February 5, 2019

Public Comments Processing
Attention: National Leader for Wetland and Highly Erodible Land Conservation
U.S. Department of Agriculture
Natural Resources Conservation Service
1400 Independence Avenue SW
Washington, DC 20250

Re: Docket Number NRCS-2018-0010; Comments on the Natural Resources Conservation Service's Interim Rule and Environmental Assessment for the Highly Erodible Land and Wetland Conservation Compliance Provisions at 7 C.F.R. part 12.

The National Wildlife Federation ("NWF") submits the following comments on the Natural Resources Conservation Service's ("NRCS") interim rule and Environmental Assessment ("EA") for the Highly Erodible Land and Wetland Conservation Compliance provisions of the Food Security Act of 1985, which amended the wetland conservation provisions at 7 C.F.R. part 12. The interim rule implements several significant changes to the wetland conservation provisions.

As discussed below, although the interim rule purports to provide "clarity" and "transparency" to NRCS's implementation of the wetlands compliance provisions, in reality the rule further obfuscates the wetlands determination process and thwarts Congress's intent in enacting the 1996 Farm Bill. In addition, in several crucial respects, NRCS's EA does not adequately assess a full range of reasonable alternatives, nor does it take the requisite "hard look" at the impacts of its action, as mandated by the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370m. To the contrary, the document reads as a justification for a decision already made, in violation of NEPA. Further, the significant impacts that this interim rule will have on wetlands and the wildlife that depend on them—including several species listed as threatened or endangered under the Endangered Species Act ("ESA")—require in-depth analysis in an Environmental Impact Statement ("EIS").

Given these concerns, we urge NRCS to withdraw the interim final rule and instead propose a rule that promotes accurate wetland determinations that include all seasonal wetlands and one that is subject to robust environmental review and public comment.

BACKGROUND

A. Statutory Background

The Administrative Procedure Act ("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).

1. NEPA

Congress enacted NEPA more than four decades ago "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment . . . ." 42 U.S.C. § 4321. In light of this mandate, the Supreme Court has reasoned that NEPA is "intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321).

In achieving NEPA's substantive goals, Congress created two specific mechanisms whereby federal agencies must evaluate the environmental and related impacts of a particular federal action—an EA and an EIS. *See* 42 U.S.C. § 4332(c). These procedural mechanisms are designed to inject environmental considerations "in the agency decisionmaking process itself," and to "'help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.'" *Pub. Citizen*, 541 U.S. at 768-69 (emphasis added) (quoting 40 C.F.R. § 1500.1(c)). Therefore, "NEPA's core focus [is] on improving agency decisionmaking," *Pub. Citizen*, 541 U.S. at 769 n.2, and specifically on ensuring that agencies take a "hard look" at potential environmental impacts and environmentally enhancing alternatives "as part of the agency's process of deciding whether to pursue a particular federal action." *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100 (1983).

The alternatives analysis "is the heart" of an EIS or EA. 40 C.F.R. § 1502.14. NEPA's implementing regulations require that the decisionmaking agency "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.* Importantly, the NEPA process "shall serve as the means of assessing the environmental impact of proposed agency actions, *rather than justifying decisions already made*." 40 C.F.R. § 1502.2(g) (emphasis added); *see also id.* § 1502.5 (requiring that NEPA review "shall be prepared early enough *so that it can serve practically as an important contribution to the decisionmaking process* and *will not be used to rationalize or justify decisions already made*" (emphases added)).

An EIS must be prepared by an agency for every "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c). Under NEPA's implementing regulations, "significance" requires consideration of both context and intensity. "Context" considerations include the affected region, interests, and locality, varying with the setting of the action, and include both short and long-term effects. "Intensity" refers to the severity of impact, including impacts that may be both beneficial and adverse; unique characteristics of the geographic area, such as proximity to wetlands, wild and scenic rivers, or ecologically critical areas; the degree to which the effects on the quality of the human environment are likely to be highly controversial; the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; whether the action is related to other actions with individually insignificant but cumulatively significant impacts; the degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act; and whether the action threatens a violation of federal law imposed for the protection of the environment. *See* 40 C.F.R. § 1508.27. Where an action is not expected to result in a significant environmental impact, the agency must still prepare an EA and a FONSI. *Id.* §§ 1508.9, 1501.3.

2. ESA

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).[1]

B. Factual Background

1. Brief History of Wetland Conservation in the Farm Bill

[1] 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.*

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.[2]

Congress renewed protections for agricultural wetlands in subsequent "Farm Bills" passed in 1990, 1996, 2002, 2008, 2014, and 2018, 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; Agriculture Improvement Act of 2018, Pub. L. 115-334, § 2102, 132 Stat. 4490, 4530 (codified at 16 U.S.C. § 3822) [hereinafter "2018 Farm Bill]. Particularly relevant here, NRCS is responsible for making the technical determinations required to administer the wetland conservation provisions and ensure compliance, including whether land is a wetland, whether certain technical exemptions apply, and whether an improper wetland conversion has occurred.[3]

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

[2] 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, Farm Services Agency 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.

[3] 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.

After the enactment of the Food Security Act, state-level NRCS offices developed mapping conventions for off-site wetlands determinations on agricultural lands. *See* Comm. 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") (emphasis added). 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, NRCS's published policy was that such determinations were only considered certified if they met *both* "the procedural (appeal rights) *and* quality mandates as provided in 7 CFR Section 12." *See* § 514.1(A) (5th ed. 2010) (emphasis added). However, pre-1996 wetland determinations were often based solely on the wetland inventory maps that Congress had rejected as insufficient to determine eligibility for benefits under the Farm Bill. *See* Attach. A at 4 n.24. Thus, NRCS 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 previously proposed to accept as certified wetland determinations made prior to 1996. In fact, Congress *specifically rejected* proposed amendments to *both* the 2014 and 2018 Farm Bills that would have allowed the certification of pre-1996 wetland determinations. *See* Steve Davies, *Farmers, Enviros Alarmed by USDA's New Wetlands Rules*, AgriPulse, Jan. 23, 2019, *available at* www.agri-pulse.com/articles/11831-producers-enviros-keep-close-eye-on-swampbuster-changes (Attach. B).

In 2013, the Secretary of Agriculture signed a Decision Memorandum ("2013 Memorandum") prepared by NRCS that proposed changes to the agency's wetland determination policy. USDA, *Summary of Proposed Wetland Conservation Compliance Changes and Clarifications* (Feb. 12, 2013) (Attach. C). One such change was to permit the NRCS to accept pre-1996 determinations as certified, even without evidence that the delineation maps met the quality mandates required by the 1996 regulations and set forth in the Food Security Act Manual

("FSA Manual"). The document allowed the NRCS to begin implementing the proposed changes and clarifications "through a combination of rulemaking and preamble discussion, public notice, and administrative updates to the [FSA Manual]." Attach. A at 4. Shortly thereafter, the NRCS held a summit with agency officials from the four prairie pothole region states and the Regional Conservationist, and through meeting notes distributed to all attendees "instructed the States to implement [the changes in the 2013 Memorandum] *while the new regulations and policies were developed*." *Id.* at 4-5 (emphasis added). The notes also specifically instructed states t*o not issue any written guidance*. *Id.* at 5.

Shortly after the passage of the 2014 Farm Bill, the NRCS abandoned its efforts to implement the policies recommended by the 2013 Memorandum through rulemaking and public notice, citing the controversy that would arise should the agency "make any changes other than those needed to recouple federal crop insurance benefits to conservation compliance in order to not place in jeopardy the alliance between environmental and agricultural interests to support the statutory change." Attach. A at 4. However, the NRCS officials in the prairie pothole states continued to follow the 2013 Memorandum. *Id.* at 9. Other states were not aware of, and therefore did not follow, the policy change. *Id.* at 9. Farm Services Agency officials were also unaware of the shift, and were reportedly "shocked that NRCS would use the determinations from the 1990s, as they regarded the older maps as of poor quality and not certified." *Id.* at 9-10.

In sum, 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 National Appeals Division." 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 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. D). 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]

[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,

3. Interim Rule

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 available, NRCS's interim rule is contrary to the very purposes of the wetland conservation provisions, and threatens to hasten the destruction and degradation of agricultural wetlands. By proceeding to issue its interim rule without preparing an EIS or engaging in the required Section 7 consultation under the ESA, the agency has enacted this policy in violation of those vitally important federal environmental statutes and will risk incurring serious legal liability.

Shortly before issuing its interim rule—which became effective immediately on publication, *see* 16 U.S.C. § 3846(b)(2) (providing that interim rules implementing the wetland conservation program are "effective on publication with an opportunity for notice and comment")—NRCS notified selected stakeholders of its intent to implement significant changes to the wetland conservation provisions by way of an email inviting their 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 that would have been useful to developing robust comments and fostering meaningful public participation *before* the publication of the interim rule. However, in a presentation accompanying the emailed invitation, NRCS summarized the changes that it would be proposing. Several of those changes—particularly those proposing to allow producers to rely on pre-1996 "official" determinations to demonstrate compliance with the wetland conservation provisions, *see* Attach. E at 16-19—are precisely the changes that NRCS issued as secret instructions in 2013, *see* Attach. A at 4-5, 9; Attach. C.

NWF attended the stakeholder meeting and submitted written comments, which are incorporated by reference herein. *See* Attach. F ("NWF's Preliminary Comments"). On January 7, 2019, NRCS published its proposed changes to the wetland conservation provisions as an interim rule, effective upon publication, with a request for comments. *See* Highly Erodible Land and Wetland Conservation, 83 Fed. Reg. 63,046 (Dec. 7, 2018). The interim rule was accompanied by an EA. There is no indication that NRCS ever consulted with the U.S. Fish and Wildlife Service under the ESA, either formally or informally. Nor does the interim rule candidly state how NRCS will treat pre-1996 "official" determinations. This is particularly concerning because the 2013 internal memorandum originally proposing these changes noted that "[a]dministrative guidance will be developed" to allow producers "to either accept their [pre-1996] determination as certified or request a new certified determination." Attach. C at 3. The interim rule fails to foreclose this possibility, apparently leaving NRCS with the option of formalizing through administrative guidance a highly controversial change in policy that the agency itself previously stated would require a rulemaking proceeding, that is in direct contravention to Congress's longstanding and well-documented intent to improve the accuracy of wetland determinations, and even worse, without the robust public participation and review that should accompany such a significant shift in agency policy and practice.

