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February 1, 2019

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

**Re: Wetland Conservation Compliance Interim Rule, Docket ID USDA-2018-0010**

Dear Mr. Outlaw:

We greatly appreciate the opportunity to review and provide comments on the U.S. Department of Agriculture (USDA) and Natural Resources Conservation Service's (NRCS) interim rule dated December 7, 2018, regarding the wetland conservation compliance provisions of the Food Security Act of 1985.

The mission of Ducks Unlimited (DU) is to conserve, restore, and manage wetlands and associated habitats for North America's waterfowl and other wetland-dependent wildlife for the benefit of all Americans. Since its creation in 1985, conservation compliance has been a hugely effective and important policy, where producers agree to meet baseline conservation standards in return for various farm program benefits. DU is proud of our collaborative efforts to work with a broad coalition of bipartisan members of Congress and agriculture, crop insurance, and conservation leaders to ensure that conservation compliance remains linked to participation in the federal farm programs. This conservation compact between taxpayers and agricultural producers provides a strong safety net for our nation's agricultural producers and natural resources, leading to significant reductions in soil erosion, as well as protecting between 1.5 million and 3.3 million acres of vulnerable wetlands through Swampbuster.

In its interim rule, NRCS amends several provisions in 7 CFR part 12 to "codify many technical portions of the existing agency policy that have not undergone public review and comment." As a national leader in wetlands conservation, DU maintains a keen interest in the implementation of wetlands compliance, including the need for accurate and technically rigorous wetland determinations. We share the agency's desire to provide transparency and clarity with regards to how NRCS delineates, determines, and certifies wetlands, as this will give certainty both to agricultural producers and taxpayers that implementation of the law is consistent with both Congressional intent and science. In keeping with those goals, we offer the following recommendations on a final rule.

## **Determining normal precipitation**

The interim rule establishes a fixed precipitation dataset from 1971-2000 to determine “normal circumstances” when making wetland determinations. While we know that wetlands exist in a highly variable and dynamic environment that is affected by climatic conditions and other factors, we also understand the need to provide consistent determinations over time. As was pointed out in the Environmental Assessment associated with the interim rule, moving the dataset forward 10 years would create a situation where producers could request new determinations on the grounds that the existing determination is no longer a reliable indication of site conditions under the new dataset. This would ultimately result in a wave of producers requesting reviews of certified wetland determinations, leading to a significant backlog of new determinations, overwhelming agency resources and staff.

For these reasons, we support the agency’s decision to maintain the use of the 1971-2000 dataset. We also support the continued use of a 30-year dataset and urge the agency to reject calls for truncating that dataset into a shorter window.

## **Definitions of pothole, playa, pocosin, and other terms**

The interim rule proposes to add a number of definitions to the regulation, including those for pothole, playa, and pocosin. NRCS has indicated their intention to define these wetland types in the regulation for the first time to provide consistency and transparency in wetland identification, as these wetland types are subject to unique hydrology criteria. In addition to these wetland types, the interim rule also includes definitions for “best drained condition,” “normal climatic conditions,” and “wetland hydrology.” In past comments, DU has urged NRCS to ensure that any such definitions are science-based and, where applicable, consistent with U.S. Fish and Wildlife Service and National Wetlands Inventory definitions, protocols, and practices. We believe the definitions proposed in the interim rule are consistent with these recommendations and support the agency’s decision.

## **Wetland minimal effects determinations**

Both the Food Security Act and 7 CFR part 12 provide for an exemption from the wetland compliance provisions if an action has a minimal effect on the functional hydrological and biological value of the subject wetland and other wetlands in the area. As stated in the rule, previous regulatory language required an on-site evaluation for both the subject wetland and all wetlands in the area to determine minimal effect, a requirement the agency found “overly burdensome.” To address this issue, the interim rule removes the requirement for an on-site evaluation of other wetlands in the area, instead allowing for this assessment to be based on “a general knowledge of wetlands in the area.”

DU recognizes that completing an on-site functional assessment of wetlands in the area is not always possible. At the same time, it is vital that off-site minimal effects assessments of these related wetlands be science-based and technically defensible. Therefore, in addition to having

“a general knowledge” of wetlands in the area, we encourage NRCS to put in place a consistent, science-based methodology and process for completing off-site assessments of these wetlands.

### **Hydrology criteria for farmed wetland and farmed wetland pasture**

In an effort to clarify the process used to determine whether hydrology criteria are met for certain wetland types, the interim rule amends the regulation to reflect the decision by NRCS to move from a strict, number-based approach applied across multiple geographic regions to one based on “more readily observable and easily quantifiable criteria.” DU acknowledges that moving from a specific “number of days” standard to this approach places the agency’s process for identifying wetlands more in line with the wider wetland scientific community, and we support this clarification.

In the rule, however, the agency specifically includes observations from aerial imagery to indicate “the presence of conditions resulting from inundation or saturation during the growing season.” With observations from aerial imagery now specifically included as hydrologic indicators, we strongly encourage the agency to incorporate the use of spring imagery when making wetland determinations. The current wetland determination process does not consistently utilize spring imagery, and instead largely relies on imagery from late summer. The vast majority of wetlands in the Prairie Pothole Region are temporary or seasonal in nature, and are critical to the production of waterfowl, upland game birds, and the protection of water quality and flood attenuation. Traditional aerial images obtained in later summer months, however, fail to consistently capture these temporary wetlands. In addition, we strongly recommend that the National Wetlands Inventory (NWI) data be a required source in the wetland determination process. Spring imagery, used in combination with traditional late summer FSA imagery, National Wetlands Inventory data, updated soils maps, LiDar data, and physical site visits, will ensure that the wetland determination process is as accurate and technically robust as possible, serving farmers, our nation’s natural resources, and American taxpayers.

