

Part 1970 - Environmental

Subpart G - WETLAND PROTECTION

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Part 1970 - Environmental

Subpart G - WETLAND PROTECTION

§ 1970.401 Purpose.

This subpart provides guidance for all Agency personnel and encourages them to work closely with their state environmental coordinator (SEC) and the National Office environmental staff (NES), as appropriate, in implementing these procedures for those federal actions that could adversely affect wetlands. The Agency recognizes that wetlands are essential to providing clean water, recharging water supplies, reducing flood risks, and providing fish and wildlife habitat. In addition, wetlands provide recreational opportunities, aesthetic benefits, sites for research and education, and commercial fishery benefits.

§ 1970.402 Authority.

The Agency will incorporate wetland protection practices to comply with and implement the following:

(a) Executive Order 11990 entitled "Protection of Wetlands", dated May 24, 1977. This executive order requires federal agencies to take action to avoid wherever possible adverse impacts to wetlands, minimize wetlands destruction and preserve the values of wetlands. Exec. Order 11990 calls for agencies to:

(1) "Avoid to the extent possible the long and short term adverse impacts associated with destruction or modification of wetlands and avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative."

(2) Provide leadership and take action to minimize the destruction, loss or degradation of wetlands, and preserve and enhance the natural and beneficial values of wetlands in carrying out the Agency's responsibilities for:

(i) Providing financial assistance for construction or improvements;

(ii) Conducting activities or programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities (where applicable); and

(iii) Acquiring, managing, and disposing of Federal lands and facilities (where applicable).

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(3) Avoid issuance of financial assistance for proposals for new construction located in wetlands unless:

(i) There is no practicable alternative to such construction, and

(ii) The proposal includes all practicable measures to minimize harm to wetlands taking into account economic, environmental, engineering and other pertinent factors.

(4) Provide opportunity for early public review of proposals for new construction in wetlands including those proposals whose impact is not significant enough to require the preparation of an environmental impact statement (EIS).

(5) Consider the proposed action(s)'s impact on survival and quality of wetlands, public health, safety, and welfare, including water supply, water quality, recharge/discharge, pollution, flood and storm hazards, sedimentation and erosion, maintenance of natural systems, conservation and productivity of existing flora and fauna, species and habitat diversity and stability, hydrologic utility, fish, wildlife, timber, and food and fiber resources, and recreational, scientific, and cultural uses of wetlands.

(b) USDA Departmental Regulation 9500-3, Land Use Policy. This policy was issued to promote land use objectives responsive to current and long term economic, social, and environmental needs. It is the Agency's responsibility to assure that agency programs discourage the unwarranted alteration of wetlands or the unwarranted expansion of the peripheral boundaries of existing settlements.

(1) It is the Agency's responsibility to advocate among federal agencies to take actions that reduce the risk of flood loss and soil erosion; that minimize impacts of floods on human safety, health, and welfare; preserve natural flood-control and other beneficial functions and values of wetlands; and reduce future need for expensive manmade flood-control systems, disaster-relief assistance, or Federal rehabilitation assistance in the event of flooding.

(2) It is the Agency's responsibility to encourage state and local governments and individual landholders to avoid encroachments on wetlands when practicable alternatives exist to meet developmental needs. The Agency will assist state and local governments, citizens

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groups, and individual landholders in identifying options and determining alternative land use values as the basis for making judicious choices in meeting growth and development needs.

(3) When land use regulations or decisions are inconsistent with USDA policies and procedures for the protection of wetlands, USDA Agencies shall not assist in actions that would convert these lands to other uses unless (1) there is a demonstrated, significant need for the project, program, or facility, and (2) there are no practicable alternative actions or sites that would avoid the conversion of these lands or, if conversion is unavoidable, the Agency will reduce the number of acres to be converted or encroached upon directly and indirectly.

(c) Section 363 of the Consolidated Farm and Rural Development Act (7 U.S.C. 2006e) (CONACT).

(1) CONACT 1990 Amendment-RD cannot directly fund wetland impact: On November 28, 1990 the Food, Agriculture, Conservation and Trade Act of 1990 amended the Consolidated Farm and Rural Development Act (CONACT) by the addition of Section 363, as follows: Section 363. Prohibition on the use of loan for certain purposes. The Secretary shall not approve any loan under this title to drain, dredge, fill or level or otherwise manipulate a wetland (as defined in section 1201(a)(16) of the Food Security Act of 1985 (16 U.S.C. 3801 (a)(16))), or to engage in any activity that results in impairing or reducing the flow, circulation, or reach of water, except in the case of activity related to the maintenance of previously converted wetlands, or in the case of such activity that is already commenced prior to the date of enactment of this section.

(2) CONACT 1996 Amendment-RD cannot directly fund wetland impact unless for utility lines: *Section 363 was further amended by the Federal Agriculture Improvement and Reform Act of 1996, dated April 4, 1996: "This section shall not apply to a loan made or guaranteed under this title for a utility line."*

(d) Federal Water Pollution Control Act (33 U.S.C. 1344) as amended, referred to as Section 404 of the CWA.

(1) This law established a federal program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands with which all individuals and federal agencies must comply. The Environmental Protection Agency (EPA) and the Army Corps of Engineers (ACE) are the two agencies that regulate placement of dredge or fill into wetlands and waterways. Activities regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports) and mining projects. Section 404 requires a permit before dredged or fill material may be discharged into wetlands or waterways unless the activity is exempt from Section 404 regulation (e.g. certain farming and forestry activities). The ACE is the agency that conducts and verifies the jurisdictional status of wetlands and waterways. In some ACE jurisdictions, some Section 404 regulatory activities have been delegated to local and state entities.

