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Via Certified Mail and Email Delivery

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Re: Preliminary Comments on Proposed Changes to the Wetland Conservation Provisions at 7 C.F.R. part 12

On behalf of the National Wildlife Federation ("NWF"), I am submitting comments on the Natural Resource Conservation Service's ("NRCS") proposed changes to the wetland conservation provisions at 7 C.F.R. part 12. NRCS proposes to implement several significant changes to the wetland conservation provisions with an interim final rule, to be published in August 2018. NWF was notified of this intent by way of an email inviting its participation in a stakeholder meeting scheduled to take place only one week after the email was received. The invitation did not contain any draft language or supporting materials that would have been useful to developing robust comments and fostering meaningful public participation *prior* to the publication of the interim rule. As a result of NRCS's failure to provide necessary information about its proposed action, these comments are preliminary, and NWF expects NRCS to comply with its statutory mandate and the Administrative Procedure Act ("APA") by providing a full opportunity for comment.

With these comments, NWF alerts NRCS to serious procedural and substantive flaws already apparent in its proposal, in order to provide the agency the opportunity to correct the errors before it proceeds further with this ill-advised rulemaking. Additionally, NWF reminds NRCS that it must issue an Environmental Impact Statement ("EIS") pursuant to the National

Environmental Policy Act ("NEPA"), and undergo Section 7 consultation pursuant to the Endangered Species Act ("ESA"), *prior* to issuing any interim rule in order to comply with federal environmental statutes.

BACKGROUND

A. Factual Background

1. Brief History of Wetland Conservation in the Farm Bill

Wetlands are among "the most dynamic habitats in the world," and "provide essential ecological functions and values that significantly benefit society." U.S. Dep't of Agric. Off. Of the Inspector Gen., *NRCS: Wetland Conservation Provisions in the Prairie Pothole Region* 1 (Jan. 2017) (Attach. A). These functions include nutrient cycling, water filtration and purification, nutrient sinks, and water storage. *Id.* Despite the myriad benefits and significant economic value of wetlands, over half of the wetlands that existed in the coterminous United States in 1600—approximately 221 million acres—were drained or filled for development or agriculture by 1984. *Id.* By 2004, only an estimated 107.7 million acres of wetlands remained in the coterminous United States. *Id.*

Serious concerns over the continued destruction and degradation of wetland habitat due to agricultural practices led Congress to take definitive action to protect agricultural wetlands in the Food Security Act of 1985 ("Food Security Act"). *See* Food Security Act of 1985, sec. 1221, Pub. L. 99-198, 99 Stat 1354 (Dec. 23, 1985). These "wetland conservation provisions," as amended, make participation in, or payments from, most United States Department of Agriculture ("USDA") benefit programs contingent upon the conservation of wetlands. 16 U.S.C. § 3822; *see also* Megan Stubbs, Cong. Res. Serv., *Conservation Compliance and U.S. Farm Policy* 5-6 (2016) ("As it exists today, conservation compliance applies to most farm program payments, loans, or other benefits administered by . . . NRCS"). Accordingly, producers who fill wetlands for agricultural production may not participate in, or receive payments from, these USDA programs. Attach. A at 2.[1]

Congress renewed protections for agricultural wetlands in subsequent "Farm Bills" passed in 1990, 1996, 2002, 2008, and 2014, affirming the importance of wetland conservation to the administration of USDA benefits, and repeatedly expressing Congress's intent to continue and improve the conservation program. Attach. A at 6. Particularly relevant here, NRCS is responsible for making the technical determinations required to administer the wetland

[1] Benefits affected by conservation compliance include Marketing Assistance Loans, ad hoc disaster assistance programs, Emergency Assistance for Livestock, Honey Bees, and Farm-raised Fish, Livestock Indemnity Program, FSA Farm Operating Loans, Emergency Disaster Loans, Federal crop insurance premium subsidies, and the Watershed Protection and Flood Prevention program. *See* Megan Stubbs, *supra*, at 6.