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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).

NWF reminds NRCS that 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.*

NRCS's duty to meaningfully respond to comments is only heightened by the fact that, 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's proposal is contrary to Congressional intent, and thus, is arbitrary and capricious. Second, as discussed *infra*, Parts II and III, NRCS has failed to comply with NEPA and the ESA.

DISCUSSION

I. NRCS's Proposed Regulatory Action Suffers from Serious Substantive Deficiencies that Must be Corrected.

A. NRCS Must Clarify its Policy Regarding Pre-1996 "Official" Determinations.

NRCS's administration of the wetland conservation provisions has long been mired in controversy. As a result, NRCS has a well-documented history of subverting both congressional intent and public participation in its implementation of the certification procedures for wetlands determinations. *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); Attach. C. In response to a growing backlog of wetland certification requests, in 2013, NRCS began to explore ways to accept as certified pre-1996 wetlands determinations for which appeal rights were not given, *without any supporting evidence of their accuracy*. Despite its determination that such a change could only be made by regulation, NRCS issued a secret memorandum to staff in the prairie pothole states that directed the offices to implement the changes in secret. *See* Attach. A. at 9. After the OIG found that NRCS's actions amounted to a significant change in policy that was never subjected to public review, and further, merely "replaced [the] backlog of pending determinations with inaccurate determinations," Attach. A at 10, NRCS initiated several actions, including amending the FSA Manual and promulgating this interim rule, under the pretext of providing "clarity" to the certification process. However, as demonstrated below, NRCS's interim rule disingenuously fails to provide clarity on the very issue that provided the impetus for this rulemaking, namely, the status of pre-1996 official determinations that were not certified.

As an initial matter, any action to accept as certified the very pre-1996 inventory maps that inspired Congress to amend the wetland conservation provisions to strengthen the certification procedures is contrary to the clearly-expressed intent of Congress and as such, must fail. In the 1996 Farm Bill, Congress recognized that the "inventory maps" NRCS had been relying 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) (Attach. G); *see also* Attach. A at 3 n.23, and that as a result, the administration of the wetland conservation program was becoming increasingly controversial. Accordingly, the 1996 Farm Bill amended the wetland conservation provisions 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 1996 NRCS relied on a "system of internal controls," set forth in the FSA 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. *See* 16 U.S.C. § 3822(a)(6). Actions taken based upon a previous "final" or "official" determination were not so exempted.[5] The legislative history of the 1996 Farm Bill reveals that this omission was intentional. By providing a "safe harbor" only to those producers that had relied on a "certified" wetland determination, Congress balanced its concern about inaccurate wetland determinations with the producers' interest in certainty.[6] 142 Cong. Rec. S4420. Thus, as NRCS has repeatedly stated in various fora over the years,[7] with the amendments to the wetland conservation provisions in the 1996 Farm Bill, Congress clearly intended that previous determinations be replaced with accurate certified wetland determinations.

Most significantly, Congress not only considered, but *expressly rejected* amendments to *both* the 2014 *and* the 2018 Farm Bills that would have allowed NRCS to consider pre-1996 determinations as certified. *See* Attach. B. "Congress' rejection of the very language that would have achieved the result [NRCS] urges weighs heavily against the [NRCS's] interpretation." *Hamdan v. Rumsfeld*, 548 U.S. 557, 579 (2006).

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[5] 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.*

[6] Moreover, the legislative history reveals that the USDA itself requested that the statutory language be altered to exempt only previous *certified* wetland determinations from review. 142 Cong. Rec. S4420. NRCS cannot now seek to change the meaning of the statute it helped write.

[7] See, e.g., NRCS, USDA, 1996 Farm Bill Summary: Conservation Provisions 3 (April 1996) (reporting that the 1996 Farm Bill "[r]equires wetland determinations to be certified by [the] NRCS. Previous wetland determinations will be certified to verify their accuracy"); NRCS, USDA, Wetland Information for USDA Participants: Fact Sheet (Standardized Brochures, various states) (undated) (reporting that "[i]n the 1996 Farm Bill, Congress decided that the inventory maps . . . were not completely accurate and since then these inventory maps have been in the process of being replaced by certified wetland determinations").

As discussed in detail in NWF's Preliminary Comments, many organizations, individuals, and even agency staff have long expressed concerns about the impacts of implementing such a policy nationwide—chiefly, the continued loss and degradation of agricultural wetlands that Congress had sought to prevent in enacting the wetland conservation provisions. *See* Attach. F. Now, under the guise of "transparency," NRCS's interim rule only further muddies the waters. Due to the timing and substance of the interim rule, it is clearly a direct response to the highly critical OIG Report released in January 2017, in which the OIG identified significant problems with NRCS's implementation of the wetland conservation provisions.[8] Yet, neither the interim rule, nor the EA accompanying it, even *mention* the OIG Report or its findings. Nor does the rule clarify how NRCS will treat pre-1996 "official" determinations that lack documentation of appeal rights or supporting documentation of their accuracy—the precise policy that was at issue in the OIG Report. It is disingenuous for NRCS to claim that its interim rule provides "transparency," *see* 83 Fed. Reg. at 63,047, when it utterly fails to address the very concerns that inspired the agency to issue it.

To the contrary, those concerns are only amplified by the text of the interim rule, or more precisely, what the text leaves open. The interim rule restates NRCS's established policy that pre-1996 determinations are considered certified if "the person was notified that the determination had been certified, and the map document was of sufficient quality to determine ineligibility for program benefits." 83 Fed. Reg. at 63,052. However, it does not require that the producer have been given notice of his appeal rights *when he was issued the determination*. Moreover, it defines "sufficient quality to determine ineligibility for program benefits" to require that the map document "be legible to the extent that areas that are determined wetland[s] can be discerned in relation to other ground features." *Id.* Thus, nothing in the interim rule restricts NRCS from issuing guidance permitting the agency to accept as certified the very pre-1996 determinations both Congress and the agency rejected as too inaccurate to determine eligibility for benefits, as long as the map documents are "legible" and the producer was belatedly issued appeal rights.[9] *See id.* at 63,051-52.

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[8] Specifically, the OIG found that "NRCS made significant changes in its process for wetland determinations that allowed producers to drain and farm more wetlands" by accepting as certified the very pre-1996 wetland inventory maps as certified wetlands determinations that had inspired Congress to amend the wetland conservation provisions in the 1996 Farm Bill, and that "[t]he process for making this change was not carried out in a transparent manner." Attach. A at i.

[9] In fact, at another point, the interim rule *reveals* that NRCS anticipates reviewing and certifying previously issued wetland determinations. Indeed, when setting forth the procedures for identifying the presence of wetland hydrology—one of the three essential characteristics of a wetland—the rule provides that the "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*." 83 Fed. Reg. at 63,052. Determinations issued after 1996 are considered "certified" and are not subject to review. *See* 16 U.S.C. § 3822; 7 C.F.R. § 12.30(c)(1). Pre-1996 determinations that were "certified" remain so, and are also not subject to review. *See* 16 U.S.C. § 3822(a)(4). Thus, the only time NRCS would need to apply the "wetland delineation methodology in use . . . at the time of the determination," 83 Fed. Reg. at 63,052, is

NRCS's initial proposal for the interim rule renders NRCS's failure to explicitly address its treatment of pre-1996 "official" determinations particularly glaring. NRCS initially proposed amending the regulations to allow producers to rely on "official" determinations issued between 1985 and 1990 for a two-year "sunset clause," provided the producer doesn't drain "obvious wetlands." Attach. E at 16. The proposal also recommended that for "official" determinations made between 1991 and 1996 for which documentation of appeal rights could not be produced, NRCS allow producers to "self-certify" that they had received appeal rights, after which the official determination would be considered certified. *See id.* at 18-19. Even where the producer did not certify that it had received appeal rights, NRCS proposed to accept the official determination as certified *without any supporting evidence of its accuracy*, unless the producer requested a new determination. *See id.* at 18-19.

Now, in the interim rule, NRCS omits *any* reference to these recommendations, and instead adopts vague language that, far from offering "clarity," *see* 83 Fed. Reg. at 63,050, leaves open an avenue for the agency to adopt, without any public involvement, the precise practice that was soundly criticized by the OIG—i.e., accepting as certified the very pre-1996 determinations that *inspired* Congress to amend the Food Security Act to add increasingly stringent requirements for accuracy. As explained in NWF's Preliminary Comments, *see* Attach. F, to the extent that NRCS is considering implementing changes that would allow the agency to accept as certified pre-1996 wetland determinations without additional evidence of their accuracy or that appeal rights were given *at the time the determination was made* (e.g., by augmenting the interim rule with additional administrative guidance), such a policy would contravene Congress' clear intent, and as such, would necessarily 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)). Such a policy would also represent a significant reversal of prior agency practice, *see* Attach. A at 6, 10, and accordingly, could not be implemented without a robust explanation 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); *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"). Significantly, such an explanation is decidedly lacking here.

To the contrary, NRCS insists that its policy regarding pre-1996 determinations has remained consistent since 2010. *See* Attach. D at 2; EA at 5 (insisting that "the clarifying language in th[e] [interim] rule does not change in any way how NRCS administers the certified wetland determination portion of the [wetland conservation] provision, the regulatory basis for certified wetland determinations, nor how such determinations are considered certified as a matter of law"). However, the OIG unequivocally determined that NRCS in fact implemented a significant change in its certification procedures in the prairie pothole states in 2013. *See* Attach. A at 6 (finding that "NRCS Changed its Wetland Determination Process Contradicting Its Prior Implementation of Policy and Practice); *id.* at 10 (finding that "[b]y making this change in the

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where the agency reviews wetland determinations, and the only wetland determinations theoretically subject to review are the "official" determinations issued prior to 1996.

implementation of policy, NRCS replaced its backlog of pending determinations with inaccurate determinations"). In the interim rule, NRCS failed to even acknowledge this finding, and thus, failed to fulfill its basic obligation under administrative law principles to "display awareness that it is changing position." *Fox Television*, 556 U.S. at 515.

