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February 5, 2019

Public Comments Processing
Attention: National Leader for Wetland and
Highly Erodible Land Conservation
USDA, Natural Resources Conservation Service
1400 Independence Avenue SW
Washington, DC 20250

Attention: Docket ID No. NRCS-2018-0010

RE: Highly Erodible Land and Wetland Conservation, 83 Fed. Reg. 63,046 (Dec. 7, 2018)

To Whom It May Concern:

The American Farm Bureau Federation (AFBF) appreciates this opportunity to offer comments on the U.S. Department of Agriculture's ("USDA") interim final rule amending its Highly Erodible Land and Wetland Conservation regulations at 7 C.F.R. part 12 (collectively, the "conservation compliance" program). The revisions were published in the *Federal Register* on December 7, 2018 at 83 Fed. Reg. 63,046 and were made effective that same day. The stated purpose of these revisions is to "codify many technical portions of the existing agency policy that have not undergone public review and comment." 83 Fed. Reg. at 63,047. The revisions amend four sections of USDA's regulations. Farm Bureau is extremely troubled by this rulemaking due to the fundamental lack of transparency and due process it affords farmers and ranchers. Highly Erodible Land and Wetland Conservation regulations are not incentive programs; rather, they are compliance regulations that not only impact participation in farm programs but also directly influence the ability of farmers and ranchers to secure vital operating loans.

AFBF is the nation's largest general farm organization, representing farm and ranch families in all 50 states and Puerto Rico. As a farm advocacy organization, AFBF regularly represents its members' interests before Congress, federal regulatory agencies and the courts. AFBF's members produce a variety of commodities grown or raised commercially in the United States. Many AFBF members are forced to participate in USDA conservation compliance programs, meaning they are not eligible for farm programs or crop insurance premium discounts unless they comply with USDA requirements, which over time has proven to be an increasingly difficult and unpredictable endeavor. Therefore, many producers are directly affected by the interim final rule.

AFBF offers the following comments on specific aspects of USDA's Interim Rule. To be clear, AFBF favors significant reforms to the conservation compliance program. We are concerned with this Interim Rule because it makes program participation significantly more difficult and fails to provide the notice and opportunity to participate in the process due regulated entities.

I. Conservation Compliance Background

The following background regarding the conservation compliance program provides important context for the specific comments on the Interim Rule that follow.

A. The Conservation Compliance Program Effectively Regulates American Farms.

First and foremost, the conservation compliance programs operate fundamentally as regulatory programs. As such, they should operate with all the duties and rights that such a regulatory program entails. By standing to lose vital payments, loans, and crop insurance benefits in the event of adverse determinations, farmers are regulated entities. But from these programs' inception, USDA has avoided providing farmers the certainty and due process they need and deserve to be able to determine the extent of their legal obligations and rights under the programs. More importantly, we find that guidance, policy and even the interim rules fail to match up with the statute in very substantive ways.

It is bad enough that USDA's conservation compliance programs lack clear regulatory standards; compounding the problem is that binding requirements are difficult to find, located on often obscure websites. Worse still, binding guidance and policy tend to morph over time without proper notification or legal justification. This opaque regulatory approach complicates farmers' good-faith attempts to comply with the law.

B. The Conservation Compliance Program Must Provide Farmers Meaningful Involvement in the Wetland Determination Process and Rights to Appeal the Same.

Farm Bureau is concerned that USDA is codifying policy and regulations in a manner that undermines congressional intent (as expressed in the 1985 farm bill and in subsequent farm bills) and unjustifiably disadvantages farmers without adequate notice and opportunity to be heard. While we agree that codifying clear, readily ascertainable program requirements into regulation is important, it is but an initial step in a much larger task of reforming the conservation compliance programs as a whole. As the U.S. Department of Justice made clear in 2018 in what has come to be known as the "Brand Memo" (a copy of which is provided along with these comments as Exhibit A, and available at https://www.justice.gov/file/1028756/download), federal agencies may not rely on guidance to enforce purported violations of law. Yet this is effectively what USDA has been doing, by its own admission. USDA contends that this rulemaking is only attempting to "codify many technical portions of the existing agency policy that have not undergone public review and comment." This statement alone highlights two very significant problems. First, the changes finalized in this interim rule are not mere technical changes to existing regulations; the changes are substantive and will directly impact eligibility of program participants. And secondly, the fact that USDA admits it is codifying "…existing agency policy that ha[s] not undergone public review and comment…" showcases the fundamental lack of transparency and due process farmers and ranchers have endured under this regulatory program.

Program participants both demand and deserve to know "how USDA delineates, determines, and certifies wetlands," and "program participants" deserve "to better understand whether their actions may result in ineligibility for USDA program benefits." 83 Fed. Reg. at 63,047. Essentially, USDA has been making regulatory determinations with significant legal and

economic consequences for regulated entities based on nothing more than guidance and policy without undertaking the required public process. This error permeates from the initial wetland identification process through the appeals process, where USDA holds all the cards, leaving farmers without the necessary tools to protect their property and due process rights. USDA has made a moving target of such fundamental elements of the appeals process as the sufficiency of the record, meaning that Agency officials can always tell farmers they have not provided sufficient information—when the Agency often does not inform farmers of what the required information is in the first place. This has to stop. USDA must codify into regulation clear standards for wetland determination records and all other aspects of the appeals process so that all parties to an appeal stand on equal footing.

General principles of good government, transparency and due process demand USDA do more than merely "*consider* incorporating [the] public comments [to this interim rule] into its policy guidance." 83 Fed. Reg. at 63,047 (emphasis added). Rather, the ideas presented in these and other comments should form the basis for USDA to promulgate a new interim final rule reflecting the input received and acknowledging that the regulations promulgated in this rule represent significant policy shifts that require more process than they are being given. At a minimum, the regulations must comport with the statute and the intent of Congress. In addition, USDA should provide responses to comments that clarify ambiguities in the preamble and regulations and explain how USDA intends to proceed in light of the comments. If USDA really intends the Interim Rule to "provide[] transparency . . . concerning how USDA delineates, determines, and certifies wetlands," USDA must (i) rectify the discrepancies identified below between the Interim Rule and the preamble; (ii) codify into regulation more definitive parameters instead of continuing to rely on extra-regulatory manuals; and (iii) bring the regulations into harmony with the statute and Congressional intent.

II. USDA Must Provide Clear Definitions of New and Important Terms.

How USDA defines terms can have a profound impact on the way they are used to implement the conservation compliance program. In this rulemaking, USDA has added definitions for the terms "best drained condition," "normal climatic conditions," "playa," "pocosin," "pothole," and "wetland hydrology," and amended the definitions of "farmed wetland" and "prior-converted cropland." Although the precise import of these changes is unknown, the way USDA has drafted these definitions raises significant concerns and highlights areas it must improve.

A. Best Drained Condition

1. Interim Rule

In this regulation, USDA has defined "best drained condition" as "the hydrologic conditions with respect to depth, duration, frequency, and timing of soil saturation or inundation resulting from drainage manipulations that occurred prior to December 23, 1985, and that exist during the wet portion of the growing season during normal climatic conditions." 83 Fed. Reg. at 63,050. In the preamble of the Interim Rule, USDA describes this as being included to clarify a long-standing "statutory concept" related to the identification of wetlands. USDA describes a

desire "to meet congressional intent to provide certainty to persons concerning the status of such land and its future use." *Id.* at 63,049.

