, Congress established legislation, beginning in 1985, to stop farmers who converted wetlands from receiving any USDA farm benefits.²⁹ That legislation has been renewed through consecutive Farm Bills in 1990, 1996, 2002, 2008, and 2014, representing an abiding commitment to preserve wetlands.³⁰ The Secretary delegated responsibility for this program to NRCS as the lead technical agency. NRCS' current published policy is that all wetland determinations after passage of the 1996 Farm Bill are certified, and those determinations made prior to that date are certified if they met procedural appeal rights and quality mandates.³¹

In response to legislative and executive mandates, NRCS developed a system of internal controls in the National Food Security Act Manual for making wetland determinations. Prior to the change in the implementation of policy in 2013, these controls involved a combination of onsite and offsite evaluations, including using aerial photography, Light Detection and Ranging

²⁸ We reviewed a total of 35 tracts (17 tracts in North Dakota and 18 tracts in South Dakota). For this finding we only included 17 tracts from North Dakota because South Dakota did not accept pre-1996 wetland determinations as certified.

²⁹ See 1985 Farm Bill, § 1221, 99 Stat. 1507-08.

³⁰ Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, §§ 1401-1424, 104 Stat. 3359, 3568-76 (1990 Farm Bill) (Title XIV of the 1990 Farm Bill, which renewed the conservation provisions of the 1985 Farm Bill, is also known as the Conservation Program Improvements Act); 1996 Farm Bill, §§ 301-326, 110 Stat. 980-92; Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §§ 2001-2006, 2201-2204, 116 Stat. 134, 223-38, 252-53; Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §§ 2001-2003, 122 Stat. 1651, 1753-56; 2014 Farm Bill.

³¹ *National Food Security Act Manual* § 514.1(A) (5th ed. Jan. 2010).

(LiDAR) data, precipitation data, hydrology reviews, and soil and vegetation samples.³² As an outcome of this process, a more current detailed color map was created of the producer's property that indicated the location of wetlands. Producers had appeal rights; if an appeal was made to NAD, NRCS would then implement the NAD determination.³³

Starting in 2009, agricultural commodity prices spiked dramatically; this created an economic incentive to bring more land into production. Consequently, producers made many more requests for wetland determinations. By the spring of 2012, the number of requests in the backlog had risen to about 12,000 pending determinations in the prairie pothole region. Since it could take years for a wetland determination to be made, NRCS senior level officials believed they needed to develop an alternative method to reduce the backlog. In 2012 and 2013, NRCS held several gatherings of employees from the prairie pothole region to discuss, among other issues, what might be done to reduce the backlog of pending wetland determinations.

As part of these internal discussions, NRCS officials proposed accepting pre-1996 determinations as certified. Beginning in 2013, NRCS moved forward with this proposal in the prairie pothole region. Officials believed that regulations and official policy would soon be revised, as they believed this change in the implementation of policy would reduce its backlog considerably. One State Conservationist responded to headquarter officials that this new interpretation could reduce the backlog by as much as 50 percent.

In March 2014, OIG received a complaint alleging that the wetland determinations resulting from this change in policy were "un-ethical," "fraudulent," "illegal," and "against the appeals of the National Appeals Division." In response to this allegation, we reviewed wetland determinations completed on 17 tracts that were made in accordance with the official current policy using technical information, and then compared them to the determinations completed with pre-1996 information. We found that pre-1996 determinations did not contain evidence in the file that procedural appeal rights and quality mandates were met.

For example, for a producer in North Dakota, the NRCS State office rescinded a 2010 determination that a district conservationist completed, showing 34 acres of wetlands on a tract. This determination was based on 10 years of current aerial photography, as well as an onsite visit. NRCS had thus invested considerable resources into this wetland determination.

This 2010 determination showed the location and size of at least 34.0 acres of wetlands on this property. However, as a result of the change in the implementation of policy, the NRCS' State office discarded the current determination and instead used a pre-1996 determination. The pre-1996 determination showed only 2.5 acres of wetland. The district conservationist protested, but the NRCS State office certified the 1995 map. The producer then proceeded to drain these acres

³² LiDAR is a remote sensing technology that measures distance by illuminating a target with a laser and analyzing the reflected light. LiDAR elevation data can be used to map the potential, static distribution of current and historic wetlands and key wetland functional drivers based on physical controls on water distribution. LiDAR intensity data can be used to map actual, dynamic variations in wetland inundation extent which can provide additional insights concerning key functional drivers.

