



United States Government Accountability Office

Report to the Chairwoman
Committee on Agriculture, Nutrition, and
Forestry, U.S. Senate

April 2021

FARM PROGRAMS

USDA Should Take Additional Steps to Ensure Compliance with Wetland Conservation Provisions



A Century of Non-Partisan Fact-Based Work

GAO@100 Highlights

Highlights of [GAO-21-241](#), a report to the Chairwoman of the Committee on Agriculture, Nutrition, and Forestry, U.S. Senate

Why GAO Did This Study

Wetlands perform vital ecological functions, and draining them can harm water quality and wildlife habitat. Many wetlands were drained for farming before enactment of wetland conservation provisions in 1985. However, millions of acres of wetlands, known as potholes, remain in the prairie pothole region.

NRCS determines where wetlands exist on the land of farmers who participate in USDA farm programs, and it identifies violations of wetland provisions. FSA administers farm program benefits. In 2017, USDA's Office of Inspector General reported that NRCS had implemented wetland determination procedures in the prairie pothole region inconsistently.

GAO was asked to review USDA's implementation of wetland conservation provisions in the prairie pothole region. This report examines, among other objectives, the steps NRCS has taken to increase the consistency of wetland determinations and the approaches NRCS and FSA use to ensure compliance with the provisions. GAO reviewed agency manuals, data, and files on wetland determinations and waivers, and interviewed agency officials and stakeholder groups.

What GAO Recommends

GAO is making six recommendations, including that NRCS use a risk-based approach for its annual compliance check and that FSA specify what constitutes adequate justification to grant good-faith waivers. The agencies agreed with five recommendations and partly agreed with the sixth, which GAO modified, as discussed in the report.

View [GAO-21-241](#). For more information, contact Steve D. Morris at (202) 512-3841 or morris@gao.gov.

April 2021

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USDA Should Take Additional Steps to Ensure Compliance with Wetland Conservation Provisions

What GAO Found

The U.S. Department of Agriculture's (USDA) Natural Resources Conservation Service (NRCS) has taken steps to increase the consistency of their determinations about where wetlands exist on farmers' lands. For example, NRCS state offices formed teams to make such determinations in the prairie pothole region (see fig.), which covers parts of Iowa, Minnesota, North Dakota, and South Dakota. These offices also standardized their wetland determination procedures and included more details, such as the types of data that can be used to identify wetland boundaries. Under wetland conservation provisions in federal law, to receive the benefits of certain USDA farm programs, farmers must not convert wetlands to cropland.

Wetlands and Cropland in the Prairie Pothole Region



Source: U.S. Fish and Wildlife Service. | GAO-21-241

NRCS's primary method to ensure compliance with wetland conservation provisions is conducting annual compliance checks of selected tracts of land for farmers in USDA programs. To select tracts, NRCS draws a national random sample. The sample is to include about 1 percent of tracts subject to wetland the provisions nationally, so many tracts are not sampled for years. For 2014 through 2018, NRCS identified fewer than five farmers with wetland conservation violations per year on the approximately 417,000 tracts in North Dakota and South Dakota—the states with the most wetland acres. Agency officials said NRCS has limited resources to conduct more checks. However, some USDA agencies emphasize risk-based criteria, rather than a random sample, in selecting tracts to check for compliance with other provisions. Doing so makes the checks more efficient by targeting the tracts most likely to have violations. If NRCS used a risk-based approach for its compliance checks (e.g., using information on acres cultivated annually on tracts), it could more efficiently ensure compliance with wetland conservation provisions.

If NRCS finds violations, USDA's Farm Service Agency (FSA) may withhold program benefits from farmers, or it may grant waivers to farmers who acted in good faith, without intent to commit violations. FSA granted 243 of 301 requests for good-faith waivers from 2010 to 2018, according to FSA data. FSA relies on committees of fellow farmers to decide on waivers by considering factors such as prior violations. GAO found that some committees relied on weak justification to grant waivers even if farmers had prior violations and that FSA had not specified what is adequate justification. By specifying what constitutes adequate justification, FSA could better ensure it provides benefits only to eligible farmers.

Contents

| | | |
|--------------|--|----|
| Letter | | 1 |
| | Background | 8 |
| | NRCS Took Steps to Increase Consistency of Wetland Determinations but Did Not Conduct Reviews, as Directed by Agency Guidance, to Ensure Consistency | 18 |
| | Appeals of Wetland Determinations Often Resulted in Changes to the Determinations, and Sometimes the Basis Was Unclear | 22 |
| | NRCS Checks Compliance without a Risk-Based Approach and Does Not Report All Potential Violations, and FSA Sometimes Grants Waivers with Weak Justification | 31 |
| | Conclusions | 41 |
| | Recommendations for Executive Action | 43 |
| | Agency Comments and Our Evaluation | 44 |
| Appendix I | Farm Service Agency (FSA) Benefits Denied Farmers for Violations of Wetland Conservation Provisions | 47 |
| Appendix II | Comments from the U.S. Department of Agriculture | 49 |
| Appendix III | GAO Contact and Staff Acknowledgments | 54 |
| Tables | | |
| | Table 1: Quality Control Reviews Completed by Natural Resources Conservation Service (NRCS) State Offices in the Prairie Pothole Region, 2017 through 2019 | 21 |
| | Table 2: Minnesota, North Dakota, and South Dakota Counties with Highest Appeal Rates for Preliminary Wetland Determinations, 2017 and 2018 | 23 |
| | Table 3: 2018 Preliminary Wetland Determinations, Appeals, and Outcomes, North Dakota and South Dakota | 26 |
| | Table 4: Number of Tracts Added at the State Level to the Sample for Annual Compliance Checks in Prairie Pothole States, 2014 through 2018 | 33 |
| | Table 5: Number of Farmers with Identified Wetland Violations, and Waivers of Ineligibility Determinations Granted in North Dakota and South Dakota, 2010 through 2018 | 38 |

| | |
|---|----|
| Table 6: Farm Service Agency (FSA) Benefits Denied Farmers for Violations of Conservation Provisions in Prairie Pothole States, 2010 through 2018 | 39 |
| Table 7: Farm Service Agency (FSA) Benefits Denied Farmers for Violations of Wetland Conservation Provisions by State, 2010 through 2018 | 47 |

Figures

| | |
|--|----|
| Figure 1: Wetlands and Cropland in the Prairie Pothole Region | 8 |
| Figure 2: Relative Wetland Density in the Prairie Pothole Region | 9 |
| Figure 3: Diagram of a Soil Profile with Subsurface (Tile) Drainage | 11 |
| Figure 4: Wetland Determination and Appeal Process | 15 |
| Figure 5: Process for Assessing Farmers' Compliance with Wetland Conservation Provisions | 17 |

Abbreviations

| | |
|----------------|--|
| 1985 Farm Bill | Food Security Act of 1985 |
| FSA | Farm Service Agency |
| NRCS manual | National Food Security Act Manual |
| NRCS | Natural Resources Conservation Service |
| OIG | Office of Inspector General |
| USDA | U.S. Department of Agriculture |

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April 2, 2021

The Honorable Debbie Stabenow
Chairwoman
Committee on Agriculture, Nutrition, and Forestry
United States Senate

Dear Madam Chairwoman:

Wetlands are some of the most productive and dynamic habitats in the world, comparable to rain forests and coral reefs. One of the world's most important wetland regions is the U.S. prairie pothole region, which contains a large number of wetland basins known as potholes.¹ This region covers about 78 million total acres, with about 70 percent located in North Dakota and South Dakota and about 30 percent located in Iowa and Minnesota.² However, over the decades, numerous wetlands in the United States, including in the prairie pothole region, have been drained and converted to cropland, in part because wetlands are often located on farmland. Draining wetlands on private property is not generally prohibited under federal law. However, it can decrease water quality and the ability to control floods; harm habitat for migratory waterfowl, fish, and other wildlife; and reduce recreational opportunities. Under the Food Security Act of 1985, as amended (1985 Farm Bill), farmers who convert wetlands to croplands are ineligible to receive benefits from certain federal farm programs.³ Since the passage of the Agricultural Act of 2014, these

¹The region has about 2.6 million wetland basins, which include potholes, as well as other types of wetlands and lakes. T.E. Dahl, *Status and Trends of Prairie Wetlands in the United States 1997 to 2009* (Washington, D.C.: U.S. Department of the Interior, Fish and Wildlife Service, Ecological Services, June 2014).

²Various researchers have used slightly different boundaries for the prairie pothole region of the United States, sometimes including a portion of Montana. The Natural Resources Conservation Service (NRCS) includes Iowa, Minnesota, North Dakota, and South Dakota (put in alphabetical order) in its administrative definition of the prairie pothole region, in part because these four states present similar administrative and technical issues when NRCS is implementing wetland conservation provisions.

³Pub. L. No. 99-198 § 1221, 99 Stat. 1354, 1507. The wetland conservation provisions in the 1985 Farm Bill apply to all farmers receiving benefits through certain federal farm programs, including price support programs, conservation programs, and crop insurance premium assistance. We refer to these collectively as "farm programs" in this report.

benefits include premium subsidies received through the federal crop insurance program.

Within the U.S. Department of Agriculture (USDA), the Natural Resources Conservation Service (NRCS) is responsible for conducting wetland determinations, which identify where wetlands exist on farmers' lands. NRCS and USDA's Farm Service Agency (FSA) are responsible for ensuring farmers' compliance with wetland conservation provisions in the 1985 Farm Bill, as amended. To be eligible for benefits under most farm programs, farmers must complete a form that (1) certifies their compliance with wetland conservation provisions; and (2) requests a wetland determination from NRCS, if needed.⁴ To assess farmers' compliance, NRCS conducts annual compliance checks for a sample of tracts of land and evaluates reports of potential violations. When NRCS identifies violations, FSA is responsible for, among other things, withholding farm program benefits or granting waivers to farmers if it determines the farmers acted in good faith because the violations were unintentional.⁵ NRCS administers its wetland conservation responsibilities through its national headquarters office, state offices for each state, and field offices in most counties.

Commodity prices and weather trends in 2009 through 2012 led to increased requests for wetland determinations in the prairie pothole region, resulting in a backlog at NRCS, according to agency documents. More specifically, commodity prices spiked dramatically, creating an incentive for farmers to bring more land into production. Many wetlands in Iowa and Minnesota had already been converted to cropland before 1985 because the financial benefits outweighed the costs of installing drainage systems. However, in North Dakota and South Dakota, numerous wetlands remained because colder temperatures and other factors had made it less attractive to farm. The high commodity prices coincided with unusually wet weather in North Dakota and South Dakota, driving up interest in installing drainage systems at the same time that the high

⁴Specifically, if farmers report on the form that they have created or plan to create new drainage systems, or that they have modified or plan to modify existing drainage systems, a wetland determination is needed.

⁵In this report, we refer to exemptions from ineligibility for good-faith reasons as good faith waivers."

commodity prices enabled farmers to afford drainage systems.⁶ Consequently, farmers' requests for wetland determinations increased substantially, and NRCS could not keep up with the demand, according to USDA documents.

By 2012, there was a backlog of 12,000 pending requests for determinations in the prairie pothole region, and farmers waited up to 2 years to get a determination on tracts of land, according to USDA.⁷ Around 2011, NRCS began taking steps to speed the process and reduce the backlog, such as making more wetland determinations offsite, without visiting the tracts, according to agency officials and documents.⁸ By 2019, NRCS had reduced the backlog to 2,947. However, as NRCS shifted its approach, conservation groups, agriculture groups, and others raised questions about the accuracy of wetland determinations made without the visits and about whether farmers were receiving consistent treatment across state lines.

We and others have previously reported on USDA's administration of wetland compliance provisions. In 2003, we found that NRCS needed to improve its compliance checks and that FSA needed to better justify its decisions to waive NRCS's findings of violations.⁹ In 2016, USDA's Office of Inspector General (OIG) reported that NRCS's procedures for its annual compliance checks were not effective for assessing farmers' compliance and recommended that NRCS revise its guidance for quality control of compliance checks, which the agency did in 2017.¹⁰ In 2017, the OIG reported that to reduce the backlog of wetland determination

⁶See U.S. Department of Agriculture, Office of Inspector General, *NRCS: Wetland Conservation Provisions in the Prairie Pothole Region*, Audit Report 10601-0003-31 (Washington, D.C.: January 2017); Carol Johnston, "Wetland Losses Due to Row Crop Expansion in the Dakota Prairie Pothole Region," *Wetlands*, vol. 33 (2013): pp. 175-182.

⁷Farmers receive benefits while they wait for determinations, but they may be required to repay those benefits if they are later found to have violated wetland conservation provisions.

⁸USDA regulations direct NRCS to develop and use both off-site and on-site wetland identification procedures in carrying out its wetlands responsibilities. See 7 C.F.R. 12.30(a)(4).

⁹GAO, *Agricultural Conservation: USDA Needs to Better Ensure Protection of Highly Erodible Cropland and Wetlands*, [GAO-03-418](#) (Washington, D.C.: Apr. 21, 2003).

¹⁰U.S. Department of Agriculture, Office of Inspector General, *USDA Monitoring of Highly Erodible Land and Wetland Conservation Violations*, Audit Report 50601-0005-31 (Washington, D.C.: June 2016).

requests, NRCS had unofficially changed one of its procedures in the prairie pothole region, which resulted in inconsistent implementation of the procedures, inaccurate determinations, and potential loss of wetlands.¹¹ NRCS did not agree that it had changed its procedures but acknowledged that it had been inconsistently implementing them. The OIG recommended that NRCS issue official guidance reinforcing correct and current rules and clarifying the procedures. In 2018, NRCS issued an interim rule clarifying the procedures, and in 2020, the agency published a final rule.¹²

You asked us to review USDA's implementation of wetland conservation provisions in the prairie pothole region. This report examines (1) the steps NRCS has taken to increase the consistency of wetland determinations, (2) the extent of appeals of NRCS's wetland determinations and the results of those appeals, and (3) the approaches NRCS and FSA used to ensure compliance with wetland conservation provisions.

To describe the steps NRCS has taken to increase the consistency of wetland determinations in the prairie pothole region, we reviewed relevant legislation, regulations, manuals, and other national- and state-level guidance. We reviewed NRCS's internal evaluations of the prairie pothole states' implementation of wetland determination procedures for 2013 through 2017, quality control reviews of wetland determinations in the four states for 2017 through 2019, and information on training requirements for staff who make wetland determinations. We selected these documents to review because they were the most recent ones completed. We compared the quality control reviews conducted by NRCS's state offices with NRCS's guidance on such reviews, and we compared headquarters' oversight of these reviews with NRCS's guidance about such oversight. We also interviewed NRCS officials in headquarters, the agency's state offices for all four prairie pothole states, and selected field offices about changes made since 2011—when NRCS began taking steps to address its backlog—to understand NRCS's policies and procedures for wetland

¹¹The OIG found that, in the prairie pothole states, NRCS began accepting as certified pre-1996 wetland determinations, which were based on older inventory maps and which NRCS previously regarded as unacceptable. In making the change, NRCS did not issue an official directive to its staff and did not publicly disclose the change, according to the report. U.S. Department of Agriculture, Office of Inspector General, *NRCS: Wetland Conservation Provisions in the Prairie Pothole Region* (Washington, D.C.: Jan. 19, 2017).