2. Concerns and Recommendations

Farm Bureau is in complete accord with USDA regarding the need to provide certainty to farmers and to ensure that they are able to "maintain hydrologic conditions on wetlands that were converted to crop production" during the allowable statutory timeframes. *Id.* However, both the preamble and the rule introduce problematic concepts that are not consistent with the statute.

First, both the definition and the preamble state that manipulations must have occurred prior to December 23, 1985. But the statute only requires that conversions be "*commenced* before December 23, 1985." 16 U.S.C. § 3822(b)(1)(A) (emphasis added). As such, best drained condition should be evaluated based on hydrologic conditions on converted land where the conversion *either* occurred prior to December 23, 1985, *or* was commenced prior to December 23, 1985. Other regulatory provisions that are unaffected by this Interim Rule recognize the import of the term "commenced" in the statutory text, which is why USDA has defined the term "commenced-conversion wetland." *E.g.*, 7 C.F.R. § 12.2(a). The regulations properly recognize that commenced-conversion wetlands "shall be evaluated by the same standards and qualify for the same exemptions as prior-converted croplands" so long as a farmer (i) started conversion of a wetland or obligated funds for conversion prior to December 23, 1985; (ii) requested an FSA determination of commencement by September 19, 1988; and (iii) completed conversion on or before January 1, 1995. *See id.* § 12.5(b)(2). Any new definitions (or related preamble discussions) must be consistent with the statutory text and these other regulatory provisions.

Second, when discussing "best drained condition" the preamble implies that only those converted lands that "are not abandoned" will be afforded protection, 83 Fed. Reg. at 63,049. The statute however clearly exempts from the ineligibility provisions "converted wetland if the original conversion of the wetland was commenced before December 23, 1985, and the Secretary determines the wetland characteristics returned after that date as a result of—(i) the lack of maintenance of drainage, dikes, levees or similar structures; (ii) a lack of management of the lands containing the wetland; or (iii) circumstances beyond the control of the person." 16 U.S.C. § 3822(b)(1)(G).

In 1996 Congress confirmed—and USDA recognized—that, once a parcel has been determined to be converted wetland, it *cannot lose that designation*, whether or not manipulations are maintained. 61 Fed. Reg. 47,019, 47,021 (Sept. 6, 1996). USDA must publish clarifications that both reiterate the principle *"once converted always converted"* and Congress' clear direction that a wetland can be farmed using normal cropping and ranching practices.

Third, the definition is ambiguous as to how USDA intends to implement or interpret the phrase "hydrologic conditions . . . that exist during the wet portion of the growing season during normal climatic conditions." 83 Fed. Reg. at 63,049. Reading this language in concert with USDA's definition of "normal climatic conditions"—discussed independently in further detail below—leaves too much to interpretation. In this Interim Rule USDA requires use of a "fixed precipitation date range of 1971-2000" to establish "normal climatic conditions." But neither the preamble nor the regulation explain how climatic conditions that exist after December 23, 1985

are appropriate to use to gauge the status of land where any manipulations were supposed to have occurred or begun prior to December 23, 1985, to address conditions and weather patterns extant prior to December 23, 1985. In brief, the definition of "best drained condition" should serve to protect the conditions sought and achieved through manipulation at the time of completion, as they existed during the wettest portion of the year when the manipulations were completed.

Farm Bureau encourages USDA to publish another rule with the necessary clarifications addressed above. In addition, USDA should re-promulgate a definition of "best drained condition" that in no uncertain terms codifies the principle and "statutory right to maintain hydrologic conditions on wetlands that were converted to crop production," whether the lands in question are farmed wetland, prior-converted cropland, or commenced-conversion cropland. With shifting precipitation and weather patterns, hydrologic conditions in farmed wetland achieved or commenced around 1985 may require additional manipulation to maintain today. Such manipulations, used only to maintain the status quo (in the case of farmed wetland), must be allowed to proceed. The current drafting of the regulation leaves several variables ambiguous and subject to reinterpretation in the field at some time in the future. Indeed, USDA's failure to amend 7 C.F.R. § 12.33(a), a provision that only allows adjusting drainage to accommodate increased water due to human activity, undermines the progress made with the new definition of "best drained condition." Why increased water conditions have occurred should not matter; maintenance of the previously achieved conditions should always be allowed. A new interim rule must swiftly rectify this problem.

B. Normal Climatic Conditions

1. Interim Rule

The Interim Rule defines "normal climatic conditions" as "the normal range of hydrologic inputs on a site as determined by the bounds provided in the Climate Analysis for Wetlands Tables or methods posted in the Field Office Technical Guide." 83 Fed. Reg. at 63,050. The Interim Rule also specifies that a "fixed precipitation date range of 1971-2000" will be used to establish "normal climatic conditions" for purposes of wetland hydrology. *Id.* at 63,052. The definition, therefore, requires making judgments as to both the appropriate source of precipitation data and the time period from which that data should come.

2. Concerns and Recommendations

As an initial matter, we agree that the Agency should not be making decisions about a field's wetland status during times of above-average precipitation. But for the reasons explained below, we believe that the definition used in the Interim Rule does not ensure determinations are made at times of normal precipitation for the field or sub-field being evaluated and applies the definition in a way that is inconsistent with the statutory provisions.

a. "Fixed Precipitation Date Range of 1971-2000"

The Agency's incorporation of "normal climatic conditions" into the regulations makes reference to a date range that post-dates the statutory cutoff for identifying converted wetland. As noted above, the Interim Rule establishes that the Agency will use a fixed precipitation data set including the years 1971–2000, but the preamble does not describe why it thinks this 30-year

time frame is appropriate from a scientific or policy perspective. At a minimum, the Agency must explain (1) how it derived the date range, including identifying the data used, and (2) how it intends to apply the date range to ensure that it is representative of precipitation in 1985 (or other relevant timeframe in the case of "commenced-conversion" wetlands).

Further, it is not entirely clear that the Agency intends consistently to use the fixed date range. This date range does not actually appear in the definition of "normal climatic conditions," but only when the Agency describes how it will determine wetland hydrology. 7 C.F.R. § 12.31(c)(4). Although the term "normal climatic conditions" is also referenced within the definitions of "best drained condition," "farmed wetland," and by inference, "prior converted cropland," the 1971–2000 timeframe does not appear in those definitions. This apparently limited application of the time period creates inconsistencies within the Interim Rule as well as a statutory conflict.

USDA should take all necessary action to ensure consistency between the regulations and the statute and make wetland determinations evaluating subject land during times of normal precipitation as reflective as possible of the 1985 time period envisioned by the statute (or other relevant timeframe in the case of "commenced-conversion" wetlands). And as discussed further below, the Interim Rule should also expand the number of weather stations it is using for precipitation data to improve accuracy for fields and be transparent about how it is manipulating the precipitation data and determining the data to be used.

b. "Normal Climatic Conditions" vs. "Normal Circumstances"

Additionally, the preamble does not explain why a definition of "normal climatic circumstances" is necessary, or how it differs from the term "normal circumstances," also used in the regulations. The two ostensibly differ in that "normal circumstances," described as including vegetation and soil, could apply to more than just the hydrologic inputs comprising "normal climatic conditions." 7 C.F.R. § 12.3(b)(2)(i). However, to a layperson, the two are not meaningfully distinct. "Normal circumstances" is the term used in the statutory definition of "wetland," 16 U.S.C. § 3801(27)(C); "normal climatic conditions" appears nowhere in the statute.