(2) Proposed activities are regulated through an ACE permit review process. An individual permit is required for potentially significant impacts. Individual permits are reviewed by the ACE, which evaluates applications under a public interest review, as well as the environmental criteria set forth in the CWA Section 404(b)(1) Guidelines (40 CFR part 230).

(3) For discharges that will have only minimal adverse effects, a general permit may be suitable. General permits are issued on a nationwide, regional, or state basis for particular categories of activities. The general permit process eliminates individual review and allows certain activities to proceed with little or no delay, provided that the general or specific conditions for the general permit are met. For example, minor road activities, utility line backfill, and bedding are activities that can be considered for a general permit. States also have a role in Section 404 decisions through State program general permits, water quality certification, or program assumption.

(4) If wetland avoidance is not possible, Section 404(a) of the CWA (33 U.S.C. section 1344(a)) allows projects in wetland areas as long as a permit is obtained through the ACE. Under the Section 404(b)(1) guidelines, ACE may only permit discharges of dredged or fill material into waters of the United States that represent the least damaging practicable alternative, so long as the alternative does not have other significant adverse environmental consequences. For "major activities", a pre-application consultation with the ACE may be necessary.

§ 1970.402(d) (Con.)

(5) Farmers who own or manage wetlands are directly affected by Section 404 of the CWA and the Swampbuster provision of the Food Security Act. The Swampbuster provision withholds certain Federal farm program benefits from farmers who convert or modify wetlands. Please note however, a farmer's violation of The Food Security Act of 1985's Swampbuster/Sodbuster provisions may render a farmer ineligible for FSA programs, but would not render that farmer ineligible for RD financial assistance.

§ 1970.403 Policies.

It is Agency policy to:

- (a) Provide leadership and take action to avoid, to the extent possible, the long- and short-term adverse impacts associated with the occupancy and modification of wetlands;
- (b) Avoid the direct or indirect support of development in wetlands whenever there is a practicable alternative;
- (c) Reduce the risk of wetland destruction or modification and the associated impacts to public health, safety and welfare; and
- (d) Restore and preserve the beneficial and natural values served by wetlands.

§ 1970.404 Responsible Parties.

The Secretary of Agriculture or designee is responsible for compliance with all applicable laws, regulations, and executive orders:

- (a) Undersecretary for Rural Development (RD). The undersecretary has overall responsibility for the implementation of the authorities cited in this subpart.
- (b) Administrator. The RD administrators have responsibility to ensure implementation within their respective program areas.
- (c) Approving Official. The Agency official with the authority to execute federal actions, usually approval of federal financial assistance. This official is usually a State Director, Program Administrator, or their designated delegate.

(d) NES. The NES provide:

(1) Technical and programmatic advice and training on environmental matters to Agency staff.

(2) Negotiation, approval, and execution of all memoranda of understanding or agreement, interagency or cooperating agency agreements, or programmatic agreements related to any environmental issue or actions taken under this part.

(3) Liaison function with federal Executive and Legislative Branch agencies.

(4) The same functions as a SEC for all programs administered at the National Office level (such as Telecommunication Programs, some Energy Programs, etc.).

(5) Guidance on resolving environmental disputes.

(6) National and state program oversight for compliance with this part.

(7) Reviews of project specific environmental files from states submitted for National Office concurrence or approval.

(e) State Director. Individual state directors ensure compliance with the requirements and procedures contained in this subpart within their areas of jurisdiction. State directors will ensure that guidance materials are issued to applicants for implementing the provisions of this subpart.

(f) SEC. The SEC will advise the state director on issues related to wetlands. They will coordinate all requirements of this subpart. The SEC will request assistance from the NES when necessary and will provide training to field and state staff, applicants, and technical service providers of the requirements of this subpart.

(g) Applicant. Any prospective applicant for financial assistance shall comply with all federal, state, and local regulations with respect to wetlands as a condition to receive financial assistance from the Agency. The Agency expects the applicant to pay for any costs incurred for wetland determination, wetland delineation, and compliance and permitting associated with all statutes, executive orders and regulations.

§ 1970.405 Definitions.

The following definitions will apply throughout this subpart.

- (a) Action refers to any proposed action or activity including:
- (1) Acquiring, managing and disposing of federal lands and facilities;
 - (2) Providing federally undertaken, financed or assisted construction and improvements; and
 - (3) Conducting federal activities and programs affecting land use, including, but not limited to, water and related land resources, planning, regulating and licensing activities.
- (b) Actions Affecting or Affected by Wetlands refers to actions that have the potential to result in long- or short-term impacts associated with the destruction or modification of wetlands and the direct or indirect support of new construction in wetlands.
- (c) Agency refers collectively or individually, as appropriate, to Rural Development (Rural Housing Service, Rural Business-Cooperative Service, and Rural Utilities Service).
- (d) Direct, indirect, or cumulative impacts" are all impacts that result in changes in the natural values and functions of a wetland. Direct impacts result from disturbances that occur within the wetland. Common direct impacts to wetlands include filling, grading, removal of vegetation, building construction and changes in water levels and drainage patterns. Most disturbances that result in direct impacts to wetlands are controlled by state and federal wetland regulatory programs. Construction activities within the wetland would be an example of a direct impact caused by an action. Another example is an action that would result in the discharge of polluted storm waters into a wetland that would immediately affect its natural value and function. Indirect impacts result from disturbances that occur in areas outside of the wetland, such as upland, other wetlands or waterways but which affects the natural values and functions of wetlands. Common indirect impacts include influx of surface water and sediments, fragmentation of a wetland from a contiguous wetland complex, loss of recharge area, or changes in local drainage patterns.