Relatedly, even while NRCS continued to insist that its practices regarding the certification status of pre-1996 wetland determinations has remained consistent, the agency paradoxically conceded that the rule was needed to "improv[e] the consistency of how the conservation compliance provisions are implemented." EA at 3. NRCS thus reaffirmed its previous statements that there has been "inconsistent application of wetland certification policy" that has yet to be resolved. *See* Attach. A at 19. However, the interim rule fails to elaborate not only on what the inconsistent policy applications have been, but also on how the interim rule will resolve them. As a result, the interim rule omits what is arguably its most essential piece—i.e., an explicit policy regarding the certification status of pre-1996 wetland determinations to be uniformly applied across states—particularly considering the interim rule's express purposes to provide clarity and improve consistency. This is particularly troubling in light of the fact that the "considerable confusion" surrounding the certification of pre-1996 wetland maps served as the *major impetus* for this rulemaking effort. *See* Attach. D at 2. Thus, the interim rule represents at best, an arbitrary and capricious failure to acknowledge and correct the rampant inconsistencies that have plagued NRCS's implementation of the wetland conservation provisions, *see Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (providing that unexplained inconsistencies in agency position are arbitrary and capricious and therefore unlawful), and at worst, a deliberate attempt to further conceal NRCS's practices from the public eye.

In sum, although purporting to provide clarity regarding NRCS's treatments of pre-1996 determinations, the 2019 Interim Rule continues to obscure a fundamental piece of the agency's implementation of the wetland conservation provisions—namely, how NRCS plans to comply with its statutory duty to ensure the accuracy of wetland determinations. While NWF is generally supportive of efforts to provide transparency to the public concerning the procedures it uses to make wetlands determinations, when placed within the context of NRCS's past actions concerning wetlands compliance, the interim rule fails to achieve this goal. To the contrary, the interim rule only further obfuscates NRCS's policies for certifying wetlands determinations. Particularly in light of NRCS's well-documented history of attempting to do in secret what would be "too controversial" to do through an open, procedurally valid administrative process, *see* Attach. A at 4 (reporting that NRCS declined to move forward with implementing the 2013 Memorandum through a rulemaking after deeming the proposed changes "too controversial"), NRCS *must* explicitly clarify how it will treat pre-1996 "official" determinations that do not meet procedural or quality mandates. Moreover, to the extent that NRCS's proposed policy regarding such determinations alters its currently stated policy, NRCS must provide the public an opportunity to comment. *See* 5 U.S.C. § 553; *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992) (providing that regardless of an agency's characterization, rules that "effect[] a change in existing law or policy" constitute legislative rules that must go through notice and comment rulemaking (quotation omitted)).

B. NRCS Must Replace Pre-1996 Official Determinations With New Certified Determinations Using Current Wetland Delineation Methodologies.

In the 2017 Amendment to the FSA Manual, NRCS declared for the first time that pre-1996 wetland determinations would be reviewed according to the Federal wetland delineation methodology in use by NRCS *at the time of the determination*." 2017 Amendment at 2. This change appears to have been carried over into the interim rule, where it is buried in the provision regarding the determination of wetland hydrology. Specifically, NRCS provides that the "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*." 83 Fed. Reg. at 63,052 (emphasis added). This provision is contrary to the plain language and Congressional intent of the 1996 Farm Bill, and must be omitted from the final rule.

As discussed above, NRCS cannot, consistent with the 1996 Farm Bill, accept as certified the very pre-1996 wetland maps that inspired Congress to amend the Farm Bill to strengthen the wetland determination and certification procedures. To the contrary, such wetland determinations are only considered "certified" if they met the procedural and quality mandates *when they were issued*. With the 1996 Farm Bill amendments, Congress balanced its concern with providing certainty to producers with its desire to ensure the accuracy of determinations by providing a "safe harbor" only to those producers that took an action relying on a previously issued *certified* determination. *See* 142 Cong. Rec. S4420. NRCS itself supported this legislative change. *Id.* Thus, it is no surprise that NRCS's own statements in various fora over the years evince its understanding that, with the amendments to the wetland conservation provisions in the 1996 Farm Bill, Congress clearly intended that previous determinations be replaced with accurate certified wetland determinations.[10]

Accordingly, NRCS's assertion that determinations made prior to 1996 are subject to the statutory and regulatory provisions in place at the time has no foundation in the statute. Congress knows how to exempt actions taken before a certain date from amended provisions—the 1996 Farm Bill is replete with examples. NRCS cannot read into the statute what is not there.

The Farm Bill dictates that where the determination is considered certified, NRCS lacks the discretion to review it regardless of when it was issued. *See* 16 U.S.C. § 3822(a)(6). However, where the pre-1996 determination is not considered certified, consistent with Congress's intent in amending the Farm Bill to ensure the accuracy of wetlands determinations, NRCS *must* issue a new determination that complies with the quality mandates that are presently in force. There are simply no circumstances, consistent with the statute, under which NRCS could use outdated wetland delineation methods to review and certify an old determination. NRCS must remove the provision from its final interim rule, and instead make clear that

[10] *See, e.g.*, NRCS, USDA, 1996 Farm Bill Summary: Conservation Provisions 3 (April 1996) (reporting that the 1996 Farm Bill "[r]equires wetland determinations to be certified by [the] NRCS. Previous wetland determinations will be certified to verify their accuracy"); NRCS, USDA, Wetland Information for USDA Participants: Fact Sheet (Standardized Brochures, various states) (undated) (reporting that "[i]n the 1996 Farm Bill, Congress decided that the inventory maps . . . were not completely accurate and since then these inventory maps have been in the process of being replaced by certified wetland determinations").

determinations of wetland hydrology will be made in accordance with the wetland delineation methodology currently in use by NRCS.

Moreover, any attempt to review wetland determinations using outdated methodologies represents a significant—and as yet unexplained—departure from past practice. Although NRCS considers the interim rule to be a mere clarification of existing policy, NRCS's own contemporaneous statements made when promulgating its own regulations implementing the 1996 Farm Bill demonstrate that the agency understood its statutory mandate to require a review of previous wetland determinations to ensure their "accuracy." *See*, *e.g.*, 61 Fed. Reg. at 47,025 (noting that NRCS was "considering establishing a specific time frame for completing the evaluation of existing wetland determinations"); *see also* NRCS, USDA, 1996 Farm Bill Summary: Conservation Provisions 3 (April 1996) (reporting that the 1996 Farm Bill "[r]equires wetland determinations to be certified by [the] NRCS. Previous wetland determinations will be certified to verify their accuracy"). Thus, 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." *State Farm*, 463 U.S. 29, 43 (1983); *Fox Television Stations, Inc.*, 556 U.S. at 515 (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").

C. Although The Interim Rule And EA Fail To Provide The Public With Sufficient Information To Offer Meaningful Comment, NWF Makes The Following General Comments Based On The Information That Is Available.

As discussed below, NRCS's EA fails to provide the public with the environmental information necessary to weigh in with their views and inform the agency decisionmaking process. *See Ctr. for Biological Diversity v. Gould ("Gould")*, 150 F. Supp. 3d 1170, 1183 (E.D. Cal. 2015) (holding that the Forest Service failed to provide adequate pre-decisional opportunity for public comment when its EA failed to include information vital to understanding the agency's action, such as the maps the Service relied upon, and the analysis underlying the agency action). Had NRCS issued a legally adequate NEPA document that objectively considered alternatives and analyzed and disclosed the environmental consequences of the interim rule, NWF "would have been able to submit a more complete comment." *Id.* at 1082. Consequently, in accordance with the basic NEPA principles regarding public participation and informed decisionmaking, and for the additional reasons set forth below, NRCS must withdraw its EA to correct the serious flaws in its analysis.

Moreover, as discussed above and outlined in more detail below, NRCS's interim rule fails to effectuate Congress's intent to preserve agricultural wetlands by, e.g., permitting the certification of inaccurate pre-1996 wetland determinations, failing to require the use of best available methods for wetland delineation, and redefining terms to allow for the manipulation of wetland determinations. This failure is particularly concerning because the interim rule is *already effective*. Thus, the agency must immediately withdraw the interim rule and correct the serious deficiencies highlighted by these comments.

NWF nevertheless offers the following preliminary substantive comments on the EA and interim rule:

- **Interim Rule Amendments to 7 C.F.R. §§ 12.2(a), .31(c); Best Drained Condition**: NWF appreciates the clarification by rule of this longstanding concept that has been difficult to consistently apply in the field. The agency's codification of this term should also set a standard for credible and consistent documented evidence of the on-going (not abandoned) best drained condition prior to December 23, 1985 that is providing the basis for wetland determinations. As the agency recognizes in its interim rule preamble, "best drained condition" is "fundamental to the identification of wetlands that experienced drainage manipulations prior to enactment of the 1985 Act, and to meet congressional intent to provide certainty to persons concerning the status of such land and its future use." 83 Fed. Reg. at 63049. It is important, then, that this "best drained condition" be based on sound documentation and not be subject to manipulation based on weak or non-existent documentation.

