



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS-R6-ES-2026-2641, FXGO166009DR000-267-FF09D000000]

National Wildlife Refuge System; Request for Information on Implementation of Drain Tile Setbacks

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for information and comments.

SUMMARY: The U.S. Fish and Wildlife Service (Service) requests information regarding the Service's process for calculating setbacks for the placement of drain tile by landowners on property where the Service owns wetland easements.

DATES: Comments will be accepted on or before [INSERT DATE 14 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. eastern time on the closing date.

To ensure your comment is received and considered, you must submit it using one of the methods identified in the **ADDRESSES** section of this document.

Comments submitted through any method not authorized in this document, or sent to an address not listed here, will not be considered.

ADDRESSES: *Comment submission:* All submissions must include the docket number FWS-R6-ES-2026-2641 which identifies this document. You must submit comments using one of the following methods:

- *Electronic submission:* Federal eRulemaking Portal at:

<https://www.regulations.gov>. In the Search box, enter FWS-R6-ES-2026-2641, which is the docket number for this action. Then click the Search button. On the resulting page,

you may submit a comment by clicking on “Comment.” Please ensure that you have found the correct document before submitting your comments.

- *U.S. mail:* Public Comments Processing, Attn: Docket No. FWS–R6–ES–2026–2641, Policy and Regulations Branch, U.S. Fish and Wildlife Service, MS: PRB (JAO/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803.

Comments submitted through any method not authorized in this document, or sent to an address not listed here, will not be considered. We will not accept comments via email, fax, or hand delivery. We are not required to consider comments that are submitted after the comment period ends or that are submitted via a method outside of these instructions. Comments containing profanity, vulgarity, threats, or other inappropriate content will not be considered.

We will post all comments at <https://www.regulations.gov>. You may request that we withhold personal identifying information from public review; however, we cannot guarantee that we will be able to do so. See **Public Availability of Comments** for more information. You may submit comments by one of the following methods:

FOR FURTHER INFORMATION CONTACT: Madonna Baucum, Chief of Regulations, U.S. Fish and Wildlife Service, by email at Info_Coll@fws.gov, or by telephone at (703) 468-8211. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

Wetland habitat in the Prairie Pothole Region (PPR) of Iowa, Minnesota, Montana, North Dakota, and South Dakota is important to waterfowl and other migratory

bird populations. The unique topography of the PPR includes numerous small wetlands and potholes that were formed through glaciation thousands of years ago. Prairie potholes are freshwater depressions and marshes, often less than 2 feet deep and 1 acre in size, that are a permanent feature of these landscapes barring deliberate alteration of the topography or hydrology. The seasonal fluctuation of surface water through these permanent wetlands basins makes the PPR biologically important to waterfowl. The PPR is responsible for producing approximately 50 to 75 percent of the primary species of ducks on the North American continent, providing habitat for more than 60 percent of the breeding population. Waterfowl fledged in the PPR are a significant natural resource that supports waterfowl hunting and an associated industry that creates an estimated 30,000 jobs and nearly \$1 billion in economic benefit.

Congress officially created the Small Wetlands Acquisition Program on August 1, 1958, by amending the 1934 Migratory Bird Hunting Stamp Act (commonly referred to as the Duck Stamp Act; 16 U.S.C. 718–718k). The amendment allowed proceeds from the sale of Federal Duck Stamps to be used to conserve and protect “small wetland and pothole areas” through the acquisition and establishment of areas designated as waterfowl production areas (WPAs). The Service purchased the first fee-title WPA in South Dakota in 1959 and began to purchase wetland easements soon thereafter.

A wetland easement is a voluntary legal agreement wherein the Service makes a one-time payment to landowners to permanently protect wetlands located on their property. Currently, each easement purchased is annotated on a map that is properly recorded as a legal instrument. Easements purchased prior to 1976 were not mapped at the time of purchase but have been after the initial purchase. The easement contains restrictions on the use or development of the land to protect its conservation values. The Service’s wetland easements are intended to be minimally restrictive meaning that they have a minimal impact on the property value and limited impact on the landowner’s use

and enjoyment of the property. Landowners who sell a wetland easement to the Service agree that wetlands protected by an easement cannot be drained, filled, leveled, or burned. If these wetlands dry up naturally, they can be farmed, grazed, or hayed. However, the Service also places restrictions on how landowners may utilize lands not covered by the wetland easement in order to avoid adverse impacts to the easement-covered wetlands allowing the Service to regulate a larger property interest than it acquired. The Service is seeking to strike the right balance between preserving the wetland interests it has legally acquired and recognizing the property rights retained by the landowner.