Given that most indirect impacts are beyond the authority of state and federal wetland regulatory programs, wetland protection can be provided by a watershed management plan under local implementation, but usually indirect impacts are not controlled by state and federal wetland regulatory programs. The NEPA process, however, can incorporate indirect impacts to wetlands into the consideration of alternatives. Examples of indirect impacts are changes in the volume of water reaching the wetland via infiltration or surface runoff, the retention time of water in the wetland, and the seasonal duration of wetland saturation, ponding or flooding. Cumulative impacts are those impacts resulting from combined direct and indirect impacts to the wetland over time. Similarly cumulative impacts are usually beyond the authority of state and federal wetland regulatory programs. The NEPA process, however, incorporates cumulative impacts to wetlands into the consideration of alternatives.

(e) Enhance means to increase, heighten, or improve the natural and beneficial values associated with a wetland.

(f) Facility refers to any (hu)man-made or (hu)man-placed item other than a structure, e.g., bridges and roads.

(g) Jurisdictional Wetland Determination (JD) refers to an approved jurisdictional determination issued by the ACE. A wetland delineation is usually completed by wetland biologist/wetland scientist prior to the issuance of a ACE jurisdictional determination.

(1) Wetland Delineation - Biologist marks (delineates) wetland areas with flags according to 1987 ACE Manual.

(2) Preliminary Jurisdictional Determination - ACE issues these determinations as requested by applicants. These determinations are advisory in nature and may not be appealed. Preliminary JDs are used for proposals that are avoiding potential wetlands located on the site. ACE typically performs a desk review only for issuance, and does not make a site visit.

(3) Approved Jurisdictional Determination - ACE issues an official determination that "waters of the U.S." and/or "navigable waters of the U.S." are either present or absent on a particular site. A Significant Nexus Analysis or site visit may or may not be performed and reviewed by EPA. These are projects that propose impacts to wetland areas.

§ 1970.405 (Con.)

(h) Least Environmental Damaging Practicable Alternative (LEDPA)- Under the Section 404(b)(1) Guidelines of the CWA, an applicant for a section 404 permit must demonstrate to the ACE that the proposed project is the least environmentally damaging practicable alternative to achieve the project's purpose. To determine the LEDPA, an applicant conducts a 404(b)(1) Alternatives Analysis. Under 40 CFR 230.10(a)-Restrictions on Discharge, no discharge shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem (waters of the United States, including wetlands) so long as the alternative does not have other significant adverse environmental consequences (with one exception for commercial navigation).

(i) Mitigation refers to all steps necessary to minimize the potentially adverse effects of the proposed action, and to restore and preserve natural and beneficial wetland values.

(j) New Construction in Wetlands includes draining, dredging, channelizing, filling, diking, impounding, and related activities and any structures or facilities begun or authorized after the effective date of Executive Order 11990, May 24, 1977.

(k) Practicable means capable of being done within existing constraints. The test of what is practicable depends upon the situation and includes consideration of all pertinent factors, such as environment, cost and technology.

(l) Preserve in reference to wetlands means to prevent alterations to natural conditions and to maintain the values and functions which characterize the wetland in its natural state.

(m) Restore in reference to wetlands means to reestablish a setting or environment in which the natural functions of the wetland can again operate.

(n) Structures refers to walled or roofed buildings, including mobile homes and gas or liquid storage tanks.

(o) Wetland - All Rural Development programs use the Food Security Act of 1985 wetland definition: The term "wetland", except when such term is part of the term "converted wetland" means land that -

- (1) has a predominance of hydric soils;
- (2) is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
- (3) under normal circumstances does support a prevalence of such vegetation. For purposes of this Act, and any other Act, this term shall not include lands in Alaska identified as having high potential for agricultural development which have a predominance of permafrost soils.

§ 1970.406 Eight Step Decision-Making Process for Alternatives Consideration.

Exec. Order 11990 requires federal agencies to take action to minimize the destruction, loss or degradation of wetlands and to provide opportunity for early public review for any proposals for new construction in wetlands. To meet these requirements, Agency environmental staff can use the framework described in the Eight Step Decision-Making Process for Alternatives Consideration as described in the implementation guidelines for Exec. Orders 11988 and 13690 (www.floods.org/ace-files/documentlibrary/FloodRiskMngmtStandard/E013690_IG_Oct15).

While the process is linear, as information is gathered throughout the decision-making process and as additional information is needed, it may be necessary to revisit or reconsider lower numbered steps. Refer to Exhibit A for a flow chart diagram of the process for wetlands.

- (a) Step 1. DETERMINE IF THE PROPOSED ACTION IS IN A WETLAND. Determine whether the applicant's proposed action is located in a wetland and whether it has the potential to affect or be affected by a wetland. Refer to this Subpart at 1970.407 (Wetland Determination) for wetland determination guidance and at 1970.408 (Alternatives Analyses and Mitigation Measures) for wetland alternatives analysis guidance. The applicant is responsible for providing this information to the Agency. The applicant is responsible for describing the proposed action, the affected wetland(s), and including or referencing maps showing the action's location with respect to the wetland. If the federal

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action will have no impact to a wetland, no further action is necessary. If the federal action will impact a wetland, continue to step 2.

(b) Step 2. PRELIMINARY PUBLIC NOTICE. Notify the public at the earliest possible time of the Agency's intent to carry out an action in a wetland, and involve the affected and interested public in the decision-making process. The preliminary public notice requirements for particular actions are outlined in 1970.409 and Exhibit B.

(c) Step 3. SEARCH FOR PRACTICABLE ALTERNATIVES. Identify and evaluate practicable alternatives to locating the proposed action in a wetland including off-site and on-site alternatives, alternative configurations, other avoidance actions and the "no action" alternative, as appropriate. All proposals with impact to wetlands should document the "no action" alternative. If a practicable alternative exists outside the wetland, the Agency must consider that alternative.