conservation provisions and ensure compliance, including whether land is a wetland, whether certain technical exemptions apply, and whether an improper wetland conversion has occurred.[2]

2. Brief History of Wetland Determinations under the Wetland Conservation Provisions, as Amended

After the enactment of the Food Security Act, state-level NRCS offices developed mapping conventions for off-site wetlands determinations on agricultural lands. *See* Cmte. On Characterization of Wetlands, Nat'l Res. Council, *Wetlands: Characteristics and Boundaries* 193 (1995). To improve the administration of the wetland conservation program, Congress amended the 1985 Food Security Act in 1990. The amendments directed NRCS to create wetland delineation maps, and establish a certification and appeals process. Food, Agriculture, Conservation, and Trade Act of 1990, § 1422, Pub. L. 101-624, 104 Stat. 3359 (Nov. 28, 1990) ("1990 Farm Bill"). Controversy and issues with inaccurate determinations continued, *see* Jeffrey A. Zinn & Claudia Copeland, CRS Issue Brief for Congress: Wetland Issues 9 (Sept. 1, 2000), so in 1996, Congress again amended the wetland conservation provisions to *combine* the delineation and certification processes, requiring that NRCS to "delineate, determine, *and certify* all wetlands located on subject land on a farm." *See* Federal Agriculture Improvement and Reform Act of 1996 (1996 Farm Bill), Pub. L. 104-127, § 322(a), 110 Stat. 888 (Apr. 4, 1996) (codified as amended at 16 U.S.C. § 3822) ("1996 Farm Bill"). Critically, Congress intended for the 1996 Farm Bill to require greater methodological rigor and substantive accuracy in wetlands certifications in order to correct NRCS's prior failure to accurately identify wetlands. *See, e.g.*, NRCS, Wetland Information for USDA Participants Fact Sheet (undated) (acknowledging that the 1996 Farm Bill was enacted because "Congress decided that the inventory maps" NRCS used to make the wetlands determinations prior to 1996, "while providing good information, were not completely accurate"); *see also* Attach. A at 3, n.23 (same).

Pursuant to the 1996 Farm Bill, NRCS increased the rigor of its wetlands certification process. With respect to wetlands determinations made between 1990 and 1996, the NRCS's stated policy from 1996 until 2013 was that such determinations *were not considered "certified"* unless the determination was appealed and upheld, a process that required site visits and supporting documentation. Attach. A at 6. The agency published this policy in the 2010 edition of the National Food Security Act Manual, *see* § 514.1(A) (5th ed. 2010), and circulated several fact sheets alerting producers that "most wetland determinations completed prior to July 3, 1996 [were] not considered certified and therefore may not be valid for determining compliance with wetland conservation provisions." NRCS, Wetland Information for USDA Participants Fact Sheet (undated); *see also* Attach. A at 3 n.23 (reporting same). The agency has never proposed to accept as certified wetland determinations made prior to 1990.[3]

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[2] A second agency within the USDA, the Farm Services Agency, makes determinations concerning producers' eligibility for Farm Bill programs administered by USDA. Attach. A at 2.

[3] NRCS successfully defended this policy before the USDA's National Appeals Director in 2012. After the Director ruled that a pre-1996 determination was certified, NRCS requested reconsideration, arguing that pre-1996 determinations *were never certified*, and that notices of certification *were never provided* at that time. NRCS also argued that the 1996 Farm Bill

NRCS's published policy with respect to wetland determinations issued between 1990 and 1996 remained consistent until 2013, when it issued secret instructions to staff in Minnesota, South Dakota, North Dakota, and Iowa—i.e., the "prairie pothole" states—to begin accepting as certified wetland determinations made during that interim, even without evidence that procedural appeal rights and quality mandates had been met. Attach. A at 4.