³³ NAD provides USDA program participants an opportunity to file an appeal and receive a hearing if the participant disagrees with a program decision. 7 C.F.R. §§ 11.1-15 (NAD Rules of Procedure)

of wetlands without violation and therefore continued to receive USDA farm program benefits. As a result of NRCS's decision to switch between these methods for making determinations, the producer drained 31.5 acres of wetland, or 93 percent.

This case is not an isolated instance of the consequences of this change in how NRCS makes wetland determinations. We reviewed 13 tracts where NRCS rescinded current determinations and replaced them with pre-1996 determinations. In total, for these 13 tracts, 341.8 out of 456.9 acres (75 percent) of wetlands that existed, according to the current data, are no longer protected and are subject to being drained.

We also reviewed two determinations rescinded by NRCS State office officials after they had been already adjudicated by NAD in 2012 and were considered administratively final. In both cases, the officials changed the determinations by removing converted wetland³⁴ violations and re-classifying wetlands. One determination was changed by relying on a 1991 inventory map; this change resulted in the loss of 14.6 acres of wetlands. In the other case, the State office issued a new determination that removed 20.6 acres of converted wetland violations. However, the State office did not have the authority to implement an alternative course of action contrary to the NAD decision.³⁵ Program regulations only provide for a producer, not the Department nor a USDA agency like NRCS, to request judicial review of a final NAD decision.³⁶

Moreover, the decision to revert to pre-1996 determinations contradicts NRCS' longstanding position that these earlier determinations were inaccurate and unacceptable. In 1997, the Chief of NRCS wrote to the Secretary's office and stated that NRCS had made over three million wetland determinations using these maps and that 60 percent of these determinations were inaccurate.³⁷ At that time, the decision was made not to certify the older determinations.

When, in 2013, NRCS reversed its earlier stance by deciding to accept the pre-1996 determinations, nine district conservationists in North Dakota requested in a letter that the new policy be put in writing.³⁸ The State Conservationist responded that the policy was already in writing and instructed them to merely read the 1990 Farm Bill.³⁹ Seven States we contacted did not consider the pre-1996 determinations certified until the national office permitted the four States in the prairie pothole region to implement the change.⁴⁰ The three States outside the prairie pothole region we contacted still do not consider these pre-1996 determinations to be certified.⁴¹ In addition, we identified standardized brochures that NRCS used to describe

³⁴ A "converted wetland" is a wetland that has been drained, dredged, filled, or otherwise altered in some way that impairs or reduces the water flow making agriculture production possible when production was not previously possible, and before the alteration or other activity, the land was a wetland and not highly erodible land or crop land. *See* 16 U.S.C. § 3801(7)(A).

³⁵ NRCS is required to implement a NAD determination no later than 30 days after the determination becomes a final determination of USDA. *See* 7 C.F.R. § 11.12(a), 614.15(a) (implementation of final NAD determinations).

³⁶ *See* 7 C.F.R. §§ 11.13, 614.17 (judicial review of NAD decisions).

³⁷ *See* Informational Memorandum from Paul W. Johnson, Chief, NRCS, to Daniel Glickman, Secretary of Agriculture (July 1997).

³⁸ *See* Memorandum from TMU 6 District Conservationists to Mary Podoll, State Conservationist, Bismarck State Office, NRCS.

³⁹ *See* Memorandum from State Conservationist to District Conservationist, NRCS, et al. (Apr. 3, 2014).

⁴⁰ Indiana, Iowa, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin.

⁴¹ Indiana, Nebraska, and Wisconsin.

wetland compliance in Georgia, Illinois, and Wisconsin. These informational brochures explain that “[m]ost wetland determinations completed prior to July 3, 1996, are not considered “certified” and therefore may no longer be valid due to changes in the swampbuster provisions.”

