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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 25

[Docket No. FWS–HQ–NWRS–2022–0092;
FXRS1261090000–245–FF09R25000]

RIN 1018–BG80

National Wildlife Refuge System; Drain Tile Setbacks

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), promulgate new regulations pertaining to wetland easements to bring consistency, transparency, and clarity for both easement landowners and the Service in the administration of conservation easements, pursuant to the National Wildlife Refuge Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997. These regulations codify the process by which landowners can request and the Service will provide drain tile setbacks under wetland easement contracts. Under these regulations, if landowners fully comply with Service-provided setbacks when installing drain tile and do not later replace or modify the drain tile, the Service grants the landowners a safe harbor from legal action in the event that the setback drain tile nevertheless results in the draining of an easement wetland. Setback distances are calculated based upon the best available science considering soil characteristics, tile diameter, the depth of the tile below the surface, and/or topography sufficient to the easement contract's standard of protection that ensures no drainage of adjacent protected wetland areas. The regulations apply only to setbacks provided by the Service beginning on the effective date of this final rule.

DATES: This rule is effective June 12, 2024.

Information collection requirements: If you wish to comment on the information collection requirements in this rule, please note that the Office of Management and Budget (OMB) is required to make a decision concerning the collection of information contained in this rule between 30 and 60 days after the date of publication of this rule in the **Federal Register**. Therefore, comments

should be submitted to OMB by June 12, 2024.

ADDRESSES: *Information collection requirements:* Written comments and suggestions on the information collection requirements should be submitted within 30 days of publication of this document to <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting “Currently under Review—Open for Public Comments” or by using the search function. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB (JAO/3W), Falls Church, VA 22041–3803 (mail); or Info_Coll@fws.gov (email). Please reference OMB Control Number 1018–0196 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: Debbie DeVore, (251) 604–1383. 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 critically 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. What makes the PPR so biologically important to waterfowl is the seasonal fluctuation of surface water through these permanent wetlands basins. 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. Waterfowl are a diverse group of birds that are important to many aquatic and wetland ecosystems throughout the country. Additionally, waterfowl hunting and associated industries

support thousands of jobs and in 2016 produced an estimated \$2.9 billion in economic benefit.

Congress, recognizing the impact that widespread drainage was having on wetlands and waterfowl populations in the PPR, 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”). 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. 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 (hereafter, “the Administration Act”); 16 U.S.C. 668dd *et seq.*)

Wetland Easements

This rulemaking action codifies new regulations pertaining to easement lands protected by a Service easement for waterfowl management rights (commonly referred to as a “wetland easement”) in the PPR. The easements are areas of land or water acquired and administered by the Service with a less than fee interest for the purpose of maintaining small wetland or pothole areas suitable for use as WPAs.

A wetland easement is a voluntary legal agreement with the Service that pays landowners to permanently protect wetlands. The easement contains restrictions on the use or development of the land to protect its conservation values. The Service's wetland easements are minimally restrictive conservation easements, meaning that they have a minimal impact on the property value and limit the landowner's use and enjoyment of the property to a minor degree. 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.

Drain Tiles

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.

Drainage systems positioned adjacent to a wetland area in low-relief terrain have the potential to indirectly affect the wetland area through lateral drainage (lateral effect). The lateral effect is defined as the perpendicular distance on either side of a tile pipe where soil water can be drained by the tile. Drainage systems positioned to encircle a wetland area completely or partially in high-relief terrain can intercept groundwater and precipitation runoff to the wetland area depending on the previously mentioned factors.

Internal Guidance for Calculating Drain Tile Setbacks

Three years ago, the Service developed basic guidance for administering a drain tile setback request process and calculating drain tile setback distances using the best available science. This guidance was captured in a published Director's Memo, which is available at <https://www.fws.gov/sites/default/files/documents/Guidance-Memo-Drain-Tile-Setbacks-Wetland-Easements.pdf> or in hard copy from your local U.S. Fish and Wildlife Service station. If you need help identifying and contacting your local station, see 50 CFR 2.2 for the contact information of the nearest Regional Office. We refer to this document as the "guidance memo" in the remainder of this document. The guidance memo sets out the basics of the calculation processes for the Service to use when determining drain tile

setback distances, including use of the van Shilfgaarde equation, and it establishes that the Service will not pursue legal redress should it later be determined that setback distances provided by the Service were inadequate to protect adjacent wetland areas from drainage. This final rule codifies the key aspects of the guidance memo, such as the use of the best available science and the legal safe harbor for landowners who fully comply with Service-provided setback distances. The guidance memo remains in full effect because it has been incorporated as part of the broader internal guidance. The Service recently finalized the broader internal guidance developed to implement the voluntary drain tile setback program that is codified in this rule. We refer to this as the "internal guidance" or "internal setback guidance" in the remainder of this document. The internal guidance provides Service personnel with direction in administering the drain tile setback process program, which includes guidance on the timeframes for and calculation of Service-provided drain tile setback distances. The internal guidance is consistent with both this rule and the guidance memo, which as noted above is itself part of the internal guidance. The purpose of the internal guidance is to provide more detail than the guidance memo or this rule, particularly elaborating on calculation processes and providing guidelines for internal processes. The internal guidance is available to the public; for a copy, please contact your local U.S. Fish and Wildlife Service station (you can search by zip code, under Refine Your Search, or by map here: <https://fws.gov/our-facilities>). If you need help identifying and contacting your local station, see 50 CFR 2.2 for the contact information of the nearest Regional Office. Landowners who want to better understand the internal guidance or who have questions about the context of the guidance are encouraged to contact your local station.