In March 2014, the Office of the Inspector General received a complaint alleging that the wetland determinations resulting from the 2013 change in policy were "unethical," "fraudulent," "illegal," and "against the appeals of the [NAD]." Attach. A at 7. The OIG Report, issued in January 2017, concluded that the agency's shift in the implementation of its policy merely replaced its backlog of pending determinations with inaccurate determinations, and recommended that the NRCS issue "official guidance reinforcing current rules and clarifying procedures for making wetlands determinations and certifications." Attach. A at 10. However, far from rectifying the inconsistencies in policy, two days after the report was published, NRCS issued an "Amendment" to the National Food Security Act Manual formalizing, without explanation, the post-2013 approach to addressing pre-1996 determinations and applying that policy nationwide. *See* Memorandum from NRCS Headquarters, to NRCS State Conservationists and Directors (Jan. 19, 2017) (Attach. B). In short, rather than correcting its failure to rigorously evaluate wetlands certifications in the prairie pothole states, NRCS adopted a manual change that expanded its unlawful and inaccurate wetlands certification process nationwide.[4]

Now, with today's truncated regulatory process, NRCS seeks to make official what it has been attempting to do in secret for the past five years—accept inaccurate wetland determinations as sufficient for the purposes of the wetland conservation program. Based upon the information provided, NRCS's proposed action is contrary to the very purposes of the wetland conservation provisions, and threatens to hasten the destruction and degradation of agricultural wetlands. Moreover, should NRCS proceed to issue its interim rule before publishing an EIS or engaging in the required Section 7 consultation under the ESA, the agency will have enacted its policy in violation of those vitally important federal environmental statutes and will risk incurring serious legal liability.

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required all wetland determinations after July 3, 1996 to be certified because *earlier wetland determinations were unreliable*. These changes were codified in the Code of Federal Regulations. The Director vacated his earlier decision and reaffirmed that pre-1996 determinations were not certified.

[4] NRCS's use of a manual update to implement this change was also unlawful. NRCS itself had previously recognized that this change would require rulemaking, in part because of the intensely controversial nature of the agency's action. *See* Attach. A at 4 (noting that the USDA Secretary signed a Decision Memorandum in 2013 (Attach. C) allowing the agency to proceed with a rulemaking to implement the same changes NRCS now proposes to make with its interim rule, but the agency abandoned the effort in 2014, deeming it "too controversial"); *see also* Attach. C at 1-3 (acknowledging changes that must be made via rulemaking—these very same changes NRCS now proposes to implement in its interim rule).

B. Statutory Background

The APA permits judicial review of "final" agency action. *See* 5 U.S.C. § 704. Under the APA, a court must "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), in excess of statutory authority, *id.* § 706(2)(C), or "without observance of procedure required by law," *id.* § 706(2)(D). To avoid judicial reversal of their actions, agencies must demonstrate that they have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006).

NEPA has "twin aims." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). First, it obligates the agency to "consider every significant aspect of the environmental impact of a proposed action." *Id.* "Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Id.* To accomplish these aims, NEPA requires that agencies prepare, and solicit public comment on, an Environmental Impact Statement ("EIS") whenever it proposes a "major federal action" with significant environmental effects. 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3. The EIS must assess the action's environmental consequences and reasonable alternatives to the proposed action. 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1502.1, 1502.3. "If any 'significant' environmental impacts might result from the proposed agency action then an EIS must be prepared *before* agency action is taken." *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983)

The ESA "represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Section 9 of the ESA prohibits any "person" from "taking" any member of an endangered or threatened species. 16 U.S.C. § 1538(a). Pursuant to Section 7 of the ESA, before undertaking any action that may have direct or indirect effects on any listed species, an action agency must engage in consultation with the FWS in order to evaluate the impact of the proposed action. *See id.* § 1536(a). The FWS has defined the term "action" for the purposes of Section 7 broadly to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," 50 C.F.R. § 402.02, "in which there is discretionary federal involvement or control." *Id.* § 402.03. An agency may only avoid this consultation requirement for a proposed action if it determines that its action will have "no effect" on threatened or endangered species or critical habitat. *Id.* § 402.14(a).[5]

[5] The term "take" is defined broadly to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." *Id.* § 1532(19). FWS has further defined "harass" to include "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. In addition, "harm" is defined to "include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *Id.*

DISCUSSION

I. NRCS's Proposed Regulatory Action Suffers from Serious Procedural and Substantive Irregularities that Must be Corrected in Any Interim Rule.