OIG found that NRCS’ process for approving this major change in the implementation of policy—effectively a reversal of almost 20 years of history—was undocumented. NRCS presented a Decision Memorandum in March 2013 to the Secretary, indicating that NRCS would be “clarifying” how it makes wetland determinations among other regulatory changes.⁴² We found that NRCS’ Decision Memorandum did not mention that for almost 20 years these determinations were deemed to be of insufficient quality to be considered certified. In fact, NRCS internal studies evaluating wetland determinations completed prior to 1996 reported that these determinations did not meet NRCS standards and had recommended that the determinations not be certified.⁴³ This Decision Memorandum was approved by the Secretary April 1, 2013. This Decision Memorandum allowed NRCS to propose changes and clarifications through the rulemaking process. However, the memorandum did not authorize NRCS to implement these changes before regulations were finalized. According to NRCS National Office officials, in the days following the passage of the 2014 Farm Bill it was eventually determined to be too controversial to make any changes other than those needed to recouple federal crop insurance benefits to conservation compliance in order to not place in jeopardy the alliance between environmental and agricultural interests that formed to support the statutory change. As of December 2016, NRCS has not published any rule changes addressing this major change in certification.

After the Decision Memorandum was approved, a wetland summit was held with the four States in the prairie pothole region and the Regional Conservationist. The meeting notes distributed to all attendees instructed the States to implement these changes while the new regulations and policies were developed. These notes also included specific instructions to the State offices not to issue any written guidance. Ultimately, Iowa, Minnesota, and North Dakota followed these instructions and began accepting pre-1996 determinations as certified. South Dakota officials stated that they declined to make any changes because they had been sued by environmental groups and were hesitant to make this change for fear of additional lawsuits. Other States outside the prairie pothole region that share a similar geography (e.g., Indiana, Nebraska, and Wisconsin) were not aware of, and did not follow, the change in the implementation of policy. They continued making wetland determinations based on the current regulations and policies that prescribe more technically accurate methods.

Ultimately, these wetland certifications are intended to be used for determining program eligibility by NRCS, FSA, and RMA. When we spoke to FSA officials, they stated that they also were unaware of the change in the implementation of policy. They further stated that they were

⁴² These other changes included continued use of the 1971-2000 precipitation dataset, consistent setback distance calculations for proposed drainage improvements, better use of mitigation banks, and consistency in identification of potholes.

⁴³ See, e.g., USDA-NRCS, Evaluation of Off-Site Wetland Mapping Conventions and Wetland Determinations in the Prairie Pothole Region (Jan. 1997); USDA-NRCS, Quality Assessment of Existing Wetland Determinations as Provided on CPA-026/026E (March 1997) (assessing wetland determinations in North Dakota).

shocked that NRCS would use the determinations from the 1990s, as they regarded the older maps as of poor quality and not certified.

Senior-level NRCS officials acknowledged there were problems of inconsistency between the States. They did not, however, indicate that they would instruct the prairie pothole States to stop using the pre-1996 determinations and argued that their continued use of the pre-1996 determinations complied with current NRCS policy as well as applicable statutes. NRCS senior level officials also claimed that they have always been following NRCS policy when determining if a pre-1996 wetland determination would or would not be considered certified. NRCS policy is that all wetland determinations after 1996 are certified, and those determinations prior to 1996 are certified if they met procedural (appeal rights) and quality mandates.⁴⁴ However, (as previously noted) for almost 20 years, NRCS did not consider most pre-1996 determinations certified.

Finally, in 2012, to defend almost 20 years of how NRCS implemented its policy, NRCS requested⁴⁵ the NAD Director to reconsider his final determination that reversed a hearing officer's decision and ruled that a pre-1996 determination was certified.⁴⁶ NRCS argued that the review determination did not consider that pre-1996 determinations were never certified, and notices of certification were never provided at that time. NRCS also argued that the 1996 Farm Bill required all wetland determinations after July 3, 1996, to be certified because earlier wetland determinations were not reliable, and the changes were codified in the Code of Federal Regulations. NRCS' arguments were so persuasive that the NAD Director vacated his earlier decision and reaffirmed that pre-1996 determination was not certified. In other words, in 2012, NRCS argued that the pre-1996 determinations were unacceptable. However, in 2013, NRCS reversed this position and accepted the pre-1996 determinations as certified.