¹²83 Fed. Reg. 63,046 (Dec. 7, 2018); 85 Fed. Reg. 53,137 (Aug. 28, 2020) (amending sections within 7 C.F.R. pt. 12).

determinations and its staffing strategies for making wetland determinations and responding to related appeals. We selected nine field offices to visit and interview (six in North Dakota and three in South Dakota), generally including offices with higher numbers of wetland determinations completed and higher numbers of appeals.¹³ Our findings about the steps NRCS has taken to increase the consistency of wetland determinations in the prairie pothole region are not generalizable beyond the four prairie pothole states.

To examine the extent of appeals of NRCS's wetland determinations in the prairie pothole region, we analyzed data on appeals of wetland determinations. Specifically, we analyzed NRCS state offices' data on appeals of preliminary and final determinations in Minnesota, North Dakota, and South Dakota, for 2017 and 2018, the most recent data available at the time of our review. We also obtained data on 2017 and 2018 appeals of final determinations to USDA's National Appeals Division, which conducts administrative appeals hearings and reviews of USDA agency decisions. We did not analyze data from NRCS's state office in Iowa because the data were not complete and, therefore, were not sufficiently reliable for reporting information on appeals.¹⁴ To assess the reliability of the data, we reviewed them for any obvious errors or missing data, and we interviewed agency officials in state offices about the source of the data and any known reliability issues. We determined that the data from Minnesota, North Dakota, South Dakota, and the National Appeals Division were sufficiently reliable for reporting information on appeals.

To examine the results of appeals of NRCS's wetland determinations in the prairie pothole region, we reviewed all 164 files for preliminary determinations made in 2018 that were appealed in North Dakota and South Dakota to learn how NRCS addressed the appeals, including whether wetland specialists made changes to the determinations. We selected appeals of preliminary determinations made in 2018 because 2018 was the most recent year for which most appeals had been resolved. In addition, we reviewed eight files for 2017 through 2020 appeals of final determinations in North Dakota and South Dakota. We

¹³We also selected offices to include a diversity of wetland specialists. Each wetland specialist is assigned to multiple field offices.

¹⁴As discussed later in this report, officials from the Iowa state office said they did not track data on all appeals because they did not need the data to manage their workload. NRCS planned to track data on appeals in a new system by the end of 2020, according to a headquarters official.

selected these eight files because they were the most recent appeals that had been resolved in each state. We selected North Dakota and South Dakota because these are the two states with the most acres of wetlands in the prairie pothole region. We reviewed NRCS guidance and interviewed agency officials in headquarters, state, and field offices about NRCS's practices and procedures for handling appeals of preliminary and final wetland determinations in the four prairie pothole states. We reviewed letters NRCS sent to farmers after they filed appeals in the four states, and we compared them with agency guidance for the letters. We visited the nine field offices that we selected based on the factors described above. We compared the steps NRCS officials took to conduct wetland determinations and respond to appeals with the procedures outlined in NRCS's manuals and policy. Our findings about the results of appeals are not generalizable beyond North Dakota and South Dakota, and our findings about the letters NRCS sends to farmers after they file appeals are not generalizable beyond the four prairie pothole states.

To examine the approaches that NRCS and FSA used to ensure compliance with wetland conservation provisions, we reviewed NRCS and FSA guidance outlining procedures for conducting annual wetland compliance checks, conducting quality assurance reviews, and responding to reports of potential violations. We analyzed agency data on compliance checks, violations of wetland conservation provisions, waivers, and benefits withheld in fiscal years 2010 through 2018, the most recent time period for which agency processes for violations and waivers were complete.¹⁵ To assess the reliability of the data, we reviewed them for any anomalies or outliers; we also interviewed agency officials about the source of the data and any known reliability issues. We determined that these data were sufficiently reliable for reporting information about compliance with wetland conservation provisions.

We reviewed FSA documents related to 69 waivers in North Dakota and South Dakota to understand how the agency made the decisions. We selected these 69 because they constituted all waivers granted in the six counties with the most violations in the two states during the time frame

¹⁵We also analyzed data on violations of highly erodible land conservation provisions because FSA does not separately track the two types of violations in all cases. Under the highly erodible land conservation provisions of the 1985 Farm Bill, farmers must use approved conservation systems if they farm highly erodible land, defined as land that can erode at excessive rates. Violations occur when farmers do not use approved conservation systems, which protect against soil erosion.

we reviewed.¹⁶ We selected these two states because they have the most acres of wetlands in the prairie pothole region. We also interviewed representatives from farm and conservation groups about wetland determinations and violations. We selected these groups because they had submitted public comments or released public statements on related issues.¹⁷ The conservation groups brought to our attention sites in North Dakota and South Dakota where they had observed drainage activity and provided photographs and aerial imagery depicting the activity. For these sites, we reviewed wetland determination files to identify whether NRCS had assessed compliance on the tracts and documented whether the drainage activity was allowable. We interviewed NRCS officials from state offices in the four prairie pothole states and the nine selected field offices described above about the procedures outlined in their manuals for identifying violations of wetland conservation provisions and their practices for following the procedures. We also interviewed FSA officials from headquarters and state offices in North Dakota and South Dakota about these issues. We determined that the control activities component of internal control was significant to this objective, along with the underlying principles that management should design control activities to achieve objectives and respond to risks and implement control activities through policies. We also compared FSA documentation on good-faith waivers with FSA guidance on the waivers, and we compared NRCS's approach for its compliance checks with guidance in its manual and guidance from the Office of Management and Budget on risk management.

We conducted this performance audit from April 2019 to April 2021 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

¹⁶Because this was a nonprobability sample, the results of the sample cannot be generalized to waivers FSA granted in all counties in North Dakota and South Dakota or in all states but can provide examples of the decision processes used in some counties.

¹⁷Specifically, the farm and conservation groups submitted comments in February 2019 on USDA's interim final rule amending its highly erodible land and wetland conservation regulations, which were published in the *Federal Register* in December 2018, 83 Fed. Reg. 63,046 (Dec. 7, 2018); issued public statements in January 2020 on the Waters of the United States Rule; or both.

Background

Wetlands perform vital ecological functions, including providing critical habitat for wildlife and waterfowl, mitigating floods by slowing down and absorbing excess water during storms, purifying water by filtering out pollutants before they enter streams and lakes, storing carbon in the vegetation and the soil, and protecting upland areas from erosion. The prairie pothole region is unique because of its many small, shallow wetlands, known as potholes, which range in size from less than 0.1 acre to more than 60 acres and fill up with water in the spring, then dry up later in the year (see fig. 1). Even very small and intermittent wetlands can be important for a species. For example, temporary and seasonal wetlands tend to warm up first in the spring and can provide critical food for ducks preparing to breed, according to the U.S. Fish and Wildlife Service.

Figure 1: Wetlands and Cropland in the Prairie Pothole Region



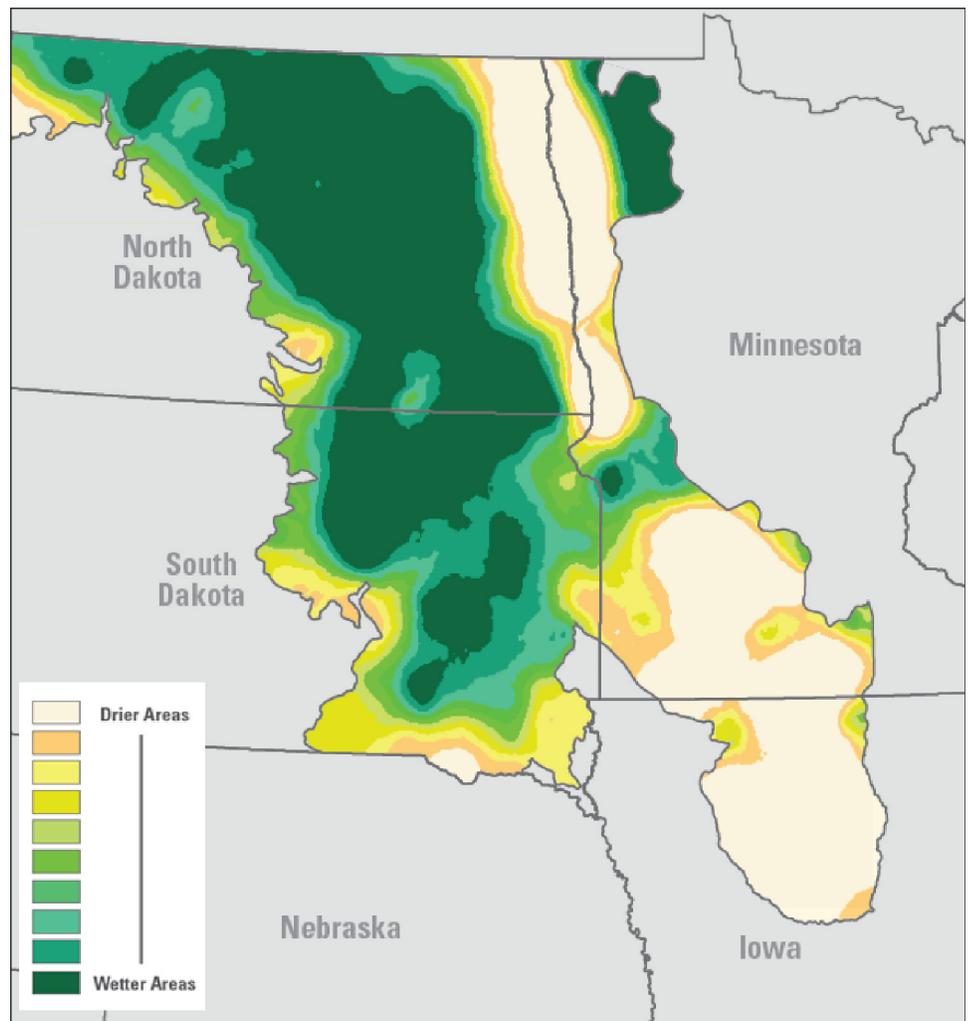
Source: U.S. Fish and Wildlife Service. | GAO-21-241

In the prairie pothole region, more than 125,000 acres of wetlands were converted to agricultural land between 1997 and 2009, according to the U.S. Fish and Wildlife Service's most recent assessment of the region's wetlands.¹⁸ North Dakota and South Dakota have the greatest density, or

¹⁸In addition, more than 87,000 acres of wetlands were restored from agricultural land between 1997 and 2009. The U.S. Fish and Wildlife Service estimated that in 1997, there were about 6.5 million acres of wetlands in the prairie pothole region. Dahl, *Status and Trends*.

number per square mile, of remaining wetlands in the region, according to the same assessment, as shown in figure 2.

Figure 2: Relative Wetland Density in the Prairie Pothole Region



Source: U.S. Fish and Wildlife Service. | GAO-21-241

The 1985 Farm Bill included provisions to conserve wetlands, as well as highly erodible cropland; to receive the benefits of most federal farm

programs, farmers must comply with these provisions.¹⁹ To implement both types of provisions after the 1985 Farm Bill was enacted, USDA expanded NRCS's role from one focused on helping farmers with technical assistance and conservation programs to one that includes ensuring compliance with the provisions.

The wetland conservation provisions specify that drainage systems that converted wetlands before the 1985 Farm Bill's enactment on December 23, 1985, are allowed and that farmers can cultivate crops in wetlands as long as they do not drain the wetlands.²⁰ NRCS identifies wetlands, determines whether farmers have violated wetland conservation provisions, and establishes related policies and procedures.²¹ NRCS headquarters is responsible for ensuring that procedures for identifying wetlands are followed accurately and consistently across states and for overseeing the agency's annual compliance checks. NRCS state offices are responsible for making wetland determinations, responding to related appeals, and conducting annual compliance checks. In addition, NRCS is to evaluate information on potential violations. Such information may be provided to FSA by officials from NRCS or other agencies, neighboring farmers, or others when they observe drainage activity, including installation of ditches or subsurface tile drainage systems (e.g., perforated pipes). When FSA receives such information, an agency official fills out a report of potential violation.²² Figure 3 depicts subsurface tile drainage.²³

¹⁹To be eligible for farm programs, farmers must use approved conservation systems if they farm highly erodible land, defined as land that can erode at excessive rates. Violations occur when farmers do not use approved conservation systems, which protect against soil erosion. In this report, we use the term "farmer" to include landowners, producers, operators, and all participants receiving farm program benefits. NRCS was known as the Soil Conservation Service from 1985 to 1994, when USDA renamed it the Natural Resources Conservation Service to better reflect the broad scope of the agency's mission.

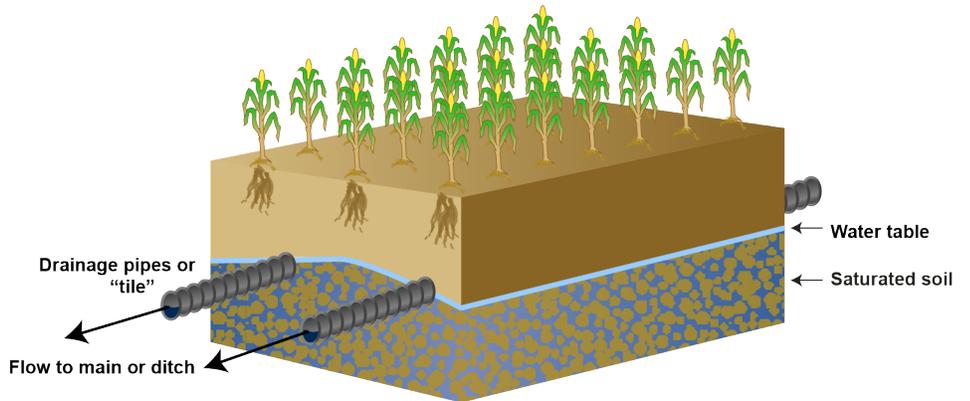
²⁰Throughout this report, we use the term "drained" to represent "converted."

²¹The 1985 Farm Bill, as amended, defines wetlands as having certain soils, vegetation, and hydrology (inundation or saturation by water at a given frequency or duration).

²²Specifically, an agency official fills out an FSA-569 form. FSA is to send the form to NRCS to evaluate compliance, and NRCS is to return the form to FSA with a final determination of whether any wetlands were improperly converted to cropland. In this report, we refer to these forms as "reports of potential violations."

²³Tile drainage is a type of drainage system that removes excess water from soil below its surface. Historically, such systems were composed of clay tiles, but plastic tubing is now more common.