- **Interim Rule Amendments to 7 C.F.R. § 12.2(a)(4)(i), (ii), (iii); Hydrology Criteria for Farmed Wetland, Farmed Wetland Pasture, and Prior Converted Cropland:** As explained in the interim rule, "[t]he prior hydrologic criteria for farmed wetland and farmed wetland pasture was based strictly on the quantification of the number of days that the wetland experienced inundation or saturation during the growing season," and "differed depending on the landscape position of the wetland." 83 Fed. Reg. at 63,049. Citing administrative difficulties, NRCS now proposes to adopt an approach that "uses more readily observable and easily quantifiable criteria." *Id.* However, this indicator approach is scientifically sound and consistent with the statutory definition of wetland *only if* in practice, determinations are capturing the full range of relevant "observable conditions resulting from inundation or saturation," *id.*, during both the growing season, and the wet portion of the growing season to capture actual wetland hydrology. Given the facts that (1) NRCS is moving away from on-site determinations in favor of off-site determinations, and (2) those off-site determinations are based largely on mid-summer aerial imagery taken during the dry portion of the growing season, many indicators of inundation will be missed, resulting in wetland determinations that omit many farmed wetlands. Indeed, an analysis of U.S. Fish and Wildlife Service waterfowl and pond surveys conducted in May and July each year from 1974-2003 found that the number of wetland basins containing water is 73% lower in July than in May. *See* NWF & The Izaak Walton League, *Wetland Conservation in the Farm Bill* 3 (undated) (Attach. H); *see also* Letter from Dan Ashe, Director, FWS, to Dave White, Chief, NRCS (June 21, 2012) (Attach. I) (reporting that "[t]he magnitude of difference between May and July surface hydrology is profound," and that the "long-term data set [collected by FWS] illustrated that in the [Prairie Pothole Region] portion of the Dakotas, the number of basins with water declined on average *by more than 70%* between May and July" (emphasis added)). Accordingly, by using mid-summer imagery, NRCS risks omitting seasonal wetlands from wetland determinations,

robbing the wetlands of statutory protections. NRCS should revise these indicator requirements to require the use of on-site wetland determinations and/or the best available off-site wetland delineation methods (e.g., the use of spring imagery, LiDAR, hydric soils mapping, and precipitation data that reflects the wet portion of the growing season), as determined by rigorous quality control studies, to ensure that off-site methods are not omitting seasonal wetlands on the landscape.

- **Interim Rule Amendment at 7 C.F.R. § 12.30(c); Replacing the Term "Tract" with the Term "Field or Sub-field":** NRCS states in the rule preamble that NRCS will conduct wetland determinations on a field or sub-field basis except when the producer requests a determination for their entire farm tract. 83 Fed. Reg. 63049-50. Yet the interim final rule then "clarif[ies]" that "[*a]ll* wetland determinations made after July 3, 1996, *will* be done on a field or sub-field basis and will be considered certified wetland determinations." *Id.* at 63051-52. NRCS's existing practice is to conduct wetland determinations on a field or sub-field basis, except when the producer requests a determination for their entire farm tract. Thus, limiting tract-wide determinations is in fact, *inconsistent* with current practice. Moreover, limiting such determinations is inefficient, and opens the door to piecemealing of wetland determinations and manipulation of the wetland determination and wetland conservation compliance enforcement operations. Rather than preclude a producer from requesting a determination on a tract-basis, NRCS should revise the interim rule to continue to allow producers the option of requesting a determination for the entire tract to improve efficiency, and to reduce delays and backlogs for the agency.

- **Interim Rule Amendments to 7 C.F.R. § 12.31(c)(4); Determining Normal Precipitation:** NWF is concerned that NRCS's only stated rationale for the use of this fixed dataset is to provide "continued certainty" to producers. NWF questions the use of this fixed precipitation dataset on several fronts:

    - First, the criteria set forth in the interim rule establish wetland identification procedures for current and future wetland determinations. Specifically, they establish criteria for use in determining whether wetland hydrology exists under normal circumstances, including under the normal climatic conditions existing at the time of the wetland determination, not necessarily as of December 23, 1985. Thus, for new wetland determinations related to new wetland conversion activities, the 30-year precipitation dataset that reflects current conditions would seem to be the appropriate dataset to employ. Presumably, NRCS keeps these WETS tables for such purposes. Even for new wetland determinations related to activities planned on fields or tracts that may have been subject to some previous agricultural activity and/or drainage manipulation, NWF questions the wisdom in using outdated precipitation data to determine current normal climatic conditions, particularly where the full impacts of using the static dataset as opposed to the new dataset have not been fully analyzed or disclosed. *See also infra* at Section II.E.

- At a minimum, if NRCS relies on the outdated 1971-2000 precipitation data to determine wetland hydrology under normal climatic conditions, the agency should limit its use to only those situations where the producer can demonstrate the existence of special circumstances, such as where the use of the new dataset would create a demonstrably unfair result.

- In addition, at a minimum, for NRCS to reject current best available precipitation data in determining wetland hydrology under normal climatic conditions, NRCS must conduct a robust and objective environmental analysis of the potential loss of seasonal wetlands resulting from the use of this outdated precipitation data alone, and in combination with the other methods set forth in this interim rule that also skew wetland determinations toward the omission of seasonal wetlands (e.g., by relying on off-site determinations and imagery taken in mid-summer, when wetlands are driest, rather than in spring, *see* Attach. H at 3 (noting that "the number of wetland basins containing water is 73% lower in July than in May")). *See also infra* at Section II.E.

- **Interim Rule Amendment at 7 C.F.R. § 12.31(e); Removal of the On-Site Determination Requirement for Minimal Effect Determinations:** The interim final rule removes the requirement of on-site evaluation as overly burdensome and that removing the requirement will "better allow USDA to provide this statutory exemption to USDA program participants" and will "not provide a substantially different decision" given that "assessments can be conducted remotely based on a general knowledge of wetland conditions in the area." 83 Fed. Reg. at 63,050. NWF offers the following comments on this rule provision:

  - We do strongly support the rule's codification of the requirement that a request for a minimal effect determination must be made prior to the beginning of wetland conversion activities, and that, in the event of a request for an after-the-fact minimal effect determination, the burden will be upon the person to demonstrate to the satisfaction of NRCS that the effect was minimal.

  - The minimal effect exemption is, by statute and regulation, limited to situations where, based the individual or cumulative effect of a wetland conversion for crop production has a minimal effect on the functions and values of wetlands in the area, "based on a functional assessment of functions and values of the subject wetland and other related wetlands in the area." The agency has a statutory duty to apply the minimal effect exemption narrowly and consistent with the wetland conservation objectives of the conservation title. The agency may not justify the removal of the on-site evaluation requirement simply to make it easier to offer this exemption to USDA program participants.

- NRCS recognizes that this is to be a science based determination and continues to require an on-site functional assessment of the subject wetland. While we do not oppose the use of off-site methods to support a functional assessment of functions and values of wetlands in the area, our concern is with the very loose standard for the off-site assessment of wetlands in the area: "Such an assessment of related wetlands in the area may be made based on a general knowledge of wetland conditions in the area." The final rule with respect to minimal effects must require the use of the best available aerial photos, spatial analysis, and other specific hydrological and biological data available for all wetlands in the area.

- With respect to the producer's burden of proof in the event of a request for an after-the-fact minimal effect determination, we urge NRCS to be clear that NRCS will hold the producer (and the agency) to the standard that any determination of minimal effect must be based on a thorough on-site evaluation coupled with the best available aerial photos, spatial analysis, and other specific hydrological and biological data available for all wetlands in the area.

Of course, without the necessary environmental information regarding the changes to agency policy implemented by this regulatory process, NWF cannot offer fully informed comments. NRCS must immediately take steps to provide such information to the public to facilitate a fully informed decisionmaking process that complies with the agency's obligations under NEPA and the APA.

II. Violations of NEPA

NRCS has chosen to utilize an EA to consider and analyze the environmental impacts of, and reasonable alternatives to, the agency's decision to accept as certified wetlands determinations that for nearly two decades the agency deemed unacceptable for the purposes of determining eligibility for program benefits. However, its EA suffers from the same defect as its interim rule in that the EA presents an entirely disingenuous discussion of the purported benefits of the interim rule, and even more troubling, entirely omits a robust discussion of the topics that an EA is required to discuss, namely, alternatives to the proposed action, and the impacts of the proposed action.

A. NRCS Must Prepare An EIS.

NRCS should have prepared an EIS, because many of the NEPA "significance" factors are implicated by this federal action. Thus, NRCS's decision to prepare an EA here, in lieu of an EIS, is contrary to NEPA and its implementing regulations.

As pertinent case law explains, an EIS must be completed here to fulfill NRCS's NEPA obligations. Indeed, several of the NEPA "significance" factors are triggered by the proposed action, although the presence of *only one* significance factor *requires* preparation of an EIS. *See Pub. Citizen v. Dept. of Transp.*, 316 F.3d 1002, 1023 (9th Cir. 2003) ("If the agency's action is

environmentally 'significant' according to any of these criteria [set forth in 40 C.F.R. § 1508.27], then DOT erred in failing to prepare an EIS."); *Humane Soc'y of the U.S.* v. *Johanns*, 520 F. Supp. 2d 8, 20 (D.D.C. 2007) (explaining that "courts have found that the presence of one or more of [the CEQ significance] factors should result in an agency decision to prepare an EIS" (citations omitted)); *Fund For Animals* v. *Norton,* 281 F. Supp. 2d 209, 218 (D.D.C. 2003) (same).

As an initial matter, the EA does not even *mention* the significance factors, much less set forth any analysis of whether they are implicated by the proposed action. However, the following significance factors are triggered here, thus requiring preparation of an EIS:

- **40 C.F.R. § 1508.27(b)(3)** – This factor is triggered where the proposed action will affect "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, *wetlands*, wild and scenic rivers, or *ecologically critical areas*." (emphasis added). The interim rule indisputably will impact wetlands. In fact, NRCS *acknowledges* that its decision to use a static decadal precipitation dataset will impact the number of wetland acres that are identified as subject to the wetland compliance provisions. Moreover, the OIG Report documented the significant local effects that NRCS's change in policy is having on agricultural wetlands. *See Anderson v. Evans*, 314 F.3d at 1019–20 (holding that "local effects are a basis for a finding that there will be a significant impact" where there are substantial questions as to the effects of the proposed actions on local resources). Yet, NRCS never addresses this—or indeed, *any*—significance factor, and thus does not explain why the interim rule's acknowledged impacts to wetlands will ostensibly be insignificant. Given Congress' findings as to the importance of wetlands to the nation, and its clearly expressed intent to preserve agricultural wetlands, and further, in light of the dramatic impacts that NRCS's changes to their wetland conservation policies have *actually had* on agricultural wetlands, this significance factor is triggered and therefore warrants a fuller analysis in an EIS.

