



DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

National Wetland Plant List

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final notice.

SUMMARY: The U.S. Army Corps of Engineers (Corps), as part of an interagency effort with the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS) and the U.S. Department of Agriculture Natural Resources Conservation Service (NRCS), is announcing the availability of the final 2016 National Wetland Plant List (NWPL). The NWPL is used to determine whether the hydrophytic vegetation parameter is met when conducting wetland determinations under the Clean Water Act and the Wetland Conservation Provisions of the Food Security Act. Other applications of the list include wetland restoration, establishment, and enhancement projects. The list will become effective on May 1, 2016 and will be used in any wetland delineation performed after this date. Delineations received prior to this date may still use the 2014 NWPL, or you may choose to use the 2016 list. Always reference the list used on any wetland delineation/determination forms.

DATES: The 2016 NWPL will become effective on May 1, 2016

ADDRESSES: U.S. Army Corps of Engineers, Attn: CECW-CO-R, 441 G Street NW, Washington, DC 20314-1000.

FOR FURTHER INFORMATION CONTACT: Karen Mulligan, Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, Washington, D.C. 20314-1000, by phone at 202-761-4664 or by e-mail at karen.mulligan@usace.army.mil.

SUPPLEMENTARY INFORMATION:

Background

The NWPL has undergone several revisions since its inception in 1988. The Corps led interagency efforts to update the list in 2012, 2013, and 2014. The 2012 list contained 7,828 species, the 2013 update contained 7,937 species, and the 2014 update contained 8,061 species. Additions, or deletions, to these lists represent new records, range extensions, nomenclatural and taxonomic changes, and newly proposed species. The latest review process began in 2015 and included the review by Regional Panels (RPs), the National Panel (NP), and the public, whom provided input on changes to the wetland indicator status of 1,689 species. Four groups of species were examined during this update. The first group consisted of rating changes for 25 species (including six new additions) that the public requested on the NWPL website (November 10, 2014 to January 31, 2015) and during the Federal Register Comment Period (September 14, 2015 to November 13, 2015). The second group consisted of 166 species with highly variable ratings spanning more than three ratings categories nationally (e.g., rated FACW in the Arid West and UPL in the Caribbean). The third group consisted of five nationally problematic species. Initially, the public requested a rating change for these five species in one region. However, their ratings were re-examined in all regions where they occur, based on a NP request (a total of 21 ratings). Seven species occurred in more than one of these three groups. The fourth group consisted of input received on the wetland ratings of 1,500 species that occur in the South Pacific Islands (SPI) subregion. In group one, based on public requests for rating changes, 88% of the wetland ratings for 25 species

were changed on the 2016 NWPL. In group two, species with highly variable ratings, the ratings of all of the species were changed to some degree. In group three, the nationally problematic species, 76% of the 21 ratings were changed for five species. In group four, the SPI species, 12.6% of the ratings were changed.

The NWPL was first published by the FWS in 1988 and first updated in 2012 to include 7,828 species. The 2014 update contained 8,061 species (Lichvar et al. 2014). Four were rated UPL in all regions where they occur, so there were a total of 8,057 species that occur in wetlands. This update contains 8,092 species, a net change of 35 more species (39 species added in the SPI, six new species in the Continental U.S (CONUS), and removal of ten UPL species). These 8,092 species have 27,984 unique ratings since each can occur in more than one of the ten regions. The 2016 list includes changes in plant indicator status (OBL, FACW, FAC, FACU and UPL designations) from the 2014 list for 186 species found in the CONUS. Since these 186 species can occur in multiple Corps delineation regions, each having a unique rating, there were a total of 306 rating changes. The indicator status (rating) represents the likelihood that a particular plant occurs in a wetland or upland. The specific breakout of the 306 rating changes was: 49 percent (150 ratings) were assigned wetter indicator ratings and 51 percent (156 ratings) species) were assigned drier indicator ratings. Ratings for 41 species were wetter in one region and drier in another region and ratings of three species did not change. In the SPI, there were 189 ratings changes, for a grand total of 495 rating changes in the entire list. A summary of rating changes by region and the response to the technical comments is available at: http://wetland_plants.usace.army.mil/. Policy-level and review process comments are summarized below.