This Final Rule

The regulations we are adopting in this final rule provide clarity and certainty to landowners that drain tile may be installed on lands encumbered by a wetland easement provided that protected wetland areas are not drained, directly or indirectly. This rule distinguishes Service wetland easements from the "Swampbuster" provisions of the Food Security Act of 1985 (also known as the "Farm Bill"; Pub. L. 99-198), which allow drain tile to have a "minimal effect" to wetlands. Service wetland easement agreements

with landowners include provisions that allow for no effect; hence, drain tile may be installed on a wetland easement tract, but it is a violation of the easement contract if the result is that the tile drains a protected wetland area.

Because the impact of a given drainage system on wetland areas varies greatly depending on site conditions, there are no one-size-fits-all specifications to prevent drain tile installation from draining wetlands and individualized calculations are needed for each drain tile installation. Therefore, on wetland easement lands, landowners will be able to voluntarily request that the Service provide them with individual drain tile setback distances. These regulations require the Service to establish drain tile setback distances based upon the best available science and with due consideration of soil characteristics, tile diameter, the depth of the tile below the surface, and/or topography that ensure protected wetland areas are not drained.

Additionally, these regulations ensure that landowners who adhere to the setback distances prescribed by the Service, including the tile diameters and tile depths below the surface that were used to calculate the Service-provided drain tile setback distances, will not be required to remove drain tile that is later found to have an adverse effect on protected wetland areas. In this way, these regulations recognize that our understanding of the effects that drain tile may have on wetland hydrology is an evolving science. Service-provided drain tile setback distances may prove inadequate to fully protect easement wetland areas from drainage. However, landowners who coordinate their tiling plans with the Service and adhere to the Service-determined setback distances will not later be held criminally responsible or civilly liable for disturbing, injuring, or destroying a unit of the National Wildlife Refuge System (*i.e.*, draining a protected wetland area) provided the subsurface drainage system is not modified, enhanced, or replaced. These regulations thus provide greater certainty and clarity for both landowners and the Service and encourage communication and collaboration.

Amendments to Existing Regulations

This rule codifies in the Code of Federal Regulations the following provisions:

(1) Within a Service-provided timeframe, the Service will provide setback distances for the placement of drain tile on lands covered by wetland easements in Iowa, Minnesota,

Montana, North Dakota, and South Dakota;

(2) The Service will provide guidance to landowners about what materials should be submitted as part of a request; and

(3) When a landowner coordinates tile planning with the Service in accordance with this guidance and adheres to the Service-provided drain tile setback distances, including the tile diameters and tile depths below the surface that were used to calculate the Service-provided drain tile setback distances, the Service will not seek legal redress if it is later determined that the Service-provided drain tile setback distances failed to protect the wetland areas from drainage, provided that the drain tile has not been modified, enhanced, or replaced.

The regulations will apply only to setbacks provided by the Service beginning on the effective date of this final rule (see **DATES**, above).

Statutory Authority

The Administration Act, as amended by the National Wildlife Refuge System Improvement Act of 1997 (hereafter, “the Improvement Act”; Pub. L. 105–57), governs the administration and public use of refuges.

Amendments enacted by the Improvement Act built upon the Administration Act in a manner that provides an “organic act” for the Refuge System, similar to organic acts that exist for other public Federal lands. The Improvement Act serves to ensure that we effectively manage the Refuge System as a national network of lands, waters, and interests for the protection and conservation of our Nation’s wildlife resources. The Administration Act states first and foremost that we focus our Refuge System mission on the conservation of fish, wildlife, and plant resources and their habitats. The Administration Act, as amended, contains 14 directives to the Secretary of the Interior (Secretary), one of which states that, in administering the Refuge System, the Secretary shall ensure effective coordination, interaction, and cooperation with owners of land adjoining refuges. The Administration Act also authorizes the Secretary to issue regulations to carry out the purposes of the Act.

Summary of Comments and Responses

On April 28, 2023, we published in the **Federal Register** (88 FR 26244) a proposed rule to establish new regulations for wetland easements that would bring consistency, transparency, and clarity for both easement landowners and the Service in the

administration of conservation easements, pursuant to the Administration Act, as amended by the Improvement Act. We accepted public comments on the proposed rule for 60 days, ending June 27, 2023. By that date, we received comments from eight commenters on the proposed rule. One commenter’s comment was unrelated to the proposed rule. We discuss the remaining substantive topics raised by commenters below.

Comment (1): Five comments expressed general support for the proposed rule. These comments expressed support for drain tile setbacks as a “good idea” to protect wetlands while providing transparency and clarity for landowners whose land is encumbered with an easement for waterfowl management rights (commonly referred to as a wetland easement).

Our Response (1): We appreciate this general support. We designed this rule to make the drain tile setback process more open and transparent, and to simplify and clarify wetland easement responsibilities for both landowners and the Service.

We did not make any changes to the rule as a result of these comments.

Comment (2): Two comments asked the Service to withdraw the proposed rule in its entirety.

Our Response (2): The Service carefully considered the concerns and reasons presented in each of these comments underlying the request to withdraw the proposed rule and not issue a final rule. These concerns, which are addressed below, do not individually or cumulatively provide a persuasive rationale for the Service to withdraw the proposed rule, nor to postpone the issuance of this final rule for further consideration.

Notably, each of these comments expressed support for the Service’s guidance memo for wetland easements (see Internal Guidance for Calculating Drain Tile Setbacks, above). The commenters also implied that a part of their reasoning for requesting that the Service withdraw the proposed rule was grounded in the belief that a final rule would supersede the guidance memo; both commenters stated a preference for the guidance memo. As discussed further below in our response to *Comment (14)*, this rule is consistent with the guidance memo, and that guidance memo remains in effect with the publication of this final rule.

We did not make any changes to the rule as a result of these comments.

Comment (3): One comment urged general caution with this rule, given that

it allows drain tile into an area with wetland easements.