By making this change in the implementation of policy, NRCS replaced its backlog of pending determinations with inaccurate determinations. NRCS should issue official guidance reinforcing current rules and clarifying procedures for making wetland determinations and certifications, including the status of pre-1996 determinations. NRCS also needs to review all NAD decisions in the prairie pothole region from January 1, 2010, through the present to determine whether the decisions were implemented.

Recommendation 1

Issue official guidance reinforcing correct and current rules and clarifying procedures for making wetland determinations and certifications, including the status of pre-1996 determinations.

⁴⁴ *National Food Security Act Manual* § 514.1.(A)(1) (5th ed. Jan. 2010).

⁴⁵ In this case, the producer appealed to FSA. FSA was designated as the Agency of record, and officially made or filed the arguments with NAD. However, based upon a review of available records and interviews with NRCS personnel involved in this matter, we determined that the Department's position and arguments were NRCS', which they filed through FSA as the Agency of record.

⁴⁶ *In re XXXXX*, No. 2011W000064 (2012 NAD Reconsideration Decision), (2011 NAD National Director Review), (2011 Administrative Judge Decision), available at http://www.nad.usda.gov/public_search.html (click "search hyperlink" at bottom of page and then enter the case number on search page).

Agency Response

NRCS accepts this recommendation. This report identifies that NRCS staff in certain states in the prairie pothole region were incorrectly implementing existing policy concerning the certification status of previously issued wetland determinations, specifically wetland determinations conducted prior to July 3, 1996. Additional policy clarification providing specific guidance to evaluate the certification status of determinations issued prior to 1996 will be developed. The estimated completion date is April 28, 2017.

OIG Position

We accept management decision for this recommendation.

Recommendation 2

Review all NAD decisions in the prairie pothole region from January 1, 2010, through the present to determine whether the decisions were implemented. In those cases where the NAD final determination was set-aside or modified instead of implemented as directed by NAD, require the State office to implement the NAD decision in accordance with applicable law.

Agency Response

NRCS accepts this recommendation. In carrying out its responsibilities for wetland compliance, NRCS completes wetland determinations that are issued with appeal rights. One of the appeal options for a person affected by the determination is the opportunity to request a hearing with NAD. At the conclusion of the NAD hearing, the Administrative Judge issues a decision that rules on whether the determination was conducted according to policy and procedures. If the agency is upheld, the determination becomes final. The regulation at 7 CFR section 12.11 also provides NRCS the responsibility to determine if the affected person's action was taken in good faith reliance on advice or information provided by an agency employee. When NRCS determines that noncompliance is due to reliance on employee provided advice or information, appropriate relief can be provided. This relief may be requested, considered, and potentially granted at any time. In these cases, a new final technical determination becomes the legal certification, and by statute can only be modified at the request of the person. NRCS will review all NAD decisions and ensure that States take appropriate action in accordance with applicable law. The estimated completion date is April 28, 2017.

OIG Position

We accept management decision for this recommendation.

Scope and Methodology

We conducted our review of the NRCS wetland conservation provisions in the prairie pothole region. We reviewed the controls over wetland determinations, appeals, and certifications of wetland determinations. We conducted field work between September 2014 and November 2015. Our audit covered wetland determinations from 2010 through 2015 in the prairie pothole region, which contains over six million acres of wetlands.⁴⁷

We determined that NRCS did not have a database that included wetland violations and wetland determinations. As a result, we selected a non-statistical sample of 35 wetland determinations from North and South Dakota provided by the complainants and also suggested by NRCS State office officials.⁴⁸ We obtained FSA data that identified the number of tracts and associated acres with the presence of highly erodible land and wetlands. We did not assess the reliability of FSA data.

We performed our field work by conducting interviews and reviewing documentation at the NRCS and FSA national offices in Washington, D.C., and four NRCS and FSA State offices in the prairie pothole region: Iowa, Minnesota, North Dakota, and South Dakota. We also met with three additional NRCS and FSA State offices outside the prairie pothole region: Indiana, Nebraska, and Wisconsin⁴⁹ to determine how States near the prairie pothole region were applying wetland conservation provisions. Additional fieldwork was performed at 10 NRCS field offices and FSA county offices in Minnesota, North Dakota, and South Dakota.⁵⁰ We also visited the Central National Technical Support Center in Fort Worth, Texas, to interview personnel that provided training on wetland determinations.