Discussion of Public Comments

1. Overview

In response to the September 14, 2015, Federal Register notice, a total of 18 comments were received and reviewed on 50 species from eight Corps wetland delineation regions and one subregion. One additional comment was submitted by mistake. The Corps received seven written comments in response to the September 14, 2015, Federal Register 80 CFR number 177. One agency responded that they had no comments on the proposed ratings and appreciated the opportunity to review the draft NWPL. Three raised technical issues and three commented only on species, offering no objections or comments on the update, and a total of 36 species were commented on in these six letters. Comments on 14 species from 11 individuals were electronically submitted on the NWPL website. The final 2016 NWPL was compiled based on the RP and NP reviews and consideration of the 18 comments received.

General Comments

Most comments pertained to the rating of specific species in several regions, some supported ratings changes and some did not. The rationale for all ratings changes is provided in the response to technical comments document. One commenter was concerned with the inclusion of invasive/non-native species on the NWPL and how ratings are assigned to these species. Nativity to a particular region of the country is irrelevant for the purpose of assigning wetland indicator ratings. Instead, wetland ratings are based on how often a plant species is found to occur in wetlands vs. uplands (Lichvar et al. 2012, Lichvar and Minkin 2008). For both native and non-native species, wetland indicator ratings are assigned based on the NWPL Review Standard. The Review Standard involves a review of literature citations, herbaria records, and field observations. RPs and NP assign final ratings based on this evidence and professional experience.

Another commenter expressed concerns that the process for requesting changes to ratings is a burden on the public with regard to time or cost. The time and cost of requesting a rating change is minimal and reasonable; an individual or group simply needs to explain the rationale behind their proposed rating change in order to begin an open dialog on the current wetland rating. The change requests are processed by the RPs and NP, through which the NWPL Review Standard is applied to the species in question.

One commenter requested the inclusion of non-governmental, private-sector and academic experts on the NWPL panels, stating that government-only membership prevents the public from benefiting from expertise of botanists and other experts who are not federal employees. We do not feel that private sector or academic representatives should serve on the interagency regional or national panels as voting members. We encourage outside entities to provide input into the ratings process by providing scientific information, field data, literature reviews, and the like during the federal register notice process and by providing comments on the NWPL website. The information obtained can be useful to provide “expertise, knowledge, and clarity” to the NWPL process in this manner and helps inform final NWPL ratings.

A final concern was the lack of habitat descriptions from the literature for many NWPL species. One commenter suggested removing from the NWPL all species that lack literature. Another criticized the lack of literature from a particular Corps region. The Corps has developed a future plan for collecting habitat citations for all the species that lack them. Ratings of these species will be re-examined in light of any new data according to this timeline: habitat citations for species that occur in the largest number of U.S. counties will be compiled in 2016, for review during the 2017 NWPL update. Supporting literature for species that occur in fewer counties will be compiled in 2018, for the 2019 NWPL update. Consistent with the current and past updates to the NWPL, we will post the following information to the NWPL website: the species’ current

regional rating, RP rating, NP rating, a summary of the types of data (e.g., literature and herbaria records) used to assign ratings, and the recently acquired literature.

Supporting documentation will be obtained from trustworthy sources, and the use of state, regional, and national floras or peer-reviewed journal articles is preferred. Online references and herbarium records will expedite data gathering provided the source is reliable. The number of citations/records considered adequate will vary with each species' range. Species with broad ranges that occur in several Corps regions will require more documentation than a species that is endemic to one or two counties. Likewise, few regionally specific references are available for species whose range recently expanded into a new Corps region. For instance, habitat references for species with recent range expansions into the South Pacific Islands, and the Caribbean may be difficult to obtain. Under these circumstances, citations from adjacent states or regions will be considered. During updates these citations from adjacent regions may be used to help guide decisions in regions that lack habitat citations due to recent range expansions. We believe that a minimum of ten citations or herbarium records for each species that currently lacks references is adequate for most species. Fewer records for rare or endemic species may be acceptable. The Corps welcomes public participation in this ongoing effort to improve wetland indicator ratings. Recent habitat citations for wetland plant species that lack literature may be contributed via email (nwpl@usace.army.mil).