Figure 3: Diagram of a Soil Profile with Subsurface (Tile) Drainage



Source: GAO adaptation of University of Minnesota Extension figure. | GAO-21-241

NRCS is to conduct wetland determinations in response to farmers' requests. When farmers apply for farm programs, they complete wetland certification forms that initiate a request for a wetland determination.²⁴ In signing the forms, farmers certify their compliance with wetland conservation provisions and acknowledge that they must file a revised form if they conduct activities that could affect compliance (such as installing drainage systems).²⁵ When farmers alter or intend to alter a wetland area, such as to install or modify drainage systems on their land, they are to complete the forms again, according to the FSA handbook.

After receiving a request, NRCS is to prepare a preliminary wetland determination, which identifies wetlands, nonwetlands, and other features on a map or image for a tract of land. Wetland determinations are to be completed by NRCS employees who have completed required training, have demonstrated proficiency in making the determinations, and have the approval and authority to make them, according to NRCS's National

²⁴Farmers use the AD-1026 form to certify compliance and request wetland determinations. The full name of the form is Highly Erodible Land Conservation (HELCS) and Wetland Conservation (WC) Certification.

²⁵Farmers should also file a revised form if they intend to level, fill, dredge, clear, or excavate land, according to the wetland certification form.

Food Security Act Manual (NRCS manual).²⁶ NRCS officials in the prairie pothole states use off-site methods to make many preliminary wetland determinations without visiting the tract, according to agency officials and an agency document. Off-site methods include analysis of aerial images, precipitation data, and soil surveys. In certain cases, such as when a potential violation has been reported, wetland specialists are to visit the site, according to the NRCS manual. On-site methods include assessments of vegetation, soil samples, and hydrology.²⁷

To identify a wetland, NRCS is to assess whether a site meets the statutory definition of wetland, which includes three diagnostic factors—soils, vegetation, and hydrology. If all three factors have certain qualities characteristic of wetlands, NRCS assigns a wetland designation to a map issued as part of the wetland determination. NRCS also assigns designations to certain types of land where draining is allowed under the 1985 Farm Bill:

- Prior converted cropland, or wetlands that were drained before December 1985.
- Farmed wetlands, or wetlands that were partially drained before December 1985 and still met the definition of wetland. These wetlands are allowed to be drained to the extent they were drained before December 1985 and not more.
- Manipulated wetlands, or wetlands that were drained after December 1985, if draining them was not for the purpose and did not have the effect of making production of an agricultural commodity possible (e.g., wetlands drained for construction of roads or buildings).
- Artificial wetlands, or lands that were nonwetlands under natural conditions but are saturated with water because of human actions, such as constructing ponds. These are not considered wetlands, according to the statutory definition.

NRCS also is to designate any wetland converted to cropland after December 1985 to be a potential violation. A converted wetland is an area that was formerly wetland, was drained after December 1985, and

²⁶U.S. Department of Agriculture, Natural Resources Conservation Service, *National Food Security Act Manual*, 5th ed. (Washington, D.C.: November 2010).

²⁷Hydrology is inundation or saturation by water at a given frequency or duration.

makes the production of an agricultural commodity possible.²⁸ For each site with a designation, NRCS is to outline the boundaries and determine the size.

For wetlands converted before December 1985, NRCS must ascertain the best-drained condition, or the greatest extent of drainage in the wetland before December 1985, according to the NRCS manual. If NRCS determines that the best-drained condition of a wetland before December 1985 was fully drained, the farmer can continue to drain it completely. However, if NRCS finds that the best-drained condition of a wetland was partially drained, the farmer is permitted to drain it only to the extent that it was drained prior to December 1985.

Farmers have 30 days to appeal preliminary determinations, as stated in NRCS regulations.²⁹ NRCS aims to resolve factual disputes at the lowest possible level within the agency, consistent with a goal in its appeals manual.³⁰ If a farmer appeals at this time, the same wetland specialist who conducted the preliminary determination is to conduct a site visit, meet with the farmer, review the determination, and issue a decision with any needed changes for a final determination.³¹ NRCS then sends the farmer an appeal decision letter that conveys the final determination. NRCS believes the appeals process improves the accuracy of wetland determinations and the sufficiency of associated documentation, according to a *Federal Register* notice.³² If the farmer does not appeal, the preliminary determination becomes final after 30 days.

²⁸Various manipulations can convert wetlands, according to the NRCS manual. For example, such manipulations include constructing ditches, installing subsurface drainage systems, and removing woody vegetation.

²⁹7 C.F.R. § 614.7.

³⁰According to NRCS's appeals manual, the goal of the informal appeals process is to maximize opportunity for resolution of factual disputes between participants and NRCS at the lowest possible level within the agency. Informal appeals include appeals of preliminary wetland determinations, requests for mediation, and appeals of final wetland determinations to FSA county committees.

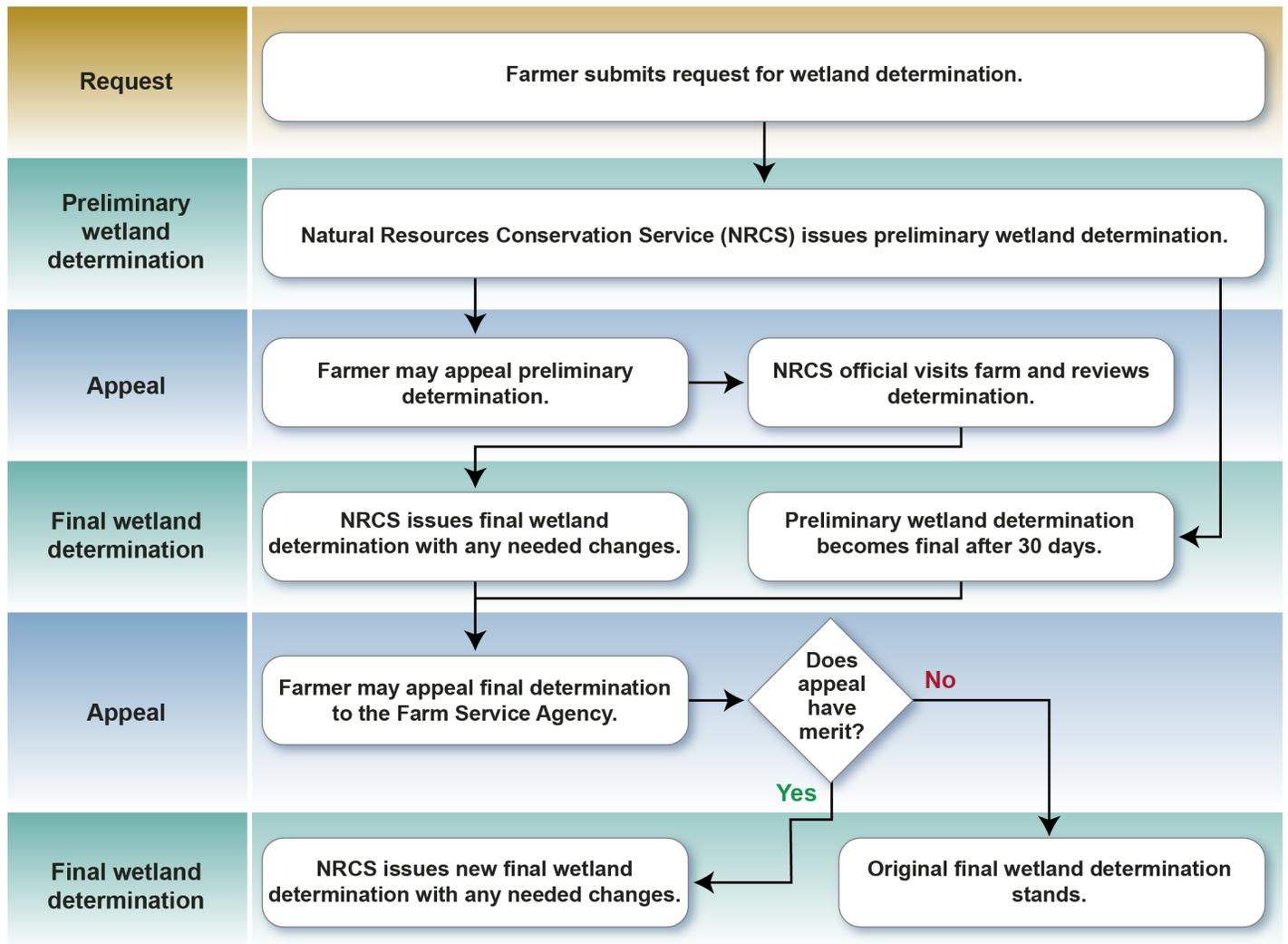
³¹If the preliminary determination remains adverse to the farmer after review, the NRCS official is to forward it to the state office to issue a final determination. 7 C.F.R. § 614.7(b)(4)). Instead of seeking reconsideration, farmers may request mediation to resolve factual disputes related to preliminary wetland determinations. 7 C.F.R. § 614.7(a)(2).

³²71 Fed. Reg. 28,239 (May 16, 2006).

The farmer may also appeal the final determination (see fig. 4) either to the FSA county committee or to the National Appeals Division, according to agency regulations.³³ The FSA county committee consists of local farmers elected by their peers for up to three consecutive 3-year terms. The committee decides whether the appeal has merit and, if so, FSA sends the wetland determination to the NRCS State Conservationist to review it and to make changes, as appropriate. The National Appeals Division holds hearings for farmers who are adversely affected by NRCS determinations. It considers evidence and decides whether NRCS's decisions were in error. If the National Appeals Division finds an NRCS decision to be in error, NRCS must issue a revised determination. Once the determination is final, NRCS notifies the farmer, and the determination generally remains valid indefinitely. However, a farmer may request a review if a natural event alters the topography or hydrology of the land such that the original determination is no longer a reliable indicator of the site conditions or if NRCS agrees the current determination is erroneous. In such cases, NRCS rescinds the original determination and prepares a new preliminary determination, according to agency officials.

³³7 C.F.R. § 614.8(b).

Figure 4: Wetland Determination and Appeal Process



Source: GAO analysis of NRCS information. | GAO-21-241

Note: Farmers may appeal final determinations either to the Farm Service Agency's county committee (shown above) or to the U.S. Department of Agriculture's National Appeals Division (not shown). In the states GAO reviewed, appeals to the county committee were more common.

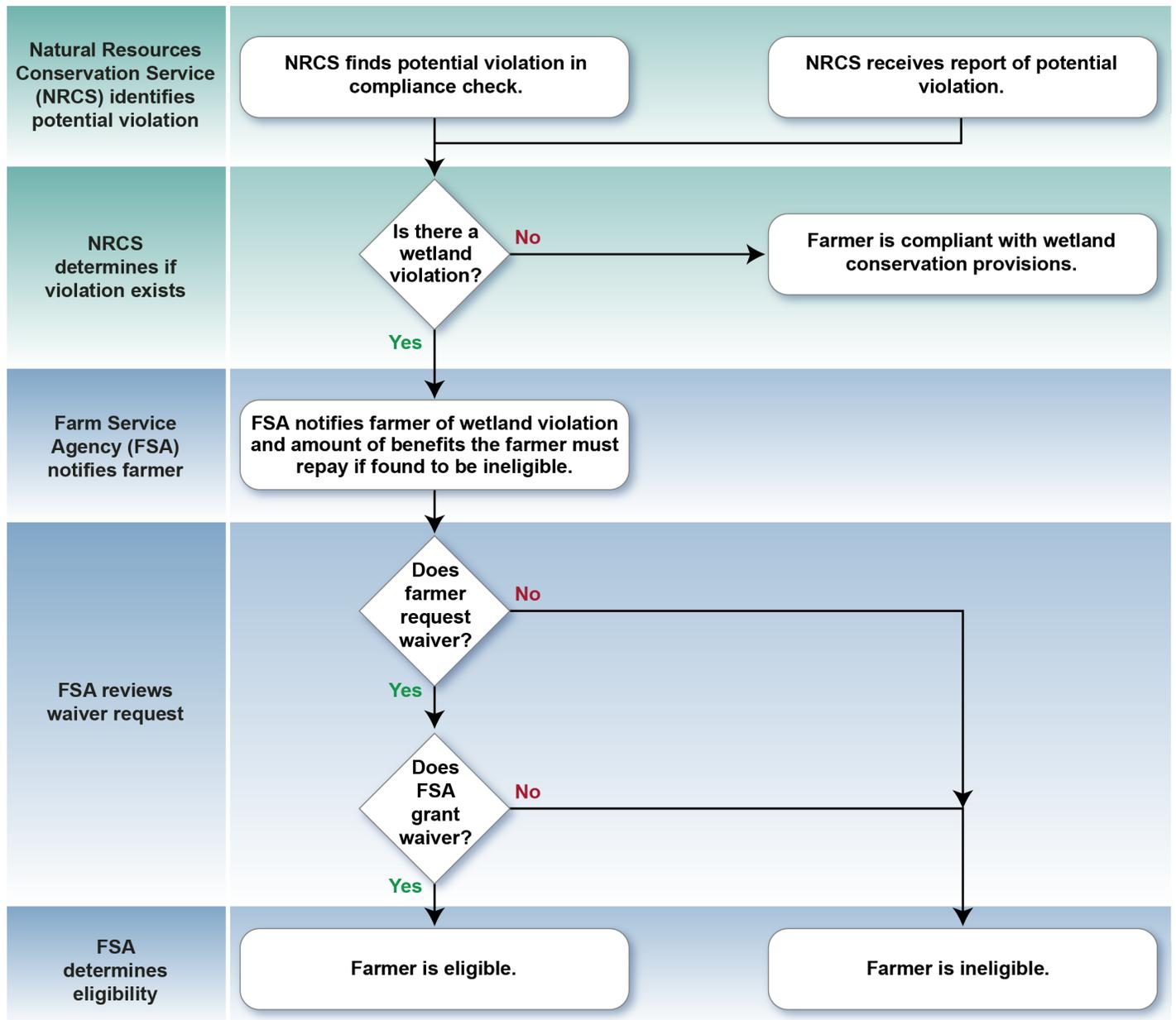
FSA is responsible for verifying eligibility for farm program benefits (based on NRCS's wetland determinations, and other factors) and administering such benefits. When NRCS finds that a farmer has converted a wetland in violation of wetland conservation provisions, FSA is responsible for deciding if the farmer is ineligible for applicable farm programs and notifies the farmer of any benefits to be withheld (see fig. 5). FSA also is

to verify eligibility for benefits subject to highly erodible land conservation provisions and withhold benefits for ineligible farmers. A farmer can request, and FSA may grant, a good-faith waiver of an ineligibility determination if FSA determines the farmer did not intend to violate provisions of the wetland or highly erodible land conservation regulations.³⁴ When a farmer requests a good-faith waiver, the FSA county committee is to review the case and decide whether FSA should grant the waiver. If FSA grants the waiver for a violation of wetland conservation provisions, the farmer must generally restore the wetland within 1 year.³⁵

³⁴In addition to requesting good-faith waivers, farmers may appeal FSA's eligibility determinations to the National Appeals Division.

³⁵Crop insurance participants may have up to 2 insurance years to restore the wetland.