Our Response (3): The Service acknowledges the concerns underlying this comment and is committed to protecting the wetlands under our easements. At the same time, the Service cannot constrain a landowner’s rights without the appropriate agreement and compensation. Through a wetland easement, the Service buys minimally restrictive rights, so the landowner may not drain, burn, fill, or level wetland areas, but we do not purchase rights specifically concerning the installation of drain tile. In some cases, it is possible for landowners to install tile within the boundaries of wetland easements without draining wetland areas, and they have the right to do so in such cases.

The Service’s solution to balancing our right to prohibit draining of wetlands under the easement and a landowner’s right to install drain tile within the easement boundary, as long as it does not drain those wetlands, is the Service-provided setback process codified by this rulemaking. The need for caution and care in the installation of tile near wetlands is met when landowners coordinate with the Service and are provided with setbacks that adequately protect easement wetlands.

We did not make any changes to the rule as a result of this comment.

Comment (4): Two commenters requested that we ensure the rule considers or is consistent with other drainage and water laws in Iowa, Minnesota, and North Dakota.

Our Response (4): The Service routinely works and coordinates with State agency partners on various aspects of our conservation mission, including water rights and wetland management. The Service works with State agencies, landowners, drainage districts, and water boards regarding efforts to maintain, repair, and replace drain tile and ditches so that drainage of non-easement protected wetlands can continue when in compliance with State and local laws and regulations and when that work will not infringe on the terms of the easement agreement or on the Service’s authorities under the Improvement Act or the Migratory Bird Conservation Act (16 U.S.C. 715–715d). We also work with and share resources with States, landowners, drainage districts, and water boards on actions that protect or otherwise benefit fens and other wetlands where we have the jurisdiction and authority to do so.

In shaping this rule, the Service did fully consider existing State laws. This rule does not conflict with any State law, and the same is true for our

wetland easement agreements, but in application to specific drain tile projects, this rule and the specific easement agreement may impose different requirements and limitations than those under State law. This is because the Service must protect the legal property interest that was paid for in the wetland easement agreement. The rights acquired protect wetland areas from being drained, burned, filled, or leveled. If these easements could not protect wetlands beyond the baseline protections under applicable State laws, they would have no value to the Service.

In cases where easement agreement requirements impose limitations beyond State law, the easement agreement, and the Service's authority to enforce its terms under the Improvement Act and Migratory Bird Conservation Act, typically supersede the applicable State law. In the *United States v. Vesterso* (828 F.2d 1234 (8th Cir. 1987)), the Eighth Circuit Court of Appeals upheld that the digging of ditches that damaged Federal easement wetlands in North Dakota was a violation of law and of the easement agreement, even though the digging was permissible under State law. The court found that, under the Administration Act, differences in requirements between Federal easements and State law are to be resolved on a case-by-case basis, so neither overrides the other in all cases. The Federal interest in the natural state of wetlands under an easement must be balanced against the State interest in and authority over State waters. On this point, the Court's opinion stated that while the Service was correct in this case and the easement agreement controlled, the Service does not have a general, absolute right to prohibit alteration of a wetland or interference of the natural flow of water under an easement.

We did not make any changes to the rule as a result of these comments.

Comment (5): Three comments referenced other permitting agencies and/or drainage laws and encouraged the Service to notify landowners receiving Service drain tile setbacks that other agencies, including Federal, State, and local governments, local watersheds and water boards, and other permitting authorities, will need to be consulted to ensure landowners' drain tile projects comply with other permitting entities.

Our Response (5): As part of our standard process, the Service notifies landowners that the drain tile setback received from the Service only addresses the Service's wetland easement on their property and that they will need to coordinate with State

and local governments, watersheds, water boards, and other permitting authorities when installing drain tile on their land to ensure their project complies with all Federal, State, local, and other laws, statutes, codes, and policies.

We did not make any changes to the rule as a result of these comments.

Comment (6): Three comments requested that the Service specifically state in the regulation what the "Service-provided timeframe" is for processing a drain tile setback.

Our Response (6): The Service understands the concern of landowners and other stakeholders for timely delivery of setback decisions. We are committed to timely communication and delivery of setback distances. Our aim is to provide landowners with an estimate of the setback calculation timeline for their specific case within 2 business weeks of receiving their request on FWS Form 3–2554. We also anticipate that, in most cases, we will be able to provide drain tile setback distances within 60 calendar days. However, there are various factors that prevent the Service from specifying a uniform deadline for this process. This includes logistical factors, such as the availability of expert personnel and scheduling of on-site assessments, and factors that are a part of the actual calculations, such as the unique physical features of a given wetland. Several of these factors are noted in our publicly available internal guidance for calculating setbacks (see Internal Guidance for Calculating Drain Tile Setbacks, above). In that internal setback guidance, we provide the guiding principles for what constitutes a reasonable timeframe for Service employees calculating setback distances.

We did not make any changes to the rule as a result of these comments.

Comment (7): One commenter asked what was meant by the term "best available science" and questioned the absence of a definition in the proposed rule.

Our Response (7): The term "best available science" is a well-defined and long-established legal standard for the actions of science-driven Federal Government agencies. For example, the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), as amended, requires species listings to be based on the "best scientific and commercial data available." As the use of the term in this final rule does not depart from its established legal meaning, which itself is consistent with the plain meaning of the phrase, providing a definition in this rule is not necessary.

The Service will ensure that our policy for, our guidance on, and our implementation of the wetland easement program are all based on scientific data and information. We will also ensure that, of the sources of relevant scientific information available to us, we make use of the "best" science by considering objective indicators of scientific quality such as peer review, replication, quality and calibration of equipment, robustness of models, and so forth, when determining which information should carry the most weight in our processes.

We did not make any changes to the rule as a result of this comment.

Comment (8): Two comments expressly noted that the provisions of the proposed rule would have no retroactive effect, but seemed to have different understandings of the implications of this fact and differing opinions as to whether the rule should have retroactive effect.

Our Response (8): Clarification on the point of retroactivity should resolve the concerns of both of these commenters and any other members of the public on this point.