A. NRCS Must Solicit and Meaningfully Respond to Comments on its Proposed Rule.

NRCS has a well-documented history of circumventing public participation and review of its administration of the wetland conservation program, and of adopting policies and procedures that thwart Congress' intent in enacting the wetland conservation provisions. *See, e.g.*, Attach. A at 8-9 (describing how NRCS implemented a policy that significantly altered the administration of the wetland conservation provisions through unwritten instructions that were not subjected to public review and comment); 2017 Amendment (making the changes described in the OIG Report official agency policy without acknowledging that they represented a significant departure from current regulations and previous policy, adopted without an opportunity for public comment). The current regulatory effort is merely the latest in a series of actions that the agency has taken to avoid its statutory duty to ensure the accuracy of wetland determinations—and to shirk the agency's duty to meaningfully involve the public in its decisionmaking. Attach. A at 4-5. It is also clear that NRCS has attempted to avoid public scrutiny precisely because the agency previously determined that abandoning the agency's prior rigor in certifying wetlands would be "too controversial" because it would result in sweeping adverse environmental impacts. *Id.* at 4. However, controversy over NRCS's action is not a legitimate reason to avoid public participation; to the contrary, it is precisely because of the robust public interest in wetlands conservation that NRCS's actions require strict adherence to statutory requirements for public involvement, including those in the Farm Bill, the APA, and NEPA.

NRCS has a clear statutory duty to provide a meaningful opportunity to comment on the interim rule after publication. The 1996 Farm Bill provides that interim rules implementing the wetland conservation program are "effective on publication *with an opportunity for notice and comment*." *See* 16 U.S.C. § 3846(b)(2) (emphasis added). Thus, although any such regulations take effect "immediately," *Id.* § 3846(c), the statute makes clear that the agency must still solicit and respond to public comment, *see id.* § 3846 (calling for an opportunity for notice and comment); 5 U.S.C. § 553(c) (directing agencies to respond to comments on rules); *Asiana Airlines v. Fed. Aviation Admin.*, 134 F.3d 393, 242 (D.C. Cir. 1998) (suggesting that where the statute requires promulgation of interim rules with opportunity for comment, "the APA once again became controlling for all subsequent proceedings"); *cf. Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 17-18 (D.D.C. 2010) (providing that interim rules are not exempt from notice and comment requirements unless Congress made its intent to modify APA procedures clear).

Even though comments may be submitted post-promulgation, NRCS still "must respond in a reasoned manner" to comments that "raise significant problems." *Am. Coll. Of Emergency Physicians v. Price*, 264 F. Supp. 3d 83, 94 (D.D.C. 2017) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003)) (discussing agency's obligation to respond to comments on

interim rules). Should NRCS fail to do so, its action will be arbitrary and capricious. *Id.* Additionally, NRCS must provide a clear timeline for accepting and responding to comments. Commenters suggest a minimum of thirty (30) days, after which NRCS must either withdraw the rule, publish a rule incorporating changes to the interim rule, or publish a document affirming the interim rule without change and directly responding to comments.

NRCS' duty to meaningfully respond to comments is only heightened by the fact, based upon the information presently available, the proposed regulatory changes to the wetland conservation program suffer from several serious substantive and procedural flaws. First, NRCS' proposal is contrary to Congressional intent, and likely arbitrary and capricious. Second, as discussed *infra*, Parts II and III, NRCS has failed to comply with NEPA and the ESA.