Figure 5: Process for Assessing Farmers' Compliance with Wetland Conservation Provisions



Source: GAO analysis of NRCS and FSA information. | GAO-21-241

NRCS Took Steps to Increase Consistency of Wetland Determinations but Did Not Conduct Reviews as Directed by Agency Guidance to Ensure Consistency

To increase the consistency of wetland determinations, NRCS formed compliance teams and standardized procedures in the prairie pothole states, and it took additional steps at the national level. However, NRCS offices GAO reviewed did not conduct annual quality reviews as directed by agency guidance to ensure consistent application of procedures in wetland determinations.

NRCS Formed Compliance Teams, Standardized Procedures, and Took Other Steps to Increase Consistency of Wetland Determinations

To increase the consistency of wetland determinations in the four prairie pothole states, NRCS took several steps, including forming a compliance team in each state office, standardizing procedures for making wetland determinations, improving training, and beginning to establish a national cadre of experts to review certain determinations.

Compliance teams. Between 2011 and 2016, the four state offices each established a compliance team with wetland specialists to conduct activities related to wetland compliance, including making wetland determinations, responding to appeals of the determinations, and investigating reports of potential violations, according to agency officials in the state offices. To oversee the compliance teams, each state office created a position of Assistant State Conservationist for Compliance.

NRCS's internal reviews in 2017 reported that forming the compliance teams significantly improved the quality and consistency of wetland determinations in North Dakota and South Dakota, as well as wetland specialists' understanding of agency procedures.³⁶ Following procedures helps ensure consistency and increase the accuracy of determinations, according to the reviews. For example, in South Dakota, the accuracy rate of wetland determinations increased from 71 percent in 2013 to 89 percent in 2017, according to one of the reviews. Agency officials explained that forming these teams reduced the number of people

³⁶In 2017, NRCS reviewed North Dakota and South Dakota but did not review Iowa or Minnesota.

conducting wetland determinations, which helped increase consistency across determinations. For example:

- Before the team was established in North Dakota, at least 52 different agency officials could make wetland determinations. Since the team was established, fewer wetland specialists (e.g., 12 in 2019) make determinations, according to an NRCS document.
- In Iowa, before the compliance team was established, there were five managers overseeing wetland compliance independently, and the managers interpreted policies slightly differently from one another, according to an NRCS official in the state office. With the compliance team, one person oversees all 10 members of Iowa's team.

Also, under the previous staffing strategy, NRCS officials who made wetland determinations had multiple additional responsibilities, according to agency officials. Conversely, under the current strategy, wetland specialists focus exclusively on making wetland determinations and other conservation-related tasks.³⁷ This focus helps the specialists further develop their expertise and contributes to increased consistency in wetland determinations, according to officials we interviewed in NRCS's state offices.

Standardized procedures for wetland determinations. NRCS's state offices in the prairie pothole region standardized their wetland determination procedures by issuing new State Offsite Methods (which we refer to collectively as the off-site methods policy) in 2015 that were the same for all four states.³⁸ The off-site methods policy details steps wetland specialists are to take when making wetland determinations without visiting the tract, such as how to use aerial imagery to help determine whether a site meets the definition of a wetland. In addition, the policy specifies situations in which field visits are needed. In 2017 and 2018, NRCS state offices in the prairie pothole region revised their off-site methods policy to further clarify procedures and improve consistency in the application of these procedures, as stated in a *Federal Register*

³⁷In North Dakota and South Dakota, the compliance teams work on issues related to both wetland conservation and highly erodible land conservation, with team members focusing on one or the other in some cases, according to NRCS officials and documents. In Minnesota and Iowa, the teams focus entirely on wetland compliance issues, according to agency officials in state offices.

³⁸The four prairie pothole states—Iowa, Minnesota, North Dakota, and South Dakota—formed the North Central Wetlands Conservation Initiative, through which all four states agreed on a standard off-site methods policy.

notice.³⁹ The revised policy increased consistency within each state, as well as among the states, because the revised version included more details about how wetland specialists are to interpret policies when making a wetland determination, according to wetland specialists and NRCS officials in state offices. For example, the revised version clarified the types of data that wetland specialists can use to identify wetland boundaries. It also recommended using precise topographic images generated through a type of remote sensing data.⁴⁰

Improved training. In response to recommendations in NRCS's 2017 internal reviews, NRCS improved its training for wetland specialists. Specifically, in 2018, the agency revised one course and developed another mandatory course for wetland specialists to help ensure they apply national wetland compliance policy consistently.

National review of certain determinations. In 2020, NRCS took steps toward establishing a national wetland adverse determination cadre, to be made up of NRCS experts who will review certain determinations in support of state offices. Specifically, in 2020, NRCS announced development of the cadre, prepared a guide for its members, and solicited applications for positions on the cadre. According to NRCS documents, the cadre will review each wetland determination that (1) includes a converted wetland, (2) has been appealed, and (3) is adverse (the farmer disagrees with it). The purpose of the cadre is to reduce the number of wetland determinations being remanded to NRCS after appeal and to ensure the accuracy, quality, and consistency of wetland determinations it reviews, according to agency documents. NRCS expected the cadre to be functioning by the end of 2020, according to a headquarters official.

³⁹82 Fed. Reg. 28,469 (June 22, 2017).

⁴⁰Light Detection and Ranging (LiDAR) is a remote sensing method used to examine the surface of the earth and generate precise, three-dimensional information about the shape of the earth and its surface characteristics.

NRCS Offices GAO Reviewed Did Not Conduct Annual Quality Reviews as Directed by Agency Guidance to Ensure Consistent Application of Procedures in Wetland Determinations

According to guidance in the NRCS manual, NRCS state offices are directed to conduct annual quality control reviews for a sample of all wetland determinations.⁴¹ Further, the manual specifies that quality control reviews are to be conducted by people outside the office being reviewed and to include tracts selected by NRCS headquarters, among other things. Such practices can help ensure greater independence in reviews.

We found that none of the four state offices we reviewed followed all of the manual’s directives for quality control reviews. Specifically, we found that from 2017 through 2019, two state offices—Minnesota and North Dakota—completed two or more reviews for at least 2 years, as shown in table 1. However, the Minnesota and North Dakota state offices did not follow the manual’s directives with respect to how the tracts were to be selected, in part because headquarters did not provide tracts for review, according to agency officials from the state offices. The other two state offices—Iowa and South Dakota—did not conduct any reviews for 2 or more years.

Table 1: Quality Control Reviews Completed by Natural Resources Conservation Service (NRCS) State Offices in the Prairie Pothole Region, 2017 through 2019

| State | 2017 | 2018 | 2019 |
|--------------|------|------|--------------|
| Iowa | 0 | 0 | 0 |
| Minnesota | 11 | 0 | 2 |
| North Dakota | 31 | 7 | ^a |
| South Dakota | 0 | 0 | ^b |

Source: GAO analysis of information from NRCS officials in state offices, and documents. | GAO-21-241

^aOfficials from the North Dakota state office indicated that reviews were in progress as of August 2020.

^bThe South Dakota state office completed the off-site portion of 10 reviews but did not complete field visits for seven of the 10, according to NRCS documentation.

Officials in the state offices provided the following explanations, among others, for not completing reviews as directed:

- Flooding and snow prevented them from conducting field visits;

⁴¹The NRCS manual also directs state offices to conduct quality control reviews for a sample of all appeals but does not specify the number of wetland determinations and appeals to include in the samples. NRCS officials in the state offices said that any quality control reviews of appeals would generally be conducted as part of reviews of wetland determinations or as part of the appeals process.

-
- The state’s compliance team was not fully staffed; or
 - During a turnover in leadership, the reviews were not completed.

The NRCS manual also directs NRCS’s headquarters officials to oversee state offices’ quality control activities to ensure they are conducted according to agency policy and to ensure consistent wetland determinations among states. Reviews may identify errors, such as inconsistent interpretations of procedures, which state offices may correct once they become aware of the errors. For example, in 2017, North Dakota’s reviewers found that 55 percent of wetland determinations they reviewed did not use maps from the correct year when providing the determinations to farmers. After the state office took corrective actions, reviewers found that 100 percent of the determinations they reviewed in 2018 used the correct maps. However, a headquarters official told us that headquarters did not oversee state offices’ quality control activities because NRCS provides considerable authority to state offices and, traditionally, headquarters has not conducted oversight of such activities. Without overseeing state offices to ensure that they conduct quality control reviews of wetland determinations as directed in its manual, NRCS may be missing opportunities to correct deficiencies, such as inconsistent application of wetland determination procedures.

Appeals of Wetland Determinations Often Resulted in Changes to the Determinations, and Sometimes the Basis Was Unclear

Wetland determinations in prairie pothole states were appealed at different rates, but the appeals often resulted in changes allowing farmers to drain and cultivate crops on more of their land without violating wetland conservation provisions. Our analysis showed that in some states, NRCS’s appeal decision letters did not provide explanations for changes to the determinations, and NRCS made some of the changes on the basis of unclear guidance.

Wetland Determinations Were Appealed at Different Rates in the Prairie Pothole States

In 2017 and 2018, the 2 years we reviewed, wetland determinations were appealed at different rates in the prairie pothole states, and appeals of preliminary determinations were more common than appeals of final determinations in North Dakota, Minnesota, and South Dakota. NRCS’s preliminary wetland determinations were appealed more frequently in North Dakota (29 percent of the time) than in Minnesota (5 percent of the time) or South Dakota (3 percent of the time). At the county level, appeal rates varied considerably. In North Dakota, the five counties with the highest appeal rates accounted for about half of statewide appeals of the preliminary determinations, and individual county-level appeal rates were as high as 63 percent. In Minnesota, county-level appeal rates for

preliminary determinations were as high as 24 percent, and in South Dakota, these rates were as high as 20 percent, as shown in table 2. In Iowa, NRCS did not track data on all appeals of 2017 and 2018 wetland determinations, so the rate of appeals is not known, according to officials in the Iowa state office. The Iowa officials said they did not track data on all appeals because they did not need the data to manage their workload. NRCS began implementing a new tracking system for wetland determinations and appeals in early 2020 and plans to complete implementation of the system in 2021, according to a headquarters official.

Table 2: Minnesota, North Dakota, and South Dakota Counties with Highest Appeal Rates for Preliminary Wetland Determinations, 2017 and 2018

| State and county | Total preliminary wetland determinations, 2017 and 2018 | Number of preliminary determinations appealed | Percentage of preliminary determinations appealed |
|---------------------|---|---|---|
| Minnesota | 5,412^a | 286 | 5 |
| Kittson | 38 | 9 | 24 ^b |
| Wright | 38 | 7 | 18 |
| East Polk | 37 | 6 | 16 |
| Steele | 48 | 7 | 15 |
| McLeod | 59 | 8 | 14 |
| North Dakota | 1,121 | 321 | 29 |
| Barnes | 120 | 76 | 63 |
| Ransom | 50 | 29 | 58 |
| Stutsman | 50 | 28 | 56 |
| LaMoure | 37 | 17 | 46 |
| Cass | 46 | 15 | 33 |
| South Dakota | 3,893 | 100 | 3 |
| Brule | 35 | 7 | 20 |
| Hanson | 57 | 7 | 12 |
| Beadle | 93 | 10 | 11 |
| Brown | 189 | 15 | 8 |
| McCook | 123 | 9 | 7 |

Source: GAO analysis of Natural Resources Conservation Service (NRCS) data. | GAO-21-241

Note: The Minnesota and North Dakota counties listed are those for which NRCS completed 30 or more preliminary wetland determinations during the 2-year period and that had the highest appeal rates. The South Dakota counties listed are those that had at least seven appeals during the 2-year period and that had the highest appeal rates.

^aIn Minnesota, there were 14 additional tracts that were missing some data entries in NRCS's database. Taking this into account, the number of preliminary wetland determinations in Minnesota in

2017 and 2018 could have been as high as 5,426, which would not change the percentage of appeals.

^bIn Kittson County, there were five additional tracts that were missing some data entries in NRCS's database. Taking this into account, the rate of appeals in Kittson County could have been as low as 21 percent, in which case it would remain the county in Minnesota with the highest percentage of appeals.

At the state level, differences in appeal rates for preliminary determinations may be due in part to differences in approaches by NRCS officials. In North Dakota, NRCS informed farmers in public meetings about the opportunity for appeals, according to agency officials in the state office. The agency's regulations call for NRCS to conduct field visits or meet in the office to review preliminary determinations that are appealed with a request for reconsideration; farmers therefore have a chance to meet with a wetland specialist.⁴² In addition, agriculture groups in North Dakota encouraged farmers to use the appeals process, according to NRCS officials in headquarters. In South Dakota, NRCS officials in the state office told us they encouraged wetland specialists to build rapport with farmers and discuss their determinations before they were issued or appealed.

At the county level within states, the variation in appeal rates may have stemmed from a variety of factors. Such factors may include the density of wetlands, amount of drainage activity, qualifications of wetland specialists conducting the determinations, or relationships between NRCS and farmers in the county, according to agency officials from the North Dakota and South Dakota state offices.⁴³

After appealing their preliminary determinations to NRCS and receiving a final determination, farmers who were unable to resolve their disputes at this level sometimes appealed their final determinations to the local FSA county committees or to the National Appeals Division. In 2017 and 2018, Iowa had 11 appeals to FSA county committees, Minnesota had two, North Dakota had 37, and South Dakota had five, according to NRCS documents and officials. Farmers appealed to the National Appeals

⁴²See 12 C.F.R. § 614.7(b).

⁴³According to NRCS officials in headquarters, appeal rates are typically higher for wetland determinations resulting from reports of potential violations than they are for determinations resulting from farmer requests. Consequently, some counties may have higher appeal rates because they have more reports of potential violations.

Division eight times during 2017 and 2018 in the four states, according to National Appeals Division data.⁴⁴

Appeals of 2018 Wetland Determinations Often Resulted in Changes, and NRCS Sometimes Did Not Explain the Basis for These Changes

In cases where farmers in North Dakota and South Dakota appealed wetland determinations, the appeals frequently resulted in changes that allowed farmers to drain and cultivate more of their land.⁴⁵ Specifically, in our review of all the files for 2018 preliminary determinations appealed in North Dakota and South Dakota, we found that 136 of the 164 appeals were complete.⁴⁶ Of the 136 completed appeals, 118 were changed. As discussed previously, wetland determinations include maps designating different types of wetlands, as well as potential violations of wetland conservation provisions. Examples of changes made to the final determinations included removing designations for potential violations on 44 final determinations and removing wetland designations for 342 acres in total, as shown in table 3. These designations were replaced with other designations, such as those for nonwetlands or prior converted cropland. The new designations generally allow the farmers to drain and cultivate crops on more land without violating wetland conservation provisions. In some cases, NRCS changed designations from potential violations to wetlands when farmers restored the wetlands by filling in noncompliant ditches, for example. In such cases, farmers could not cultivate crops on more land, but they did not have to repay benefits, as they would have been required to do if they were found to be violating wetland conservation provisions. According to NRCS officials in headquarters and state offices, all of these changes made the final determinations more accurate.