Moreover, the definition of "normal climatic conditions" lacks sufficient information to be understandable to regulated farmers. The definition uses the term "hydrologic inputs" when the more common term is "precipitation." Does USDA consider "hydrologic inputs" to be anything other than what the general public understands as precipitation? To demonstrate clear intent, the terminology should be consistent and be a term that most people recognize. Second, allowing USDA to choose between two different guides (the Climate Analysis for Wetlands Tables or the Field Office Technical Guide) leaves farmers uncertain as to the standards that might apply to their land. USDA identifies no criteria that would cause it to choose one guide over another in any given circumstance. The definition provides no parameters for the development of content in these two guides and describes them in name only. This is but one example of the way the conservation compliance program leaves too much to the discretion of individual Agency staff in the field, unnecessarily disadvantaging the farmer and depriving the farmer from the ability to meaningfully participate in the process.

As an example of the statutory conflict, both 16 U.S.C. § 3822(b)(1)(A) and (G) include exemptions for "conversion of the wetland [that] was commenced before December 23, 1985." However, the rule defines a "farmed wetland," "farmed wetland pasture" and by inference "prior converted cropland" as having to meet hydrologic indicators that can be met by a direct observation during a site visit "conducted under a period of normal climate conditions or drier" or as "observed on aerial imagery . . . determined to represent normal or drier than normal climatic conditions." Because the indicators do not include a time frame for when "normal climatic conditions" are to be judged, it leaves it to be arbitrarily decided by Agency personnel.

As another example of the conflicts created by the definition, 16 U.S.C. § 3822(d) includes in its definition of wetland the concept that it, "under normal circumstances, support[s] a prevalence of [hydrophytic] vegetation." This is the only context in the statutory wetland provisions referring to "normal circumstances," and the Agency in turn repeats the term "normal circumstances" in its explanation of the hydrophytic vegetation component of a wetland determination. 7 C.F.R. § 12.31(b)(2)(i). Yet for the wetland hydrology component of a wetland determination USDA now uses the term "normal climatic circumstances." *Id.* § 12.31(c)(4). While "normal climatic conditions" is now a defined term, "normal circumstances" is not. Common sense tells us that normal precipitation is a big part of what is considered to be "normal circumstances" yet this term is still undefined in the Interim Rule and was left unqualified by the new term "normal climatic conditions." This leaves another inconsistency in the rule that USDA must explain.

c. Data and Data Manipulation

The preamble does not explain how the guides referenced in the definition are representative of actual on-site conditions. The preamble states the "National Water and Climate Center compiles precipitation data using information from National Oceanic and Atmospheric Administration (NOAA) weather stations." 83 Fed. Reg. at 63,048. Then, "this weather data" is used to develop the "Climate Analysis for Wetlands Tables" that is used in the definition. *Id.* The preamble does not describe what data manipulation occurs between the point of data collection through all these steps before it is included in the wetlands tables. Neither the rule nor the preamble describes whether any other information is used in the development of these wetlands tables. The Agency is not transparent about whether the NOAA weather station data will be the only source of data, whether other data may be included or whether the data will be manipulated, much less *how* it will be manipulated in developing the tables. If the USDA Natural Resources Conservation Service (NRCS) is only going to use NOAA weather stations, the definition should specifically state how it is going to use this data to determine normal precipitation instead of creating another black box which can change without notice and comment. Without a better description, the definition does not provide enough information for farmers or their consulting engineers to evaluate compliance.

Assuming the Agency will only use the NOAA weather stations, there are not enough of them to fairly approximate rainfall for a wetland determination on most tracts. Weather can vary significantly from place to place and county to county. To improve the data quality, we recommend that the Agency include in the data set another type of weather station called AWOS (Automated Weather Observing System), which is controlled by the FAA, a university or a local agency. The preamble does not include any discussion of why it is only using ASOS (Automated

Surface Observing System) weather stations controlled by NOAA. Expanding the number of weather stations will improve accuracy of the weather data for tracts.

C. Farmed Wetland and Farmed Wetland Pasture

1. Interim Rule

The Interim Rule alters the prior definitions of "farmed wetland" and "farmed wetland pasture," codifying several options for USDA to use to identify farmed wetland conditions, including site-visit observation of inundation, identification of indicators from the Corps of Engineers' Wetland Delineation Manual, use of aerial imagery, and the use of other "analytic techniques, such as the use of drainage equations or the evaluation of monitoring data." 83 Fed. Reg. at 63,051.

2. Concerns and Recommendations

a. Interim Rule

Whether intentional or not, this Interim Rule expands the farmed wetland category by making it easier for USDA to designate land as a farmed wetland. As a result, the rule substantively changes what land qualifies as prior-converted cropland or commenced-conversion wetlands under the statutory exemptions, to the detriment of farmers that have relied on prior interpretations. This new definition reflects what the USDA wants to do, not what the USDA has been doing under existing Agency guidance. USDA should avoid promulgating rules that move the goalposts and upend farmers' expectations regarding the regulations that apply to their land, limiting farmers' flexibility with respect to land management.

Specifically, by focusing exclusively on wetland hydrology in the definition of farmed wetland, USDA is regulating land that would not satisfy the three basic characteristics of a wetland that USDA and other federal agencies have recognized: hydric soils, hydrophytic vegetation, and wetland hydrology. *See* 7 C.F.R. § 12.2; *see also B&D Land & Livestock Co. v. Schafer*, 584 F. Supp. 2d 1182, 1199 (N.D. Iowa 2008) (ruling that hydrophytic vegetation and wetland hydrology requirements are "*separate, mandatory* requirements" and USDA must treat them as such (emphasis in original)). Indeed, the definition conflicts with another new provision USDA codified requiring USDA to use those three benchmarks in the first step of a three-step wetland determination. 7 C.F.R. § 12.30(c)(7). A field must meet the definition of wetland before it can meet the definition of "farmed wetland." As with other clarifications, USDA should make clear in a new Interim Rule that it does not intend to abandon the traditional definition of wetland when identifying a farmed wetland.

Moreover, the methods USDA is codifying to identify wetland hydrology appear to make it more likely that USDA will find that criterion satisfied, which opens the door to expanded wetland designations given that USDA infers the existence of the other two criteria from hydrology—even though at least one court has ruled the three are distinct requirements. *See B&D Land & Livestock Co.*, 584 F. Supp. 2d at 1199. By only requiring one indicator to be met, especially since some of the indicators imply a one-time evaluation, farmers are at risk of arbitrary determinations made without a realistic assessment of conditions and without the

opportunity to participate in the process. Put plain, a one-time snapshot after a precipitation event should not result in an adverse classification based on a cursory review.

The Agency gives itself additional discretion by prefacing the list of hydrologic indicators with the word "any," indicating that only one of the indicators needs to be found. 7 C.F.R. § 12.2(a)(4). The use of the word "any" combined with the language of each of the indicators allows USDA to have one observation to determine that a field contains a farmed wetland. For example, the use of the singular "a" in the provision allowing USDA to "directly observe[] during a site visit conducted under a period of normal climatic conditions or drier" implies that USDA need only see a parcel once to determine whether conditions are met. But the rule also requires inundation to occur for a certain number of consecutive days or a percentage of the growing season. How can USDA determine during one site visit or from one aerial photo whether a consecutive-day requirement for inundation is met, much less a percentage of the entire growing season? Furthermore, the use of "normal climatic conditions" introduces an element of confusion as to when exactly the land is to be observed. If "[w]hen making a decision on wetland hydrology, NRCS will utilize a fixed precipitation date range of 1971-2000 for determining normal climatic conditions," how will USDA determine when to visit land in 2019 that is being judged against precipitation measured between 1971 and 2000? 7 C.F.R. § 12.31(c)(4). USDA must clarify how it intends to apply this provision, including whether it considers a one-time observation to be sufficient (which we would vigorously oppose). A single site visit or aerial photos on their own are not sufficient to find that hydrologic criteria are satisfied; rather, site visits and photos should be used as internal controls to confirm the analytical techniques/models.