(d) Step 4. IDENTIFY ADVERSE IMPACTS AND BENEFICIAL VALUES/FUNCTIONS. Identify the potential direct, indirect, and cumulative wetland impacts that could result from the proposed action and alternatives. Identify primary and secondary functions and values of the wetland such as water quality improvement, water filtration, floodwater storage, fish and wildlife habitat, aesthetics, and biological productivity. Then analyze the impacts to the following factors: 1) Natural environment (topography, water sources, habitat areas, etc.), 2) Social concerns (aesthetics, historic and cultural values, land use patterns, etc.) 3) Economic and engineering aspects (costs of construction, transportation, access, ingress, egress, etc.), and 4) Legal considerations (permits, leases, deed restrictions, setbacks, etc.)

(e) Step 5. MITIGATE ADVERSE IMPACTS. Mitigation can take the form of avoidance, minimization of wetland impacts, or compensation for impacts including all efforts to minimize the adverse impacts to wetlands identified under Step 4. Avoidance can often be accomplished by reviewing alternative layouts, designs, and configurations. It also employs on-site evaluation of those factors evaluated in Step 4, including the presence of other natural or cultural resources, economic constraints, engineering constraints, transportation constraints, traffic constraints, site access, site buffer setbacks, etc. Agency

environmental staff or the applicant should ensure documentation in the environmental file of any efforts to avoid, minimize, and mitigate adverse impacts to the wetland including restoration, preservation or enhancement of the natural and beneficial values served by the wetlands to be impacted. Additional avoidance, minimization, and mitigation measures are listed in 1970.408.

(f) Step 6. RE-EVALUATE ALTERNATIVES. Re-evaluate the proposed action to determine its potential to disrupt wetland values. Alternatives preliminarily rejected at Step 3 should also be re-evaluated as to whether they are practicable in light of the information gained in Steps 4 and 5. The Agency may deny financial assistance for a project that impacts a wetland if the Agency determines there are practicable alternatives which would accomplish the proposed action's purpose and need without wetland impact, regardless of whether or not a CWA Section 404 permit is issued. This is because Exec. Order 11990 applies additional requirements for the search for practicable alternatives to federal agencies, and also because of the CONACT S. 363 provisions.

(g) Step 7. FINAL PUBLIC NOTICE. Prepare and provide the public with a finding and explanation of the Agency's final decision that the wetland impact is the least damaging practicable alternative and that there is a significant need for the proposed action.

(h) Step 8. IMPLEMENT PROPOSED ACTION WITH APPROPRIATE MITIGATION. After the Agency has finalized the environmental review regarding wetlands and if a Finding of No Significant Impact (FONSI)/Record of Decision (ROD) is prepared, the proposed action may be implemented. When wetland (or other important resource) impacts would occur from an Agency action, but permits/authorizations are not yet issued, the Agency can complete an Environmental Assessment (EA) and publish a FONSI/ROD evaluating the proposed impacts with an indication within the EA, the FONSI/ROD, and the Letter of Conditions/Conditional Commitment, that permit(s) and authorization(s) are pending and that any associated mitigation will be a requirement in the Letter of Conditions. However, the EA, FONSI/ROD, and Letter of Conditions/Conditional Commitment shall indicate that no construction shall commence until after the permit(s) is/are issued. The EA/EIS, FONSI/ROD, and Letter of Conditions/Conditional Commitment should also state that the applicant is required to send a revised project description to the Agency for evaluation should the impacts associated with the proposal vary significantly from those evaluated in the EA/EIS, and the Agency will need to supplement the EA/EIS.

§ 1970.406(h) (Con.)

The environmental documentation includes the following three components.

- (1) Documentation that there is no practicable alternative to wetland impacts;
- (2) Documentation that the proposed project includes all practicable measures to minimize harm to wetlands which may result from such a project; and
- (3) Documentation that the proposed project does not violate Section 363 of the CONACT

§ 1970.407 Wetland Delineations and Jurisdictional Determinations.

(a) Wetland Definition. Wetlands are defined in section 1970.405. The term "wetland" encompasses a variety of conditions and degrees of wetness. Some wetlands are very easy to recognize because the water sits on the land's surface for much of the year (permanently or seasonally flooded). Other wetlands exist due to saturation of the soil by groundwater and can be difficult to identify (intermittent or temporarily flooded). Wetlands do not need to be wet year-round. In fact, due to seasonal variations in rainfall and other environmental conditions, most wetlands lack both surface water and waterlogged soils during at least part of the growing season each year. Examples of wetlands include, but are not limited to, swamps, fresh and salt water marshes, estuaries, bogs, beaches, wet meadows, sloughs, potholes, mud flats, river overflows and other similar areas. This definition includes those wetland areas separated from their natural supply of water as a result of activities such as the construction of structural flood protection methods or solid-fill road beds and activities such as mineral extraction and navigation improvements.

(b) Preliminary Screening for Wetlands. For small actions for which applicants frequently do not hire a design professional (architect, engineer, biologist, or wetland specialist) to complete a detailed site analysis and wetland delineation, the presence of hydric soils is the primary screening tool for identification of wetlands.

Soil survey maps (Natural Resources Conservation Service (NRCS) Web Soil Survey; see link in Exhibit C) are the best source of hydric soil identification without a professional wetland scientist at the site performing a wetland delineation. Other useful tools are the Fish and Wildlife Service (FWS) National Wetlands Inventory (NWI) Maps, U. S. Geological Survey (USGS) Topographic Maps, and aerial photographs and satellite images. If one of these resources indicates the presence of hydric soils or the potential for wetland areas within or immediately adjacent to the project area, it is recommended that further investigation be completed on the project site. A wetland delineation may be required.

