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Public Comments Processing

Attn: National Leader for Wetland and Highly Erodible Land Conservation
USDA, Natural Resources Conservation Service
1400 Independence Avenue SW
Washington, D.C. 20250

SUBMITTED VIA FEDERAL ERULEMAKING PORTAL

**Re: Comments on Highly Erodible Land and Wetland Conservation Interim Rule
Docket ID No. NRCS-2018-0010**

Dear National Leader for Wetland and Highly Erodible Land Conservation:

The undersigned organizations thank you for this opportunity to provide comments to the USDA-Natural Resources Conservation Service on the interim rule published in the Federal Register on December 7, 2018 (83 Fed. Reg. 63,046), Doc ID No. NRCS 2018-0010.

We represent producers who encounter highly erodible land and wetland conservation compliance regulations as a regular part of their farm operation and management decisions. Wetlands management has been an issue in North Dakota since the passage of the 1985 farm bill. While we understand protection of wetlands is mandated by law, we ask for a more commonsense approach to wetlands management in working with NRCS.

Cooperation with NRCS can be a key component to successful farm management and profitability. However, we know regulatory uncertainty, delay of process, complex procedural requirements, and inaccurate wetland determinations that lead to lengthy and costly appeals cause frustration and result in agency distrust among our producers. Frustration and distrust leads producers to consider whether the benefits of enrolling in farm programs and premium subsidies on federal crop insurance outweigh the costs and burdens of complex and uncertain conservation compliance restrictions.

Contrary to what is often heard or read about wetland conservation compliance in the prairie pothole region of the United States, our producers are not opposed to conservation of wetland resources. Farmers are the best stewards of their land and understand its importance to the vitality of their livelihood.

In support of those statements, we'd like to highlight findings from the recent 2012 National Resources Inventory report conducted by the USDA-NRCS and the Center for Survey Statistics and Methodology at Iowa State University.¹ This report, which was cited in the NRCS's August

¹ U.S. Department of Agriculture. 2015. Summary Report: 2012 National Resources Inventory, Natural Resources Conservation Service, Washington, DC, and Center for Survey Statistics and Methodology, Iowa State University, Ames, Iowa.

2018 Interim Rule Environmental Assessment Report, notes that the period between 1997 and 2007 was the first decade in modern history that saw a nationwide increase in palustrine and estuarine wetlands. It concludes that most of those gains in wetlands were found in the highly agricultural central region of the U.S.: North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, Nebraska, Illinois, Indiana, Missouri, Kansas, Oklahoma, and Texas.