B. NRCS' Proposed Treatment of Pre-1996 Wetland Determinations Flouts Congress's Intent to Preserve Wetlands.

Since the 1985 Food Security Act, Congress has established a clear trend towards requiring the wetland conservation program to be based on increasingly accurate wetland determinations. The 1985 Food Security Act had few substantive requirements other than directing NRCS to "consult with the Secretary of the Interior on such determinations and actions as are necessary" to implement a wetland conservation program. Unsatisfied with the results, Congress directed NRCS in the 1990 Farm Bill to "delineate wetlands on wetland delineation maps." Congress also added for the first time a requirement that NRCS certify wetland maps "as sufficient for the purpose of making determinations of ineligibility for program benefits." Under the 1990 Farm Bill, certification of wetland maps occurred only after providing *both* "notice to the affected owners or operators," *and* "an opportunity to appeal such delineations." The NRCS began developing inventory maps of wetlands on agricultural lands. However, due to limitations of the source material, the wetland maps NRCS created only showed potential wetland areas and were better classified as tools to *predict* the presence and approximate boundary of wetland areas. *See* Justin Lamunyon, *Wetlands and the Swampbuster Provisions: The Delineation Procedures, Options, and Alternatives for the American Farmer*, 73 Neb. L. Rev. 163, 169-170 (1994) (describing criticism of mapping conventions under the 1990 Farm Bill).[6]

Recognizing that these "inventory maps" relied upon to make wetlands determinations, "while providing good information, were not completely accurate," *see, e.g.*, NRCS, Wetland Information for USDA Participants Fact Sheet (undated); *see also* Attach. A at 3 n.23, and that as a result, the administration of the wetland conservation program was becoming increasingly controversial, Congress again amended the wetland conservation provisions in the 1996 Farm Bill to require that *all* determinations be certified. *See* Federal Agriculture Improvement and Reform Act of 1996 (1996 Farm Bill), Pub. L. 104-127, § 322(a), 110 Stat. 888 (Apr. 4, 1996) (codified as amended at 16 U.S.C. § 3822). To make these new certified determinations, after

[6] For example, aerial slides used to identify wetlands on the maps were supposed to be taken annually but were not always available for every county. Additionally, slides were often taken at a time of year that was optimal for distinguishing crops, not wetlands, because surface waters had already receded. Finally, limited photo quality made color differentiation—a key wetland indicator—nearly impossible to observe.

1996 the NRCS relied on a "system of internal controls," set forth in the National Food Security Act Manual, that ensured the quality and accuracy of wetland determinations, including the use of new technologies and both off-site and on-site evaluations. Attach. A at 6-7. Congress also provided that only those actions taken based on previous *certified* determinations would be exempt from adverse agency action under a safe harbor provision. Actions taken based upon a previous "final" or "official" determination were not so exempted, further indicating Congress's intent to ensure the accuracy of wetland determinations moving forward.[7]

In accordance with Congress's clear intent to ensure the accuracy of wetland determinations both for producers and for wetland conservation, NRCS long held that determinations made prior to 1996 were not considered certified unless they had been appealed, a process that required field visits and supporting documentation. Now, in direct contravention of this longstanding and well-documented congressional intent to improve the accuracy of wetland determinations, NRCS proposes to accept any pre-1996 wetland determinations as certified, even where documentation of appeal rights cannot be produced and even where the agency lacks any rigorous empirical evidence of the accuracy of those determinations. By proposing to accept as certified the very pre-1996 determinations that *inspired* Congress to amend the Food Security Act to add increasingly stringent requirements for accuracy, NRCS's regulatory changes fail to give effect to Congress' clear intent, and as such, must fail. *See Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1368 (D.C. Cir. 1990) (providing that Congress' "intention is the law and must be given effect" (quotation omitted)).

Additionally, NRCS's proposal to determine normal precipitation using a static 30-year average precipitation data set (1971-2000) further defies Congressional intent and bucks the trend towards improved accuracy. To determine the "normal circumstances" under which the land is properly classified as a wetland subject to the wetland conservation program, NRCS uses the National Oceanic and Atmospheric Administration's ("NOAA") 30-year average precipitation data set, which slides forward every ten years and is scheduled to do so soon—i.e., moving from the 1971-2000 data set to the 1981-2010 data set. As NRCS itself has recognized, "using the updated precipitation data [] will likely result in: 1) more areas being identified as wetlands, and 2) larger wetland areas subject to the USDA wetland compliance provisions." Memorandum from NRCS on the Summary of Proposed Wetland Conservation Compliance Changes and Clarifications to USDA Sec'y 1 (Feb. 12, 2013) (Attach. C). Accordingly, NRCS's proposal to continue using obsolete data for wetlands certifications will be less accurate regarding existing conditions and less protective of wetlands, and thus will be fundamentally inconsistent with Congress's intent to preserve wetlands. By proposing to use inaccurate, outdated data, NRCS again fails to give effect to Congress's clearly expressed intent that wetland determinations be based on accurate and current data. Thus, NRCS' proposal regarding precipitation data must also fail. *See Amalgamated Transit Union v. Skinner*, 894 F.2d 1362,