- **40 C.F.R. § 1508.27(b)(4)** – This factor addresses "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." The OIG Report notes that NRCS originally sought to make the changes implemented by the interim rule in 2013. However, the changes were deemed "too controversial," and NRCS instead attempted to implement the changes behind closed doors. Thus, NRCS has *conceded* that this is a controversial activity within the meaning of NEPA. Moreover, as demonstrated by the long and complicated history of the implementation of the wetland conservation provisions, there are significant scientific, legal, and practical controversies implicated by the program, particularly over the methodologies used to delineate wetlands. This point is only reinforced by NRCS's well-documented history of attempting to shroud its administration of the program in secrecy. Accordingly, this action is highly controversial as defined by NEPA and therefore requires consideration in an EIS.

- **40 C.F.R. § 1508.27(b)(5)** – This factor addresses "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown

risks." NRCS has failed to identify the environmental impacts of its action on agricultural wetlands and the species that depend on them. Courts have found that in such cases, "uncertainty as to the impact of a proposed action" on local resources is "a basis for a finding that there will be a significant impact" and setting aside a FONSI. *See Anderson v. Evans*, 314 F.3d at 1018–21. As demonstrated by the OIG, NRCS's wetland conservation policies are already impacting agricultural wetlands. Moreover, because many of the policies implemented by the interim rule are ill-defined, their precise effects remain unknown. Thus, this significance factor is triggered and warrants a fuller analysis in an EIS.

- **40 C.F.R. § 1508.27(b)(6)** – This factor addresses "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." With this interim rule, NRCS proposes significant changes to its administration of the wetland conservation provisions that represent significant departures from prior policy. This dramatic shift in legal interpretation and management approach cannot avoid scrutiny in an EIS and is precisely the type of activity triggering the precedent-setting significance factor.

- **40 C.F.R. § 1508.27(b)(7)** – This factor addresses "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." In particular, "[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." Taken as a whole, the interim rule imposes several changes to NRCS's wetlands identification policies that, when considered cumulatively with existing practices, result in the exclusion of seasonal wetlands in wetlands determinations. For example, the interim rule provides that NRCS will use a decadal precipitation dataset that is widely acknowledged to be "dry." When considered cumulatively with the fact that NRCS's practice is to use aerial imagery from the dry season—i.e., after seasonal wetlands have already dried—NRCS's proposal threatens to have cumulatively significant impacts on whether seasonal wetlands are identified as subject to wetlands conservation compliance. Additionally, the interim rule provides that NRCS will now conduct wetland determinations on a field basis, which allows for the piecemealing of wetland determinations and opens the door for manipulation of wetland determinations. These cumulatively significant impacts were never even *mentioned* in the EA. Thus, this significance factor is triggered and must be analyzed in an EIS.

- **40 C.F.R. § 1508.27(b)(9)** – This factor addresses "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the [ESA]." As set forth below, the interim rule will indisputably impact endangered and threatened species that rely upon affected wetlands for various biological functions. These impacts have never been analyzed in a NEPA process, nor has NRCS undergone consultation as required under the ESA. Accordingly, NRCS must immediately initiate consultation with FWS, and must analyze the interim rule's impacts on endangered and threatened species in an EIS.

- **40 C.F.R. § 1508.27(b)(10)** – This factor addresses "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the

environment." NRCS never considered whether the interim rule and the policies it implements are consistent with the Farm Bill. Thus, NRCS unlawfully failed to analyze several critical issues. *See ONDA*, 625 F.3d at 1109 ("[C]onsiderations made relevant by the substantive statute driving the proposed action must be addressed in NEPA analysis."). In enacting the wetland conservation provisions of the Farm Bill, Congress recognized that "[w]etlands are a priceless resource whose contributions have long gone unrecognized," H. Rep. 99-271 at 86, and sought "to discourage the draining of wetlands or 'swampbusting' for the purpose of growing agricultural commodities," *id.* at 78. Yet, NRCS never assessed whether implementing policies that in fact lessen the rigor of the methods used to make wetlands determinations is an appropriate implementation of a statute that aims to preserve agricultural wetlands. Nor did NRCS consider whether those policies are consistent with its own regulations, which declare as a central purpose of the wetlands conservation program, to "remove certain incentives for persons to produce agricultural commodities on . . . converted wetland and to thereby [a]ssist in preserving the functions and values of the Nation's wetlands." 7 C.F.R. § 12.1. NRCS cannot avoid grappling with its legal duties under the Farm Bill and its implementing regulations. To the contrary, a full and fair discussion of alternatives to the interim rule and their impacts would only serve to better inform the agency's administration of the wetlands conservation program, and is precisely why an EIS must be prepared. In addition, because NRCS has failed to initiate consultation under section 7 of the ESA where this action so clearly "may affect" endangered or threatened, an EIS is required because the action threatens a substantial violation of the ESA and its implementing regulations.

In short, an EIS is required when even *one* of these factors is implicated. Because at least *seven* significance factors are triggered here, it is wholly inconsistent with NEPA and its regulations for NRCS to prepare only an EA under the circumstances, and therefore it would be a patent NEPA violation if NRCS refuses to prepare an EIS here. For all of these reasons, an EIS is required for this action.

B. NRCS's Characterization Of The Changes Set Forth In Its Interim Rule As Merely Administrative Is Contrary to the Evidence And Cannot Be Cited To Avoid Its Obligations Under NEPA.

NRCS suggests that even an EA is unnecessary in this case, as "Congress has prescribed many requirements [of the wetlands compliance provisions] in statute, and there is little discretion remaining for [NRCS] to exercise." EA at 2. Thus, according to NRCS, "[m]any decisions that remain are administrative in nature and fall within a category of activities excluded from the requirement to prepare an EIS." *Id.* NRCS concludes that "*despite this*, [the agency] has decided to prepare this EA to review the environmental impacts of the proposed clarifications" in the interim rule. *Id.* (emphasis added)

NEPA compliance is not a favor to the public, nor is it a tool to justify a decision already made. It is an indispensable, statutorily required component of agency decisionmaking that both informs the public and forces the agency to take a hard look at the environmental consequences of its action. As set forth below, NRCS's EA fails at both counts. However, that failure begins with NRCS's characterization of its action as merely "administrative" and as such, exempt from

a full environmental review. This characterization is demonstrably false. As discussed above and conclusively established in the OIG Report, NRCS made significant changes in its wetlands determination policy in response to a growing backlog of determination requests. These changes have led to significant impacts on agricultural wetlands, as exhaustively detailed in the OIG Report. Thus, it is indisputable that NRCS has taken a "major federal action" because it "adopt[ed] . . . new . . . procedures" for making and evaluating wetland determinations. *See* 40 C.F.R § 1508.18(a), (b); *see also Comm. 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)).

Yet, neither the interim rule, nor the EA, even *acknowledge* that NRCS significantly changed its policy. To the contrary, NRCS has steadfastly refused to acknowledge the OIG's findings, instead insisting that subsequent actions that were taken *in direct response* to the OIG Report were intended to "clarify" existing policy with regard to the certification issue. This is particularly disingenuous in light of the fact that NRCS's subsequent actions have uniformly been taken to make permanent the very changes that the OIG Report faulted NRCS for making outside of the lawful rulemaking process—indeed, the very changes that *NRCS itself* acknowledged could not be made without an explicit regulatory amendment. NRCS cannot continue to turn a blind eye to the impacts of its own actions and avoid public scrutiny by attempting to mischaracterize such major policy changes as mere "clarifications" of existing policy. *Cf. CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) (noting that "the agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law,' but the record indicates otherwise" (citations omitted)).

The same is true for other major policy changes set forth in the interim rule. For example, in the interim rule, NRCS takes a discretionary action to use a static precipitation dataset in reference to determining "normal circumstances." The EA *concedes* that this decision will impact the number of wetland acres that are identified as subject to the wetland conservation provisions. The draining of agricultural wetlands that would otherwise have been identified—or not—had the dataset shifted forward will unquestionably result in ecological, aesthetic, cultural, economic, and social effects on the natural and physical environment. *Id.* §§ 1508.14, 1508.27. Thus, it defies logic to characterize this decision as administrative in nature. Rather, by making this discretionary decision in accordance with its statutory mandate to administer the wetland conservation provisions, NRCS took a major federal action that will have significant impacts on the environment, and that accordingly, must be subjected to a full NEPA analysis.

C. The Purpose And Need Statement Mischaracterizes The Proposed Action And Impermissibly Constrains The Range Of Reasonable Alternatives

Irrespective of whether an EIS or EA is appropriate under the circumstances, NRCS's analysis of alternatives in the EA does not satisfy NEPA or its implementing regulations. An EA must "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives." 40 C.F.R. § 1508.9(b). The goals of the action necessarily dictates the range of "reasonable" alternatives that the agency must consider in evaluating the environmental impacts of a proposed action. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). Therefore, an agency cannot define its objectives in

unreasonably narrow terms. *See, e.g.*, *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) (providing that "the statements of purpose and need drafted to guide the environmental review process" may not be "unreasonably narrow").