⁴⁴Farmers may appeal final wetland determinations to the National Appeals Division instead of appealing to FSA county committees or after doing so.

⁴⁵We reviewed all 2018 preliminary wetland determinations that were appealed in North Dakota and South Dakota. We selected these two states because these are the two states with the most acres of wetlands in the prairie pothole region.

⁴⁶Twenty-eight of the 164 appeals were either still in progress or were missing documentation at the time of our review. In North Dakota, 19 appeals were in progress, and one was missing documentation at the time of our review. In South Dakota, four appeals were in progress, and four were missing documentation. NRCS officials in the state offices said the appeals in progress were not complete for three main reasons: (1) weather or scheduling conflicts had prevented wetland specialists from conducting field visits, (2) NRCS was waiting for the farmer's attorney or consultant to respond to agency communications, or (3) NRCS was conducting additional reviews of the determinations before finalizing them. An agency official in the South Dakota office said that, for preliminary determinations completed in 2019 and later, they have improved their process for storing documents.

Table 3: 2018 Preliminary Wetland Determinations, Appeals, and Outcomes, North Dakota and South Dakota

| State | 2018 Preliminary wetland determinations | | | Final wetland determinations after appeal | | | |
|--------------|---|---------------------------|--|---|--------------------------|---|---|
| | Number completed | Number appealed (percent) | Number with potential violation designations | Number completed | Number changed (percent) | Acres with preliminary wetland designations removed | Number with potential violation designations removed (percent) ^a |
| North Dakota | 632 | 133 (21) | 47 | 113 | 108 (96) | 320 | 42 (89) |
| South Dakota | 1,603 | 31 (2) | 2 | 23 | 10 (43) | 22 | 2 (100) |

Source: GAO analysis of Natural Resources Conservation Service data and wetland determination files. | GAO-21-241

^aDenotes the percentage of final wetland determinations after appeal, with one or more potential violation designations removed.

Of the 136 completed appeals of preliminary wetland determinations, 23 were in South Dakota, and NRCS made changes to 10 of these determinations. For example, in one case, a wetland specialist reduced the size of a wetland because a field visit revealed that the original size was in error. In another case, a wetland specialist removed a wetland designation after the farmer provided documentation that the basin was wet because of human actions and thus did not meet NRCS’s definition of wetland.⁴⁷ In South Dakota, NRCS provided explanations like those in appeal decision letters that the state office sent to farmers with their final determinations. Farm groups we interviewed told us it is helpful to farmers when NRCS includes such explanations in the letters. Under NRCS regulations and the appeals manual, the letters must include findings of fact that provide the basis for the determination. The findings of fact are to include pertinent facts based on evidence that is specific to the determination. Accordingly, the South Dakota state office’s letters described each change that was made to the determinations and included detailed evidence and explanations for why changes were or were not made for each basin in question.⁴⁸

The remaining 113 of the 136 completed appeals of preliminary wetland determinations were in North Dakota, and NRCS made changes to 108 of these determinations. Wetland specialists made the changes for various reasons, such as because they saw a drain in an aerial image that they previously missed, interpreted an image to indicate that a basin was dry

⁴⁷Specifically, an artesian well had been installed in 1905, allowing water that was naturally under pressure to flow to the surface.

⁴⁸Similarly, the Minnesota state office’s letters also included detailed evidence and explanations for any changes.

rather than wet, or determined that a different year should be used to assess the best-drained condition, according to documents in the files we reviewed. Changes such as these are allowable under NRCS procedures, which rely to a considerable degree on professional judgment.

However, in North Dakota, the appeal decision letters to farmers did not provide evidence specific to the determinations, as called for in NRCS's appeals manual, and they did not say whether any changes were made or provide explanations for any changes made.⁴⁹ Instead, the letters included the date the field visit was conducted and standard language on the purpose of the field visit, the definition of wetlands, and agency regulations and procedures for making wetland determinations. Agency officials in North Dakota told us the state office does not include specific information about the basis for any changes made because the office uses a template for appeal decision letters approved by NRCS headquarters in 2012, which does not include the information, and the letters are more reader friendly this way.

NRCS headquarters does not plan to change the template for appeal decision letters, according to a headquarters official. Unless NRCS updates the template to stipulate that specific facts providing the basis for each determination are to be included, as called for in the agency's appeals manual, farmers may not understand the basis for determinations on their land. As a result, farmers may appeal at a higher level, hindering NRCS's aim of resolving disputes at the lowest possible level within the agency.

When farmers appealed their final determinations to the local FSA county committees in North Dakota and South Dakota, the committees usually found that the appeals had merit, and FSA sent them to the NRCS state office for review, according to wetland specialists and FSA officials. For the eight appeals of this type that we reviewed in North Dakota and South Dakota, NRCS state offices also made changes to the wetland determinations in all eight cases. In addition, for the eight times that farmers appealed their final determinations to the National Appeals Division during 2017 and 2018 in the four prairie pothole states, NRCS rescinded the determinations in four cases, the farmer withdrew the

⁴⁹The Iowa state office's letters also did not consistently include specific information about the basis for the determinations, but the letters did disclose changes that were made.

appeal in one case, and the National Appeals Division found that the agency was not in error in the other three cases.

NRCS Made Some Changes to Wetland Determinations on the Basis of Unclear Guidance

According to NRCS wetland specialists, determinations may need to be changed after appeal because of missing information during the preliminary determination. For example, soil maps sometimes lack precise information needed for accurate wetland determinations, leading to conclusions that need to be revised when soil samples are collected onsite. In addition, missing aerial images can lead to inaccuracies that are corrected when farmers or consultants provide the images. To help increase the accuracy of wetland determinations, the South Dakota state office purchased all available aerial images for years that were missing in the state office's collection, according to an agency official in the state office.⁵⁰

Preliminary determinations are also sometimes changed because of different interpretations about how agency procedures should be applied. For example, wetland specialists have sometimes inconsistently applied agency procedures for identifying the best-drained condition of a basin, according to agency officials in state offices. Our interviews with wetland specialists, review of NRCS's off-site methods policy, and review of agency files also indicate that wetland specialists are applying the best-drained condition standard inconsistently and that the correct approach is not clearly defined in the off-site methods policy. NRCS wetland specialists in the prairie pothole states described to us two different approaches for applying the standard:

- Wetland specialists use an image from the year that (1) had normal precipitation levels; and (2) most closely follows installation of a drain, to ascertain the best-drained condition of a basin.
- Wetland specialists use professional judgment to select the most appropriate image to use.

We reviewed the off-site methods policy and found that it is unclear and includes both approaches without clarifying when specialists should use each approach. For example, in one place, the guidance states that the year of the image shall be the closest year following the manipulation that most accurately reflects best-drained condition. In another place, the

⁵⁰NRCS's South Dakota state office purchased the images from the National Agriculture Imagery Program (NAIP), according to the agency official. NAIP is administered by FSA.

guidance states that the wetland specialist must consider all available imagery for the years following the manipulation year.⁵¹

In our review of NRCS files, we found several preliminary determinations that were appealed included designations that would limit the extent to which a farmer could drain certain basins, based on the best-drained condition standard. After NRCS addressed the appeals of these preliminary determinations and applied the standard again, the final determinations had designations generally allowing farmers to completely drain the basins.⁵² For example:

- In one preliminary determination, a wetland specialist determined that the best-drained condition of a 66-acre wetland was in 1984 and that the wetland was partially drained at the time. After the farmer appealed, the wetland specialist changed the best-drained condition year to 1979 and determined that the wetland was completely drained at the time, so the farmer was allowed to drain the 66-acre wetland. According to NRCS officials in headquarters, the wetland specialist changed the best-drained condition year on the basis of aerial photography that was discovered during the appeal process.
- After designating 17 basins as partially drained based on off-site methods used in a preliminary determination, a wetland specialist changed the designation to fully drained for 11 of the 17 basins (totaling 10.5 acres) after the farmer appealed. For 10 of the 11 basins, the wetland specialist made the changes because these basins were dry during a May 2018 field visit, which was an unusually wet period in the state, according to agency officials.⁵³

The best-drained condition standard was also the basis for changes NRCS made when final wetland determinations were appealed and for decisions to rescind existing wetland determinations and issue new ones,

⁵¹North Dakota's off-site methods policy uses slightly different wording in the first place—stating that the year chosen will be the closest year following the manipulation as possible—but uses the same wording in the second place.

⁵²Specifically, the final determinations had designations of prior converted cropland, which authorizes farmers to conduct drainage activities with no restrictions unless the drainage would convert adjacent wetlands, according to the NRCS manual.

⁵³For the 11th basin, the wetland specialist revised the best-drained condition year and found that the basin was fully drained in that year.

according to our review of agency files.⁵⁴ NRCS internal reviews and our interviews with agency officials in the four state offices and headquarters also indicated that the standard is unclear. For example, from 2017 through 2019, NRCS quality control reviews in the prairie pothole states identified instances of wetland specialists inconsistently interpreting the best-drained condition standard. An agency official from one state office told us the standard is interpreted in different ways across the prairie pothole region. A headquarters official told us there have always been challenges with interpreting the best-drained condition standard.

In addition, in North Dakota, when the state office reviewed a final determination that had been appealed, the office changed a designation for violation to one for manipulated wetland on the basis of unclear guidance in the NRCS manual. We found that NRCS officials we interviewed in state offices and headquarters interpreted agency guidance on the designation for manipulated wetland differently. The designation for manipulated wetland is to be used for a wetland drained after December 1985 if the drainage activity (1) was not for the purpose of making agricultural production possible and (2) did not make production possible, according to the NRCS manual.⁵⁵ Agency officials in the North Dakota office told us the drained wetland was on pastureland rather than cropland, so it was not for the purpose of making production possible, and it did not make production possible because the wetland was still saturated in some years. NRCS stated that it is not evident that the manipulated wetland designation was misapplied in this instance. However, NRCS officials in headquarters and another state office said it would be unusual to use this designation for a drained wetland on pastureland. Further, wetlands adjacent to grassy areas provide important ecological benefits, according to the U.S. Fish and Wildlife Service.⁵⁶ The NRCS manual does not mention pastureland in its guidance on the manipulated wetland designation, but a USDA document with frequently

⁵⁴In South Dakota, officials in the state office told us that many of the requests they receive to replace determinations are for those that were issued prior to 1996 (when NRCS did not apply the best-drained condition standard) and that include designations allowing farmers to partially, but not fully, drain basins.

⁵⁵An agricultural commodity is defined in statute and generally means a crop planted and produced by annual tilling of the soil.

⁵⁶Grasslands connected or in close proximity to wetlands are crucial for nesting waterfowl and other wildlife species, and grassland buffers around wetlands can have beneficial effects on wetland water quality, according to a U.S. Fish and Wildlife Service report. Dahl, *Status and Trends*.

asked questions states that converting a wetland to pasture can make agricultural production possible and, because making agricultural commodity production possible by converting a wetland is a violation of wetland conservation provisions, farmers with pastureland must certify that they have not converted a wetland.⁵⁷

The off-site methods policy states that its purpose is to provide guidance to agency officials to maximize consistency and accuracy of wetland determinations. In addition, the NRCS manual lists quality assurance responsibilities to include ensuring consistent and uniform wetland determinations within each state and between adjacent states. By clarifying, in documentation, how wetland specialists should apply the agency's procedures for wetland determinations, particularly for the best-drained condition standard, NRCS could better ensure that its specialists are applying the procedures consistently, both to preserve wetlands and to treat farmers equitably.

NRCS Checks Compliance without a Risk-Based Approach and Does Not Report All Potential Violations, and FSA Sometimes Grants Waivers with Weak Justification

To help ensure compliance with wetland conservation provisions, NRCS conducts annual compliance checks of a sample of tracts for farmers participating in farm programs and evaluates reports of potential violations. However, NRCS does not generally use a risk-based approach in selecting tracts to check, and NRCS officials do not report all potential violations they observe. From 2014 through 2018, NRCS identified few violations each year in North Dakota and South Dakota—the two states with the most acres of wetlands in the prairie pothole region. Additionally, FSA frequently granted waivers for such violations, and its decisions were sometimes based on weak justifications.

NRCS Conducts Compliance Checks for a Small Sample of Tracts and Does Not Use a Risk-Based Approach

Each year, according to the NRCS manual, NRCS headquarters is to randomly select a national sample of tracts for farmers participating in farm programs that are subject to conservation provisions and check the sample for compliance with these provisions. NRCS selects and checks a sample of about 1 percent of tracts subject to the provisions, according to an official from headquarters. In the random sample, each tract has an equal probability of selection. However, because there are more than 1

⁵⁷U.S. Department of Agriculture, "Frequently Asked Questions, Conservation Compliance" (Washington, D.C.: Aug. 31, 2015).

million tracts in the four prairie pothole states, many tracts rarely come up in the sample, even if they meet NRCS selection criteria, which include risk-based factors, as discussed below. NRCS data from 2014 through 2018 show that NRCS conducted compliance checks on an average of 5,683 tracts in the four prairie pothole states—just over 0.5 percent of tracts for farmers participating in farm programs subject to wetland conservation provisions. As discussed later in this report, these compliance checks sometimes resulted in identification of violations.

NRCS's compliance-checking approach is not fully consistent with the NRCS manual, which specifies that the national sample is to be selected randomly but also calls for the sample to include certain categories of tracts, some of which we identified as risk based. Some of these categories are to be included at the national level, and others are to be added at the state level. At the national level, there are nine such categories, and it is unclear whether the inclusion of tracts in these categories is required; but at the state level, the manual specifies that addition of five categories of tracts is mandatory. We found that at the national level, NRCS's headquarters includes four of the nine categories and does not include the remaining five categories. At the state level, NRCS consistently adds two of the five categories and does not consistently add three categories of tracts.

At the national level, some of the categories to be included appear to be risk based, such as tracts associated with a significant level of farm program payments and tracts with characteristics where potential violations might be expected to occur. However, officials from NRCS headquarters told us they do not include these categories of tracts in the sample because NRCS does not want to be perceived as targeting certain farmers and because using a random approach helps ensure that all farmers realize that they could be checked in any given year.

In identifying categories of tracts to be included in the sample, the NRCS manual specifies that adding the following five categories of tracts is mandatory at the state level:

1. tracts where potential violations were reported,
2. tracts referred by other USDA agencies,
3. tracts where a variance or exemption was granted the previous year,
4. tracts of farmers who are requesting reinstatement in farm programs, and

5. tracts for no more than 5 percent of all FSA farm credit loans.

The first four categories of tracts appear to be risk based. NRCS consistently added tracts in the third and the fifth categories to the sample for the four prairie pothole states, according to NRCS officials in the state offices, but they did not consistently add tracts for the other categories. NRCS officials told us they did not add the tracts for the other categories for various reasons, including that one of the categories did not make sense. We examined the relevant guidance and found that it was not always clear how to implement it. For example, the manual does not specify whether all or a sample of tracts are to be included from each category.