(1) NRCS Web Soil Survey (WSS). NRCS mapped hydric soils can be accessed for most of the contiguous United States at the WSS website (see Exhibit C). This resource can be used by applicants and Agency environmental staff to determine the presence of mapped hydric soils or hydric soil inclusions. This website provides high resolution (less than 1 acre) soil survey maps for most areas in the contiguous U.S. Soil maps provide general information regarding the presence of larger hydric soil areas and soil units which have inclusions of hydric soils. While such maps provide a valuable screening tool, they cannot replace the services of a professional wetland scientist. The soil survey may also provide information regarding other items such as water table characteristics and timing and frequency of inundation. If mapped hydric soils or hydric soils inclusions exist, a site visit should be made to evaluate potential impacts or the project should avoid those areas. Soil survey maps are more reliable for small-scale projects (smaller sites) than NWI maps, which are geared toward larger land areas, but soil surveys were not meant to delineate small wetland areas.

(2) FWS NWI Maps - Wetlands Mapper. The NWI Database was developed to identify wetlands that exist on large land tracts (1 to 5 acres of land). These maps provide low resolution wetland information which can be used to rule out areas of large wetland occurrences, but are not very useful for small-scale site specific projects. These maps do **not** show all wetlands since the maps are derived from aerial photo interpretation with varying limitations due to scale, photo quality, inventory techniques, and other factors. If a wetland area appears on an NWI map there is a high probability that a wetland area is present, depending on the date of the mapping.

§ 1970.407(b)(2) (Con.)

Checking the current aerial photographs available online can often be a useful tool to confirm NWI mapping. Note that the wetland boundaries are approximate and need to be formally delineated. However, if there is not a NWI identified wetland, it does NOT indicate that the site is void of wetland areas (see Exhibit C for link to website).

(3) USGS Topographical Maps. The USGS publishes topographical maps that show land elevations and mapping symbols that may be useful in delineation of wetlands. Areas in blue with the marsh symbol depict wetlands (see Exhibit C for link to website).

(4) Aerial Photographs/Satellite Images. Recent aerial photography and satellite images can indicate areas of distressed vegetation from seasonally wet areas. There are currently several internet resources available which show mapping with aerial photographs (see Exhibit C).

(c) Professional Wetland Delineations, ACE Jurisdictional Determinations and Section 404 Authorization for Wetland Impact. Completion of professional wetland delineations, obtaining ACE Jurisdictional Determinations, and Section 404 authorizations for wetland impacts are the applicant's financial responsibility. The purpose of these steps is to determine the limits of the wetland area, eliminate or reduce disturbance to the wetland, obtain authorization for any impacts and to develop mitigating measures to protect wetlands. Environmental professionals, such as wetland scientists and biologists, are specially trained to complete wetland delineations according to the ACE 1987 Wetlands Delineation Manual (link located in Exhibit C). During the wetland delineation, wetland areas are marked (delineated) with flags according to the 1987 Manual and surveyed in order to develop a scaled map showing the wetland boundaries. The 1987 Manual wetland delineation process identifies hydrologic conditions characteristic of a wetland (e.g. evidence of standing water, drainage patterns etc.), and confirms the presence of hydric soils, and hydrophytic plants. If all three wetland parameters are present on the proposed site, a finding is made that there are wetlands on the site. The Agency relies on the ACE Jurisdictional Determination to confirm the presence of jurisdictional wetlands. The Agency will use the Food Security Act definition referenced previously to determine wetlands for evaluating impacts.

If the proposed site is located on land currently in agricultural production, the landowner or NRCS may have a copy of the NRCS CPA-026 form which serves as a wetland determination completed by NRCS staff. The District or area office of the ACE should be contacted for making jurisdictional determinations and for Section 404 authorization for wetland impacts (Permits). See Exhibit C for links to the ACE's Regulatory website and district office locations. All Section 404 wetland impact authorizations should be included and explained in the environmental review document. For utility projects, lines will be installed in compliance with the applicable ACE nationwide permits and the condition of the permits that assures no adverse effect on wetlands, due to the required restorations, etc. This should be explained in the environmental review document.

§ 1970.408 Alternatives Analysis and Mitigation Measures.

Details regarding the proposed action's purpose and need and the nature of the specific action will be required to evaluate practicable alternatives. Items which may be included in an alternatives analysis include: detailed purpose and need, location of project in relation to its clients/service radius, demand for services, geographic constraints, presence of other natural or cultural resources, economic constraints, engineering constraints, transportation constraints, traffic constraints, site access, site buffer setbacks, etc.

If a CWA Section 404 permit has already been issued and includes a documented alternatives analysis for a proposal's wetland impact, the Agency should incorporate by reference this alternatives analysis. To do this, the Agency needs to independently review the alternatives analysis completed for obtaining the permit. If the alternatives analysis is deficient, then the Agency must ensure adequate supplemental materials are included. However, supplementing Section 404 permit alternatives analyses is often not necessary. Alternatives analysis and mitigation consists of three components:

(a) Avoidance of Wetland Impacts.

Off-Site and On-Site Alternative Site Search. The main focus of the alternatives analysis process is to determine if an alternative site (whether off-site or on-site) could meet the purpose and need of the proposed action and avoid the proposed impact to wetlands.

§ 1970.408(a) (Con.)

When the search for practical off-site and on-site alternatives has been documented and exhausted and impacts have been minimized to the maximum extent practicable, but complete avoidance is not possible, mitigation measures are then investigated.

(b) Minimization Efforts. If an alternative site is not identified, the next step is to determine and document how wetland impacts can be minimized to the maximum extent practicable, under the constraints of the proposed action's purpose and need.