NRCS defined the need for the action in the EA: "The proposed clarifications are needed to ensure that the regulations are consistent with the current technical standards being applied by NRCS in making technical determinations." EA at 3. NRCS reported that the purposes of the proposed action were to "provid[e] the public with transparency, provid[e] certainty to USDA program participants, and improv[e] the consistency of how the conservation compliance provisions are implemented" across the country. *Id.* NRCS thus framed the purpose and need for the interim rule as merely codifying NRCS's existing policies. However, this characterization is contrary to the overwhelming evidence demonstrating that the interim rule constitutes a major policy change that will impact NRCS's effectiveness in fulfilling its statutory mandate to preserve agricultural wetlands. Because the purpose and need statement inaccurately describes the action and ignores the facts before the agency, it is arbitrary and capricious.

The purpose and need statement is also flawed in that it impermissibly constrains the range of reasonable alternatives. While NRCS enjoys "considerable discretion" in defining the purpose and need of a project, it cannot define its objectives in "unreasonably narrow terms," such that only one alternative would accomplish its goals and the EA becomes a foreordained formality. *See Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt*., 606 F.3d 1058, 1070 (9th Cir. 2010); *Davis v. Mineta*, 302 F.3d 1104, 1118–20 (10th Cir. 2002). In formulating the purpose and need statement, NRCS was obliged to consider the statutory context of its action. *See League of Wilderness Defenders v. U.S. Forest Serv.*, 689 F.3d 1060, 1070 (9th Cir. 2012); *Citizens Against Burlington*, 938 F.2d at 196 (stating that "an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives"); *City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983) ("Frequently, a pertinent guide for identifying an appropriate definition of an agency's objective will be the legislative grant of power underlying the proposed action.").

The conservation compliance provisions and their implementing regulations have as their goal "to remove certain incentives for persons to produce agricultural commodities on . . . converted wetland and to thereby . . . [a]ssist in preserving the functions and values of the Nation's wetlands." 7 C.F.R. § 12.1(b)(4). Accordingly, NRCS's consideration of the interim rule must include an evaluation of whether the regulatory and policy changes will better achieve this goal. Yet, NRCS framed the purpose and need so narrowly as to exclude consideration of any policies except for those it identified as the "current technical standards." In so doing, NRCS ensured that the changes implemented by the interim rule were the *only* solution to the various technical and practical challenges faced by the agency in administering the wetlands conservation provisions, thus rendering a regional project a "foregone conclusion" in violation of NEPA. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 710-11 (10th Cir. 2009).

D. NRCS Unlawfully Avoided its Obligation to Consider a Full Range of Alternatives Under NEPA

NEPA requires that NRCS "[r]igorously explore and objectively evaluate *all* reasonable alternatives" to the proposed action, including a "no action" alternative. 40 C.F.R. § 1502.14(a) (emphasis added); *see also id.* § 1508.9(b); *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1039 (10th Cir. 2001). Because NEPA's overriding purpose is to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment," 40 C.F.R. § 1500.1, NEPA's implementing regulations, which are binding on all federal agencies, provide that the consideration of alternatives for reducing adverse impacts "is the heart" of an EIS or EA. 40 C.F.R. § 1502.14. Accordingly, EAs "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.*

1. The EA Fails to Include a True "No Action" Alternative.

The EA purported to consider two alternatives: a No Action Alternative, under which NRCS would not update its regulations; and the Proposed Action Alternative, under which NRCS would make the proposed changes set forth in the interim rule. EA at 2. According to NRCS, the interim rule "merely clarifies some aspects of the technical procedures already being used by [NRCS]." NRCS therefore maintains that there is no practical difference between the No Action Alternative and the Proposed Action Alternative.

A no action alternative "allows policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action." *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, 642 (9th Cir. 2010). Where the agency is proposing changes to an ongoing management program, "'no action' is 'no change' from current management direction or level of management intensity." *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

Applying those principles here, it is clear that NRCS's No Action Alternative is inconsistent with NEPA and cannot be sustained. "To fulfill NEPA's goal of providing the public with information to assess the impact of a proposed action, the "no action" alternative should be based on the status quo." *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 746 F. Supp. 2d 1055, 1091 (N.D. Cal 2009). According to NRCS, the status quo *is* the interim rule because the interim rule merely "clarifies" existing policy and does not change the agency's procedures. However, as demonstrated above, this assertion is directly contradicted by the agency's own statements in the 2013 Memorandum, where it acknowledged that many of the interim rule's proposed changes *required* the agency to undergo a rulemaking. *See generally* Attach B. Moreover, the OIG determined that NRCS *did* change its policy with respect to its policy regarding the certification of pre-1996 wetlands determinations, the precise contours of which remain a central issue. Such significant changes cannot fairly be characterized as mere codifications of existing agency policy, and cannot possibly reflect the status quo. Rather, the true status quo—i.e., the alternative that represents "no change" from NRCS's longstanding practices with respect to its administration of the wetlands conservation provisions—is NRCS's administration of the wetlands conservation program as it existed prior to the adoption of *any* of

the changes developed over the course of this regulatory process. *See* 46 Fed. Reg. at 18,027 (providing that the no action alternative is properly construed as one under which the agency continues its course of action "until that action is changed").

As a practical matter, NRCS's characterization of its No Action Alternative skews the agency's entire analysis of alternatives. The "no action" alternative "serves as a benchmark" for comparing the other alternatives. *Theodore Roosevelt Conservation P'ship v. Salazar*, 744 F. Supp. 2d 151, 160 (D.D.C. 2010), *aff'd*, 661 F.3d 66 (D.C. Cir. 2011); *see also Ctr. for Biological Diversity*, 623 F.3d at 642 (providing that the no action alternative is intended to "provide a baseline against which the action alternative" is evaluated). Without "[accurate baseline] data, an agency cannot carefully consider information about significant environment impacts . . . resulting in an arbitrary and capricious decision." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011); *see also Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008) (holding an agency's no action alternative invalid because it improperly defined the baseline). This is precisely what occurred here, where NRCS's No Action Alternative "assume[d] the existence of the very plan being proposed." *Friends of Yosemite Valley v. Scarlett*, 439 F. Supp. 2d 1074, 1105 (E.D. Cal. 2006), *aff'd*, *Friends of Yosemite Valley*, 520 F.3d at 1037-38. To establish as the baseline the existence of the very rule being analyzed "is logically untenable" and renders the no action alternative "meaningless." *Id.* Thus, NRCS's formulation of the no action alternative deprived NRCS and the public of a meaningful opportunity to assess the impacts of a regional project against those of less environmentally destructive projects. Thus, the current alternatives analysis for the interim rule is fundamentally flawed. To comply with NEPA, the alternatives analysis must be revised to include a true no action alternative that accurately serves as the baseline for its NEPA analysis.

2. Because the Action Alternatives are Substantially Similar, the FEIS Fails to Analyze a Reasonable Range of Alternatives.

NEPA imposes a clear-cut procedural obligation on NRCS to take a "hard look" at alternatives that would entail less significant impacts on resources affected by the project. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 100 (1983). EAs must "[r]igorously explore and objectively evaluate all reasonable alternatives" and, in particular, "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14. The regulations further mandate that the EA must "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency," but that may nonetheless meet the overall objectives of the action while ameliorating environmental impacts. *Id.*

The EA violates these requirements. The EA purported to consider two alternatives: a No Action Alternative, under which NRCS would not update its regulations; and the Proposed Action Alternative, under which NRCS would make the proposed changes set forth in the interim rule. As NRCS acknowledges, there is not a major environmental impact difference among the alternatives. In fact, the alternatives are functionally identical. As a result, NRCS's analysis is devoid of any meaningful consideration of alternatives. Even the No Action Alternative assumed the existence of the interim rule, and deprived the EA of a meaningful

baseline against which to measure the rule's anticipated impacts. In fact, because the No Action Alternative and Proposed Action Alternative are functionally identical, the EA essentially considered only the impacts from a single alternative. Such an approach cannot satisfy the agency's obligations under NEPA to examine "all reasonable alternatives," including those that lie outside the jurisdiction of the agency. *See Citizens for Envtl. Quality v. United States*, 731 F. Supp. 970, 989 (D. Colo. 1989) ("Consideration of alternatives which lead to similar results is not sufficient under NEPA[.]"); *Friends of Yosemite Valley*, 520 F.3d at 1038 (finding that SEIS "lacked a reasonable range of action alternatives" because "the [three action] alternatives are essentially identical" and thus are "not varied enough to allow for a real, informed choice"). Indeed, courts have rejected precisely this type of avoidance approach by agencies in the past. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (concluding that the EIS violated NEPA when the two action alternatives considered in detail were "virtually identical"); *Friends of Yosemite Valley*, 520 F.3d at 1038 (finding that SEIS "lacked a reasonable range of action alternatives" because "the [three action] alternatives are essentially identical" and thus are "not varied enough to allow for a real, informed choice"); *cf. Dombeck*, 185 F.3d at 1175 (holding that agencies must "provide legitimate consideration to alternatives that fall between the obvious extremes")

While NEPA does not require NRCS to "consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives," *Seattle Audubon Soc'yy v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996), it is particularly troubling here that NRCS failed to consider any alternatives that were more consistent with the basic policy objectives of the wetland conservation provisions than the single alternative subjected to consideration. As discussed above, NRCS's objectives must take into account "the views of Congress, expressed . . . in the agency's statutory authorization to act." *Citizens Against Burlington, Inc.*, 938 F.2d at 196; *see also Theodore Roosevelt Conservation P'ship*, 661 F.3d at 72 (defining "reasonable alternative" to mean one that "is objectively feasible as well as 'reasonable in light of [the agency's] objectives'" (alterations in original) (quoting *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999))). With respect to agricultural wetlands, Congress has unequivocally expressed its intent to preserve agricultural wetlands. *See, e.g.*, H. Rep. 99-271 at 78 (noting that a "major objective" of the wetland conservation provisions is "to discourage the draining of wetlands or 'swampbusting' for the purpose of growing agricultural commodities"); *id.* at 86 ("Wetlands are a priceless resource whose contributions have long gone unrecognized."); *accord* 7 C.F.R. § 12.1 (listing as a central purpose of the wetland conservation provisions the "remov[al] [of] certain incentives for persons to produce agricultural commodities on . . . converted wetland and to thereby [a]ssist in preserving the functions and values of the Nation's wetlands"). Thus, NRCS's failure to rigorously explore a single action alternative (or more than one) that would be more protective of agricultural wetlands—e.g., alternatives that would resolve the certification issue by establishing that the only pre-1996 determinations that are considered certified are those that were certified at the time they were issued, require the use of best available methods when making off-site determinations for minimal effects exemptions, or ensure the accuracy of wetland determinations by implementing measures to better identify seasonal wetlands—is a flagrant violation of NEPA.