NRCS data from 2014 through 2018 show that a small number of tracts have been added to the national sample in the four prairie pothole states.⁵⁸ Specifically, from 2014 to 2018, the number of tracts added to the national sample of compliance checks in the four prairie pothole states decreased from 552 to 166 (from 10 percent to 3 percent), as shown in table 4.

Table 4: Number of Tracts Added at the State Level to the Sample for Annual Compliance Checks in Prairie Pothole States, 2014 through 2018

Tracts in the sample are checked for compliance with wetland conservation provisions in federal law; under such provisions, to receive the benefits of certain U.S. Department of Agriculture farm programs, farmers must not convert wetlands to farmland.

| State | Tracts subject to wetland conservation provisions | Average number of tracts in the sample before addition of tracts at the state level ^a | Number of tracts added to the sample at the state level | | | | |
|--------------|---|--|---|------------|------------|------------|------------|
| | | | 2014 | 2015 | 2016 | 2017 | 2018 |
| Iowa | 324,088 | 1,396 | 191 | 280 | 274 | 141 | 91 |
| Minnesota | 293,954 | 935 | 135 | 130 | 127 | 35 | 20 |
| North Dakota | 203,069 | 1,277 | 94 | 70 | 139 | 0 | 43 |
| South Dakota | 213,632 | 959 | 132 | 99 | 68 | 7 | 12 |
| Total | 1,034,743 | 4,567 | 552 | 579 | 608 | 183 | 166 |

Source: GAO analysis of Natural Resources Conservation Service (NRCS) data on annual compliance checks. | GAO-21-241

Note: According to NRCS officials in headquarters, in 2014, 2015, and 2016, states added tracts for farmers who participated in the federal crop insurance program. Starting in 2017, tracts were added for crop insurance participants by headquarters instead, resulting in a decrease in tracts added at the state level.

⁵⁸NRCS's compliance system does not direct states to differentiate between the five categories for tracts added to the compliance check sample.

^aThe average number of tracts in the sample before the addition of tracts at the state level does not include the number of tracts in the sample in 2015. When developing the sample for the 2015 compliance check, NRCS used an incomplete universe of tracts, which inadvertently omitted some tracts. NRCS has since corrected its sampling methods.

In contrast to NRCS, other USDA agencies use risk-based approaches to achieve their objectives and increase the efficiency of their compliance checks. These approaches include nonrandom, as well as random, techniques. Nonrandom techniques include using (1) risk-based information and (2) data mining—a technique for extracting knowledge from large volumes of data—to select a sample of farms for review. For example, FSA uses information on farm payments and farms' organizational structure to select its sample of farms to review for compliance with a requirement that farmers be actively engaged in farming.⁵⁹ USDA's Risk Management Agency, which administers the federal crop insurance program, uses data mining to review claims and identify anomalies, such as excessive crop yields and severe losses, which suggest that the claims are at higher risk of fraud, waste, or abuse. FSA then focuses its compliance checks on these claims. Using risk-based information to focus compliance checks has increased the efficiency of its compliance checks by better focusing limited resources, according to an agency report.⁶⁰

NRCS and FSA have data that could be used to develop a more risk-based sample for NRCS's annual compliance check. For example, FSA's annual crop acreage reports include data on the total acreage of a given tract, as well as the number of acres in that tract on which a farmer cultivates or does not cultivate crops. NRCS could use the acreage reports to identify anomalies associated with higher-risk tracts. For example, if wetlands were converted to croplands, the acreage report

⁵⁹The criteria that FSA uses to select farms for compliance reviews include payment amounts and whether a farming operation (such as a general partnership) has undergone an organizational change in the past year. Organizational changes are relevant because the total payment amount that a farming operation receives can depend on the number of members in the operation.

⁶⁰U.S. Department of Agriculture, Risk Management Agency, *Program Compliance and Integrity, Annual Report to Congress, January-December 2006* (Washington, D.C.: July 2011).

would show an atypical increase in acreage with crops, even in the wettest of years.⁶¹

The Office of Management and Budget's Circular A-123 directs agencies to use a risk-based approach toward meeting objectives—in this case, ensuring compliance with wetland conservation provisions.⁶² By clarifying and updating the manual to call for a risk-based approach—including random and nonrandom techniques—to be used in selecting a sample, NRCS could make its compliance checks more efficient and effective.

NRCS Officials Do Not Report All Potential Violations

As part of its efforts to ensure compliance with wetland conservation provisions, NRCS also evaluates reports of potential violations to determine whether violations occurred. Such reports may be initiated by NRCS officials, neighboring farmers, officials from other agencies, and concerned citizens.⁶³ When NRCS finds violations, it provides information to FSA to use to determine farmer eligibility for benefits.

In the past, NRCS field office staff and wetland specialists initiated reports of potential violations if they saw drainage activity that could violate wetland conservation provisions, according to our review of agency files and our interviews with NRCS field office staff and wetland specialists. However, NRCS field office staff and wetland specialists told us that they used to submit these reports but have not done so recently. Specifically, NRCS officials from all of the state offices and wetland specialists we interviewed in the prairie pothole states told us they do not initiate a report when they observe a potential violation, unless the potential violation is on a tract for which they are actively conducting a wetland determination. Wetland specialists said they sometimes observe potential violations while driving between farms; on tracts adjacent to those where they are providing technical assistance; or while reviewing aerial imagery for other conservation programs, but they do not report these potential violations.

⁶¹Under the 1985 Farm Bill, farmers can cultivate crops on wetlands that have not been converted, but they would more commonly do so in normal and dry years when temporary wetlands generally dry out in the spring or summer, according to agency officials from state offices.

⁶²Office of Management and Budget, *Management's Responsibility for Enterprise Risk Management and Internal Control*, Circular No. A-123 (Washington, D.C.: July 15, 2016).

⁶³NRCS or other USDA officials, neighboring farmers, or others may initiate reports of potential violations to FSA when they observe drainage activity, according to the NRCS manual. When FSA receives such a report, agency officials record it on the FSA-569 form and refer the potential violation to NRCS for investigation.

Even though they are allowed to initiate reports of potential violations, according to the NRCS manual, wetland specialists told us that they do not initiate these reports; they explained that they do not believe NRCS is responsible for enforcing compliance with the wetland provisions. According to a wetland specialist, NRCS's role is to provide assistance to farmers about conservation practices on their land, and reporting potential violations may be counterproductive because it could undermine NRCS's relationships with farmers. Moreover, NRCS's headquarters and state offices have directed wetland specialists, through verbal or email guidance, not to initiate reports in such circumstances, according to agency officials from state offices, field office staff, and wetland specialists. Instead, the guidance encourages staff to contact farmers who are potentially noncompliant and recommend that the farmers update their wetland certification forms. NRCS officials from state offices told us that this approach is part of a broader effort to provide good customer service to farmers, and the objective is to help farmers maintain their eligibility for farm program benefits.

We reviewed wetland determination files for 28 tracts of land (10 in North Dakota and 18 in South Dakota) with apparent drainage activity.⁶⁴ To determine whether the activity on these tracts is compliant with wetland conservation provisions, NRCS would need to evaluate the tracts. For five of the 10 tracts in North Dakota, the files indicated that NRCS had identified wetlands on and issued wetland determinations for the tracts in the early 1990s but had not subsequently evaluated those tracts because they were not required to do so under agency procedures. We verified that the farmers of these five tracts participate in farm programs and are consequently subject to wetland conservation provisions. Agency procedures call for NRCS to evaluate drainage activity if (1) the farmer requests a new determination, (2) the tract is selected in the annual compliance check, or (3) NRCS receives a report of a potential violation. Agency officials in North Dakota's State office told us, and our review of the five files confirmed, that NRCS had not evaluated the tracts because none of these three conditions were met.

⁶⁴Conservation groups we interviewed made us aware of these tracts and said they had observed drainage activity on all of them. The groups provided photographs and aerial images that appeared to show drainage activity from as far back as 2010. Individuals from the groups said they did not report the potential violations to NRCS because when they had previously reported potential violations, they did not know what, if any, steps the agency took in response to their reports.

As discussed earlier, NRCS draws a random sample of about 1 percent of tracts nationwide, with each tract having an equal probability of selection. Consequently, many tracts may be sampled infrequently or not at all, and violations may go undetected on these tracts. According to an agency official from headquarters, NRCS has limited resources to conduct more compliance checks. However, NRCS officials can report potential violations they observe, which gives NRCS the opportunity to identify and evaluate potential violations not detected during its annual compliance checks and provide this information to FSA for decisions regarding farm benefit eligibility. In addition, NRCS has a goal to prevent waste—including unnecessary costs resulting from inefficient or ineffective practices, systems, or controls—according to its compliance strategy.⁶⁵ When NRCS officials do not report potential violations they observe, NRCS is not efficiently using its limited resources available for detection of violations. By ensuring that NRCS instructs its state and field offices to consistently report any potential violations they observe, USDA could better use its available resources to ensure farm program benefits are provided only to farmers who comply with wetland conservation provisions.

FSA Frequently Granted Farmers Waivers for Violations of Wetland Conservation Provisions, but Its Decisions Sometimes Relied on Weak Justification

Our analysis of FSA data indicates that FSA frequently waives ineligibility determinations for violations identified by NRCS if FSA finds that farmers acted in good faith and without an intent to violate wetland conservation provisions. Farmers are then able to regain eligibility for farm program benefits, under the condition that they restore the wetlands.⁶⁶ For example, from 2010 through 2018, FSA granted good-faith waivers for approximately 81 percent (243 of 301) of the farmers with wetland violations NRCS identified in North Dakota and South Dakota.⁶⁷ Beginning in 2014, the number of requests for good-faith waivers

⁶⁵U.S. Department of Agriculture, Natural Resources Conservation Service, *NRCS Compliance Strategy, FY2014-2017* (Washington, D.C.: June 2014).

⁶⁶Instead of restoring the wetland, farmers may choose to mitigate the converted wetland through enhancing an existing wetland or by creating an equivalent wetland on a new site in the area.

⁶⁷Data from 2018 were the most recent available at the time of our review. It is possible that FSA's data do not capture all wetland violations and waivers granted because these data are entered by FSA officials who are focusing on implementing programs and do not always prioritize data entry, according to agency officials. The agency uses these data for reporting and not to determine farmers' eligibility, according to FSA officials. We are presenting these data to provide general information on the magnitude of the violations and waivers granted.

declined, consistent with a decline in violations that NRCS identified. From 2014 through 2018, FSA granted all requested waivers (see table 5).⁶⁸ FSA officials told us that one reason for the decline in violations identified could be that crop insurance benefits became subject to wetland conservation provisions in the Agricultural Act of 2014. As a result, the disincentive for violations was strengthened because the potential loss of benefits to farmers was greater with the addition of crop insurance benefits. Additional reasons for the decline in violations include the increased cost of installing drainage systems and lower commodity prices, which reduced incentives to expand crop acreage, according to NRCS officials from headquarters and state offices. Further, the decline may be due in part to a gap between when the violation occurred and when it was detected; violations that occurred in recent years have had less time to be detected.

Table 5: Number of Farmers with Identified Wetland Violations, and Waivers of Ineligibility Determinations Granted in North Dakota and South Dakota, 2010 through 2018

| | Year in which the violations occurred | | | | | | | | | |
|---|---------------------------------------|------|------|------|------|------|------|----------------|------|--|
| | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | |
| Farmers with violations identified by the Natural Resources Conservation Service ^a | 58 | 89 | 93 | 50 | 3 | 3 | 4 | 1 | 1 | |
| Waivers granted by the Farm Service Agency (FSA) | 43 | 70 | 79 | 40 | 3 | 3 | 4 | 1 ^a | 1 | |

Source: FSA data. | GAO-21-241

Note: Because it may take time to detect violations, the number of farmers with violations for any given year may increase as additional time elapses. FSA data may not capture all wetland violations and waivers granted but provide general information on their magnitude. The agency uses these data for reporting and not to determine farmers' eligibility, according to FSA officials.

^aThe farmer received a good-faith waiver for this violation in 2017 but did not restore the wetland or mitigate the violation within 1 year, which is a condition of the waiver, so the farmer became ineligible. Farmers may restore converted wetlands by filling in noncompliant ditches, for example, and they may mitigate converted wetlands by enhancing existing wetlands or creating equivalent wetlands on a new site in the area. As of June 2020, this farmer is not participating in any U.S. Department of Agriculture farm programs.

FSA data on benefits denied or reinstated after good-faith waivers for violations of wetland conservation provisions are combined with similar data for violations of highly erodible land conservation provisions. As noted earlier, the 1985 Farm Bill included conservation provisions for both wetlands and highly erodible cropland, and farmers who participate in

⁶⁸It can take several years or more for NRCS to identify wetland violations. Therefore, it is possible that NRCS has not yet identified violations that took place in more recent years, according to NRCS officials from headquarters and state offices.

most federal farm programs are to comply with these provisions. In the prairie pothole states, FSA ultimately denied 8 percent of benefits after granting good-faith waivers that reinstated the vast majority of benefits (by dollar value), as shown in table 6.⁶⁹ Nationally, FSA ultimately denied 11 percent of benefits, as shown in appendix I.

Table 6: Farm Service Agency (FSA) Benefits Denied Farmers for Violations of Conservation Provisions in Prairie Pothole States, 2010 through 2018

| State | Tracts and farmers subject to review ^a | | Violations | | | | Benefit dollars (in thousands) | | |
|--------------|---|----------------|-----------------|------------|-----------------------------------|--------------------------------------|--------------------------------|---------------|---------------------------|
| | Tracts | Farmers | Tracts reviewed | Wetland | Highly erodible land ^b | Farmers with violations ^c | Initially denied | Reinstated | Percent ultimately denied |
| Iowa | 324,088 | 195,360 | 1,788 | 159 | 530 | 1,658 | 45,657 | 42,985 | 6 |
| Minn. | 293,954 | 134,112 | 1,077 | 110 | 8 | 136 | 3,643 | 3,370 | 7 |
| N.Dak. | 203,069 | 66,548 | 1,544 | 173 | 8 | 236 | 11,389 | 9,569 | 16 |
| S.Dak. | 213,632 | 70,727 | 1,155 | 76 | 1 | 52 | 2,706 | 2,418 | 11 |
| Total | 1,034,743 | 466,747 | 5,564 | 518 | 547 | 2,082 | 63,395 | 58,342 | 8 |

Source: GAO analysis of FSA and Natural Resources Conservation Service (NRCS) data. | GAO-21-241

Note: FSA data may not capture all wetland violations and waivers granted but provide general information on their magnitude. The agency uses these data for reporting and not to determine farmers' eligibility, according to FSA officials. Certain benefits from the U.S. Department of Agriculture's Risk Management Agency are also denied to farmers found in violation of wetland conservation provisions, but this table does not include such benefits. Benefit dollars may be reinstated as a result of appeals or waivers.

^aNumber of tracts potentially subject to review and farmers subject to conservation provisions for wetlands and highly erodible lands, as of 2018.