[7] NRCS itself also conducted "many internal studies" that revealed that pre-1996 determinations were not sufficiently accurate to be considered certified, i.e., they failed to comply with the statutory requirement that wetland delineation maps be "sufficient for the purpose of making determinations of ineligibility for program benefits." Attach. A at 3. Additionally, NRCS expressed concern that producer files lacked evidence that producers had been notified of their appeal rights, which was a required element of "certification." *Id.*

1368 (D.C. Cir. 1990) (providing that Congress's "intention is the law and must be given effect" (quotation omitted)).

From the 1985 Food Security Act to the 2014 Farm Bill, which recoupled crop insurance subsidies to wetland conservation compliance, Congress has consistently taken actions reaffirming its intent to accurately delineate and protect wetlands by removing the economic incentive to convert them to agricultural use. Neither of NRCS's current proposals advance those purposes. To the contrary, NRCS' regulatory efforts *directly conflict* with clearly expressed Congressional intent and as such, must be rejected by the agency. *See Rapanos v. United States*, 547 U.S. 715, 766 (2006) (providing that "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is . . . not in conflict with the expressed intent of Congress").

At the *bare minimum*, NRCS *must* offer a robust explanation for its actions to ensure that there is a "rational connection between the facts found and the choice made." *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This is particularly true for the proposed changes to the agency's treatment of pre-1996 wetland determinations, which represent a significant—and as yet unexplained—reversal of prior policy, *See* OIG Report. *See Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (providing that while agencies are free to change their existing policies, they must, at a minimum "display awareness that it is changing position" and "show that there are good reasons for the new policy").

II. NEPA Mandates that NRCS Prepare an EIS Prior to Promulgating its Interim Rule.

NEPA requires an agency to prepare an EIS when it undertakes a "major federal action [] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NRCS's proposed changes to the wetland conservation provisions undoubtedly meet these criteria. Therefore, the agency must prepare an EIS *prior* to promulgating an interim rule. *See Sierra Club*, 717 F.2d at 1415 (providing that the EIS must be prepared "*before* agency action is taken").

NRCS's proposed regulation constitutes a "major federal action" because it "adopt[ed] . . . new . . . procedures" for evaluating certain wetland determinations. 40 C.F.R § 1508.18(a), (b); *see also Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002-03 (D.C. Cir. 1979) ("The duty to prepare an EIS normally is triggered when there is a proposal to change the status quo.") (footnote omitted). "Effects" includes "ecological . . . , aesthetic, historic, cultural, economic, social or health" effects, and may be direct, indirect, or cumulative. 40 C.F.R. § 1508.8. Application of the regulatory changes will result in the reduction of delineated wetland acreage for certain farm tracts, which, in turn, will incentivize the draining of those undesignated wetlands by removing the penalty for doing so. As such, it is clear that NRCS's proposed regulation will have serious adverse environmental consequences.[8]

[8] Indeed, the implementation of substantially similar policies regarding pre-1996 determinations has already resulted in extensive destruction of wetland acreage due to inaccuracies. *See* Attach.