We reviewed the conservation files for the selected samples to determine if wetland determinations were completed according to wetland conservation laws, regulations, and procedures.

To meet our audit objectives, we performed the following audit procedures:

- reviewed applicable law, regulations, and agency procedures related to wetland conservation provisions;
- reviewed NRCS national office policies, procedures, and oversight of wetland conservation provisions;
- interviewed complainants to obtain information about the allegations. We reviewed the documents provided and determined an audit was justified;

⁴⁷ T.E. Dahl, *Status and trends of prairie wetlands in the United States 1997 to 2009*, at 32 (U.S. Department of the Interior, U.S. Fish and Wildlife Service., Ecological Services, 2014).

⁴⁸ We reviewed 17 tracts in North Dakota and 18 tracts in South Dakota.

⁴⁹ We did not contact the FSA State office in Indiana.

⁵⁰ We did not perform work at a Minnesota FSA county office.

- interviewed NRCS national office officials on the agency's policy and procedures for wetland determinations;
- interviewed NRCS State officials from Indiana, Iowa, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin to determine how wetland conservation provisions were being applied;
- interviewed retired NRCS employees to get a historical perspective and description of the implementation of wetland conservation provisions; and
- assessed if NRCS correctly applied wetland determinations, handled appeals, and issued certification of wetland determinations in accordance with wetland conservation provisions.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions, based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Abbreviations

FSA	Farm Service Agency
LiDAR.....	Light Detection and Ranging
NAD	National Appeals Division
NRCS	Natural Resources Conservation Service
OIG.....	Office of Inspector General
RMA.....	Risk Management Agency
USDA	Department of Agriculture

**USDA'S
NATURAL RESOURCES CONSERVATION
SERVICE
RESPONSE TO AUDIT REPORT**



January 10, 2017

SUBJECT: ESD - Natural Resources Conservation Service (NRCS) Wetland Conservation Provisions in the Prairie Pothole Region Audit Report 10601-0003-31

TO: Gil H. Harden File Code: 190
Assistant Inspector General for Audit
Office of Inspector General

Attached is the NRCS response to the subject audit report. This report has undergone dramatic improvements since the first draft was originally transmitted in April 2016. NRCS is appreciative of the Office of Inspector General (OIG) audit team for working through these many changes. Apart from the official agency response, NRCS retains several concerns that the report's content has failed to include or within the report's language that could be misconstrued or misleading. Additional opportunities to clarify the report scope, context, and complete information are also identified in the attached version of the report provided by OIG with comments from NRCS.

The following is a summary of the agency's major concerns with this version of the audit report

- Despite the audit executive summary, the report fails to evaluate if wetland determinations in the prairie pothole region were in accordance with laws and regulations. By omitting reference to the legal status of pre-1996 determinations, the link to the report's findings and recommendation on the need for policy clarification is not clear. Without this legal context, evidence presented also may confuse the lay reader. For example, the report cites a historic (1997) internal study that recommended that wetland determinations in North Dakota should not be considered certified. However, by that time Congress had changed the law regarding certification, making this recommendation irrelevant.
- Throughout the report, OIG cites to NRCS making a significant change in procedural implementation of wetland policy without clarifying that any change was limited to specific States. The report language infers the scope of the change was national and the change itself was to agency national policy. The report also cites several State-issued documents as evidence; however, these State issued guidance documents are not reflective of national NRCS opinion or guidance. This evidence provides additional examples of inconsistent policy application by States.
- In regard to the change in the implementation of policy, the report does not reflect that in some prairie pothole region States NRCS was incorrectly rejecting pre-1996 determinations without first evaluating their certification status, as is required by

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current national policy. Omitting this fact fails to provide the context in which NRCS directed States to follow current policy.

If you have questions, please contact me at (202) 720-7246, or have a member of your staff contact Leonard Jordan, Associate Chief for Conservation, at (202) 720-7246.