(c) Mitigation Measures. Mitigation measures are intended to reduce the disruption to the natural values and functions of wetlands and restore, or create, lost wetland functions and values for wetland impacts that could not be avoided or minimized further. If wetland impacts are still unavoidable, mitigation measures must be developed to reduce the severity of the impact. All mitigation measures must be incorporated into the environmental file and included in the letter of conditions/conditional commitment for the financial assistance, if applicable. The following measures are those that may be required by the Agency for applicants to implement in order to mitigate for wetland impacts. They are intended to preserve, restore, or imitate natural hydrologic conditions. Such methods may be either physical or managerial in character.

- (1) Purchase mitigation banking credits from an approved wetland mitigation bank or fund;
- (2) Create, restore, or enhance wetland habitats;
- (3) Control the uses and occupancy of wetlands, e.g., zoning and subdivision regulation;
- (4) Preserve wetland values and functions through public ownership, e.g., fee title, easements and development rights;
- (5) Delay or reduce the amount of runoff from paved surfaces and roofed structures discharged into a wetland, e.g., construction of detention basins and use of flow restricting barriers on roofs;
- (6) Maintain natural rates of infiltration in developed or developing areas, e.g., construction of seepage or recharge basins (grass swales, rain gardens etc.) and minimization of paved areas;

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§ 1970.408(c) (Con.)

- (7) Protect stream banks and shorelines with vegetative and other natural cover, e.g., use of aquatic and water-loving woody plants;
- (8) Restore and preserve wetland values and functions and protect life and property through regulation.
- (9) Control soil erosion and sedimentation, e.g., construction of sediment basins, stabilization of exposed soils with sod and minimization of exposed soil.

§ 1970.409 Public Notification Requirements.

(a) Preliminary Notice. The preliminary notice of the proposed action in a wetland must be published at the earliest possible time.

(1) ACE General Permits (Nationwide, Regional) - For wetland impacts approved by ACE General permits no preliminary public noticing for wetland impacts is required.

(2) EA/ACE Individual Permits - For wetland impacts approved by a ACE Individual Permit, public noticing will be completed as described in 1970.14. Section 404 Individual Permits are typically elevated to an EA (or in some cases an EIS), therefore requiring the publication of a "Notice of Availability of the EA/EIS" in the local newspaper or through other distribution methods as approved by the Agency Environmental Staff. The template for the preliminary public notice is included as Exhibit B. The Agency will review all comments received and incorporate any appropriate changes into the NEPA review. Publishing of preliminary notices are to be combined with any other public noticing requirements for the proposal to save costs for the applicant (e.g. the notice of availability, or for impacts such as floodplains or historic properties).

(b) Final Notice. Where it is not possible to avoid an impact to a wetland and all practicable mitigation measures have been identified and agreed to by the prospective applicant, a final notice of the proposed action must be published where described in this section.

(1) ACE General Permits (Nationwide, Regional) - For wetland impacts approved by ACE General permits no final public noticing for wetland impacts is required.

(2) EAs/ACE Individual Permits - For wetland impacts approved by a ACE Individual Permit, final public noticing will be completed as described in 7 CFR 1970.14. A template for the final public notice

§ 1970.409(b)(2) (Con.)

in the newspaper is included in Exhibit B. Publishing of final notices is to be combined with any other public noticing requirements for the proposal to save costs for the applicant (e.g. the FONSI/ROD Notice and final notices for other impacts such as floodplains or historic properties). Final Notices should include the following:

- (i) A description of the applicant's proposed action and the Agency's involvement, the action's location, and the surrounding area;
- (ii) A description of the wetland impacts and the mechanisms that will be used to mitigate them (if applicable);
- (iii) A statement of why the applicant's proposed action must be located in a wetland;
- (iv) Acknowledgement of any public comments received and if so how they were addressed.
- (v) A statement indicating the applicant's action must conform to applicable State and local wetland regulations; and
- (vi) A statement listing other involved agencies and individuals

§ 1970.410 Implementation of the Consolidated Farm and Rural Development Act (CONACT).

(a) The Agency will implement Section 363 provisions as follows: Section 363 prohibits wetland conversion through the use of Agency financial assistance for CONACT authorized programs. This statutory language is more restrictive than that of Exec. Order 11990, which requires that wetland impacts be avoided whenever a practicable alternative is available, but allows wetland impact when no practicable alternative is present, and there is purpose and need for the proposal. Section 363 exempts utility lines from the wetland impact prohibition provision. Therefore Agency financial assistance for programs listed in 1970.411(c) cannot be used to directly finance a proposal to *drain, dredge, fill or level or otherwise manipulate a wetland except in the case of utility lines*. However, the Office of General Counsel issued a

formal opinion in February 2016 which clarifies the circumstances surrounding the Section 363 prohibition (Exhibit C, Attachment 1). According to this opinion RD may finance proposals which propose wetland impact as long as the RD financial assistance itself does not finance the wetland impact portion of the proposal. The Agency will therefore move forward with the following guidelines when funding proposals under the programs which are subject to Section 363 as listed in section (c) below.

(b) For all CONACT authorized programs any proposed activities which drain, dredge, fill or level, or otherwise manipulate a wetland must be funded by non-Agency funding. The wetland impacts, however, may take place concurrently with Agency financial assistance issuance.

(1) For direct loans where fee schedules list funds which are distributed to specific project activities, the Agency must ensure that no Rural Development funds are used to *drain, dredge, fill or level or otherwise manipulate a wetland* (emphasis added). This includes financial assistance for obtaining wetland permits.

(2) For guaranteed loans the lender must ensure that no Rural Development funds are used to *drain, dredge, fill or level or otherwise manipulate a wetland* (emphasis added) and must sign and date the Wetland Impact Prohibition certification form (Exhibit C, Attachment 2) prior to the completion of the environmental review.