The regulations in this rulemaking will not have retroactive effect; they will apply only to setbacks provided by the Service beginning on the effective date of this final rule (see **DATES**, above). This rule creates a voluntary process for landowners to request drain tile setback distances. There is no requirement to request or to make use of Service-provided setback distances, but the rule does provide a legal safe harbor for those landowners who do both. Thus, those landowners who have never before requested setback distances from the Service are in the same position regardless of whether or not the rule has retroactive effect. This is why the absence of retroactive effect could only be relevant to those landowners who received Service-provided setback distances under our guidance memo on drain tile setbacks (see Internal Guidance for Calculating Drain Tile Setbacks, above). In that case, however, the position of those landowners is also unchanged, since the guidance memo remains in full effect and will guide refuge personnel in implementing these new regulations. This rule merely codifies the key principles of our guidance memo.

In summary, the rule only has prospective effect, but this does not change the status of either (1) landowners who have never requested setback distances and thus have no legal safe harbor should they install tile that drains an easement wetland; or (2) landowners who requested and

complied with setback distances and thus do have a legal safe harbor should their drain tile nevertheless drain an easement wetland. What the prospective effect does mean is that the voluntary process for setback requests and receiving legal safe harbor is further solidified by inclusion in our regulations and that landowners who request and fully comply with setback distances from the Service in the future can be assured of legal safe harbor.

We did not make any changes to the rule as a result of these comments.

Comment (9): Two commenters requested that the Service offer assurance that a landowner who follows the Service-provided setback will be afforded a legal safe harbor regardless of whether the Service-provided setback distances do or do not protect the wetland from drainage.

Our Response (9): The Service understands the importance for landowners of our commitment not to seek legal redress against landowners who coordinate with the Service and fully cooperate with the Service's setback determinations. In fact, providing assurance on this point is one of the Service's primary reasons for pursuing this rulemaking. This rule codifies exactly this type of assurance for landowners, as directly stated in the regulatory provisions at 50 CFR 25.24(c) (see Regulation Promulgation, below). Regarding this protection from legal redress, the regulations we are adopting in this rule specifically state that when a landowner coordinates tile planning with the Service in accordance with the regulations and adheres to the Service-provided drain tile setback distances, then the Service will not seek legal redress if it is later determined that the drain tile setback distances provided by the Service failed to protect the wetland areas from drainage, provided that the drain tile has not been modified, enhanced, or replaced.

We did not make any changes to the rule as a result of these comments.

Comment (10): One comment requested that the regulations clarify that maintenance and repairs of drain tile systems installed in accordance with Service guidance or coordination are permissible without any further agency involvement.

Our Response (10): Landowners with wetland easements on their property are always allowed to install and to maintain drain tile systems, but if the tile drains wetlands in violation of the Service's easement, then the landowner may face legal action. In the interest of both parties, the Service offers a voluntary process for landowners to request a Service-provided setback;

landowners who fully comply with the Service-provided setback distances when installing or maintaining a drain tile system are shielded from legal action. In the case of a landowner's actions to maintain or repair a drain tile system, remaining within this legal safe harbor requires that the landowner's maintenance or repair actions do not amount to a modification, enhancement, or replacement of the system. This requirement is provided in the regulatory provision at 50 CFR 25.24(c) (see Regulation Promulgation, below), where it clearly states that drainage of an easement wetland, after installation of a drain tile system in accordance with a Service-provided setback, will not result in the Service taking legal action provided that the drain tile has not been modified, enhanced, or replaced.

Drain tile systems installed in accordance with Service guidance or coordination should not drain easement-protected wetland areas. Therefore, routine maintenance and repair actions that do not amount to modification, enhancement, or replacement, whether or not coordinated with the Service, would not invalidate the safe harbor protections provided to landowners who install drain tile systems in accordance with Service-provided setbacks and other guidance. A true maintenance or repair action should not change the tile system in a way that impacts the Service's setback distances. For example, substituting one 4-inch tile for another 4-inch tile at the same location and depth would be a routine repair that does not invalidate the landowner's legal safe harbor. This difference between a routine maintenance and repair action and an action to modify or enhance the drain tile system, or to replace it with another system altogether, is commonly understood for those landowners who employ and those service providers who install drain tile systems, so further clarification in the regulatory provision is not necessary.

At the same time, a wetland easement agreement is a commitment to shared responsibility for the designated wetlands and an important piece of that shared responsibility is effective communication between landowners and the Service. The Service encourages landowners to be generally communicative about all aspects of wetland easement agreements and is committed to helpful communication in return. Specific to maintenance and repair of a drain tile system installed in accordance with Service-provided setback distances, continued communication is as mutually

beneficial as the setback process. In fact, the only way for a landowner to be truly certain whether the maintenance or repair actions they wish to take would constitute a modification, enhancement, or replacement, and thus whether they remain within the legal safe harbor regulatory provision, is to coordinate the maintenance or repair with the Service.

We did not make any changes to the rule as a result of this comment.

Comment (11): One comment stated that there should be no need for any later assessments or determinations of whether the setback distances provided the desired wetland protection where a landowner installs drain tile based on Service-provided setback distances, given the legal safe harbor for the landowner in the event the wetland is drained.

Our Response (11): The Service periodically monitors all of our wetland easements using a variety of nonintensive methods, such as aerial photography. In the interest of both landowners and minimal disturbance to wetlands, we seek to not monitor more often or more intensively than necessary. Our existing publicly available policy on wetland easements requires periodic monitoring and sets out the monitoring methods that our personnel may use (see Service Manual at 601 FW 6 at <https://www.fws.gov/policy-library/601fw6>).