Additionally, the reference to "Group B (Evidence of Recent Inundation)" of the "Corps of Engineers Wetland Delineation Manual" is another example of goalposts that can move without the opportunity for the public to weigh in. The regulation provides no certainty that what the Corps considers to be evidence of recent inundation will be consistent throughout the years, such that the same farmer could have different parcels of the same farm designated differently just because they are being evaluated at different times. The Group B indicators are also highly subjective; many of them contain "cautions and user notes" that could be interpreted to allow the identification of a nonwetland as wetland merely due to a precipitation or brief flooding event. The subjectivity of Group B indicators and the ability for them to change without notice to the regulated farmers mean they are unreliable indicators for these purposes, especially when they are used in isolation from other hydrologic indicators. We ask that this reference be omitted from the rules.

Also, although we do not oppose the use of aerial imagery to confirm wetland delineations, aerial imagery alone, as with a one-time on-site review, is insufficient to evaluate wetland hydrology and likely cannot be used to assess whether consecutive-day requirements for inundation are satisfied. Used alone, it does not allow for an accounting of how much precipitation the area received in the week or month before the photo was taken. Aerial imagery and on-site visits should only be used as internal controls to confirm data-driven assessments of a parcel.

In that vein, the ability for USDA to use unspecified "analytic techniques" further risks an "I know it when I see it" wetland determination, and keeps farmers in the dark about what

will be used to determine their compliance status. Such broad, undefined discretion flies in the face of the transparency USDA sets forth as a reason for promulgating the Interim Rule. Moreover, the use of techniques not codified into regulation through a public process runs afoul of the spirit of the Brand Memo by imposing on regulated entities requirements that have not gone through the required process to become binding regulations. USDA's current list of analytic techniques identified in guidance is selectively used by NRCS without rationale even when an approved method provides a more accurate analysis. For example, the Iowa NRCS does not use the Soil, Plant, Air, Water (SPAW) model and has discouraged farmers from using it even though it is an approved methodology. NRCS, *National Engineering Handbook,* ch. 19 (Hydrologic Tools for Wetland Identification and Analysis at 19-96, *et. seq.*) (Sept. 2015). USDA should clarify exactly which tools, if any, beyond those specified in the regulation ("the use of drainage equations or the evaluation of monitoring data"), it intends to use to evaluate inundation and saturation, including when and under what circumstances each tool is to be used.

b. Other Concerns

Beyond the concerns with the Interim Rule identified above, several aspects of the regulations concerning farmed wetland and farmed wetland pasture should be changed in future rulemaking. For example, with respect to playas, pocosins, and potholes, the Corps' Wetland Delineation Manual uses a standard of 14 consecutive days of flooding or ponding. *See, e.g.*, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Midwest Region (Version 2.0) 70 (August 2010) ("Regional Supplement"), *available at* https://usace.contentdm.oclc.org/utils/getfile/collection/p266001coll1/id/7630. USDA has not explained why it uses a standard of 7 days for ponding, but 14 days for saturation. USDA's standards should be no more stringent than the Corps' Wetland Delineation Manual, especially since USDA incorporates its principles in other respects.

Additionally, similar to our concerns noted above with regard to the definition of "best drained condition" and below with regard to the definition of "prior converted cropland," the definition of "farmed wetland" implies that any manipulations will have been completed by December 23, 1985. But USDA has a definition for "commenced-conversion wetland" that includes farmed wetland "on which conversion began, but was not completed, prior to December 23, 1985." 7 C.F.R. § 12.2. USDA does not incorporate this "commenced" concept into the remainder of its regulations, which introduces problematic ambiguity. USDA should make clear across the board that the statute recognizes conversions that commenced, but were not completed, prior to December 23, 1985.

Also referenced in the context of "best drained condition" that applies with equal or greater force in the context of farmed wetland is USDA's creature of regulation, the disallowance of an exemption for farmed wetland that has been abandoned. As USDA appears to understand, the statutory term "converted wetland" encompasses USDA's categories of "prior converted cropland," "commenced-conversion wetland," "farmed wetland," and "farmed wetland pasture." However, for farmed wetland and farmed wetland pasture USDA has imposed extra-statutory rules regarding abandonment that directly contradict congressional intent. Although we understand that for administrability reasons USDA imposed time limits on wetland determinations for conversions that commenced, but were not complete, as of December 23, 1985, USDA cannot claim that administrability concerns allow it to disqualify farmers from

receiving benefits where Congress did not. USDA appears to have acknowledged this in the preamble to the 1996 regulations where, similar to its recognition of "once a PC, always a PC," the Agency recognized that the 1996 farm bill "[p]ermits a person to cease using farmed wetlands, or farmed-wetland pastures . . . and subsequently bring these lands back into agricultural production *after any length of time* without loss of eligibility for USDA program benefits, given certain conditions." 61 Fed. Reg. at 47,020 (emphasis added). And yet, in 7 C.F.R. § 12.33(c), USDA expressly limited the reach of Congress's exemption, considering farmed wetlands to be abandoned after five years of non-use unless other conditions are met. Just because this regulation was codified decades ago does not make it right. Coupled with USDA's apparent expansion of the farmed wetland category through re-definition, USDA has exceeded its statutory authorization as to how and when the Agency can control converted wetland. USDA must return its administration of the conservation compliance program to what Congress actually intended.

It is of paramount importance that USDA recognize that a "farmed wetland" must first meet the definition of a wetland and should be disqualified as a prior converted wetland before undergoing a farmed wetland evaluation. The evaluation of hydrologic indicators must be more comprehensive then meeting one of the superficial indicators without further study. Reference documents and guidance, which change without notice, do not provide an opportunity for farmers to participate in the process that determines their compliance with these regulations. To follow administrative law, USDA must also clearly identify the scientifically and legally sound compliance requirements so that regulated farmers can determine their compliance status before the surprise NRCS determination.

D. Prior-Converted Cropland

1. Interim Rule

The Interim Rule amends the definition of prior-converted cropland to define it by what it is not, *i.e.* any wetland converted prior to December 23, 1985, that does not meet the criteria of farmed wetland. 83 Fed. Reg. at 63,051.

2. Concern and Recommendations

Our concerns with the revised definition of prior-converted cropland parallel our concerns with regard to how USDA is redefining farmed wetland. By expanding the universe of what could be considered farmed wetland, USDA is thereby limiting the land delineated as prior-converted cropland, eliminating or significantly reducing farmers' ability to conduct maintenance or improvement to their land.

USDA must recognize that prior-converted cropland is not only not farmed wetland, *it is no longer wetland*.[1] Prior-converted cropland is a critically important designation for land that

[1] Although USDA has not proposed to amend the definition of "nonwetland" in the Interim Rule, the Agency should. The statute defines "nonwetland" as land lacking "any one" of the three wetland criteria. 16 U.S.C. § 3822(e). USDA's current regulation reads simply that the (Continued...)

has been significantly modified so that it no longer exhibits its natural hydrology or vegetation and due to agricultural manipulation and drainage, it no longer performs the functions or has the values that the area did in its natural condition. Prior-converted cropland is no longer wetland and should never be treated as wetland under the Food Security Act or any rule implementing the Food Security Act.