Moreover, there can be no legitimate dispute that the impacts from NRCS's proposed regulation will be "significant" within the meaning of NEPA. In fact, NRCS' action implicates numerous "significance" factors that necessitate the preparation of an EIS, including the policy's impacts to wetlands and other ecologically significant areas, the uncertainty of the policy's effects on the environment, the degree to which the environmental effects are likely to be highly controversial, the precedential nature of this change in policy, and the policy's potential impacts on endangered and threatened species. 40 C.F.R. § 1508.27. Finally, the large-scale draining of agricultural wetlands will unquestionably result in ecological, aesthetic, cultural, economic, and social effects on the natural and physical environment. *Id.* §§ 1508.14, 1508.27. Therefore, under NEPA, NRCS is required to prepare an EIS to assess the alternatives to, and impacts of, its proposed changes to the wetlands conservation provisions. *Accord Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8 (D.D.C. 2007) (finding that promulgation of interim final rule governing the administration of a federal program constitutes a major federal action with reasonably foreseeable significant impacts such that the agency was required to subject its interim rule to NEPA analysis prior to its promulgation).

NRCS' obligation to prepare an EIS is only compounded by the fact that the proposed changes to the wetland conservation provisions will be published as interim rules that are immediately effective. The NEPA process represents the only opportunity for the public to provide meaningful input on the environmental impacts of the proposed changes *before* they are implemented. Therefore, to serve NEPA's goal of ensuring "fully informed and well-considered decision[s] by federal agencies, " *See Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 196 (D.C. Cir. 2017), NRCS must prepare and issue an EIS prior to any interim rule.

III. The ESA Requires that NRCS Undergo Section 7 Consultation Prior to Promulgating its Proposed Interim Rule.

Completion of the ESA's consultation process is vital to compliance with the Act's substantive mandates. "Absent consultation with [the FWS], there is no confirmation that [the agency's action] would avoid jeopardizing threatened or endangered species or adversely modifying critical habitat." *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 21 (D.D.C. 2014) (citations omitted). NRCS must undertake the legally mandated process for analyzing and addressing impacts to listed species and their habitat *before* implementing this final interim rule that *will* indisputably harm myriad listed species in various ways.

Wetlands are crucial habitat for at least one third of all plants and animals listed as threatened or endangered under the ESA. *See, e.g.*, Nat'l Park Serv., *Why Are Wetlands Important?*, https://www.nps.gov/subjects/wetlands/why.htm. Nearly half of all listed species use wetlands at some point during their lifecycle. *See, e.g.*, Roddy Scheer & Doug Moss, *Why Are Wetlands So Important to Preserve?*, Scientific Am., https://www.scientificamerican.com/article/why-are-wetlands-so-important-to-preserve/. Since the 1700s, more than half of the 221 million acres of wetlands that once existed in the lower forty-eight states have been

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A at 4-5. Additionally, NRCS seeks to use a static 30-year precipitation data set *precisely because* it will result in fewer protected wetlands subject to the wetland conservation provisions. *See* Attach. C at 1.

destroyed. *See* Nat'l Park Serv., *supra*. Agricultural conversion has destroyed a "very high percentage" of wetlands. U.S. Fish & Wildlife Serv., Report to Congress: Wetlands Losses in the United States, 1780s to 1980s at 9 (1990).

Three quarters of wetlands in the coterminous United States occur on private lands. NRCS, *Shorebirds* 6 (July 2000), *available at* https://directives.sc.egov.usda.gov/Open NonWebContent.aspx?content =18480.wba. These wetlands are also experiencing severe degradation and loss due to agricultural practices and programs. *See* T. E. Dahl, U.S. Fish & Wildlife Serv., *Status and Trends of Wetlands in the Conterminous United States, 2004 to 2009* 42 (2011) (attributing the loss of over 100,000 acres of wetlands to agricultural land uses and practices from the period of 2004 to 2009). In certain regions, the "profound reductions in wetland extent have resulted in habitat loss, fragmentation, and limited opportunities for reestablishment and watershed rehabilitation." *Id.* at 16. Thus. The degradation and loss of agricultural wetlands have been cited as continuing threats to listed species and their recovery.[9]