^bTo be eligible for farm programs, farmers must use approved conservation practices on land that is highly erodible, defined as land that can erode at excessive rates. NRCS may identify violations when farmers do not use approved conservation practices, which protect against soil erosion.

^cMultiple farmers can be associated with a given tract and a given violation. For example, if a tract of land is owned by more than one person who receives benefits, the violation is attributed to all owners.

FSA decides whether to grant waivers based on recommendations that local county committees make. When determining whether a farmer acted in good faith and without an intent to violate wetland provisions, county

⁶⁹This percentage includes benefits reinstated following waivers for both wetland violations and highly erodible land violations. To be eligible for farm programs, farmers must use approved conservation systems if they farm highly erodible land, defined as land that can erode at excessive rates. Violations occur when farmers do not use approved conservation systems. By statute, 100 percent of benefits can be reinstated following a waiver for wetland violations. For highly erodible land violations, FSA can reduce a payment by \$1,000 to \$12,000, based on factors including the number of acres in violation and the actual soil loss.

committees are to consider certain factors listed in FSA's handbook on highly erodible land and wetland conservation.⁷⁰ However, according to an agency official, because county committees are made up of fellow farmers, they may be reluctant to deny the waivers and penalize a neighbor's eligibility for farm program benefits.⁷¹ For example, one factor the FSA handbook lists is whether the farmer has a record of violating wetland provisions. In our review of a nongeneralizable sample of cases, we found that the committees sometimes recommended good-faith waivers to farmers even when these farmers had such a record.

The sample we reviewed included 69 good-faith waivers in North Dakota and South Dakota from 2011 through 2015. These waivers constituted all waivers granted in the six counties with the most violations in North Dakota and South Dakota from 2010 through 2018. We found that in all 63 cases, the county committees determined that the farmer acted in good faith and FSA approved the waiver. In 14 of the 69 cases, the farmer had a history of wetland violations. Committee documents, such as meeting minutes, show that the committees were aware of and discussed the previous violations but still recommended the waivers.

FSA officials told us that farmers may receive multiple waivers because the circumstances surrounding wetland violations are unique to each wetland violation, so the same farmer may have converted wetlands unintentionally or unknowingly more than once. FSA officials further explained that county committees may recommend waivers in such situations because they are concerned the farmer would be required to repay significant benefits accumulated during the time before NRCS detected the violation, which in some cases was more than 10 years.

However, the committees sometimes relied on weak justification to recommend the waivers. For example, according to their meeting minutes, in several cases the committee stated that the farmer did not benefit financially from converting the wetland, but the committee did not include supporting documentation or evidence that it verified this statement to be true, and it is not required to do so. Furthermore, FSA

⁷⁰U.S. Department of Agriculture, Farm Service Agency, *Highly Erodible Land Conservation and Wetland Conservation Provisions Handbook*, Revision 4 (Washington, D.C.: February 2019).

⁷¹In April 2003, we also reported that FSA frequently granted good-faith waivers and that agency officials told us county committees might be predisposed to grant the waivers to farmers requesting them, since the committees are made up of fellow farmers. See [GAO-03-418](#).

officials did not ensure that the committees' decisions were adequately justified in documentation before approving the waivers. FSA officials told us that the FSA handbook does not provide guidelines for when to approve county committee recommendations.

In 2003, we reported that FSA frequently granted good-faith waivers without clearly documenting the basis for the waivers, and we recommended that FSA ensure its waiver decisions were justified and documented.⁷² Partly in response to our recommendation, FSA issued guidance in 2005 stating that approvals for good-faith waivers must be supported by conclusive evidence, but the guidance expired in 2006. It was not extended, in part because the agency communicates this directive through training, according to an agency official.⁷³ However, the training has not resolved the issue, as shown by the cases where the committees recommended, and FSA approved, waivers with what agency officials have acknowledged was little evidence. The FSA handbook requires the committee decisions to be documented along with the reasons for the decisions, but the handbook does not specify what constitutes adequate justification or documentation for the decisions. Under federal standards for internal control, management should design control activities to achieve objectives and respond to risks—in this case, the objective of ensuring that farmers who receive waivers acted in good faith. In addition, management should implement control activities through policies, which are documented. By strengthening its guidance to specify what constitutes adequate justification and documentation for decisions to grant good-faith waivers, FSA could better ensure that it provides benefits only to farmers who are eligible to receive them.

Conclusions

Given the vital functions provided by wetlands and the value to farmers of maintaining eligibility for farm program benefits, it is important that NRCS and FSA implement wetland conservation provisions in the farm bill consistently and effectively. Since 2011, NRCS has taken steps to achieve more consistent wetland determinations, such as establishing wetland compliance teams and standardizing its procedures in the prairie pothole states. However, state offices have not regularly completed quality control reviews—a key tool for ensuring consistent wetland

⁷²[GAO-03-418](#).

⁷³FSA provides training on implementing farm bill provisions to agency officials who specialize in compliance, including wetland compliance. The training documents state that approvals for good-faith waivers must be supported by evidence that the farmer acted in good faith and without intent to violate.

determinations—and NRCS’s headquarters is not overseeing state offices to ensure that they conduct them, as agency guidance directs. Without performing such oversight to ensure state offices conduct these reviews as directed in NRCS’s manual, the agency may be missing opportunities to correct deficiencies such as inconsistent application of wetland determination procedures.

In addition, in appeal decision letters to farmers, NRCS state offices do not consistently provide evidence specific to the determinations, as called for in the agency’s appeals manual, because the template they use does not include this direction. Unless NRCS updates the template to stipulate that the basis for the determinations is to be included, farmers may not understand the basis and may file appeals at higher levels, hindering the agency’s goal of resolving disputes at the lowest possible level.

Further, we found that NRCS’s guidance on certain wetland determination procedures is not clear and includes conflicting directions. As a result, NRCS wetland specialists applied the procedures inconsistently, particularly for the best-drained condition standard. By clarifying how wetland specialists should apply these procedures for wetland determinations, NRCS could better ensure that the procedures are applied consistently and accurately, both to preserve wetlands and to treat farmers equitably.

To carry out its responsibility for ensuring that farmers receiving farm program benefits comply with wetland conservation provisions, USDA relies on NRCS and FSA. For example, NRCS conducts annual compliance checks for a sample of tracts. Through NRCS’s guidance for selecting the sample and its implementation of the guidance, the agency has given primacy to a simple random sample, with each tract having an equal probability of selection. In contrast, other USDA agencies use risk-based approaches to select samples for their compliance checks, which has increased the efficiency of these checks by better focusing limited resources. By clarifying and updating the manual to call for a risk-based approach to be used in selecting a sample, NRCS could make its compliance checks more efficient and effective.

NRCS state and field office staff sometimes observe potential violations but do not report them because they believe it is not their responsibility, and NRCS’s headquarters and state offices have directed them not to do so unless the potential violation is on a tract for which staff are actively conducting a wetland determination. However, USDA is responsible for ensuring that farmers receiving farm program benefits are in compliance

with wetland conservation provisions, and when agency staff do not report potential violations they observe, it is not an efficient use of the limited resources USDA has for detection of violations. By ensuring that NRCS instructs its state and field offices to consistently report any potential violations they observe, USDA could better use its available resources to ensure farm program benefits are provided only to farmers who comply with wetland conservation provisions.

FSA is responsible for granting good-faith waivers for wetland violations identified by NRCS if farmers acted in good faith and without an intent to violate wetland conservation provisions. FSA's handbook calls for waiver decisions to be documented, along with the reason for the decisions. However, the handbook does not specify what constitutes adequate justification and documentation for the decisions. By strengthening its guidance to specify what constitutes adequate justification and documentation, FSA could better ensure that it provides benefits only to farmers who are eligible to receive them.

Recommendations for Executive Action

We are making a total of six recommendations, including four to NRCS, one to USDA, and one to FSA:

The Chief of the Natural Resources Conservation Service should oversee state offices to ensure that they conduct quality control reviews of wetland determinations as directed in the agency's manual. (Recommendation 1)

The Chief of the Natural Resources Conservation Service should update the template for appeal decision letters accompanying final wetland determinations to stipulate that the letters must include specific facts providing the basis for the determinations, as called for in the agency's appeals manual. (Recommendation 2)

The Chief of the Natural Resources Conservation Service should clarify agency guidance on how wetland specialists are to apply the agency's procedures for wetland determinations, particularly related to the best-drained condition standard. (Recommendation 3)

The Chief of the Natural Resources Conservation Service should clarify guidance on the annual compliance check (in its National Food Security Act Manual) to ensure that a risk-based approach is used in selecting a sample, which could include using crop acreage reports and other sources of information to identify anomalies associated with higher-risk tracts. (Recommendation 4)

The Secretary of Agriculture should ensure that the Chief of the Natural Resources Conservation Service instructs state and field offices to consistently report any potential violations they observe. (Recommendation 5)

The FSA Administrator should strengthen agency guidance to specify what constitutes adequate justification and documentation for decisions to grant good-faith waivers. (Recommendation 6)

Agency Comments and Our Evaluation

We provided a draft of this report to USDA for review and comment. USDA provided consolidated comments from NRCS and FSA, reproduced in appendix II, in which the agencies agreed with five of our six recommendations and partially agreed with the sixth. In addition, NRCS disagreed with our characterization of the appeals process and the role of NRCS in detecting wetland violations. NRCS also provided technical comments, which we incorporated as appropriate. The agencies' comments and our response are discussed in greater detail below.

NRCS agreed with our recommendation concerning the agency overseeing state offices to ensure they conduct quality control reviews of wetland determinations as directed in the agency's manual. NRCS estimated that it would complete this action by the end of February 2022, which will satisfy our recommendation. However, the agency disagreed with two of the examples that we used to illustrate our findings related to this recommendation. We modified the examples to address the agency's comments.

NRCS also agreed with our recommendation about updating the template for appeal decision letters accompanying final wetland determinations to stipulate that the letters must include specific facts providing the basis for the determinations, as called for in the agency's manual. NRCS further said that ensuring the letters specify the basis for the determinations would improve customer service and estimated that they would do so by the end of February 2022, which would satisfy our recommendation. However, NRCS also stated that it disagreed with our characterization of the appeals process resulting in changes allowing farmers to drain and cultivate crops on more of their land without violating wetland conservation provisions. The agency stated that the appeals process provides important opportunities for farmers to provide additional information, and that changes NRCS makes to wetland determinations may legally allow for activities including drainage. Our finding about the results of appeals was specific to changes NRCS made to 2018

preliminary determinations appealed in North Dakota and South Dakota; we found that NRCS made changes to 118 of the 136 determinations with completed appeals. We agree that such changes are permissible under agency procedures, as noted in the report, but we stand by our statement that the changes frequently allowed farmers to drain and cultivate more of their land without violating wetland conservation provisions. For example, as we reported, in North Dakota NRCS often removed wetland designations after wetland determinations were appealed. Removing these designations generally allowed farmers to drain and cultivate more of their land while complying with wetland conservation provisions.

Regarding our recommendation about NRCS clarifying guidance on how wetland specialists are to apply agency procedures for wetland determinations, NRCS partially agreed. Our recommendation originally specified that NRCS should clarify guidance on the best-drained condition standard and the manipulated wetland designation. The agency agreed that additional guidance is needed for the best-drained condition standard but questioned whether guidance needs to be clarified for the manipulated wetland designation. Our review of the guidance and interviews with agency officials indicated that clarification could be helpful in this area. However, in our review of the 2018 preliminary wetland determinations that were appealed in North Dakota and South Dakota, we found only one example for which we had sufficient evidence to report that NRCS changed a determination on the basis of unclear guidance for the manipulated wetland designation. We modified our recommendation so that it no longer specifies that this aspect of the guidance must be clarified. NRCS's actions will satisfy our recommendation if the agency clarifies guidance on how to apply procedures for the best-drained conditions standard.

NRCS agreed with our recommendation about clarifying guidance on the annual compliance check in its manual to ensure that a risk-based approach is used in selecting a sample for wetland compliance checks. The agency stated that NRCS and FSA see value in risk-based methodologies and the two agencies will work with the Risk Management Agency to leverage its experience with risk-based sample selection and develop an effective, efficient approach to select samples for wetland compliance checks. NRCS further stated that the agencies expect to complete this action by the end of February 2022. The agencies' actions will address our recommendation if they ensure that the approach used for sample selection includes risk-based methods.

Concerning our recommendation that the Secretary of Agriculture should ensure that the Chief of NRCS instructs state and field offices to consistently report any potential violations they observe, NRCS agreed that policy clarification is needed. NRCS said the agency will work with FSA and the Risk Management Agency to develop policy that clearly identifies when NRCS will submit reports of potential violations. Regarding the role of NRCS in detecting wetland violations, NRCS stated that when agency officials observe certain types of drainage activities, they will first invite farmers to request wetland determinations, and if the farmers decline, officials will report the potential violations for investigation. We do not believe that we mischaracterized NRCS's role, and NRCS did not specify where they disagreed with our characterization. NRCS's actions will satisfy our recommendation if agency policy ensures that all potential violations that NRCS officials observe are evaluated.

Finally, FSA agreed with our recommendation regarding strengthening agency guidance on what constitutes adequate justification and documentation for decisions to grant good-faith waivers. FSA further stated that it will strengthen county committee guidance to identify parameters for adequate justification and documentation, which it plans to complete by the end of October 2021. We expect that this action will satisfy our recommendation.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the appropriate congressional committees, the Secretary of Agriculture, and other interested parties. In addition, the report will be available at no charge on the GAO website at <https://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-3841 or morriss@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix III.