(3) Grant funds are not subject to the Section 363 of the CONACT wetland impact prohibition.

(c) Prohibitions under the CONACT must be considered when proposed actions for the following programs are located in wetland areas. The following programs come under the authority of the CONACT:

- (1) Community Facilities Guaranteed Loan Program
- (2) Community Facilities Direct Loan Program
- (3) Water and Waste Disposal Direct Loans
- (4) Water and Waste Disposal Guaranteed Loans
- (5) Rural Water and Wastewater Circuit Rider Program

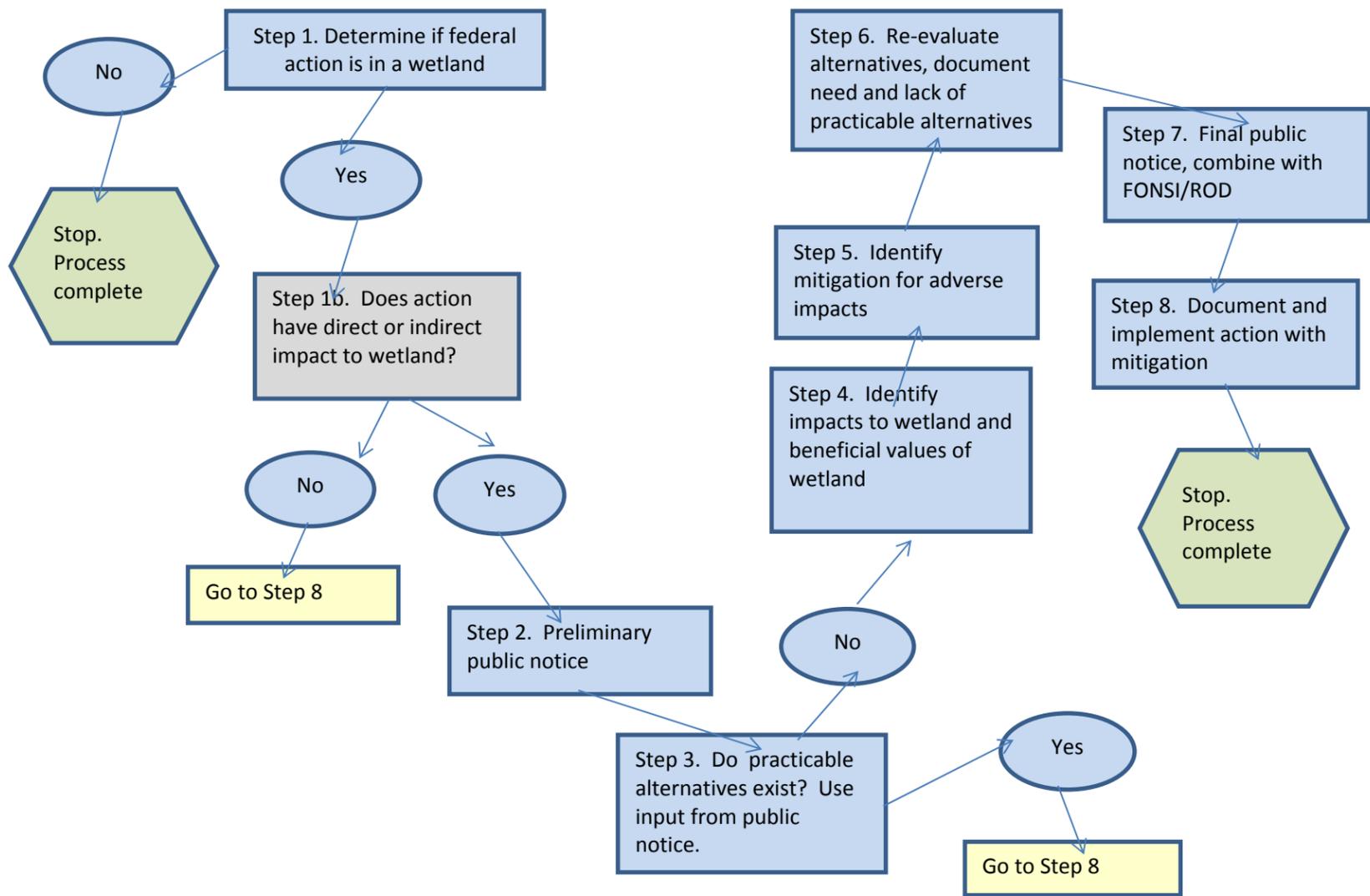
§ 1970.410(c) (Con.)

- (6) Loan Guarantees for Water, Wastewater and Essential Community Facilities Loans
- (7) Business and Industry Guaranteed Loan Program
- (8) Rural Transportation (RBEG earmarks and/or set aside)
- (9) Business and Industry Direct Loan Program
- (10) Intermediary Relending Program
- (11) National Sheep Industry Improvement Center
- (12) Guarantee and Commitment to Guarantee Loans
- (13) Northern Great Plains Regional Authority

Exhibits - A, B, C and D

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Flowchart for Wetlands Protection



Public Notices Templates

Template Preliminary Public Notice for Potential Impacts to Wetlands

[Insert applicant's name] intends to seek financial assistance from USDA, [**Rural Housing Service (RHS), Rural Business Service (RBS), Rural Utilities Service (RUS)**] for [insert type of project here: construction, infrastructure improvements, etc.]. The proposed project consists of [**itemize the project's construction activities and locations**]. [**Insert a detailed written description of location**]. If implemented, the proposed project will convert wetlands [**include definition of wetland(s), acreage, and locations**]. In accordance with Executive Order 11990, Protection of Wetlands, and USDA Departmental Regulation 9500-3, Land Use Policy, the purpose of this notice is to inform the public of this proposed conversion or effect and request comments concerning the proposal, alternative sites or actions that would avoid these impacts, and methods that could be used to minimize these impacts.