By permitting producers to certify inaccurate wetland determinations and convert improperly delineated wetlands to agricultural use without penalty, the NRCS's actions at the very least "may affect" listed species through the destruction of important habitat for endangered migratory birds and other animals that frequent agricultural wetlands. Indeed, considering that nearly half of all listed species depend on wetland habitat at some point in their lifecycles, and further, that three quarters of wetland habitat in the coterminous United States occurs on private lands, it defies logic to assume that a change in policy reversing the incentive to preserve such wetlands would *not* affect listed species. Accordingly, the NRCS is obligated to consult with FWS to "insure" that the implementation of its new policies will avoid jeopardy to those species. *See* 16 U.S.C. § 1536; *cf. Nat'l Parks Conservation Ass'n*, 62 F. Supp. 3d at 12-13 ("The "may affect" threshold for triggering the consultation duty under section 7(a)(2) is low."); *see also id.*

[9] *See, e.g.*, FWS, *Bog Turtle Fact Sheet* (2010), *available at* https://www.nrcs.usda.gov/ Internet/FSE_DOCUMENTS/nrcs142p2_017978.pdf (citing the loss of essential breeding wetland habitat and habitat fragmentation due to agricultural practices as "the greatest threats" to the threatened bog turtle, especially since the majority of remaining bog turtle habitat occurs on private lands); FWS, *Wood Stork (*Mycteria americana*), 5-Year Review* 16 (2006) (noting that "loss, fragmentation, and modification of wetland habitats continue as threats to [endangered] wood storks"); NRCS, *Massasauga Rattlesnake Conservation*, https://www.nrcs.usda.gov/wps /portal/nrcs/detail/pa/technical/ecoscience/threat/?cid=nrcseprd1289249 (reporting that the threatened massasauga rattlesnake is "closely linked to wetlands and the areas around them," and is vulnerable to wetland habitat loss due to agricultural practices wetlands); FWS, *Southwestern Willow Flycatcher, 5-Year Review* 35 (2014) (finding that the "primary cause of the [endangered southwestern willow] flycatcher's decline is loss and modification" of the wetland and riparian habitats on which it depends due to urban and agricultural development); 74 Fed. Reg. 6700, 6703 (Feb. 10, 2009) (noting that the endangered reticulated salamander depends on wetlands for breeding habitat, and citing "[r]ange-wide historic losses of both upland and wetland habitat . . . due to conversion of flatwoods sites to agriculture" as a primary threat to the species' recovery).

at 13 ("Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement.").[10]

Additionally, pursuant to Section 9 of the ESA, it is unlawful to undertake or authorize activities likely to result in the incidental take of listed species without an adequate biological opinion—and, most importantly, an incidental take statement—in place. 16 U.S.C. §§ 1536, 1538(g). Those who choose to do so despite this prohibition may be subject to criminal and civil federal enforcement actions, as well as civil actions by citizens for declaratory and injunctive relief. *See* 16 U.S.C. § 1540. NRCS's implementation of the changes proposed in the final interim rule are reasonably certain to take listed species. Thus, should NRCS proceed to implement its final interim rule without obtaining authorization from the FWS to take listed species, NRCS will be in violation of Section 9. 16 U.S.C. § 1538(a)(1)(B).

Because the destruction of wetlands—incentivized by the NRCS—has serious adverse effects on listed species, NRCS must conduct Section 7 consultation (either informal or formal) on the proposed interim rule. Further, because NRCS is obligated to avoid "mak[ing] any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures," 16 U.S.C. § 1536(d)(1), ESA consultation must be completed *before* the interim rule is finalized.

CONCLUSION

For the foregoing reasons, NRCS' proposed changes to the wetland conservation provisions are legally deficient. If NRCS nonetheless proceeds to issue an interim rule promulgating these changes, it will be doing so in clear violation of federal procedural and environmental laws. In lieu of taking that step, NWF urges NRCS to explore a less environmentally destructive alternative.

Sincerely,

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[10] To the extent that species under the jurisdiction of the National Marine Fisheries Service ("NMFS") will also be impacted by this policy change, the ESA also requires that NRCS consult with NFMS concerning the effects to those listed species prior to issuing the interim rule.