

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 undersigned organizations appreciate 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. Our organizations are 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. Our organizations 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 Programs Must Provide Farmers with Due Process.

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. More importantly, we find that guidance, policy and even the interim rules fail to match up with the statute in very substantive ways.

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

We are 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. 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.

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.

II. **Conversions Commenced before December 23, 1985.**

Throughout the preamble and Interim Rule, USDA repeatedly applies an incorrect standard for determining the applicability of conservation compliance programs. The statute exempts production on lands that are on a “converted wetland if the conversion of the wetland was *commenced* before December 23, 1985.” 16 U.S.C. § 3822(b)(1)(A) (emphasis added). *See also* 7 C.F.R. § 12.2(a) (recognizing the import of the term “commenced” in the definition of “commenced-conversion wetland.”). Yet, the Interim Rule requires that all conversions must have “occurred” by December 23, 1985. That is, the statute requires only that the conversion *begin* before December 23, 1985, while the Interim Rule suggests that the manipulation must be *completed* by that date. Areas of the Interim Rule that are affected by this error include the wetland identification procedure and the definitions of the terms “best drained condition,” “farmed wetland,” and “prior converted cropland.” 83 Fed. Reg. at 63,050-52. USDA should make clear across the board that the statute recognizes conversions that commenced, but were not completed, prior to December 23, 1985.

III. USDA Must Recognize the Principle of “Once Converted Always Converted.”

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, 47,020 (Sept. 6, 1996) (recognizing 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.”) (emphasis added). 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.

USDA similarly impermissibly limits the reach of the abandonment exemption in other parts of the code. For example, in 7 C.F.R. § 12.33(c), USDA considers farmed wetlands to be abandoned after five years of non-use unless other conditions are met. Similarly, 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. We emphatically reiterate that USDA should amend its regulations to recognize the once converted, always converted status of converted wetland.

IV. 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 particular, USDA has amended the definitions of “farmed wetland” and “prior-converted cropland” in a way that raises significant concerns.

A. 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 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 refers to a date range that post-dates the statutory cutoff for identifying converted wetland. The Interim Rule’s preamble does not describe why the Agency thinks this 30-year time frame is appropriate from a scientific, policy or legal perspective. It is important that the Agency explain why precipitation data from after December 23, 1985 is appropriate to use in this context, given that (1) Congress is excluding from conservation compliance consideration farmers’ wetland drainage efforts that took place or commenced before that date to convert a wetland to agricultural use, and (2) farmers’ drainage activities, in terms of their location and extent, were decided in the context of hydrological and precipitation conditions preceding that date. Judging whether something is or is not a wetland using precipitation data from after December 23, 1985 creates the very real possibility that a farmer’s actions that fully converted a wetland before that date (and therefore as “prior converted” would be excluded by Congress from conservation compliance consideration) could be found under the Interim Rule not to have converted the wetland, thereby thrusting the land in question back under the programs’ provisions.

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 preceding December 23, 1985 (or other relevant timeframe in the case of “commenced-conversion” wetlands). 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 period ending December 23, 1985, as envisioned by the statute (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.

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 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.

B. 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

The 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.

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.

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.

Moreover, 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. In a similar vein, the use of techniques not codified into regulation through a public process runs afoul of the spirit of the Brand Memo (available at <https://www.justice.gov/file/1028756/download>) by imposing requirements on regulated entities that have not gone through the required process to become binding regulations. 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.

C. 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 how USDA is redefining farmed wetland. By expanding the universe of what could be considered farmed wetland, USDA is 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 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.

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

V. Wetland Certifications and Minimal Effects Determinations.

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.

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.

B. 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

Congress established in the conservation compliance program minimal effects (and mitigation) measures with the intention that they be practically implemented and usable to farmers. The Agency must bring this overall perspective and objective to their implementation of these measures. This means not only assuring that farmers meet the requirements of the conservation compliance program, but also that USDA will work to help farmers make compliant drainage decisions that support their operations' profitability and productivity. The minimal effects (and mitigation) provisions that Congress created should work well in situations where wetter parts of farmers' fields may still exhibit some wetland properties but in practice have extremely limited wetland functions and values. This is due to these lands often being actively farmed and because they are part of a large, extensive, highly managed, highly drained, productive agricultural landscape.

To achieve the goal of helping farmers make program compliant drainage decisions that improve their operations, will require the Agency to accurately consider the actual functions and values present in the farm field instances described above. Depending on the degree of values present, there must be circumstances where it is appropriate for farmers to further drain those areas (and, if needed, conduct mitigation measures). Yet such things are not taking place under the Agency's implementation of the conservation compliance program today.

We note that in other natural resource policy arenas, agriculture is actively working to reduce nutrient losses from row crop fields and one of the important practices in this regard is the installation of treatment wetlands. Such treatment measures will often make a good deal of sense as mitigation measures for any of the more minimal values involved in wetter areas of farm fields that could be drained, consistent with their role on the broader, highly managed and drained landscape. We encourage you to develop conservation compliance program measures that are supportive of these efforts.

With respect to the minimal effects provisions in the Interim Rule, we note that removing the requirement that on-site visits to an area in order to assess other wetlands that may be present 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, or the lack of other 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 decisions with profound effects on producers. This built-in subjectivity could easily be used to justify a denial of the minimal effects 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.

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.

VI. 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,

American Farm Bureau Federation
National Cattlemen's Beef Association
National Cotton Council
National Council of Farmer Cooperatives
United Egg Producers