As with other rules, the definition of prior-converted cropland in the Interim Rule implies that conversion was complete before December 23, 1985, while the statute only requires commencement in advance of that date. Indeed, the definitions of prior-converted cropland and farmed wetland would seem to exclude commenced-conversion wetland by defining the categories as having completed conversions prior to December 23, 1985. USDA should make it clear across the board that the statute recognizes conversions that commenced, but were not completed, prior to December 23, 1985. USDA must resolve any inconsistencies between the regulatory provisions that properly exempt commenced-conversion wetlands in the same manner as prior converted cropland (*e.g.*, 7 C.F.R. § 12.5(b)(5)) and others provisions, such as the definition of "prior-converted cropland" that do not mention commencement and instead imply that conversions must have been complete prior to December 23, 1985.

E. Wetland Hydrology

1. Interim Rule

USDA has added "wetland hydrology" as a defined term in the regulations, defining it as "inundation or saturation by surface or groundwater during a growing season at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation." 83 Fed. Reg. at 63,051.

2. Concerns and Recommendations

At the outset, it is unclear why USDA has added this term both in the definitions section and the wetland identification procedures regulation at 7 C.F.R. § 12.31. Additionally, the regulations do not make clear the relationship between the fairly general definition of wetland hydrology and the much more specific description of the hydrology required to support a designation of land as farmed wetland. USDA should clarify the precise purpose of the addition in both places in the regulations. USDA should also define wetland hydrology more clearly within the regulations. The following long-standing hydrologic criteria should be included in the regulation, preamble and implementing manuals:

> Wetlands on agricultural lands that do not contain potholes, pocosins or playas are inundated for 14 or more consecutive days during the growing season or 10 percent of the growing season. Wetlands on agricultural lands containing potholes, pocosins and playas are inundated for 7 or more consecutive days or are saturated for more than 14 consecutive days during the growing season in most years.

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land "does not meet wetland criteria," 7 C.F.R. § 12.2, improperly allowing USDA discretion the statute does not grant.

Additionally, in the interests of transparency and due process, USDA should disclaim any reliance on wetland delineation regional supplements that have not undergone notice and comment, and should put out for notice and comment any new supplements.

III. USDA Must Clarify the Purpose of Identifying *Potentially* Highly Erodible Land.

A. Interim Rule

USDA has added to the process for identifying "potentially highly erodible" land the option of using Lidar "or other elevation data of an adequate resolution" to assess the land, along with the ability to request an on-site determination if a person disagrees with the off-site determination. 83 Fed. Reg. at 63,051.

B. Concerns and Recommendations

Farming highly erodible land can be done responsibly with the addition of approved conservation practices that often require the use of federal farm program benefits to adopt or install. Farming in a way that is not consistent with conservation compliance statutes and rules affects many USDA benefits that go beyond those used to follow conservation plans and systems. In addition to conservation cost-share programs, these benefits can include commodity support payments, disaster payments and farm loans administered by the USDA's Natural Resources Conservation Service and the Farm Service Agency. These benefits are critical to a farmer's risk management, natural resource protection, and family livelihood. If a farmer is found to be in violation of conservation compliance statute or rules, then several penalties can be enforced. The penalties can be as severe as declaring the farmer ineligible for current or future benefits and demanding repayment of past benefits. The non-statutory category of "potentially highly erodible" land suggests there are farmers on the verge of losing these important earned benefits who may not even know they are at such risk.

Our greatest concern is that the statute does not specify "potentially highly erodible" land as a regulated category. Why, exactly, the USDA has chosen to include this term in its regulations is unclear. What are the practical consequences of a designation of "potentially highly erodible" land? In fact, the category of "potentially highly erodible" does not seem to be explained in the preamble. Regardless, we are opposed to any designation that would increase the likelihood of an adverse determination on a farmer's land where such designation has no statutory basis. The USDA should consider whether the category of "potentially highly erodible" land is really necessary to carry out its statutory mandate, or is just an internal Agency conservation planning tool that can be used to prioritize workloads, watershed projects or cost-share availability. To the extent USDA intends to maintain this category of "potentially highly erodible" land, it must provide notice to farmers that there may be such lands on their property and give them some sort of opportunity to participate in any determinations. If, for instance, they have been farming in reliance on a determination that there are no highly erodible lands present, they need to be informed if Agency staff believes there may be *potentially* highly erodible lands. Farmers must have a meaningful chance to contest such findings because this designation may have a negative effect on current land values and farming practices.

These concerns are why Farm Bureau supports:

- Limiting the penalty and/or crop insurance subsidy loss for the violation of rules dealing with highly erodible land, wetlands and other conservation compliance standards to the individual FSA tract number where the violation occurred rather than the farmer's entire operation.

- Allowing local NRCS personnel who work directly with farmers to coordinate the repair of damage, such as from extreme weather or from normal farming practices, to fields only with a highly-erodible-land designation. NRCS should consider field condition limitations before imposing penalties for non-compliance.

With these policy concerns in mind, we observe that the Interim Rule preamble does not explain its amendment of the "potentially highly erodible" category or even explain the need for the category at all. While we are not necessarily opposed to the addition of the use of Lidar as a conservation planning tool, if it is to be used in a way that could affect landowners' property rights, USDA must make made clear when and how it will be used. For example technical issues, such as what resolution of Lidar the USDA plans to use (there are different resolutions in use today from state to state), need to be made clear. And since the USDA is allowing "other elevation data of an adequate resolution" to be used, the regulation must specify what resolution is "adequate." This is but another provision that could be subject to changing state-by-state interpretations, contrary to the June 2016 Office of Inspector General's opinion in its USDA Monitoring of Highly Erodible Land and Wetland Conservation Violations audit report (available at https://www.usda.gov/oig/webdocs/50601-0005-31.pdf), thereby removing certainty for farmers and creating enforcement inconsistences from state to state, county to county. The USDA should issue a new, more specific, interim rule.

Additionally, we understand that the USDA may be in the process of promulgating new formulas for its measuring erosion using the Water Erosion Prediction Project model. We remind the USDA that under the statute, 16 U.S.C. § 3801(11)(C), USDA "may not change the [erosion] equations after [initial promulgation] except following notice and comment in a manner consistent with section 553 of title 5," *i.e.*, the Administrative Procedure Act. We question the need for the change and its cascading implications for conservation compliance, crop insurance eligibility, and Agency budget impacts, and look forward to review and comment on USDA's proposal, if it decides to move forward on this troubling development.

IV. Wetland Identification, Determination, and Certification

A. Wetland Certifications

1. Interim Rule

USDA promulgated several changes to the certification process in 7 C.F.R. § 12.30(c)(1), including (1) explaining when a map is of sufficient quality to determine eligibility for program benefits ("legible to the extent that areas that are determined wetland can be discerned in relation to other ground features"), (2) specifying that "wetland determinations after July 3, 1996, will be done on a field or sub-field basis," and (3) that determinations made between November 28,

1990 and July 3, 1996, will be considered certified if they use a map of sufficient quality, and were either issued on a June 1991 form or have other documentation "that the person was notified of the certification" and "provided appeal rights." 83 Fed. Reg. at 63,051-52. USDA also eliminated two sentences regarding not-inventoried designations.