/s/

Jason A. Weller
Chief

Attachments

cc: (w/attachments)
Val Dolcini, Administrator, Farm Service Agency

Wetland Conservation Provisions in the Prairie Pothole Region—10601-0003-31 Agency Response

Summary

NRCS generally accepts the two audit recommendations in the Wetland Conservation Provisions in the Prairie Pothole Region—10601-0003-31; however, there remain inaccuracies in the report text that misportray key facts and have potential to confuse the reader. In this response, we refine key points to ensure that the public is provided with the most complete information on this important topic.

The report has taken an important step to identify that the evidence presented and conclusions drawn relate to the implementation of policy; however, the report does not state unequivocally that the audit clearly found that NRCS staff in the Prairie Pothole Region were applying inconsistent procedures regarding the certification status of wetland determinations conducted prior to July 3, 1996 (1996). For example, the report correctly presents the current policy that determinations made prior to 1996 are certified if they met procedural appeal rights and quality mandates; however fails to provide the context that States were found to be incorrectly following that policy by automatically rejecting the certification status of all pre-1996 determinations. NRCS has also provided evidence that pre-1996 determinations were provided with appeal rights on the back side of the “Person Copy,” page in the carbon set form used at the time; however, this fact is not recognized in the report. Recommendation 1 signals that the implementation inconsistency is the key finding from the audit, which is strengthened if this line of discussion is clearly identified.

There are several areas where the report scope is not clear in the text, suggesting that the presented evidence may apply beyond the narrow, non-statistically drawn sample used as the foundation for the audit. For example, the report states that NRCS implementation of policy was “to not consider wetland determinations completed from 1990 to 1996 to be certified unless the determination was appealed and upheld, a process which required field visits and supporting documentation.” This was the case in North Dakota, one State in the Prairie Pothole Region; however, this criteria is not contained in national policy and there is no evidence of it being applied on a broad scale. In another example, the report cites Wisconsin State guidance that incorrectly asserts that all pre-1996 determinations were based on inventories. Again, a single State although that is not evident in the discussion.

There are several areas in the report where the evidence presented is not complete and could be misleading to the lay reader. For example, the report cites internal studies that judged the quality of pre-1996 determinations, but does not provide the context (i.e., studies conducted to assess the determination quality for implementation of the Clean Water Act, as well as the Food Security Act provisions at a time that USDA was operating in accordance with a memorandum of agreement with the Army Corps of Engineers). Recommendation 1 is more

clearly understood by identifying that the changing requirements and policies during the late 1990s contributed significantly to the inconsistent application of wetland certification policy.

The report includes a comparison of determinations from North Dakota made using pre-1996 approved procedures and those using a set of post-2009 procedures. The report concludes that more wetlands and more wetland acres were identified on the more recent determinations. This comparison is irrelevant to the legal standing of certified wetland determinations and merely demonstrates that technical tools and capabilities have improved over time and that regional weather patterns have become wetter. However, as presented, the comparison poses the risk that an uninformed reader may conclude that older determinations are not valid.

The report presents a 2012 NAD case as evidence that NRCS disputed the certification status of pre-1996 determinations. However, does not indicate this to be a single case in one State and that the particular determination could not be considered certified because it did not contain the certification statement signed by USDA.

Finally, the report includes quotations from the complaint alleging that NRCS actions were “un-ethical,” “fraudulent,” and “illegal.” These are inflammatory statements and do not belong in an audit, particularly since their veracity was not evaluated in light of the statute and regulation.

Recommendation 1

Issue official guidance reinforcing correct and current rules and clarifying procedures for making wetland determinations and certifications, including the status of pre-1996 determinations.

Agency Response

NRCS accepts this recommendation. This report identifies that NRCS staff in certain States in the prairie pothole region were incorrectly implementing existing policy concerning the certification status of previously issued wetland determinations, specifically wetland determinations conducted prior to July 3, 1996.