In the specific situation of a landowner installing drain tile according to Service-provided setbacks, we will continue to monitor the wetlands on that property in the same manner as any other property subject to an easement. We will do this for three reasons. First, as noted above, our policy requires monitoring all of our wetland easement interests. Second, we need to monitor these wetlands in the interest of our overall migratory bird and waterfowl wildlife management responsibilities and wildlife conservation mission, which constitute the purpose for obtaining and maintaining these easements. Third, while the landowner may have complied with Service-provided setbacks at the time of drain tile installation, full compliance with the Service's setbacks under these regulations, and thus securing the legal safe harbor for the landowner, also requires that a landowner does not subsequently modify, enhance, or replace the drain tile system. This means that we need to continue monitoring to identify when an easement wetland has been drained. If an easement wetland has been drained, we determine whether the landowner

has modified, enhanced, or replaced the drain tile system in order to determine whether or not the legal safe harbor applies and the Service should or should not seek legal redress. Moreover, monitoring for this purpose is critical because identifying when an easement wetland has been drained may be the best, or even the only, signal for us that a landowner has modified, enhanced, or replaced the drain tile system after the initial installation.

We did not make any changes to the rule as a result of this comment.

Comment (12): One comment urged that the Service should not seek legal redress against a landowner in cases where a drainage district acts in a manner inconsistent with the provisions in the proposed rule, and that this should be stated in the regulations.

Our Response (12): It is unclear how a drainage district could act inconsistently with the provisions in this rule, as this rule provides a process for landowners to request and obtain setback distances from the Service and, if they fully comply with those setback distances, be assured of a legal safe harbor in the event a wetland is drained. Assuming that the commenter is referring to actions taken by a drainage district that could violate the terms of a wetland easement, such as draining an easement-protected wetland, then our response is that we cannot provide any such provision in the regulations.

The Service will determine an appropriate response in this type of situation on a case-by-case basis, and accordingly will not commit to any blanket limitation on our options for legal redress merely because a drainage district is involved and may bear more responsibility than the landowner for the easement violation. Unless the legal safe harbor for landowners codified by this rule applies, the Service reserves the right to seek legal redress against any and all responsible parties in the event of drainage of a wetland in violation of a wetland easement, or any other violation of the terms of a wetland easement, to the full extent of applicable law.

We did not make any changes to the rule as a result of this comment.

Comment (13): One comment expressed the concern that due to the distribution of small easement wetlands throughout a landowner's property and the setback distances provided by the Service, there might not be any location on the property where the landowner can install drain tile that complies with the Service's setbacks. This commenter was also concerned that in this case the rule prevents the landowner from installing drain tile.

Our Response (13): This rule does not prevent any landowner from installing drain tile. As discussed above under our response to *Comment (10)*, landowners with wetland easements on their property are always allowed to install drain tile systems, but if the tile drains wetlands in violation of the Service's easement, then the landowner may face legal action.

The situation described by this commenter is possible. The locations and measurements of the overall property, the protected wetland areas, and the calculated setback distances may in some cases be such that there is no location within the borders of the overall property where drain tile can be placed that is setback from all easement wetlands at the distances determined by the Service's calculations. In such a case, the landowner may nevertheless choose to install drain tile, but they would do so at the risk of draining one or more easement wetlands and without the assurance of a legal safe harbor.

Conversely, other landowners may find that they are able to install drain tile on a wetland easement and setback from all wetlands in full compliance with the setback distances calculated by the Service, and thus ensure a legal safe harbor for the installation. Where a landowner's property fits along the continuum bounded by these two situations depends on the size and distribution of the wetlands, the hydrology of the wetlands, and other factors unique to each property.

We did not make any changes to the rule as a result of this comment.

Comment (14): Two comments expressed support for the Service's guidance memo on calculating drain tile setbacks, finalized in 2020. Both of the comments urged the Service to revise the proposed rule to explicitly reference the guidance memo, and one also urged codifying the setback calculation content from the existing Service guidance.

Our Response (14): The guidance memo remains in full effect (see Internal Guidance for Calculating Drain Tile Setbacks, above). The guidance memo, as well as our internal guidance more generally and any future updated guidance, need not be expressly referenced in the regulations in order to guide Service administration of wetland easements (see Internal Guidance for Calculating Drain Tile Setbacks, above). There is nothing incongruent between the guidance memo and this rule. The guidance memo was developed based on the best science available at that time. It also assures landowners that the Service will not pursue legal redress should it later be determined that

setback distances were inadequate to protect adjacent wetland areas from drainage. This regulation codifies these two principles, ensuring that Service calculations will be based on the best available science to prevent protected wetland areas from drainage and that landowners who fully cooperate with Service-provided setbacks will have a legal safe harbor.

Including the calculation processes of the Service's guidance memo in the regulations, however, would not be in the interest of the Service or landowners. In order for setback calculations to be based on the best available science, the Service needs to be able to update our processes as empirical experience and new scientific studies provide new information. Updating those processes through rulemaking is inefficient and unnecessary. As the Service and other agencies routinely do, the Service has codified our obligation to use the best available science in regulation and will then keep our publicly available, detailed internal guidance up-to-date and effective. This will allow us to best protect wetlands while also providing accurate, no-farther-than-necessary setback distances to landowners.

We did not make any changes to the rule as a result of these comments.

Comment (15): One comment included a request that the Service make the methodology for determining a drain tile setback publicly available, and that the Service invite public comments any time the Service proposes to change the methodology.

Our Response (15): The Service's internal setback guidance documents containing the methodology for determining a drain tile setback are publicly available (see Internal Guidance for Calculating Drain Tile Setbacks, above). Landowners retain the right to challenge the Service's methodology if they believe there was an error in our methodology or in our application of the methodology to their case. This provides an efficient, reasonable, and open process for setback determinations.

The Service's methodology was established using the best available science and the expertise and best professional judgment of Service personnel to provide adequate protection for wetland easement areas.

We did not make any changes to the rule as a result of this comment.

Comment (16): Two comments called for the Service to establish an administrative appeal process that is independent of the direction and control of the Service.