2. Concerns and Recommendations

First, USDA appears to be claiming for itself the discretion—after a wetland determination has been certified for years—to now determine that a decades-old map is of insufficient quality to uphold a certified determination. This would not be consistent with Congressional intent (as expressed in the Manager's Report to the 1990 Farm Bill) that "[f]or maps completed prior to the date of enactment of this Act, the Managers intend for producers to be notified *that their maps are to be certified* and that they have some appropriate time for appeal." *See* 83 Fed. Reg. at 63,050. Mapping technology has dramatically increased in precision over the past several decades; this fact should not be used against a landowner to undermine settled expectations regarding his or her land. Determinations certified prior to USDA's adoption of new mapping conventions should be exempt from invalidation due to changes that only new imaging technology can detect. To that end, USDA's regulations should expressly recognize that pre-1990 certifications are valid unless *the producer* raises the issue that they were never provided with appeal rights after passage of the 1990 Farm Bill (and thus, were not able to appeal the determination to become certified).

Second, and we assume unintentionally, USDA appears to be retroactively defining how prior wetland determinations were made. It is unclear how USDA can state that determinations after July 3, 1996 will be made on a field or sub-field basis when presumably they are already complete. Ambiguous regulations such as these leave unbridled discretion to the Agency to take advantage of farmers, of which examples abound.[2]

Third, USDA has not made clear how it intends to employ this backwards-looking provision. Will a farmer no longer be able to rely on a determination as certified if no appeal rights were given, even if the farmer does not want to appeal? The decision as to what is certified seems to be entirely within the discretion of USDA, meaning that the decision as to whether to make a new determination is also within its discretion. This is a disturbing development. Nothing appears to prevent USDA from coming back to a farmer's land and saying that due to a technicality a wetland determination—even if favorable to the farmer—has to be redone. However, subsection (6) of the same provision provides that certifications remain valid until the person affected requests review (but only then if a natural event occurs or NRCS concurs that the

[2] *See, e.g.*, Thomas A. Lawler, Erin C. Herbold, & Roger A. McEowen, "USDA Administrative Appeals – It's More Than Going Through the Motions," https://www.calt.iastate.edu/system/files/USDA%20Administrative%20Appeals.pdf (adverse result for farmer who acted in reliance on prior owner's representations regarding wetland status and was found to have the burden to preserve evidence and factual and legal issues); *B&D Land & Livestock Co.*, 584 F. Supp. 2d at 1202 (finding Agency wetland determination "so flawed that it cannot be ascribed to a difference in view or the product of agency expertise" based on "errors individually and in their accumulation").

current determination contains an error). Indeed, the statute provides that "[t]he delineation shall not be subject to a subsequent wetland certification or delineation by the Secretary, unless requested by the person." 16 U.S.C. § 3822(a)(6). USDA should clarify whether the changes to when it considers a determination certified in subsection (1) were intended to limit the ability of a landowner to request a review of a certification; we presume not, but the preamble does not clearly explain.

Subsection (6) of the wetland certification provision states "[a]s long as the affected person is in compliance with the wetland conservation provision of this part, *and as long as the area is devoted to the use and management of the land for production of food, fiber, or horticultural crops,* a certification made under this section will remain valid and in effect . . . ." 7 C.F.R. § 12.30(c)(6) (emphasis added). The phrase in italics implies that a wetland determination covering prior-converted cropland would not remain valid if the prior-converted cropland is abandoned, in direct contradiction of the once converted, always converted determination by Congress in 1996 and recognized by USDA (see above). We emphatically reiterate that USDA should amend this regulation to recognize the once converted, always converted status of converted wetland.

B. Wetland Determinations

1. Interim Rule

The Interim Rule codifies a three-step process for wetland determination: (1) assessment of hydrophytic vegetation, hydric soils, and wetland hydrology under normal circumstances; (2) application of any exemptions (including undertaking a minimal-effects analysis); and (3) assessment of the size of the wetland and the boundaries of each wetland type. 83 Fed. Reg. at 63,052.

2. Concerns and Recommendations

The Interim Rule's preamble provides far more detail with regard to the three-step process than the text of the regulation. Such specification—and more—is necessary to ensure uniform application of the regulations across the country. The statute instructs that "[t]he Secretary of Agriculture shall ensure that employees of the Department of Agriculture who administer this subchapter receive appropriate training to properly apply the minimal effect exemptions determined by the Secretary." 16 U.S.C. § 3822(d). Such training necessarily requires training in what a wetland is in the first place. USDA would do well to provide consistent training to employees, including precise specifications as to what manuals to reference when. Better still, USDA could codify into regulation the precise procedures. And USDA should provide farmers and their consultants the opportunity to attend the training so that all involved in the determinations process are on a level playing field. The transparency USDA asserts it is providing in the Interim Rule would only be enhanced by further clarification of process.

C. Wetland Identification

1. Interim Rule

The Interim Rule revises the wetland identification section of the regulations (§ 12.31) by reiterating the definition of "wetland hydrology" prescribed in the definitions section and incorporating "best-drained condition" and "normal climatic conditions" into an evaluation of wetland hydrology. 83 Fed. Reg. at 63,052.

2. Concerns and Recommendations

Field tile in farm field has been used in the U.S. since 1835 to increase crop production and lessen soil erosion. It was also a human health-protection tool that dried malaria-infested mosquito breeding grounds. The extent of tile in the upper-Midwest today, for example, ranges from 25 percent of farmland in the western Corn Belt to 50 percent in the eastern Corn Belt, according to land grant university researchers. Today, field tile is a legitimate, scientific conservation practice that reduces soil saturation, erosion and phosphorus loading of surface waters. Much of the tile is old and in disrepair, having been installed 100 years ago or more, and must be replaced in the coming years if farmers are to maintain the productive capacity of farmland. And even though tiling technology has improved, the ability of newer, more efficient systems to remove additional soil moisture has been offset by increasing periods of wetter weather. Farmers still experience "wet spots" in tiled fields that can sometimes "drown out" growing crops.

Most true wetlands (wetlands with high geomorphic functions and values) were tiled or partially tiled prior to the adoption of the 1985 farm bill. Yet, the "swampbuster" rules enacted in the 1985 farm bill prohibit the conversion of a "wetland" (or what farmers see as a wet spot in field that is normally tilled and planted most years) to a crop. If a farmer is found to have converted such a so-called "wetland," they can be declared ineligible for farm program benefits, just as in the highly erodible farmland provisions previously discussed. Again, these benefits are critical to a farmer's risk management, natural resource protection, and family livelihood.

The swampbuster rules include these three requirements to be defined as a wetland: (1) a predominance of hydric soil; (2) inundation by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions, and (3) under normal circumstances support of a prevalence of such vegetation. In other words, to be a wetland, a tract must have hydric soils, hydrophytic vegetation and wetland hydrology. Sounds simple enough in theory.

In practice, not so much. These criteria have been amplified by various internal policy documents since 1984 that have not had the benefit of public review or comment. As a result, there have been at least a couple of important cases in recent years proving how the NRCS has misunderstood, misapplied and misinterpreted definitions. The three wetland identification criteria have been used to find farmers in violation of the wetland conservation provisions of the

farm bill,[3] not to protect true wetlands. The complexity of these cases and the already confusing wetland definitions and related procedures used to identify wetlands are illustrated by the NRCS in *Table 1 (Appeals of Wetland Determinations*), attached as Exhibit B to these comments, and which can also be found at https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_006512.pdf. This labyrinthine flowchart is an example of what NRCS used in 2007 to try to "help" Agency staff and farmers "understand" the wetland identification process. Intentional or not, it has only served to intimidate producers and deter them from asserting their rights. This complex wetland identification scheme is simply unacceptable and must change.