Moreover, because the EA's alternatives analysis evaluates only a single alternative, NRCS's approach raises grave questions as to whether NRCS is merely using this process not to genuinely consider alternatives to the action but instead to justify the decision NRCS already made when it began taking actions in 2014 to implement the regulatory and policy changes detailed in the 2013 Decision Memorandum ostensibly to reduce the backlog of wetland determination requests. As the NEPA regulations make clear, utilizing the NEPA process as nothing more than a ruse to justify or rationalize a decision already made is a patent violation of the letter and spirit of NEPA. *See, e.g.*, 40 C.F.R. § 1502.2(g) (explaining that the NEPA process "shall serve as the means of assessing the environmental impact of proposed agency actions, *rather than justifying decisions already made*." (emphasis added)); *see also id.* § 1502.5 (requiring that NEPA review "shall be prepared *early enough so that it can serve practically as an important contribution to the decisionmaking process* and ***will not be used to rationalize or justify decisions already made***" (emphases added)).

For all of these reasons, and in order to satisfy the obligations of NEPA and its implementing regulations, NRCS must consider reasonable action alternatives that would better protect agricultural wetlands and minimize the adverse impacts on these important habitats. *Cf. Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 577 (D.C. Cir. 2016) ("Accordingly, because the Service in these circumstances did not consider any other reasonable alternative that would have taken fewer Indiana bats than Buckeye's plan, it failed to consider a reasonable range of alternatives and violated its obligation under NEPA.").

3. NRCS Should Consider The Following Alternatives In An EIS.

When developing alternatives to the interim rule for consideration in an EIS, NRCS should include the following elements.

First, NRCS should establish a certification standard that accurately reflects Congressional intent in enacting the wetland conservation provisions. The interim rule defines "sufficient quality to determine ineligibility for program benefits" to require only that the map document "be *legible* to the extent that areas that are determined wetland can be discerned in relation to other ground features." 83 Fed. Reg. at 63,051 (emphasis added). Such a relaxed standard plainly does not satisfy NRCS's statutory mandates under the wetland conservation provisions to preserve agricultural wetlands, in part, by ensuring the accuracy of wetland determinations. Instead, NRCS should define "sufficient quality to determine ineligibility for program benefits" to require that the map document be based on a field investigation or on off-site methods that are demonstrated to be accurate. Methods should be selected only after a robust and publicly available wetland accuracy assessment that ground-truths offsite methods, and ensures that for the methods selected, the errors of wetland omission do not exceed errors of wetland commission. Specifically, only methods that have omission and commission error rates that are both under 5%, and symmetrical should be used to make certified determinations.

Second, the certification of pre-1996 determinations should be subject to NRCS's longstanding policy that was in place before the agency began implementing the changes set forth in the 2013 Memorandum. In other words, they are only considered "certified" if they met procedural and quality mandates *when they were issued*. Pre-1996 determinations that do not

meet this standard should be replaced with a new certified determination made subject to the same "sufficient quality" standard outlined above.

Third, to effectuate Congressional intent in preserving agricultural wetlands and providing certainty to producers, NRCS should explicitly require the use of best available science when making off-site determinations, including with respect to hydrology, normal climatic conditions, minimal effect, and best drained conditions definitions and rule provisions. Specifically, these methods should incorporate some or all of the following elements:

- On-site wetland determinations and/or the enhanced use of spring imagery to ensure that seasonal wetlands are not improperly excluded from determinations;

- LiDAR technology; and

- Precipitation data that more accurately reflects the field conditions during the wet portion of the growing season.

Moreover, NRCS should require that its off-site delineation methods be subjected to quality control studies to ensure that off-site methods are not omitting seasonal wetlands on the landscape. Other quality control methods NRCS should consider as alternatives include:

- Revising the hydrology indicators to incorporate the presence of hydric soil inclusions within non-hydric soils fields;

- Sliding the decadal precipitation dataset forward and presently using the 1981-2010 dataset when determining "normal conditions," *except* in specified circumstances where the use of the 1971-2000 dataset is determined to be appropriate when considering past agricultural conversions that have occurred on the tract;

- Requiring that the best available data sources be used when making determinations to ensure that the wetland determination process is as accurate and technically robust as possible, and further, to ensure that seasonal wetlands are not improperly omitted from such determinations, including: spring imagery, where such imagery is available[11]; National Wetlands Inventory data; updated soils maps; LiDAR data; and physical site visits;

[11] This is particularly important because NRCS has now specifically included observations from aerial imagery as hydrologic indicators. 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 and other migratory 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. *See* Attach. H at 3 (noting that "the number of wetland basins containing water is 73% lower in July than in May"); Attach. I.

- Investing in the increased development of spring imagery to make it more widely available; and

- Requiring the use of a consistent, science-based methodology and process for completing off-site assessments of wetlands when making a minimal effects determination, as specified above.

E. NRCS Failed to Adequately Analyze the Impacts of its Action

The EA also failed to adequately evaluate the impacts of its action as required by NEPA and its implementing regulations. As discussed above, under NEPA, an EA must "take[] a hard look at the problem." *Van Antwerp*, 661 F.3d at 1154. "Although the contours of the 'hard look' doctrine may be imprecise," the agency's analysis must, at minimum, be sufficient to demonstrate that it "'has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious.'" *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) (quoting *Balt. Gas*, 462 U.S. at 97–98); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 16 (D.D.C. 2009) (noting that to comply with the "hard look" requirement, agencies must "consider all direct, indirect, and cumulative impacts that are foreseeable as a result of the [interim] rule").

Because the No Action Alternative and Proposed Action Alternative were functionally identical, the EA is devoid of any meaningful comparison of the impacts of alternatives. As a result, NRCS's impacts analysis must also fail. *See W. Watersheds Proj. v. Christiansen*, --- F. Supp. 3d ---, 2018 WL 6715536 (D. Wyo. Sept. 14, 2018) (holding that the Forest Service's "failure to consider a reasonable range of alternatives" necessarily meant that the Service had also "failed to take a hard look at the alternatives to the proposed action, some of which might mitigate impacts").

The EA's impacts analysis is also insufficient under NEPA because it omits discussion of several significant impacts from its analysis. *See Brady Campaign*, 612 F. Supp. 2d at 21 (providing that "[i]gnoring possible environmental consequences" renders an agency's impact analysis arbitrary and capricious (quoting *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154-55 (D.C. Cir. 1985)). In particular, the EA does not even *mention* the significant change in policy that allowed the agency to accept as certified inaccurate pre-1996 wetland determinations, nor does it discuss the environmental impacts that are *already occurring* as a result of the policy change. As mentioned above, the OIG reported that in its review of several tracts where NRCS applied its new policy—i.e., where NRCS accepted as certified pre-1996 wetland determinations—75 % of wetlands that existed were "no longer protected and are subject to being drained." Attach. A at 7-8. Yet, NRCS never undertook an analysis of the environmental impacts that are likely to occur as a result of this wetland loss. Without such a discussion, the EA fails to satisfy NEPA's most basic command to "consider every significant aspect of the environmental impact of a proposed action," *Balt. Gas*, 462 U.S. at 97 (internal quotation omitted), and consequently, is quintessentially arbitrary under NEPA, *see Brady Campaign*, 612 F. Supp. 2d at 21.

Even for the impacts that the EA does mention, the limited discussion only serves to highlight the deficiencies in NRCS's evaluation, and underscores the practical value of a full analysis that takes the required "hard look" at the impacts of the interim rule. For example, NRCS proposes in its interim rule to determine normal precipitation using a static 30-year average precipitation dataset (1971-2000). 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 dataset, which slides forward every ten years and is scheduled to do so soon—i.e., moving from the 1971-2000 dataset to the 1981-2010 dataset. As the EA reports, more acres of wetlands would be identified under the 1981-2010 dataset than under the 1971-2000 dataset due to an overall increase in precipitation; "however, the differences would not be evenly distributed nationwide." EA at 9. NRCS insists that "[f]uture decadal updates . . . would likely include periods of widespread and severe drought," which "would result in fewer acres of wetland identified as subject to the [wetland conservation] provisions." *Id.* at 10. However, NRCS does not explain why the agency could not account for periods of widespread drought in its analysis. NRCS concludes without meaningful analysis that "[t]he overall impact of maintaining use of the 1971-2000 dataset is expected to be negligible over time." *Id.* at 10.

Courts have long held that such "general statements about 'possible' effects" as insufficient to satisfy the "hard look" requirement. *See, e.g.*, *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). The EA never attempts to quantify the impact of lost wetlands under *either* decadal dataset, nor does it offer "a justification regarding why more definitive information could not be provided." *Id.* Rather, it discusses the impacts of its action using general descriptors—e.g., "negligible," "fewer"—that are undefined, and as such, "are wholly uninformative." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 101-02, 106 (D.D.C. 2006). Despite its lack of data, NRCS nevertheless asserts throughout the EA that the use of the updated decadal dataset "*would* result in fewer acres of wetland" subject to the wetland conservation provisions. However, whether the use of one decadal dataset over another will result in fewer identified wetlands is only part of the inquiry. The proper evaluation should identify the *environmental impacts* of having fewer wetlands subject to the wetland conservation provisions, in light of the documented losses that have already occurred—and that are reasonably expected to continue—due to changing agricultural practices, climate change, and development. *See Blue Mountains Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) (finding that the Forest Service failed to take a "hard look" at the impacts of its action where failed to properly "identify the impact of the increased sediment from the logging and roadbuilding on the fisheries habitat in light of the documented increases that already have resulted from the fire"). Without such an analysis, the EA cannot be said to contain "a reasonably thorough discussion of the significant aspects of the probable environmental consequences," as required under NEPA. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992).