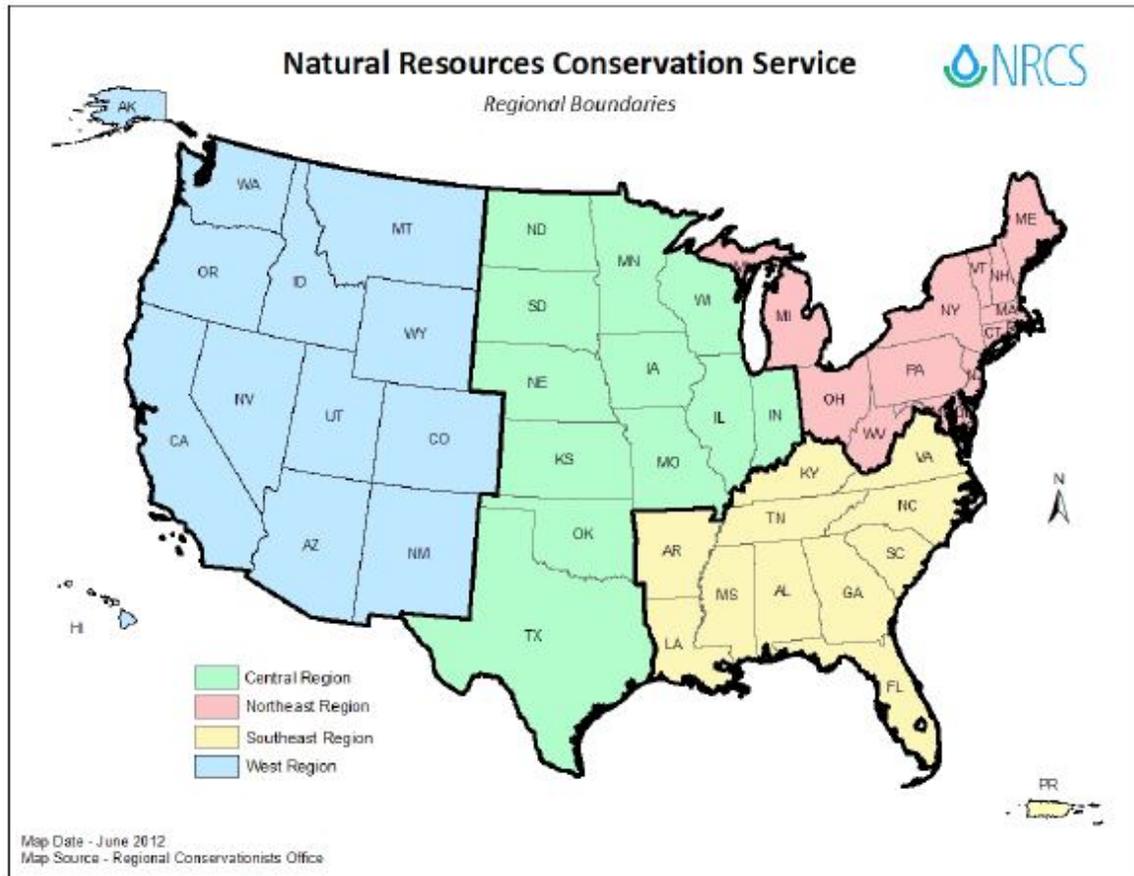


Figure 1. NRCS regional boundaries.

Notably, the Northeast region of the U.S. was reported to have experienced a gradual loss of over 100,000 acres of palustrine and estuarine wetlands between 1992 and 2010. The Southeast Region, while experiencing a modest gain, still lost over 200,000 acres of palustrine and estuarine wetlands during this same time period. The report notes these losses are attributable primarily to urban development – not agricultural drainage.

Commenters who assert farmers in the central region, and primarily the prairie pothole region to the north, are depleting the nations' wetlands by regularly engaging in construction, improvement, and maintenance of water management infrastructure are ignoring facts in independent studies such as the 2012 National Resources Inventory conducted by NRCS.

Our producers are proof that farmers can profitably lead the nation in production of corn, soybeans, wheat and sorghum, while preserving (and even improving) our nation's wetland resources.

However, the importance of streamlined and certain regulatory processes for wetland conservation compliance cannot be stressed enough.

We understand the interim rule is intended to clarify how the USDA delineates, determines, and certifies wetlands in a manner sufficient for making determinations that can lead to ineligibility for certain USDA program benefits such as conservation cost-share programs, farm loans, and crop insurance. Farmers need transparency, consistency, and certainty in how new terms are defined and new regulations are implemented.

While we believe the interim rule codifies several important agency policies that provide certainty for producers, there are several areas in the interim rule that are in need of additional clarity. Improvements could be made to allow farmers meaningful involvement in the wetland and highly erodible land determinations process by proposing rules through public notice and comment, and offering responses to the comments received.

Based on these concerns, we provide the following comments to the interim rule:

1. Precipitation Data Used in Wetland Determinations.

Planning water management projects around dynamic wetland systems that vary based on changing climate conditions can be challenging. The interim rule sets a fixed, 30-year precipitation data set for making determinations representative of "normal circumstances."

Data leading up to December 23, 1985, is important for many exemptions applicable to Swampbuster. We agree with the interim rule's prefatory comments which point out that the forward adjustment of precipitation data to determine "normal circumstances" will result in unfair and inconsistent determinations.

We oppose any efforts to use a rolling data set that would adjust the identification of wetlands based on precipitation cycles that represent conditions wetter than those considered normal at the time Swampbuster was enacted.

We encourage the agency to be more transparent with the data it relies on in making its determinations of "normal climatic conditions." Unfortunately, aerial photography is not available for critical years preceding 1985 in all regions of the U.S., placing those producers at a disadvantage when determining the application of exemptions.

Moreover, critical data about the aerial photographs that do exist, such as the date on which it was taken, is often not available and not considered by the agency when determining normal climatic conditions. A growing season that, on average, represents normal precipitation circumstances, may have presented not-so-normal circumstances in the days leading up to a historical aerial photography. If the days leading up to the photograph were abnormally dry,

wetland indicators may not appear. If the days leading up to the photograph were abnormally wet, wetness signatures may be exaggerated.