Due in part to these wetland identification complexities and the problems they have caused farmers and ranchers trying to make a living while balancing legitimate natural resource needs, Farm Bureau supports the following reforms in addition to those already mentioned elsewhere in these comments:

- Exempting farmland from the conservation compliance program if a crop can be produced in a wetter-than-normal year;

- Labeling all tracts and fields as non-wetland or prior converted wetland if there was any form of artificial drainage that has been used prior to the 1985 conservation compliance rules and if the intent was to make crop production possible;

- A requirement that wetland hydrology criteria be applied to farmland only when hydrology is present at least 66.7 percent of the time in a normal year's aerial photograph, instead of the current 50 percent of the time;

- Limiting the penalty and/or crop insurance subsidy loss for the violation of rules dealing with highly erodible land, wetlands and other conservation compliance standards to the individual FSA tract number where the violation occurred rather than the farmer's entire operation; and

- Fields labeled prior converted should be qualified for tile installation to improve soil health and to prevent the proliferation of invasive weeds.

With these policies in mind, we note that the Interim Rule again references "drainage manipulations that occurred prior to December 23, 1985," instead of manipulations that occurred or *commenced* prior to that date. As discussed in detail above and consistent with Farm Bureau policy, USDA must recognize the validity of manipulations that *commenced* prior to the statutory deadline.

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[3] Roger A. McEowen, "Wetlands and Farm Programs – Does NRCS Understand the Rules?" Agric. Law & Taxation Blog (June 18, 2018), https://lawprofessors.typepad.com/agriculturallaw/2018/06/wetlands-and-farm-programs-does-nrcs-understand-the-rules.html.

Additionally, the Interim Rule provides that "[t]he determination of wetland hydrology will be made in accordance with the current Federal wetland delineation methodology in use by NRCS at the time of the determination." 7 C.F.R. § 12.31(c)(3). This new provision significantly undermines the benefits afforded by codifying the procedures for determining wetland status. Moreover, it too violates the spirit of the Brand Memo, which states that Agency guidance may not be treated as binding in enforcement actions. A wetland determination can have—and in fact, has had—the effect of an enforcement action in itself, given its implications for a grower's eligibility for farm program benefits and crop insurance premium discounts. Reliance on procedures not made subject to public-notice rulemaking in defensive actions is not meaningfully different.

As with the suggestions for wetland determinations above, wetland identification procedures and criteria should be made more explicit in the regulations themselves to enhance transparency and create regulatory certainty.

D. Minimal Effects Determinations

1. Interim Rule

The Interim Rule amends the procedure for minimal-effects determinations so as to allow the evaluation of wetlands in the area of the subject wetland to be made based on "a general knowledge of wetland conditions in the area," instead of requiring that both the subject wetlands and area wetlands be evaluated in person. 83 Fed. Reg. at 63,052.

2. Concerns and Recommendations

The removal of the on-site requirement for area wetlands could introduce more unchecked discretion into a minimal-effects determination process where the scales are already tipped in USDA's favor. Additionally, although the statute is clear that minimal-effects determinations must take into account the subject wetland and wetlands in the area, 16 U.S.C. § 3822(f)(1), the way the area assessment is described in this regulation, including the use of "may," raises a question whether the provision could be interpreted not to require assessment of area wetlands. With the recent change in Agency procedure not to have the local conservationist perform the wetlands determination, it remains to be seen if the evaluator will have a "general knowledge" of other related wetlands in the area. Moreover, because the rule does not contain any standard as to what information suffices to make a judgment about "wetland conditions in the area," evaluators are left to their own devices to make a decision with profound effects on producers. This built-in subjectivity could easily be used to justify a denial of the exemption with little ability of the farmer to challenge USDA's conclusions. USDA should clarify that in every minimal-effects analysis, it must assess the functional hydrological and biological value of both the subject wetland and other wetlands in the area.

USDA's minimal-effects regulations also omit several key elements Congress included in the statute. First, and most importantly, the statute provides that "[t]he Secretary *shall* exempt a person from the ineligibility provisions . . . for any action associated with the production of an agricultural commodity on a converted wetland" in the event of a minimal-effect determination. 16 U.S.C. § 3822(f) (emphasis added). The statute does not require that a landowner first request

such a determination; rather, such determination must automatically accompany any on-site visit preceding a determination regarding eligibility. The use of "shall" in this context is unambiguous; an evaluation of the applicability of the minimal-effects provision must occur prior to a finding of ineligibility. Although the preexisting minimal-effects regulation states that "NRCS shall determine whether the effect of . . . conversion of a wetland . . . has a minimal effect on the functions and values of wetlands in the area," it then goes on to imply that the landowner must make a "request for such determination . . . prior to the beginning of activities that would convert the wetland." 7 C.F.R. § 12.31(e)(1). If land is already converted, the regulations also imply that it will be the landowner "seek[ing] a determination that the effect of such conversion on wetland was minimal." *Id.* As such, USDA's regulation is at best inconsistent in this regard.

It is incumbent on USDA to affirmatively assess whether the statutory exemptions apply. This requirement is confirmed by both the Interim Rule where the wetland determination process steps require USDA to determine "if any exemptions apply" before the wetland delineation is completed, and the most recently enacted Farm Bill where the Secretary has a duty to consider whether an exemption applies before declaring ineligibility. 83 Fed. Reg. at 63,052; Pub. L. No. 115-334, § 2101 (2018). Nevertheless, USDA's regulations impermissibly put the burden of proof on the farmer "to demonstrate to the satisfaction of NRCS that the effect was minimal" in the case of an already-converted wetland. 7 C.F.R. § 12.31(e)(1); *see also id.* § 12.5(b)(7). When the determination is USDA's duty in the first instance, and USDA retains access to the relevant technical information and applicable guidance, USDA must set the specific criteria required to claim that a wetland conversion was minimal instead of requiring landowners to attempt to prove the same "to the satisfaction of the NRCS."

Second, the statute requires the Secretary to "identify by regulation categorical minimal effect exemptions on a regional basis." 16 U.S.C. § 3822(d). But USDA's regulations impermissibly delegate this authority to the states. Most states have not identified or adopted the required categorical exemptions and even if they have made a recommendation, USDA has not adopted any categorical exemptions in its rules. USDA should take this authority back and promulgate clear standards for minimal-effect exemptions.

Third, although the "Scope of minimal-effect determination" subsection contains a passing reference to mitigation of wetland conversion, 7 C.F.R. § 12.31(e)(2), we remind USDA that § 12.5(4) is a wholly distinct and fully self-executing mitigation exception, which largely tracks the statutory language regarding the ability of farmers to offset the values, acreage, and functions affected by conversion, 16 U.S.C. § 3822(f)(2). Indeed, in recent farm bills Congress specifically set aside USDA money to be used in mitigation activities, indicating that Congress wanted more farmers to be able to take advantage of the program. *See* Pub. L. No. 113-79, § 2609, 128 Stat. 649, 761 (2014); Pub. L. No. 115-334, § 2103 (2018). USDA should similarly encourage mitigation efforts, and in doing so, amend its regulations generally not to require more than a one-to-one ratio for mitigation; functional capacity should be the benchmark. *See* 16 U.S.C. §§ 3822(f)(2)(D), (E).

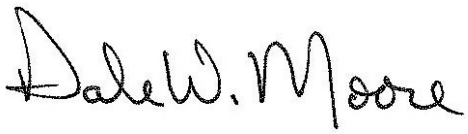
The minimal effect exemption provisions have not been fully implemented by the USDA in accordance with the statute. The elimination of required on-site visits for area wetlands evaluations falls far short of meeting the statutory requirements for the exemption. To comply

with the statute, USDA should evaluate the applicability of the exemption before the wetland delineation instead of placing the burden on the farmer to request and satisfy the NRCS with indeterminate criteria. The rules should also establish clear criteria of what will be considered during a minimal effect analysis in order to give fair notice and allow farmer participation in the process.