The environmental documentation regarding this proposal is available for review at [**insert Rural Development office location or applicant locations**]. For questions regarding this proposal, contact [**insert name and telephone number of Rural Development official**]. (If applicable) Other federal agencies involved in this proposal are _____.

Any person interested in commenting on this proposal should submit comments to the address above by [**insert a date that is 14-30 days from the date the notice is first published**].

Template Final Public Notice for Potential Impacts to Wetlands

[Insert applicant's name] intends to seek financial assistance from USDA, [**Rural Housing Service (RHS), Rural Business Service (RBS), Rural Utilities Service (RUS)**] for [insert type of project here: construction, infrastructure improvements, etc.]. The proposed action consists of [**itemize the project's construction elements and locations**]. [**Insert a detailed written description of location**]. [**RHS, RBS, RUS**] has assessed the environmental impacts of this proposal and determined that the location of [**insert construction activity or facility**] will convert or effect a wetland(s). In accordance with Executive Order 11990, Protection of Wetlands, and USDA Departmental Regulation 9500-3, Land Use Policy, the Agency is notifying the interested public of this land conversion. It has been determined that there is no practicable alternative to avoiding this conversion or effect and that there is a significant need for the proposal.

The basis of this determination is [**summarize the justification, need and reasons for the conversion or effect, and note if/if not any comments were received and how they were resolved**].

(If applicable) Other federal agencies involved in this proposal are

For information regarding this notice, contact [**Name and contact information for RD point of contact**]. Any person interested in commenting on this decision should submit comments to the address above by [If additional public review period is required insert a date seven days from the date the notice is first published].

OGC Opinion on Separation of Funds

USDA
United States Department of Agriculture
Office of the General Counsel
Washington, D.C.
20250-1400

February 1, 2016

**MEMORANDUM FOR JULIET BOCHICCHIO
ENVIRONMENTAL-PROTECTION SPECIALIST**

FROM: Janet Safian
Assistant General Counsel
Food Assistance, International and Rural Division

SUBJECT: Formal Opinion request on the ability to separate funding under Section 363 of the Consolidated Farm and Rural Development Act.

You have requested a formal opinion from our office on the specific subject of whether a Rural Development Agency would be in violation of Section 363 (7 USC 2006e) of the Consolidated Farm and Rural Development Act (Con Act) if a private party concurrently filled wetlands associated with the Rural Development (RD) project, but the RD funds themselves did not finance the proposed wetland impact.

Section 363 provides:

"The Secretary shall not approve any loan under this title to drain, dredge, fill, level or Otherwise manipulate a wetland (as defined in section 1201 (a)(16) of the Food Security Act of 1985 (16 U.S.C. 3801(a)(16))), or to engage in any activity that results in impairing or reducing the flow, circulation, or reach of water, except in the case of activity related to the maintenance of previously converted wetlands, or in the case of such activity that is already commenced before November 28, 1990. This section shall not apply to a loan made or guaranteed under this title for a utility line."

This specific section of the Con Act sets forth a limitation on the Secretary of Agriculture's loan-making power, by stating that the Secretary of Agriculture cannot approve any loans under the Con Act which would result in draining, dredging, filling, leveling, manipulating a wetland or engaging in any activity that results in reducing the flow, circulation or reach of water, in certain cases.

RD Instruction 1970-G
Exhibit C
Attachment C-1
Page 2

While the Secretary of Agriculture does not have the authority under the Con Act to authorize loans that result in the draining, filling, manipulating of wetlands, there is no such prohibition on private parties, as Section 363 does not apply to private individuals. Therefore, it is the opinion of this office that if a private party manipulated wetlands associated with an RD project, so long as the RD funds did not finance any proposed wetland impact, there is no violation of Section 363 of the Con Act. For example, a lender might ask Rural Business-Cooperative Service (RBS) for a Business and Industry Loan Guarantee for the construction of a lumber mill. In order to access the lumber mill, it is necessary to construct an access road over existing wetlands. RBS may guarantee the loan for the construction of the lumber mill without violating Section 363, so long as no RBS money is used for the construction of the access road, since that portion of the construction contemplated wetland conversion.

If you have any questions, you can contact me by email at janet.safian@ogc.usda.gov or call me at (202) 720-2923.

Wetland Impact Prohibition Certification

Section 363 of the Consolidated Farm and Rural Development Act
(7 U.S.C. 2006e) (CONACT) Wetland Impact Prohibition
Lender Certification Form

I _____(name of Lender Representative)_____, representative of the lender (title of lender), hereby certify that the use of Rural Development funds for the following proposal _____(name of proposal)_____ will not be utilized to drain, dredge, fill or level or otherwise manipulate a wetland. This includes financial assistance for obtaining wetland permits.

Lender Representative Signature

Date

External Resources

EPA wetlands webpage:
water.epa.gov/type/wetlands

ACE CWA Guidance
www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance

ACE Wetland Delineation Manual
www.fws.gov/habitatconservation/delineation%2087

Regional Supplements to ACE Delineation Manual
www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/reg_supp

ACE Districts
www.usace.army.mil/Locations

ACE Regulatory webpage - list of Nationwide Permits, updated National Wetland Plant List, and Regulatory Guidance Letters, and jurisdictional information:
www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits

ACE JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK
www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final

NRCS Web Soil Survey - mapped hydric soil units
websoilsurvey.nrcs.usda.gov/app

FWS National Wetlands Inventory - Wetlands Mapper
www.fws.gov/wetlands/Data/Mapper

USGS Topographic Maps
www.usgs.gov/pubprod

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