For these reasons, the agency should consider policies that are flexible on use of credible evidence outside the 30-year “normal” data set when such data aids in providing credible information that is otherwise missing. For example, when there are not aerial photographs surrounding a pre-1985 drainage manipulation, or the data such as the date of the photograph or rainfall in the days leading up to the photograph are missing, the agency should consider expanding that data set if there are more recent years with better images and more data following an action like a pre-1985 drainage manipulation repair that has been authorized by NRCS.

Recommendation: We encourage NRCS to continue using a fixed precipitation data set when determining “normal climatic conditions” for the initial *Level 1* wetland determination.

We recommend NRCS improve transparency in its wetland determinations by providing information to the producer used to make the determination that an aerial photograph and year represents “normal climatic conditions” as part of providing a wetland determination.

We recommend NRCS consider less rigid policies that allow for consideration of best available data outside of the 30-year “normal” data set when such data supplements information about a determination that is otherwise missing.

2. Definition of a Pothole – Observation of Inundation or Saturation.

The interim rule adds a definition of “pothole” to 7 C.F.R. 12.2 - “a closed depression, generally circular, elliptical, or linear in shape, occurring in glacial outwash plains, moraines, till plains, and glacial lake plains.”

We urge NRCS to improve transparency by indicating on its wetland determinations when a site is determined to be a “pothole” wetland. Our producers have long been concerned with the agency’s use of a lesser hydrology requirement for delineation of pothole wetlands than non-pothole wetlands. Under the existing definition, an area can be a “wetland” if it is a pothole and never ponds water for a single day during the growing season. These wetlands are difficult to identify and often regularly produce viable crops.

We are opposed to the interim rule’s use of inundation observed during a site visit for identification of a wetland and observation of inundation or saturation during a site visit for identification of a pothole wetland. Observations of inundation or saturation during a site visit cannot be indicative of the length of time in which a site needs to be inundated or saturated to be considered a wetland under the rule.

Recommendation: We encourage NRCS to be more transparent with its wetland determinations by identifying which wetlands are pothole wetlands.

We encourage NRCS to rescind 7 C.F.R. 12.2, *wetland determination (4)(i)(A), (4)(ii)(A), and 5(i)* to ensure that a single day's site observation of inundation or saturation is not used by the agency as evidence that a site meets the hydrology requirement for wetland.

3. Defining "Best Drained Condition" Applying Definition to Wetland Identification Procedures.

We support the interim rule's insertion of a "best drained condition" definition in 7 C.F.R. § 12.2(a). We also support interim rule's insertion of the wetland identification procedures related to "wetland hydrology" and the "best drained condition" found in the new 7 C.F.R. § 12.31(c)(2) & (3).

Correct application of the "best drained condition" to a wetland determination means the producer is entitled to maintain the best farming regime that existed following the pre-December 23, 1985, drainage manipulation. This is the standard required by statute as confirmed by, and discussed in, the Eighth Circuit Court of Appeals case *Barthel v. U.S. Dept. of Ag.*, 181 F.3d 934 (1999).

The "best drained condition" rule is applied in the *State Guidance for Wetland Determinations Including State Offsite Methods* ("ND SOSM") adopted by the North Dakota Natural Resources Conservation Service. Prior to addressing the "best drained condition" in the ND SOSM, the NRCS frequently failed to account for lack of maintenance or man-made increases in hydrology upstream of a sampling unit when evaluating pre-1985 drainage manipulations. Conversely, too little credibility was given to recent maintenance when reviewing aerial imagery for wet signatures under normal conditions. This resulted in sampling units being labeled as "farmed wetlands" that met the regulatory definition for exempt "prior-converted cropland" prior to December 23, 1985.

Sampling units that produce an agricultural commodity in their best drained condition should be determined to meet the regulatory definition of "prior-converted cropland." In their best drained condition, these sites already produce an agricultural commodity and, therefore, cannot be converted to "have the effect of making the production of an agricultural commodity possible." 16 U.S.C. § 3821(d).

Recommendation: We encourage NRCS to continue application of the "best drained condition" rule to all wetlands that were manipulated for drainage prior to December 23, 1985.

4. Definition of “Wetland Hydrology”.

The interim rule adds a definition for wetland hydrology that references inundation or saturation by surface *or groundwater*. We are concerned with the NRCS’s recent shift away from traditional minimal effect setback distances employing the van Schilfgaarde equation for groundwater discharge wetlands.

Until recently, NRCS provided regulatory certainty to producers and land improvement contractors designing and installing subsurface water management systems through the online lateral effect determination spreadsheets. With the corresponding soil type, average depth below ground, and tile diameter, the regulated community could utilize the lateral effect spreadsheets to apply a setback distance from wetlands for tile plans.