V. Conclusion

USDA has an opportunity to both clarify the Interim Rule and promulgate new rules that could provide much needed transparency and certainty for the farmers regulated by the conservation compliance program. USDA should not go partway and stop. Instead, USDA should take a hard look at the discretion it has arrogated to itself, determine whether it accords with the statute, and promulgate new rules that are consistent with Congressional intent and that provide clear, reasonable requirements for farmers.

Sincerely,



Dale Moore
Executive Vice President

EXHIBIT A

U. S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

January 25, 2018

MEMORANDUM FOR: HEADS OF CIVIL LITIGATING COMPONENTS
UNITED STATES ATTORNEYS

CC: REGULATORY REFORM TASK FORCE

FROM: THE ASSOCIATE ATTORNEY GENERAL

SUBJECT: Limiting Use of Agency Guidance Documents
In Affirmative Civil Enforcement Cases

On November 16, 2017, the Attorney General issued a memorandum ("Guidance Policy") prohibiting Department components from issuing guidance documents that effectively bind the public without undergoing the notice-and-comment rulemaking process. Under the Guidance Policy, the Department may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local, and tribal governments), or to create binding standards by which the Department will determine compliance with existing statutory or regulatory requirements.

The Guidance Policy also prohibits the Department from using its guidance documents to coerce regulated parties into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or lawful regulation. And when the Department issues a guidance document setting out voluntary standards, the Guidance Policy requires a clear statement that noncompliance will not in itself result in any enforcement action.

The principles from the Guidance Policy are relevant to more than just the Department's own publication of guidance documents. These principles also should guide Department litigators in determining the legal relevance of other agencies' guidance documents in affirmative civil enforcement ("ACE").[1]

[1] As used in this memorandum, "guidance document" means any agency statement of general applicability and future effect, whether styled as "guidance" or otherwise, that is designed to advise parties outside the federal Executive Branch about legal rights and obligations. This memorandum does not apply to adjudicatory actions that do not have the aim or effect of binding anyone beyond the parties involved, documents informing the public of agency enforcement priorities or factors considered in exercising prosecutorial discretion, or internal directives, memoranda, or training materials for agency personnel. For more information, see "Memorandum for All Components: Prohibition of Improper Guidance Documents," from Attorney General Jefferson B. Sessions III, November 16, 2017. "Affirmative civil enforcement" refers to the Department's filing of civil lawsuits on behalf of the United States to

Guidance documents cannot create binding requirements that do not already exist by statute or regulation.

Accordingly, effective immediately for ACE cases, the Department may not use its enforcement authority to effectively convert agency guidance documents into binding rules.

Likewise, Department litigators may not use noncompliance with guidance documents as a basis for proving violations of applicable law in ACE cases.

The Department may continue to use agency guidance documents for proper purposes in such cases. For instance, some guidance documents simply explain or paraphrase legal mandates from existing statutes or regulations, and the Department may use evidence that a party read such a guidance document to help prove that the party had the requisite knowledge of the mandate.

However, the Department should not treat a party's noncompliance with an agency guidance document as presumptively or conclusively establishing that the party violated the applicable statute or regulation. That a party fails to comply with agency guidance expanding upon statutory or regulatory requirements does not mean that the party violated those underlying legal requirements; agency guidance documents cannot create any additional legal obligations.

This memorandum applies only to future ACE actions brought by the Department, as well as (wherever practicable) those matters pending as of the date of this memorandum. This memorandum is an internal Department of Justice policy directed at Department components and employees. Accordingly, it is not intended to, does not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

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recover government money lost to fraud or other misconduct or to impose penalties for violations of Federal health, safety, civil rights or environmental laws. For example, this memorandum applies when the Department is enforcing the False Claims Act, alleging that a party knowingly submitted a false claim for payment by falsely certifying compliance with material statutory or regulatory requirements.

EXHIBIT B

Appeals of Technical Determinations (Wetlands; HEL)

USDA participant requests technical determination; or potential violation found during technical assistance, compliance status review; or through whistleblower

NRCS completes technical determination and issues a preliminary technical determination **(PTD)**

FO documents in Conservation Assistance Notes the producer's objectives for determination request

Will the **PTD** be adverse to the producer's objectives?

- Y → DCnotifies producer of his appeal rights:
  a. Mediation
  b. Reconsideration and field review
- N → DC issues final technical determination **(FTD)** 30 days after producer is sent "Preliminary determination"

Does producer waive his right to mediation or a field review in writing?

- Y → DC issues **FTD** with appeal rights to NAD or FSA-COC
- N → Is mediation requested within 30 days of **PTD**?
  - Y → Is settlement agreement reached?
    - Y → DC issues Final Technical Determination **(FTD)** based upon agreement; Producer waives further appeal rights
    - N → Is field review requested within 30 days after **PTD** or mediation hearing with no agreement reached?
      - N → DC issues **FTD** with appeal rights to NAD or FSA-COC → **Go to blue question**
      - Y → Conduct field review within 15 working days, field conditions permitting
        - Are field review results adverse to the Producer's objectives?
          - N → DC issues Final Technical Determination **(FTD)**
          - Y → FO prepares Preliminary Administrative File w/ information indicated on Check list and forwards to AO w/in 7 days
            - Does AO find the information adequate (within 7 days)?
              - N → FO prepares Preliminary Administrative File w/ information indicated on Check list and forwards to AO w/in 7 days
              - Y → Preliminary Administrative File is sent to STC for review
                - Has the technical determination already been appealed to FSA-COC?
                  - Y → STC issues technical review findings and sends to FSA-COC → FSA notifies producer of STC review findings
                  - N → STC completes review of technical determination
                    - Is it adverse to the Producer's objectives?
                      - Y → STC issues **FTD** with Producer's appeal rights to NAD or FSA –COC
                      - N → STC issues **FTD**
                        - Does STC decision affirm **PTD**?
                          - N → STC asks FO to prepare a Preliminary Administrative File
                          - Y → Is the **FTD** appealed to FSA-COC within 30 days?
                            - Y → Does the FSA/COC request STC technical review of DC's **FTD**?
                              - Y → Has STC reviewed the **PTD?**
                                - N → STC asks FO to prepare a Preliminary Administrative File
                                - Y → Go to Green Box
                              - N → Is the **FTD** appealed to NAD within 30 days?
                                - N → Technical determination process is complete
                                - Y → Field Office prepares complete Administrative File and sends to State Office → S.O. reviews and forwards to NAD and appellant → NAD Hearing Officer's determination is issued
                                  - Does Hearing Officer's finding uphold **FTD**?
                                    - N → Does NRCS appeal to NAD Director?
                                      - Y → NAD Director reviews the hearing officer's decision and issues decision
                                        - Did NRCS Appeal?
                                          - Y → Is hearing officer's decision upheld?
                                            - N → STC or DC issues new **FTD** to Producer
                                            - Y → Technical determination process is complete
                                          - N (Producer appealed) → Is hearing officer's decision upheld?
                                            - N → STC or DC issues new **FTD** to Producer
                                            - Y → Technical determination process is complete
                                      - N → Technical determination process is complete
                                    - Y → Does Producer appeal to NAD Director?
                                      - Y → NAD Director reviews the hearing officer's decision and issues decision
                                      - N → Technical determination process is complete

PTD = PRELIMINARY TECHNICAL DETERMINATION
FTD = FINAL TECHNICAL DETERM INATION

Approved: **/s/ Richard Van Klaveren**
State Conservationist
Date: **3/8/07**