Nor can the EA be said to "foster both informed decisionmaking and informed public participation." (quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir.1982)). The "hard look" mandate serves NEPA's twin goals of ensuring that agencies "consider every significant aspect of the environmental impact of a proposed action," and "ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process."

Balt. Gas, 462 U.S. at 97. Accordingly, "[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b). However, NRCS's impacts discussion is devoid of any scientific analysis of the environmental effects of the interim rule. In fact, its impacts analysis is largely devoid of any acknowledgement that NRCS's actions will impact the environment *at all*.[12] Such information is essential to an informed evaluation of the merits of the interim rule as compared to alternatives, and, thus, is critical to meaningful public participation. The EA's failure to disclose the impacts of its action "preclude[d] meaningful evaluation of the effectiveness of the agency's proposed action in achieving its stated goals, as well as the availability of alternatives," and "belies its claim that it took the 'hard look' required to avoid a finding that [its EA] was arbitrary, capricious, and contrary to law." *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 227, 229 (D.D.C. 2003) (finding that the agency's failure to provide information in the EA process sufficient to foster public participation violated NEPA's "hard look" requirement).

Had NRCS taken a legally adequate "hard look" at the impacts of the interim rule—e.g., by comparing the actual impacts of using either decadal dataset on the number of wetlands identified—both the agency and the public would be better informed of the environmental effects of the alternatives and would be able to offer meaningful comment on the interim rule. *Cf. Gould*, 150 F. Supp. 3d at 1182 (finding that the Forest Service violated NEPA where the agency's failure to include environmental information that it relied upon in its decision precluded plaintiffs from submitting more complete comments). Moreover, the EA's omission of information regarding the interim rule's impacts is particularly troubling in light of the fact that the policies NRCS has sought to implement with this rulemaking process have *already* resulted in significant adverse impacts to agricultural wetlands. Accordingly, NRCS must revise its EA to include a more robust, objective analysis of the environmental impacts of the interim rule that allows the public to "ensure that the agency has adequately considered and disclosed the environmental impact of its actions." *City of Olmsted Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 269 (D.C. Cir. 2002). At the very least, NRCS must "provide[] sufficient evidence and analysis" to support its decision not to prepare an EIS. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004) (quoting 40 C.F.R. § 1508.9(a)).

NRCS's failure to take a "hard look" at the impacts of its action is also apparent in its focus on the *administrative* impacts of the interim rule on NRCS's implementation of the wetlands conservation program, as opposed to the *environmental* impacts. It is axiomatic that the purpose of an impacts analysis under NEPA is to evaluate the environmental impacts or effects of a proposed action. *Cf. Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S.

[12] For example, returning to the agency's discussion of the interim rule's implementation of the static decadal precipitation dataset, the EA states in general terms that shifting the dataset forward would result in more wetland acres mapped in some regions, and fewer wetland acres mapped in others. NRCS does not discuss the *environmental impacts* that would result from the increase or decrease in protected wetlands. Likewise, when discussing the agency's policy regarding the certification of pre-1996 wetland determinations, NRCS maintains that there are no environmental impacts because, according to the agency, there has been "no change" to the "determinations' regulatory status as being certified or not certified."

766, 772 (1983) ("The theme of § 102 [of NEPA] is sounded by the adjective "environmental": NEPA does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment."). However, aside from a few general and conclusory statements regarding the interim rule's impacts on the amount of wetland acres that will be identified as subject to the wetlands conservation provisions, NRCS's impacts analysis consists of a discussion of the political and administrative difficulties the agency faces in administering the program. As a result, the EA reads less as a meaningful comparison of alternatives and their impacts, and more as an impermissible attempt to "rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000); *see also, e.g.*, 40 C.F.R. § 1502.2(g) (explaining that the NEPA process cannot be used to "justify[] decisions already made").

Moreover, while considerations of administrative difficulty properly inform the agency's evaluation of the feasibility of alternatives, *see, e.g.*, *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 72 (defining "reasonable alternatives" as those that are "objectively feasible as well as 'reasonable in light of [the agency's] objectives.'" (alterations in original) (quoting *City of Alexandria*, 198 F.3d at 867)), NEPA and its implementing regulations demand that the impacts analysis provide an evaluation of the *environmental effects* of the proposed action. 40 C.F.R. § 1508.8 (defining environmental impacts to include "ecological . . . , aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative"). Indeed, nothing in NEPA prevents NRCS from selecting an alternative based on its own policy considerations, as long as the agency "has adequately considered and disclosed the environmental impact of its actions." *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C.Cir.2006) (quoting *Balt. Gas*, 462 U.S. at 97–98); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) ("NEPA merely prohibits uninformed—rather than unwise—agency action."). By focusing on policy and political considerations and giving short shrift to environmental impacts, NRCS's impacts analysis fails to meet this most basic requirement. Accordingly, because NRCS's EA fails to meaningfully grapple with the impacts of its own action on the environment, it violates NEPA's "hard look" standard and is arbitrary and capricious.

In sum, the failure to fully consider an environmental impact has long been held to be arbitrary and capricious under the procedures set forth in NEPA. *See Brady Campaign*, 612 F. Supp. 2d at 21. NRCS's EA not only fails to consider the environmental impacts of the interim rule, it fails to acknowledge that such impacts even exist. However, it is well-established that "[i]gnoring possible environmental consequences will not suffice." *Found. on Econ. Trends*, 756 F.2d at 154 (citing 40 C.F.R. § 1508.27(b)(5)). Accordingly, for all of these reasons, NRCS arbitrarily and capriciously ignored the environmental impacts that would result from its interim rule. NRCS must correct these serious deficiencies to comply with its obligations under NEPA.

F. By Failing To Take A "Hard Look" At The Impacts Of, And Alternatives To, The Interim Rule, NRCS Precluded Meaningful Public Participation In Violation Of NEPA.

As a practical matter, as discussed below, NRCS's failure to adequately describe and evaluate the alternatives and their impacts deprived the public of any meaningful opportunity to participate in the agency's decisionmaking process. Indeed, NEPA regulations require federal

agencies to involve the public in the NEPA process "to the fullest extent possible" 40 C.F.R. § 1500.2.

As discussed above, NRCS failed to provide the public with sufficient information regarding the proposed action and its potential environmental impacts to allow for meaningful substantive comment. Although NRCS held public meetings and distributed a slideshow packet describing the interim rule, the scoping notice did not provide any environmental information about the rule's potential environmental impacts. Courts have previously faulted agencies for "fail[ing] to give the public an adequate pre-decisional opportunity for informed comment" where they distributed a scoping letter but no draft EA, particularly where "the scoping notice provided no environmental data concerning impacts to wildlife, cultural resources, watersheds, soils, fisheries, or aquatics," nor did it discuss "potential cumulative effects." *Sierra Nev. Forest Prot. Campaign v. Weingardt*, 376 F.Supp.2d 984, 992 (E.D. Cal. 2005). Repeated requests to NRCS for draft EAs and related documents were refused. As a result, the only opportunity for the public to participate in the NEPA process was after the EA was finalized. Moreover, the EA was released on the same day as the interim rule, which became effective immediately. The public was therefore precluded from providing input on the interim rule, its impacts, and any alternatives *before* the rule went into effect. This cannot be squared with NEPA's command to begin the environmental review process "early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5; *cf. Gould*, 150 F. Supp. 3d at 1182).

After the interim rule was issued, the serious deficiencies in the EA rendered informed public comment impossible. In preparing its EA, NRCS was obliged to "provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process." *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 953 (9th Cir. 2008). As established above, NRCS's EA utterly failed in this regard. For example, by adopting a purpose and need statement that failed to account for its statutory mandate and impermissibly restricted its range of reasonable alternatives, NRCS deprived the public of any opportunity to evaluate reasonable alternatives that may better protect agricultural wetlands while still providing certainty to producers.

The EA's overarching and fatal flaw, however, arises from NRCS's mischaracterization of the interim rule as a mere "clarification" of existing agency policy. This contrived construction of the agency's action taints NRCS's entire analysis, and is at best, disingenuous, and at worst, amounts to an intentional effort to once again preclude public participation in, and oversight of, an administrative program that has significant environmental effects. Either way, neither the procedure nor the substance of the EA were sufficient "to permit members of the public to weigh in with their views and thus inform the agency decision-making process." *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 953 (9th Cir. 2008). Consequently, NRCS's EA violates NEPA.

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. Indeed, because the interim rule is already in effect, NRCS is currently in ongoing violation of the ESA and its implementing regulations.

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 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/OpenNonWebContent.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.[13]

[13] *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

By permitting producers to certify inaccurate wetland determinations and convert improperly delineated wetlands to agricultural use without penalty, NRCS's actions at the very least "may affect" listed species by facilitating 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, 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.* at 13 ("Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement.").[14]

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 NRCS—has serious adverse effects on listed species, NRCS must conduct Section 7 consultation 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's proposed changes to the wetland conservation provisions are legally deficient. We urge NRCS to withdraw the interim final rule and instead propose a rule that promotes accurate wetland determinations that include all seasonal wetlands and one that is subject to robust environmental review and public comment. If NRCS nonetheless proceeds to issue an interim rule promulgating these changes, it will be doing so in clear violation of federal

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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).

[14] 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 NMFS concerning the effects to those listed species prior to issuing the interim rule.

administrative and environmental laws. In lieu of taking that step, NWF urges NRCS to withdraw the rule and explore a less environmentally destructive alternative in an EIS and through ESA consultation.

Sincerely,

Jan Goldman-Carter
Counsel, Wetlands and Water Resources
National Wildlife Federation
1200 G St., NW Suite 900
Washington, DC 20005
goldmancarterj@nwf.org
202-797-6894

c: Leslie Deavers,
Jason Outlaw