Our Response (16): Administrative appeals processes are a common feature of good government throughout Federal agencies. These processes allow agency subject-matter expertise to form the administrative hearing record and inform the decision reached on appeal. They also allow the agency to double-check its initial decision so that it can identify, and thereby more quickly address, any errors that were made. Regulated parties, in this case landowners, always have the option of appealing the ultimate agency decision to a judicial branch court after exhausting the administrative appeals process, which is sufficient to address any potential errors in the administrative appeal process that could harm their interests.

In the U.S. Federal Government, no administrative appeals process external to the agency whose final decision is being challenged exists. Quasi-independent administrative tribunals and review boards do exist, such as the Environmental Appeals Board, a body that hears appeals of Environmental Protection Agency (EPA) final decisions and reports directly to the EPA Administrator outside of the regular EPA line authority. The commenters presented no compelling evidence that the current administrative appeals process is inherently flawed or not reaching appropriate determinations concerning wetland easements. The Service is also not otherwise aware of any reasons the existing appeals process is inadequate. We do not see any need at this time to devote considerable resources toward the creation of a quasi-independent body to hear appeals of Service decisions concerning wetland easements.

Landowners who disagree with a Service-provided setback distance, or another final decision concerning wetland easements, may appeal to the appropriate Regional Director in accordance with the procedure established by 50 CFR 25.45.

We did not make any changes to the rule as a result of these comments.

Comment (17): One comment questioned how landowners will be notified of the responsibility to request a setback to protect the wetlands on their land that are subject to a wetland easement.

Our Response (17): This rule does not obligate or require any landowner to request a drain tile setback. We have created a voluntary process for landowners to request and receive a Service-provided drain tile setback to facilitate coordination between landowners and the Service and to improve landowner compliance with

the requirements of the Service's wetland easements. This process benefits landowners in that it provides a legal safe harbor for landowners who fully comply with the Service's setback determination, as the Service will not seek legal redress in the event that the wetland drains despite the landowner's adherence to the Service's setback determination. Landowners have the right to install drain tile on their land without requesting a Service-provided setback, but in that case, they are legally obligated to ensure by their own efforts that the drain tile does not violate any wetland easement agreement with the Service by draining protected wetlands.

While the setback request process is voluntary, the Service will make efforts to notify landowners about this mutually beneficial opportunity. The Service intends to publicize the opportunity through various communication channels. In fact, our existing internal guidance provides strategies, and our process includes steps for communication with landowners concerning their ability to request a Service-provided setback. The publication of this rule and the regulations that we are codifying in the Code of Federal Regulations will also serve as public notice of this opportunity for landowners with wetland easement agreements.

We did not make any changes to the rule as a result of this comment.

Comment (18): One comment expressed concern that the rule does not clearly tell the landowner what lands are subject to the easement or provide adequate notice as to the reasonable parameters of the easement.

Our Response (18): This rule provides a general framework for the Service in regulating all of our wetland easement interests, so it is not the appropriate place to delineate individual easement boundaries in detail. The appropriate place to clarify the boundaries of the Service's wetland easement is in each wetland easement agreement document itself. That is why each easement document includes a clear legal description of the lands that are subject to the easement. In fact, multiple courts have found the parameters in individual easement documents to be clear (see, e.g., *United States v. Albrecht*, 496 F.2d 906 (8th Cir. 1974) (using the phrase "precise draftsmanship" in reference to the terms of the easement agreement), and *United States v. Seest*, 631 F.2d 107 (8th Cir. 1980)).

For the same reasons, this rule is not the appropriate means of notifying landowners of the parameters of wetland easements. Landowners are adequately notified of the easement and

the extent to which it encumbers their property either when signing the wetland easement agreement with the Service or when performing due diligence before obtaining land subject to an existing wetland easement from another private landowner. Every easement document is registered and publicly available in the applicable State or county land records, and landowners can also obtain a copy by contacting their local U.S. Fish and Wildlife Service station. (If you need help identifying and contacting your local station, see 50 CFR 2.2 for the contact information of the nearest Regional Office.) Review of the easement document provides a landowner with the necessary details of the boundaries of the easement. Thus, landowners should know of all the reasonable parameters. Landowners who are nevertheless unsure of the parameters of an easement are welcome to consult the Service by contacting their local U.S. Fish and Wildlife Service station. (If you need help identifying and contacting your local station, see 50 CFR 2.2 for the contact information of the nearest Regional Office.)

We did not make any changes to the rule as a result of this comment.

Comment (19): One comment requested that, for newly acquired wetland easements, the Service ensure landowners agreeing to the easements understand what limitations are associated with drain tile installation.

Our Response (19): The Service takes steps to ensure that new landowners are aware of the limitations on drain tile installation that wetland easements require. The Service's Realty Specialists working with new landowners who are enrolling their land in wetland conservation easements inform landowners of what rights the Service acquires or restricts during the easement agreement process. This ensures landowners are aware of what a wetland easement will mean for them before they sign an easement document. Most importantly, the Service clearly articulates that no wetlands protected by the easement can be drained. If a landowner wants to retain the ability to drain a given wetland area, they can choose to not include that individual wetland area in the wetland easement.

We did not make any changes to the rule as a result of this comment.

Comment (20): Two comments requested that the regulations be revised to inform landowners exactly what information and materials will be required from them when they request a drain tile setback.

Our Response (20): The Service recognizes that landowners are rightfully cautious about their private information. The Service developed FWS Form 3–2554 for landowners to use to request a drain tile setback from the Service. The form was available for public comment in our Information Collection Request on OMB’s website at <https://www.reginfo.gov/public/>. In response to these comments, this final rule now directly references the form. FWS Form 3–2554 requests basic contact information for the landowner, along with the easement number(s) for the specific land covered by the wetland easement. In response to these comments, we have revised the form to also request desired tile depths and diameters, as well as attachment of relevant installation plans, to facilitate our setback calculations.