Certification of wetland determinations first was enacted in the Food, Agriculture, Conservation, and Trade Act of 1990, with corresponding changes made in the regulation at that time. Since June 1991, certified wetland determinations were provided with the inclusion of appeal rights on the back side of the “Person Copy” of the SCS-CPA-026 form. Additional clarification of the certification issue was made in the Federal Agricultural Improvement and Reform Act of 1996, when Congress made it clear that certifications made prior to that date remain valid unless a new certification is requested by a person. Certified wetland determinations are provided by NRCS to persons so that they can make informed decisions about the management of their lands to remain eligible for USDA program assistance.

As part of this process, policy is developed that must be consistent with the statutory and regulatory provisions. The policy regarding certification has varied through the years and has contributed to general misunderstanding. For example, there was a period of time when USDA operated in accordance with a memorandum of agreement with the Army Corps of Engineers to make determinations that would be valid for the Food Security Act and the Clean Water Act

(CWA). During this time, there were internal USDA studies that found some determinations lacked the quality required for implementation of the CWA, which led to further confusion.

Policy in place since 2010 specifies that wetland determinations conducted prior to July 3, 1996, are considered certified if they met the procedural (appeal rights) and quality mandates as provided in 7 CFR Section 12. USDA's Office of the General Counsel (OGC) has confirmed that this policy is in alignment with statute and regulation. However, staff in some prairie pothole region States were rejecting all wetland determinations conducted prior to July 1996 without considering if the determinations met requirements in accordance with established policy. In some cases staff in prairie pothole region States were incorrectly requiring evidence of an appeal, which resulted in a field visit at the time the original determination was completed; however, by policy all that was required was that the operator had received appeal rights—there was no obligation to exercise those rights.

NRCS attempted to correct these inconsistent implementation issues in 2013 by instructing NRCS staff in prairie pothole region States to follow existing policy and begin to examine determinations conducted prior to 1996 to determine if they met procedural and quality mandates and should be correctly identified as certified determinations. These actions, to bring States in alignment with national policy, are referred to in the report as being a significant change in policy. In addition, the instruction to NRCS State offices only occurred in specific States where it was identified that policy was not being followed, which led to the complaint that initiated the audit.

The audit also highlights a large determination backlog in the prairie pothole region, suggesting that the direction to follow existing policy may have been driven in part by the backlog. Since 2009, the combination of expired Conservation Reserve Program acres returning to crop production and the changing economics of corn and soybean production led to a surge in producer interest in drainage improvements and the need for NRCS completed wetland determinations. NRCS responded to this increased demand, and beginning in 2011, has dedicated an additional \$10.5 million of funding aimed at completing determinations, which has resulted in completing approximately 60,000 new certified determinations in the prairie pothole region, and reducing the backlog by 70 percent. The focus on wetlands determinations helped to reveal that some NRCS staff in the prairie pothole region were not following existing policy, but the affirmation and direction to adhere to policy was not for the purposes of reducing the backlog.

Additional policy clarification regarding the quality aspect of determinations is needed, as demonstrated in this report. Additional policy clarification providing specific guidance to evaluate the certification status of determinations issued prior to 1996 will be developed. The estimated completion date is April 28, 2017.

Recommendation 2

Review all NAD decisions in the prairie pothole region from January 1, 2010, to the present to

determine whether the decisions were implemented. In those cases where the NAD final determination was set-aside or modified instead of implemented as directed by NAD, require the State office to implement the NAD decision in accordance with applicable law.

Agency Response

NRCS accepts this recommendation. In carrying out its responsibilities for wetland compliance NRCS completes wetland determinations that are issued with appeal rights. One of the appeal options for a person affected by the determination is the opportunity to request a hearing with NAD. At the conclusion of the NAD hearing, the Administrative Judge issues a decision that rules on whether the determination was conducted according to policy and procedures. If the agency is upheld, the determination becomes final. The regulation at 7 CFR section 12.11 also provides NRCS the responsibility to determine if the affected person's action was taken in good faith reliance on advice or information provided by an agency employee. When NRCS determines that noncompliance is due to reliance on employee provided advice or information, appropriate relief can be provided. This relief may be requested, considered, and potentially granted at any time. In these cases, a new final technical determination becomes the legal certification, and by statute can only be modified at the request of the person. NRCS will review all NAD decisions and ensure that States take appropriate action in accordance with applicable law. The estimated completion date is April 28, 2017.

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