Within the last couple years, NRCS began removing these online setback tables for certain types of discharge hydric soils and replacing them with a note that site specific evaluation would be required. Discharge wetlands are those that receive their source of hydrology primarily from groundwater. Particularly troublesome was the manner in which the agency made the shift in technical policy without notice or explanation and a chance for the regulated community to comment on the change.

In some instances, producers are reporting that tile systems were installed and designed using the traditional minimal effect setback distances published online. During the lag time between the tile design and installation and the agency issuing a post-installation wetland determination, the agency made the unannounced shift in technical policy and issued converted wetland determinations using the enlarged setback distances applied to discharge wetlands. These setback distances are often three times or more larger than those previously published online under the minimal effect setback tables.

Recommendation: We encourage the agency to: (1) revert back to the minimal effect setback tables online using the traditional equations until the NRCS is prepared to issue a proposal for employing a standard for discharge wetlands that can be provided online with certainty and without a site specific analysis; (2) provide the regulated community and public the opportunity to review NRCS’s proposal and provide comment; and (3) apply the minimal effect setback table distances for all water management systems designed and installed prior to official publication of a final rule or policy addressing setback distances from discharge wetlands.

5. Certification of Wetland Determinations on the “Field or Sub-field” Level.

We support the interim rule’s replacement of “tract” with “field or sub-field” in 7 C.F.R. § 12.30(c)(1). The previous rule’s mandate that wetland determinations be conducted on a tract basis created an unnecessary burden on NRCS that contributed to the backlog of pending wetland determinations and further delay and frustration from the regulated community.

By allowing the agency to focus on just those fields or sub-fields within a tract where a water management activity is proposed, NRCS should be able to shorten its response time to certification requests filed by producers.

We believe the revised 7 C.F.R. § 12.30(c)(1) applies to producers' request for recertification under 7 C.F.R. § 12.30(c)(6). That section allows a producer to request review of a certified wetland determination if the agency concurs with the producer that the wetland determination contains an error. Under existing practices, the agency often cautions producers that a request for a review of an error to a field or sub-field on a wetland determination will, if NRCS concurs with the error, authorize the agency to conduct a new wetland determination on the entire tract. This creates complex frictions with the wetland conservation compliance rules in situations where the producer has already engaged in water management activities in reliance on the agency's certified wetland determination. If those fields or sub-fields not in question are reviewed and later determined to be wetland, a producer might find himself in violation of the wetland conservation compliance provisions despite being compliant at the time the management decision was made. Therefore, we believe the revised 7 C.F.R. § 12.30(c)(1) language must apply to allow producers to request NRCS review fields or sub-fields and to revise those labels on the certified determination if the NRCS concurs that the certified determination contains an error.

Recommendation: We request the agency clarify that 7 C.F.R. § 12.30(c)(1) as stated in the interim rule applies to a producer's request for recertification of a certified wetland determination.

6. Wetland Determination Certification.

We support the interim rule's revisions to 7 C.F.R. § 12.30(c)(1) which add further guidance and clarity to the status of wetland determinations as "certified." Certification of NRCS wetland determinations is the most critical help of providing producers with regulatory certainty regarding their wetland conservation compliance. Until about 2014, NRCS took the position that when a producer completes USDA Form AD-1026, the NRCS may issue a new certified wetland determination on any tract which had not previously received a certified wetland determination issued after July 3, 1996. As the prefatory comments note, this position violated the statutory language of the 1990 and 1996 farm bills. The agency corrected this position in its policy in the last several years, and we are encouraged to see the agency formally recognize these certification requirements in the interim rule.

We encourage the agency to clarify conditions that constitute a "map document . . . of sufficient quality to determine ineligibility for program benefits" as used in 7 C.F.R. § 12.30(c)(1). We assume this to mean that if the producer can identify the location, general size, and label applied to a wetland on the wetland map document, that the wetland map document meets the criteria in the rule to be considered certified.

We encourage the agency to continue looking at the potential for certification of wetland determinations issued prior to November 28, 1990. In particular, those wetland determinations

issued with appeal rights prior to November 28, 1990, that otherwise met the procedural and quality mandates as provided in 7 C.F.R. Part 12, should be honored as “certified” wetland determinations. Certainly, those pre-November 28, 1990, wetland determinations that completed an appeals and review process by NRCS should be treated as “certified.”

Recommendation: We request the agency clarify 7 C.F.R. § 12.30(c)(1) as to what constitutes a map document of sufficient quality to determine ineligibility for program benefits.