It would be inefficient to specify in our regulations the exact information requested by the form, especially as this could change over time. Instead, the Service is specifying the form in the regulations, has ensured the form contains all currently needed information, and will ensure the form remains updated in the future. The Service is following processes established by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) for FWS Form 3–2554. This includes ensuring that the information collection is reasonable, that no more information is collected than necessary, and that the form is renewed every 3 years so that it remains updated and compliant with the other requirements. The Privacy Act of 1974 (5 U.S.C. 552a) also ensures that private information provided on the form is protected.

We made changes to the rule as a result of these comments. Specifically, we added a direct reference to FWS Form 3–2554 and added additional fields to the form. This provides greater clarity on what information and materials landowners must provide when requesting a drain tile setback.

Comment (21): One comment expressed concern that the proposed rule does not include any assurances that information provided by landowners will be confidential and not subject to the Freedom of Information Act (FOIA; 5 U.S.C. 552, as amended by Pub. L. 104–231, 110 Stat. 3048).

Our Response (21): The Service, like all other agencies in the Executive Branch, must comply with FOIA. FOIA requires that any person may request access to records of the Executive Branch of the United States, and copies of the records must be provided in full, except to the extent that all or specific portions of the record fall under one or

more of the exempt categories. Among these exempt categories are information that would violate an individual’s right to privacy and information that constitutes trade secrets or other confidential commercial or financial information (see 5 U.S.C. 552(b)). Thus, the Service may be compelled to turn over redacted copies of certain records concerning wetland easements, but the personally identifiable information of landowners and any proprietary commercial information in the records, including the information collected on FWS Form 3–2554, are exempt from FOIA and not disclosed. As this is a general exemption to FOIA applicable across the Federal Government, it need not be specified in our regulations. We did, however, add a standard FOIA statement to the form that helps to clarify the point that business information is FOIA exempt and directs landowners to label the information that they consider to be business information when submitting the form.

We did not make any changes to the rule as a result of this comment, but we did modify the associated setback request form to add a standard FOIA statement on business information.

Changes From the Proposed Rule

As discussed above under Summary of Comments and Responses, based on comments we received on the April 28, 2023, proposed rule (88 FR 26244), we made changes in this final rule and to the associated setback request form. In this final rule, we added a direct reference to FWS Form 3–2554 in the regulation at 50 CFR 25.24(b) (see Regulation Promulgation, below). In the FWS Form 3–2554, we added three fields pertaining to technical information: one requesting the desired depths of the drain tile installation, if known; one requesting the desired diameters of the drain tile installation, if known; and one requesting that the landowner attach their drain tile installation plan, if available. We also added a standard FOIA statement to the form that clarifies business information is FOIA exempt and directs landowners to label the information that they consider to be business information when submitting the form. These changes were made in response to comments requesting that we provide more specificity as to what information and materials landowners will be asked to include when requesting a Service-provided setback.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866, 13563, and 14094)

Executive Order 14094 reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. We have developed this rule in a manner consistent with these requirements.

E.O. 12866, as reaffirmed by E.O. 13563 and E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rulemaking action is not significant.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities. However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for “significant impact” and a threshold for a “substantial number of small entities.” See 5 U.S.C. 605(b).

Within the Prairie Pothole Region (comprising Iowa, Minnesota, North Dakota, South Dakota, and Montana), there are approximately 28,000 wetland easements, of which the majority are located on privately owned farmland. Thus, small businesses within the crop production industry (North American Industry Classification System 111) may be impacted by the rule. One aspect of the rule codifies the Service’s existing drain tile setback practices; therefore,

the effect of this regulatory provision on small businesses will be negligible. The rule also provides legal certainty for landowners who adhere to the setback distances prescribed by the Service. The information collection form to request the setback distances is estimated to take 25 minutes, which will be negligible for small businesses. Currently, approximately 20 landowners annually (less than 0.01 percent) must remove drain tile systems because they do not adhere to the contract that granted the easement. As a result of the added benefit of legal certainty, the rule may provide the incentive to these landowners to adhere to the contract and, thus, reduce the costs of removing drain tile systems. The average annual number of small businesses (20) potentially impacted by this rulemaking is not substantial.

Therefore, we certify that this rule will not have a significant economic effect on a substantial number of small entities as defined under the RFA. A regulatory flexibility analysis is not required. Accordingly, a small entity compliance guide is not required.

Congressional Review Act

This rule is not a major rule under 5 U.S.C. 804(2) of the Congressional Review Act. We anticipate no significant employment or small business effects. This rule:

a. Will not have an annual effect on the economy of \$100 million or more. The minimal impact will be scattered across five States and will most likely not be significant in any local area.

b. Will not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions.

c. Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This rule will not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule will not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings (E.O. 12630)

In accordance with E.O. 12630, this rule will not have significant takings implications. A takings implication

assessment is not required. The rule does not have any takings implications because it will not impact protected property rights. The rule provides clarity and standardization of the Service's existing process for providing drain tile setback distances to landowners and provides landowners with legal protection when they choose to follow the Service's setback distances. The rule does not require landowners to consult the Service regarding setback distances, nor does it require landowners to follow the Service's setback distances if they are provided.

Federalism (E.O. 13132)

Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

Civil Justice Reform (E.O. 12988)

In accordance with E.O. 12988, the Department of the Interior has determined that this rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Energy Supply, Distribution or Use (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A statement of energy effects is not required.

Consultation and Coordination With Indian Tribal Governments (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under Executive Order 13175 and have determined that it has no substantial direct effects on federally recognized Indian Tribes.