The acquisition of wetland easements accelerated across the PPR following the passage of the 1961 Wetlands Loan Act (Pub. L. 87–383), which authorized appropriations to advance funding for the purchase of wetland easements. Wetland easements are part of the National Wildlife Refuge System, governed by the National Wildlife Refuge System Administration Act (16 U.S.C. 668dd et seq.).

Traditionally, the purpose of subsurface agricultural drainage has been to lower the water table of poorly drained soils with the goal of improving soil aeration. Recently, advanced drainage systems have been promoted as a way to manipulate soil water content during the growing season. Subsurface drainage systems typically remove water through perforated pipe (commonly referred to as drain tile) placed below the soil surface.

Drain tile positioned adjacent to wetland areas can result in reduced hydroperiods (periods of inundation) depending on several factors, such as the depth of tile in relation to the wetland area. The amount and timing of precipitation intercepted by subsurface drainage systems will vary depending on soil properties, topography (low/high topographic relief), placement of tile relative to the wetland area (horizontal distance, elevation), and the relation between the wetland area and groundwater (i.e., recharge,

discharge). Direct drainage of a wetland area by placing perforated tile and surface inlet pipes through (beneath) the wetland area would have a detrimental effect on wetland hydrology regardless of other factors.

Drain tile setback distances and easement conditions vary widely because they depend on the specific soils, topography, and wetland characteristics of each site.

Drainage systems placed near a wetland can influence how water moves toward or away from that wetland, but the extent of this influence changes from one easement to another. In low-relief areas, drain tiles may draw groundwater laterally toward the pipe, while in higher-relief areas, drainage tile systems may intercept water flowing toward the wetland. Because these factors differ across the landscape, the potential effects of drainage and the resulting setback calculations are determined by the unique environmental conditions of each easement. Many property owners take issue with the fact they are not compensated for the loss of the use of their private property outside the easement that was originally purchased based on the area that is determined by the Fish and Wildlife Service as needed to stop drainage of the wetland. In most cases these drain tile setback distances were not provided to the landowner at the time the easement was purchased. In these cases, the landowner believed he was agreeing to limit his use of the land within the easement boundary itself.

On May 13, 2024, the Service issued a final rule that codified the process by which landowners could request, and the Service would provide drain tile setbacks under wetland easement contracts (89 FR 41336). This rule was effective on June 12, 2024. The regulations applied only to setbacks provided by the Service beginning on the effective date of the 2024 rule. See the 2024 rule for a complete discussion on the history of the PPR, wetland easements, and drain tile setbacks.

Prior to finalizing the 2024 rule, the Service issued both internal setback guidance for administering drain tile setback requests and calculating drain tile setback distances,

as well as a February 2020, guidance memo, “Drain Tile Setbacks and Legal Action on U.S. Fish and Wildlife Service Wetland Easements.” For a full discussion of the guidance memo and its key aspects, see the 2024 rule (89 FR 41336 at 41337, May 13, 2024).

Purpose of this Request for Information (RFI)

The purpose of this RFI is to gather information pertaining to easement lands protected by a Service easement for waterfowl management (commonly referred to as a wetland easement) in the PPR, and how the Service should calculate drain tile setbacks when requested to do so by a landowner. The Service especially invites information regarding:

- Efficacy of the 2024 rule “National Wildlife Refuge System; Drain Tile Setbacks” (89 FR 41336, May 13, 2024).
- How the current rule did or did not work as intended.
- How the Service should calculate drain tile setbacks when requested by a landowner.

Request for Information

The Service invites the public to provide information on any aspect of the Service’s 2024 regulation pertaining to drain tile setbacks on lands covered by wetland easement contracts, or the process by which the Service calculates recommended setbacks. Commenters may respond to the questions above or provide other relevant information. Submitters are encouraged to provide specific examples, geographies, dates, and any relevant supporting materials.

Public Availability of Comments

All information received in response to this RFI will be posted on <https://www.regulations.gov> and may include personal identifying information. Do not include information you do not wish to make publicly available.

Authority

The authority for this RFI is the National Wildlife Refuge Administration Act of 1966 (16 U.S.C. 668dd et seq.), as amended by the National Wildlife Refuge System Improvement Act of 1997 (Pub. L. 105–57), governing the administration and public use of refuges.

Brian R. Nesvik,

Director,

U.S. Fish and Wildlife Service.

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