The Corps believes we have adequately reviewed the comments and allowed for public and agency input for the proposal. More extensive response to comments can be viewed at http://wetland_plants.usace.army.mil/. Future updates to the NWPL will occur biennially according to the following procedures. A change in indicator status may be requested at any time at http://wetland_plants.usace.army.mil/ by clicking on the “Submit a NWPL Change Request” link and submitting the appropriate data. Data includes ecological data,

literature reviews, frequency and abundance data, testing descriptions, and geographic data for the taxon in wetlands and uplands in the Corps wetland region or subregion for which the change is proposed. The regions and subregions are based on Land Resource Regions (LRRs) and Major Land Resource Areas (MLRAs) (<http://soils.usda.gov/survey/geography/mlra/>) and are shown for each wetland supplement region on the NWPL website. If the commenter feels that a wetland supplement region needs a subregion that has not yet been developed, the commenter should identify the MLRAs involved and provide a list of species from within that region that need their own wetland ratings. In addition to these public requests, biennial updates will also include changes in nomenclature and taxonomy, range extensions, and newly proposed species. Proposed rating changes will be compiled in January of odd years (i.e., 2017, 2019) and sent to the RPs for input in February. The NP will assign wetland ratings to non-consensus species and will review all regional lists in April. The proposed changes will be compiled over the summer and published in the Federal Register for public comment in September. In October, public comments will be summarized and the National Panel will review and respond to comments. The final changes will be published in the Federal Register in December of odd years.

The Corps, in cooperation with the USEPA, USFWS and NRCS, is publishing final wetland indicator statuses for the 2016 NWPL. The final NWPL is available at http://wetland_plants.usace.army.mil/ and state, regional, and national lists can be downloaded from this site. This completes the review of the NWPL. All comments received have been evaluated and final indicator statuses have been set.

Administrative Requirements

Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998, (63 FR 31855) regarding plain language, this preamble is written using plain language. The use of

“we” in this notice refers to the Corps. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

Paperwork Reduction Act

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. For the Corps Regulatory Program under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements is maintained by the Corps of Engineers (OMB approval number 0710-0003, which expires on August 31, 2015 (extension request currently in review). This update will not have an effect on the paperwork burden because a wetland delineation is not required for a complete application for most permit types. The delineation of special aquatic sites for a complete preconstruction notification only applies to nationwide permits (NWP) and any additional hours will be included in the burden estimate for the 2017 NWP rulemaking.

The action will not substantially change paperwork burdens on the regulated public because the use of 2016 NWPL will merely be substituted for the 2014 list currently used in the application process in jurisdictional determinations. Further, the NWPL can be viewed on-line or merged into existing documents (e.g., pick lists for delineations/determination forms) and subsequent updates will be made electronically.

Executive Orders 12866 and 13563

Under Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821), we must determine whether the regulatory action is “significant” and therefore subject to review by OMB and the requirements of the Executive Orders. The Executive Orders define “significant regulatory action” as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Orders 12866 and 13563, we determined that this action is not a "significant regulatory action" and therefore, it is not subject to review under requirements of the Executive Orders.

Executive Order 13132

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." The action does not have federalism implications. We do not believe that the action has substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. The action does not impose any additional substantive obligations on State or local governments. Therefore, Executive Order 13132 does not apply to this action.

Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of the proposed issuance and modification of NWPs on small entities, a small entity is defined as: (1) a small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of the action on small entities, we certify that the updates to the NWPL will not have a significant impact on a substantial number of small entities since it does not change the Corps' current wetland delineation/identification procedures, or the circumstances under which a wetland delineation is required to make a decision on a Department of the Army permit application. The NWPL is only used to determine if a site has wetland plant community and is not the sole factor for determining whether a site is a wetland under the Clean Water Act. To be considered a wetland under the Clean Water Act, the site must also have wetland hydrology and hydric soils.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for

proposed and final rules with “federal mandates” that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating a rule for which a written statement is needed, Section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed, under Section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the NWPL issued today does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. The use of the NWPL is consistent with current agency practice, does not impose new substantive requirements and therefore does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Therefore, the NWPL issued today is not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, we have determined that the NWPL update contains no regulatory

requirements that might significantly or uniquely affect small governments. Therefore, the issuance of the NWPL is not subject to the requirements of Section 203 of UMRA.

Environmental Documentation

A decision document has been prepared for this action after all comments received were evaluated. The decision document is available through Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street, NW, Washington, DC 20314–1000.

Authority

We utilize the NWPL in conducting wetland determinations under the authority of Section 404 of the Clean Water Act (33 U.S.C. §1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §401 et seq.).

Dated: April 5, 2016.

Edward E. Belk, Jr., P.E.
Chief, Operations and Regulatory Division
Directorate of Civil Works

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