Paperwork Reduction Act (PRA)

This rule contains new information collections. All information collections require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The OMB reviewed the information collection requirements associated with requesting

individualized drain tile setback distances for wetland easements in the PPR and assigned the placeholder OMB Control Number 1018-0196, pending final review and approval of the following:

Requests for Drain Tile Setbacks (FWS Form 3-2554)

Upon the request of a landowner (via submission of FWS Form 3-2554), the Service will provide setback distances for the placement of drain tile on lands covered by wetland easements. The setback distances will be based on best available science and must be adequate to ensure protected wetland areas are not drained. Information collected via FWS Form 3-2554 includes basic contact information for the landowner, along with the easement number(s) for the specific land covered by the wetland easement.

Revisions to Form Since Proposed Rule Phase: In response to public comments, we revised the form to also collect technical information about the contemplated drain tile installation, specifically the desired drain tile depths and diameters, and request that the landowner attach any plans they have prepared for the installation (e.g., a geographic information system (GIS) Shapefile). We also updated the reporting and recordkeeping time burden estimates to be 10 minutes for reporting and 15 minutes for recordkeeping. Finally, we added a standard FOIA statement to the form that clarifies business information is FOIA-exempt and directs landowners to label the information that they consider to be business information when submitting the form.

The Service will provide guidance to landowners about what materials should be submitted as part of a request and will provide setback distances to landowners within a Service-provided timeframe. When a landowner coordinates their tile planning with the Service in accordance with this guidance and adheres to the Service-provided drain tile setback distances, the Service will not seek legal redress if it is later determined that Service-provided drain tile setback distance failed to protect the wetland areas from drainage, provided that drain tile has not been modified, enhanced, or replaced.

Title of Collection: Requests for Drain Tile Setback (50 CFR part 25).

OMB Control Number: 1018-0196.

Form Number: FWS Form 3-2554.

Type of Review: New.

Respondents/Affected Public: Individuals/households, businesses, and State/local/Tribal governments.

Total Estimated Number of Annual Respondents: 150.

Total Estimated Number of Annual Responses: 150.

Estimated Completion Time per Response: 5 minutes for reporting and 10 minutes for recordkeeping requirements.

Total Estimated Number of Annual Burden Hours: 63.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

On April 28, 2023, we published in the **Federal Register** (88 FR 26244) a proposed rule (RIN 1018–BG80) that announced our intention to request OMB approval of the information collections identified in the rule. In that proposed rule, we solicited comments for 60 days on the information collections in this submission, ending on June 27, 2023. Summaries of comments addressing the information collections contained in this rule, as well as the agency response to those comments, can be found above under Summary of Comments and Responses, as well as in the information collection request submitted to OMB on the *RegInfo.gov* website at <https://www.reginfo.gov/public/>.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of this information collection, including:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of response.

Send your written comments and suggestions on this information collection by the date indicated in **DATES** to OMB, with a copy to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB (JAO/3W), Falls Church, VA

22041–3803 (mail); or *Info_Coll@fws.gov* (email). Please reference “OMB Control Number 1018–0196 Drain Tile Setbacks” in the subject line of your comments.

National Environmental Policy Act

We are required under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) to assess the impact of any Federal action significantly affecting the quality of the human environment, health, and safety. We have determined that the rule falls under the class of actions covered by the following Department of the Interior categorical exclusion: Policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case (43 CFR 46.210(i)). The regulations codify existing Service practice in administering minimally restrictive wetland easements.

Primary Author

Debbie DeVore, Division of Natural Resources and Conservation Planning, National Wildlife Refuge System, is the primary author of this rulemaking document.

List of Subjects in 50 CFR Part 25

Administrative practice and procedure, Concessions, Reporting and recordkeeping requirements, Safety, Wildlife refuges.

Regulation Promulgation

For the reasons set forth in the preamble, we amend title 50, chapter I, subchapter C of the Code of Federal Regulations as set forth below:

PART 25—ADMINISTRATIVE PROVISIONS

■ 1. The authority citation for part 25 continues to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 460k, 664, 668dd, and 715i, 3901 *et seq.*; and Pub. L. 102–402, 106 Stat. 1961.

Subpart B—Administrative Provisions

■ 2. Revise § 25.23 to read as follows:

§ 25.23 Information collection requirements.

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this part and assigned OMB Control Numbers 1018–0102, 1018–0140, 1018–0181, and 1018–0196 (unless otherwise

indicated). Federal agencies may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Direct comments regarding the burden estimates or any other aspect of the information collection to the Service's Information Collection Clearance Officer at the address provided at 50 CFR 2.1(b).

■ 3. Add § 25.24 to read as follows:

§ 25.24 Drain tile setbacks.

(a) *Applicability.* The regulations in this section apply to any easement lands protected by a U.S. Fish and Wildlife Service easement for waterfowl management rights (commonly referred to as a wetland easement) that were acquired through the Small Wetlands Acquisition Program in the Prairie Pothole Region of Iowa, Minnesota, Montana, North Dakota, and South Dakota. The regulations in this section apply only to setbacks provided by the Service beginning on June 12, 2024.

(b) *Drainage tile setbacks.* Upon the request of a landowner, using FWS Form 3–2554, the Service will provide setback distances for the placement of drain tile on lands covered by wetland easements. The setback distances will be based on the best available science and must be adequate to ensure that protected wetland areas are not drained. Contact your local U.S. Fish and Wildlife Service station to obtain further information. You can obtain contact information for your local Service station by contacting one of the Service regional offices; addresses for these offices are at 50 CFR 2.2.

(c) *Protection from legal redress.* The Service will provide guidance to landowners about what materials should be submitted as part of a request and will provide setback distances to landowners within a Service-provided timeframe. When a landowner coordinates tile planning with the Service in accordance with the regulations in this section and adheres to the Service-provided drain tile setback distances, including the tile diameters and tile depths below the surface that were used to calculate the Service-provided drain tile setback distances, the Service will not seek legal redress if it is later determined that the drain tile setback distances provided by the Service failed to protect the wetland areas from drainage, provided that the

drain tile has not been modified,
enhanced, or replaced.

Shannon Estenoz,

*Assistant Secretary for Fish and Wildlife and
Parks.*

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