We encourage the agency to consider criteria which would allow for a wetland determination issued before November 28, 1990, to be considered “certified.”

7. Wetland Minimal Effects Exemptions.

We are encouraged to see the NRCS work on strengthening the application of the minimal effect exemption to wetland determinations by including language in the interim rule that strengthens the agency’s ability to make these exemption determinations off-site. However, we believe the revised 7 C.F.R. § 12.31(e)(1) (formally section 12.31(d)) in the interim rule continues to violate the mandate included in the 1990 farm bill that the agency is to exempt those activities which have a minimal effect on wetland functions and values in all circumstances.

The violating language of 7 C.F.R. § 12.31(e)(1) states:

A request for [a minimal effect exemption] will be made prior to the beginning of activities that would convert the wetland. If a person has converted a wetland and then seeks a determination that the effect of such conversion on wetland was minimal, the burden will be upon the person to demonstrate to the satisfaction of NRCS that the effect was minimal.

Since 1990, Congress has stated that those activities which have a minimal effect on wetland functions and values shall be exempt. The timing of the potential conversion activities should have no bearing on the determination by the Secretary as to a violation or conversion of a wetland.

The Food Security Act of 1985 authorized the Secretary of Agriculture to exempt activities associated with the production of an agricultural commodity on converted wetland if the effect of such action on the hydrological and biological aspect of wetlands was minimal.² In 1987, the Secretary adopted final rules mandating that a request for a Minimal Effects determination be made prior to the operator beginning activities that would convert the wetland. If an agricultural operator converted a wetland and then sought a determination that the effect of such conversion

² Section 1222(c) of Pub. L. No. 99-198, 99 Stat. 1354, 1508 (Dec. 23, 1985).

on wetlands was minimal, the burden was on the operator to demonstrate to the satisfaction of SCS (currently NRCS) that the effect was minimal.³

In 1990, Congress strengthened the minimal effect exemption in statute by mandating the Secretary exempt actions that will have a minimal effect on the functional hydrological and biological value of the wetland.⁴ No limitation was included on the application of the Minimal Effects exemption to requests made before water management activities commenced. To increase certainty about whether an activity would qualify for a minimal effect exemption and to reduce the need for site-specific determinations, Congress required the Secretary in the 1996 Farm bill to promulgate a regulation identifying categories of activities determined to have Minimal Effects on wetland functions and values.⁵

The Secretary's federal regulations on minimal effects, however, have remained largely unchanged since the first rules were adopted in 1987. Today, 7 C.F.R. section 12.31(e)(1) still contains the original 1987 provisions that place the burden on the operator to demonstrate to the satisfaction of NRCS that the effect on wetlands of activities already commenced meets the Minimal Effects exemption.

In 1996, the Secretary adopted regulations providing a process whereby the NRCS State Conservationist, in consultation with the NRCS State Technical Committee, must identify categories of conversion activities and conditions which are routinely determined by NRCS to have minimal effects on wetland functions and values and, after evaluation by the Chief of NRCS, publish those exemptions in the Federal Register. Unfortunately, we are not aware that North Dakota, like most states, has published any minimal effect categorical exemptions. On the ground, many wetland determinations are issued in response to reports of potential noncompliance where the water management activities have already taken place. To expect agricultural operators to demonstrate qualification for the Minimal Effects exemption when the procedures of making such a determination and categories of activities that meet the exemption are unwritten is impracticable.

Recommendation: We urge the agency to apply the minimal effect exemption to all wetland determinations, regardless of whether the potential conversion activities have already occurred. In addition, we urge the Secretary to require each state in 2019 to identify categories of activities and conditions that have a minimal effect on wetland functions and values.

³ 52 Fed. Reg. 35059, 35208 (Sept. 17, 1987) (codified at 7 C.F.R. 12.31(d) (1987)).

⁴ Section 1422 of Pub. L. No. 101-624, 104 Stat. 3359, 3573 (Nov. 28, 1990).

⁵ Section 322(c) of Pub. L. No. 104-127, 110 Stat. 888, 990 (Apr. 4, 1996).

We appreciate the opportunity to outline our concerns regarding the USDA-NRCS's interim rule addressing highly erodible land and wetland conservation compliance.

If you have any questions, please feel free to contact Dan Wogsland, Executive Director of the ND Grain Growers Association at danw@ndgga.com or 701-282-9361, or by contacting the representatives of the undersigned organizations submitting these comments.

Sincerely,

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