Sincerely yours,



Steve D. Morris
Director, Natural Resources and Environment

Appendix I: Farm Service Agency (FSA) Benefits Denied Farmers for Violations of Wetland Conservation Provisions

Table 7: Farm Service Agency (FSA) Benefits Denied Farmers for Violations of Wetland Conservation Provisions by State, 2010 through 2018

| State | Tracts and farmers subject to review ^a (in thousands) | | Violations | | | Benefit dollars (in thousands) | | | Percent ultimately denied |
|--------|---|---------|------------|-----------------------------------|--------------------------------------|-----------------------------------|------------|--------|---------------------------|
| | Tracts | Farmers | Wetland | Highly erodible land ^b | Farmers with violations ^c | Initially denied | Reinstated | Denied | |
| Ala. | 229 | 55 | 0 | 1 | 1 | 10 | 0 | 10 | 100 |
| Alas. | 2 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Ariz. | 11 | 11 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Ark. | 190 | 72 | 1 | 0 | 1 | 0 | 0 | 0 | 0 |
| Calif. | 137 | 73 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Colo. | 110 | 46 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Conn. | 11 | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Del. | 11 | 4 | 1 | 0 | 2 | 0 | 0 | 0 | 0 |
| Fla. | 90 | 29 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| Ga. | 231 | 65 | 15 | 0 | 30 | 1,034 | 659 | 374 | 36 |
| Hawaii | 7 | 4 | 1 | 0 | 1 | 226 | 226 | 0 | 0 |
| Idaho | 65 | 31 | 5 | 9 | 39 | 381 | 362 | 19 | 5 |
| Ill. | 380 | 222 | 25 | 66 | 173 | 7,706 | 7,352 | 354 | 5 |
| Ind. | 278 | 112 | 101 | 3 | 147 | 2,951 | 2,499 | 452 | 15 |
| Iowa | 324 | 195 | 159 | 530 | 1,658 | 45,657 | 42,985 | 2,673 | 6 |
| Kans. | 305 | 163 | 7 | 16 | 40 | 435 | 413 | 22 | 5 |
| Ky. | 302 | 103 | 33 | 20 | 102 | 2,689 | 2,672 | 17 | 1 |
| La. | 120 | 56 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Maine | 28 | 8 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Md. | 38 | 16 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Mass. | 14 | 6 | 4 | 0 | 1 | 0 | 0 | 0 | 0 |
| Mich. | 247 | 60 | 57 | 0 | 81 | 6,795 | 4,220 | 2,576 | 38 |
| Minn. | 294 | 134 | 110 | 8 | 136 | 3,643 | 3,370 | 272 | 7 |
| Miss. | 207 | 73 | 3 | 0 | 7 | 808 | 808 | 0 | 0 |
| Mo. | 343 | 142 | 30 | 58 | 103 | 2,901 | 2,731 | 169 | 6 |
| Mont. | 256 | 41 | 1 | 4 | 6 | 234 | 234 | 0 | 0 |
| Neb. | 212 | 117 | 108 | 149 | 531 | 13,556 | 12,295 | 1,262 | 9 |
| Nev. | 6 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| N.H. | 10 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| N.J. | 23 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| N.Mex. | 38 | 19 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

**Appendix I: Farm Service Agency (FSA)
Benefits Denied Farmers for Violations of
Wetland Conservation Provisions**

| State | Tracts and farmers subject to review ^a (in thousands) | | Violations | | | Benefit dollars (in thousands) | | | Percent ultimately denied |
|--------------|---|--------------|--------------|-----------------------------------|--------------------------------------|-----------------------------------|---------------|---------------|---------------------------|
| | Tracts | Farmers | Wetland | Highly erodible land ^b | Farmers with violations ^c | Initially denied | Reinstated | Denied | |
| N.Y. | 127 | 33 | 43 | 2 | 70 | 2,541 | 1,874 | 667 | 26 |
| N.C. | 326 | 58 | 7 | 29 | 24 | 95 | 87 | 9 | 9 |
| N.Dak. | 203 | 67 | 173 | 8 | 236 | 11,389 | 9,569 | 1,820 | 16 |
| Ohio | 285 | 106 | 52 | 20 | 83 | 1,813 | 1,470 | 343 | 19 |
| Okla. | 256 | 92 | 3 | 16 | 10 | 382 | 125 | 257 | 67 |
| Ore. | 77 | 26 | 9 | 0 | 7 | 80 | 80 | 0 | 0 |
| Pa. | 147 | 40 | 29 | 23 | 53 | 946 | 929 | 17 | 2 |
| R.I. | 3 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| S.C. | 147 | 28 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| S.Dak. | 214 | 71 | 76 | 1 | 52 | 2,706 | 2,418 | 288 | 11 |
| Tenn. | 301 | 70 | 19 | 22 | 44 | 242 | 241 | 1 | 0 |
| Tex. | 611 | 200 | 11 | 3 | 20 | 423 | 380 | 43 | 10 |
| Utah | 34 | 14 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Vt. | 22 | 9 | 8 | 0 | 8 | 1,558 | 1,484 | 74 | 5 |
| Va. | 182 | 37 | 11 | 3 | 25 | 92 | 7 | 86 | 93 |
| Wash. | 95 | 35 | 0 | 1 | 6 | 57 | 57 | 0 | 0 |
| W.Va. | 53 | 14 | 10 | 0 | 10 | 70 | 70 | 0 | 0 |
| Wis. | 334 | 98 | 138 | 25 | 214 | 1,944 | 1,070 | 874 | 45 |
| Wyo. | 37 | 12 | 0 | 2 | 2 | 18 | 9 | 9 | 51 |
| Total | 7,972 | 2,887 | 1,251 | 1,019 | 3,923 | 112,578 | 99,890 | 12,687 | 11 |

Source: GAO analysis of FSA data. | GAO-21-241

Note: FSA data may not capture all wetland violations and waivers granted but provide general information on their magnitude. The agency uses these data for reporting and not to determine farmers' eligibility, according to FSA officials. Certain benefits from the U.S. Department of Agriculture's Risk Management Agency are also denied to farmers found in violation of wetland conservation provisions, but this table does not include such benefits. Benefit dollars may be reinstated as a result of appeals or waivers

^aNumber of tracts potentially subject to review, and farmers subject to conservation provisions for wetlands and highly erodible lands, as of 2018.

^bTo be eligible for farm programs, farmers must use approved conservation systems if they farm highly erodible land, defined as land that can erode at excessive rates. The Natural Resources Conservation Service may identify violations when farmers do not use approved conservation systems, which protect against soil erosion caused by wind or water.

^cMultiple farmers can be associated with a given tract and a given violation. For example, if a tract of land has multiple owners who receive benefits, the violation is attributed to all owners.

Appendix II: Comments from the U.S. Department of Agriculture



United States Department of Agriculture

Office of the Secretary
Washington, D.C. 20250

March 5, 2021

Mr. Steve D. Morris
Director
Natural Resources and Environment
Government Accountability Office
2635 Century Parkway, Suite 600
Atlanta, Georgia 30345

Dear Director Morris:

The U.S. Department of Agriculture (USDA) appreciates the opportunity to respond to the U.S. Government Accountability Office (GAO) draft report, *Farm Programs-USDA Should Take Additional Steps to Ensure Compliance with Wetland Conservation Provision* for recommendations 1-6, GAO-21-241.

Attached are the Natural Resources Conservation Service (NRCS) and the Farm Service Agency's (FSA) responses to the GAO Official Draft dated 2021.

In Summary:

GAO reviewed USDA's implementation of wetland conservation provisions in the prairie pothole region. GAO examined the steps NRCS has taken to increase the consistency of wetland determinations, and the approaches used by NRCS and FSA to ensure compliance with the provisions.

GAO found that NRCS did not conduct reviews as directed by agency guidance to ensure consistency. Appeals and wetland determinations were sometimes unclear when changes were made to the original determination, NRCS checks compliance that does not report all potential violations, and FSA sometimes granted waivers that lacked justification.

If you require additional information, please contact Gary Weishaar, Branch Chief, External Audits and Investigations, at 202-401-0584.

Sincerely,

A handwritten signature in black ink that reads "Gloria Montaño Greene".

Gloria Montaño Greene
Deputy Under Secretary
Farm Production and Conservation

Attachment

An Equal Opportunity Employer

**Appendix II: Comments from the U.S.
Department of Agriculture**



United States Department of Agriculture

USDA Should Take Additional Steps to Ensure Compliance with
Wetlands Conservation Provisions - GAO-21-241

Agency Response

Summary

A consolidated response from the Natural Resources Conservation Service (NRCS) and the Farm Service Agency (FSA) is found below. You will find references in some responses from the Risk Management Agency (RMA) because it, too, has customers subject to the wetlands conservation compliance provisions. All three agencies fall within the USDA's Farm Production and Conservation Mission area.

NRCS generally accepts audit recommendations 1, 2, 4 and 5, and accepts 3 in part; and the FSA agrees with recommendation 6. Even though NRCS accepts most of the audit recommendations, there are inaccuracies in the report that misrepresent key facts and could confuse the reader. In this response, NRCS refines key points to ensure the most complete information is provided to the public on this important topic.

The report recognizes the improvements made in the Prairie Pothole Region to improve the accuracy and consistency of Food Security Act wetland determinations, and the report has taken an important step to identify that the evidence presented and conclusions drawn relate to the implementation of policy. NRCS also notes that GAO did not identify any instances where NRCS actions or policies were not in conformance with statutory or regulatory mandates. However, as detailed below, NRCS disagrees with the report's characterization of the wetland determination appeals process and the role of NRCS regarding detection of wetland violations. It should be noted that the report does not provide a complete description of the appeals process. USDA program participants should be cautioned against using it as a reliable source of information regarding appeals.

Recommendation 1

The Chief of the Natural Resources Conservation Service should oversee state offices to ensure that they conduct quality control reviews of wetland determinations as directed in the agency's manual.

Agency Response

NRCS accepts this recommendation. The estimated completion date is February 28, 2022. The report identifies issues related to the performance of quality control reviews on wetland determinations and that NRCS agrees that additional oversight by NRCS National Headquarters is needed to ensure that quality control reviews of wetland determinations are conducted according to agency policy. However, the report mischaracterizes several facts. Past quality control reviews in North Dakota did not find that the incorrect aerial image year was used "when determining the size of wetlands." The reviews found that the correct image year was not always

**Appendix II: Comments from the U.S.
Department of Agriculture**

used as the base for the map which provided the wetland determination to the USDA program participant. This was an administrative deficiency which was corrected and at no time led to the issuance of wetland determinations which were incorrectly sized or identified. The report also states that quality control reviews in Minnesota and North Dakota were not completed according to policy with respect to who was to conduct the reviews. In Minnesota, NRCS affirms that reviews were conducted by Minnesota State office staff by individuals whose work location was outside the office being reviewed. In North Dakota, NRCS affirms that reviews were conducted by members of the North Dakota compliance team and those reviews were conducted by individuals whose work location was outside the office being reviewed. As such, Minnesota and North Dakota met the policy which requires that reviews be conducted by persons from outside the subject NRCS office.

Recommendation 2

The Chief of the Natural Resources Conservation Service should update the template for appeal decision letters accompanying final wetland determinations to stipulate that the letters must include specific facts providing the basis for the determinations, as called for in the agency's appeals manual.

Agency Response

NRCS accepts this recommendation. The report identifies that some letters accompanying final wetland determinations do not include specific facts providing the basis for the determination. NRCS agrees that the template letters should be revised to accommodate the inclusion of specific facts regarding the basis for the determination as a measure to improve customer service. The estimated completion date is February 28, 2022. However, NRCS disagrees with the report's characterization of the appeals process resulting in changes which allow "farmers to drain and cultivate crops on more of their land without violating wetland conservation provisions." The appeals process provides important opportunities for USDA program participants to provide additional information which may not have been considered in the initial wetland determination. This new information may lead to revised wetland designations. This results in final wetland determinations that provide the correct exemptions as established by Congress in the Food Security Act, which may legally allow for such activities, including the installation of additional drainage.

Recommendation 3

The Chief of the Natural Resources Conservation Service should clarify agency guidance on how wetland specialists are to apply the agency's procedures for wetland determinations, specifically related to the best-drained condition standard and the manipulated wetland designation.

Agency Response

NRCS accepts this recommendation in part. NRCS agrees that additional guidance is needed regarding application of the best-drained condition standard. However, it is not evident that a misapplication of the manipulated wetland designation was made based on the facts presented in this specific case cited in the report, which was only one instance out of the many files that were reviewed. To this end, NRCS affirms that the manipulated wetland designation was properly applied and does not agree that clarification of that guidance is required.

**Appendix II: Comments from the U.S.
Department of Agriculture**

Regarding the application of the best-drained condition standard, NRCS notes that it will always require a certain amount of interpretation and professional judgement. Wetlands manipulated prior to December 23, 1985, were often done through a series of actions that may have occurred over extended periods of time. In addition, professional judgement must be used to assess multiple sources of information spanning long periods of time and may have only been collected intermittently or may be reflective of abnormally wet or dry climatic conditions. NRCS recognizes that improvements in guidance can be made regarding the application of the best-drained condition standard. The estimated completion date is February 28, 2022.

Recommendation 4

The Chief of the Natural Resources Conservation Service should clarify guidance on the annual compliance check (in its National Food Security Act Manual) to ensure that a risk-based approach is used in selecting a sample, which could include using crop acreage reports and other sources of information to identify anomalies associated with higher-risk tracts.

Agency Response

NRCS accepts this recommendation. NRCS and FSA have long used and will continue to use a random sampling approach for compliance spot checks that included the random sample plus additional spot checks on USDA employees, persons with previous violations or variances or exemptions granted in the previous year, as well as whistle blower investigations. We see value in adding other risk-based methodologies that would provide an effective mechanism for identifying tracts and farms for compliance purposes. Either a random sample or one using clear risk-based criteria will also ensure that spot checks are not discretionary and removes a potential opportunity for bias to influence the decision. The estimated completion date is February 28, 2022.

Together, the agencies will work with the RMA to leverage its experience with risk-based selection of spot checks and develop an effective, efficient approach to selecting tracts and farms for compliance spot checks.

Recommendation 5

The Secretary of Agriculture should ensure that the Chief of the Natural Resources Conservation Service instructs state and field offices to consistently report any potential violations they observe.

Agency Response

NRCS agrees that policy clarification is needed. NRCS will work with FSA and RMA to develop policy that clearly identifies when NRCS will submit reports of potential violations. NRCS recognizes that reporting producers for a potential violation can have significant ramifications, so the primary method of identifying potential violations will be the random and risk-based approach described previously and guidance will be provided on what limited set of observations strongly suggest a potential violation. In cases where a producer should have notified NRCS about ditching, tree clearing or other activities as they previously agreed to, but have not, NRCS will continue to take the initial step of contacting the producer to recommend that they voluntarily file a request for a determination. This step allows the producer an opportunity to document a potential good-faith rationale. Should a producer decline to make this

**Appendix II: Comments from the U.S.
Department of Agriculture**

request, the observation will be referred for investigation. Finally, NRCS recognizes the varying nature of wetlands across the country and will ensure that employees are trained based on the local conditions and have the ability to request assistance from a more experienced employee if they are uncertain. The estimated completion date is December 31, 2021

Recommendation 6

The FSA Administrator should strengthen agency guidance to specify what constitutes adequate justification and documentation for decisions to grant good-faith waivers.

Agency Response

FSA agrees with the findings and the recommendation; and will strengthen County Office Committee guidance on good faith relief to ensure parameters are identified to provide adequate justification and documentation to support good faith waivers.

FSA has worked within statutory authorities to grant good faith exemption relief on a case by case basis. Given the available relief afforded to producers who have been found to have committed a wetland violation, we agree with GAO that tighter control activities through policies should be implemented to ensure farmers who receive waivers, in fact, acted in good faith. The estimated completion date is October 31, 2021.

Appendix III: GAO Contact and Staff Acknowledgments

GAO Contact

Steve Morris, (202) 512-3841 or morriss@gao.gov

Staff Acknowledgments

In addition to the contact named above, Thomas Cook (Assistant Director), Christine Feehan (Analyst-in-Charge), Rose Almoguera, Kevin Bray, Tara Congdon, Justin Fisher, Cynthia Norris, Amber Sinclair, McKenna Stahl, Sara Sullivan, and Walter Vance also made important contributions to this report.

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