### **Certification of pre-1996 wetland determinations**

The interim rule also updates 7 CFR part 12 to reflect the decision by NRCS to certify wetland determinations completed between November 28, 1990, and before July 3, 1996. As has been stated before, DU strongly objects to certifying these determinations without documented quality control assurances. Furthermore, we believe this action by NRCS to be contrary to Congressional intent, as during the debates leading up to both the 2014 Farm Bill and 2018 Farm Bill, amendments to automatically certify these pre-1996 wetland determinations were introduced and subsequently either rejected by the committee or withdrawn prior to markup.

The arguments against certifying these wetland determinations are well-documented. In February 1997, representatives of NRCS, the Environmental Protection Agency, and the U.S. Fish and Wildlife Service signed an interagency report entitled: “Quality Assessment for Existing Wetland Determinations as provided on CPA-026/026E.” This assessment found that over 90

percent of the wetland determinations issued in North Dakota between 1990 and 1996 were not of sufficient quality for implementation of the wetland conservation provisions of the Food Security Act. Federal agency partners involved in the assessment cited several reasons why these wetland determinations failed to meet USDA's quality standards, including incorrect or missing labels, poor boundary delineations, and lack of adequate Farm Service Agency slides. Furthermore, in a July 1997 memo to Secretary of Agriculture Dan Glickman, NRCS Chief Paul Johnson stated that over 3 million wetland determinations were made using pre-1996 determinations, and that 60 percent of these determinations were inaccurate. The results of these and other assessments led to the creation of USDA's Wetland Mapping Conventions used today and supported the change to require certified wetland determinations in the 1996 Farm Bill.

These assessments are also supported by a January 2017 Office of Inspector General (OIG) audit report of the Wetland Conservation Provisions in the Prairie Pothole Region, which detailed the decision by USDA to certify pre-1996 wetland determinations. In this report, the OIG found that, of the cases reviewed, 75 percent of wetlands that should have been protected were not, and thus were subject to drainage and loss of public benefit intended by Swampbuster.

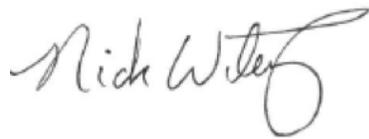
Furthermore, we are concerned that NRCS failed to prepare an Environmental Assessment (EA) when it began certifying pre-1996 wetland determinations in 2013. While an EA was prepared for this interim rule, its scope was limited only to the changes being made in the regulation, which are only referred to as "clarifications" in the rule. The EA itself states that, "Under the No Action Alternative, USDA would not update its regulations," and points out that the changes in the interim rule "merely clarify some aspects of technical procedures already being used by USDA." In other words, without this rule, NRCS would continue to follow these procedures, but without transparency about its standard practices. While we appreciate NRCS providing this transparency to the public now on changes made in the past, it is very concerning that there appears to have been no formal analysis or review of the environmental impacts of NRCS certifying pre-1996 wetland determinations, despite the fact that pre-1996 wetland determinations have been shown to significantly reduce the number of high-value wetlands protected under Swampbuster.

In light of these facts, DU strongly urges USDA to take appropriate action to ensure that Swampbuster is implemented as intended and the public benefits of wetlands are retained by immediately discontinuing the certification of pre-1996 wetland determinations and resuming use of up-to-date, technically rigorous methods for wetland determinations. Pre-1996 wetland determinations, as the OIG report clearly demonstrated, are not of sufficient quality to determine eligibility for USDA program benefits, and the data and methods used to complete them do not meet the current, technically rigorous requirements that NRCS uses to complete certified wetland determinations. Allowing the certification of pre-1996 wetland determinations weakens the integrity of Swampbuster and erodes the public and private benefits that were the intent of Congress when conservation compliance was enacted into law.

Conservation compliance is intended to provide the public assurances that producers receiving taxpayer support for voluntary federal farm programs are adhering to basic conservation standards. This long-standing federal policy and conservation compact has worked well for over 30 years, but these goals cannot be accomplished without the accurate, science-based wetland determinations that serve as the foundation for Swampbuster. We believe many of the changes made in the interim rule do provide greater transparency, clarity, and consistency for producers and taxpayers alike, with the exception of the certification of pre-1996 wetland determinations, and we urge NRCS to consider our recommendations above on this issue.

Thank you for the opportunity to review and provide our comments, and we look forward to continuing the strong relationship Ducks Unlimited has with USDA and NRCS on this and other issues. If you have any additional questions regarding these comments, please contact Kellis Moss ([kmoss@ducks.org](mailto:kmoss@ducks.org); 202-621-1643) or Andrew Schmidt ([aschmidt@ducks.org](mailto:aschmidt@ducks.org); 202-621-1657).

Sincerely,

A handwritten signature in cursive script that reads "Nick Wiley". The signature is written in dark ink and is positioned above the typed name and title.

Nick Wiley  
Chief Conservation Officer  
Ducks Unlimited, Inc.