IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF IOWA, EASTERN DIVISION

CTM HOLDINGS, LLC, an Iowa limited liability company, *Plaintiff*, vs. THE UNITED STATES DEPARTMENT OF AGRICULTURE; THOMAS J. VILSACK, in his official capacity as the Secretary of the United States Department of Agriculture; THE NATURAL RESOURCES CONSERVATION SERVICE; TERRY COSBY, in his official capacity as Chief of the Natural Resources Conservation Service; and JON HUBBERT, in his official capacity as Iowa State Conservationist, *Defendants*, IOWA FARMERS UNION, IOWA ENVIRONMENTAL COUNCIL, FOOD & WATER WATCH, and DAKOTA RURAL ACTION, *Intervenors*.	CIVIL NO. 6:24-cv-02016-CJW-MAR **PLAINTIFF'S COMBINED RESISTANCE TO DEFENDANTS' AND INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT**

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Plaintiff CTM Holdings, LLC (CTM) submits this combined response to Defendants and Intervenors' Motions for Summary Judgment.

ARGUMENT

I. This Court can reach the merits of the case.

A. CTM has standing.

Defendants argue that CTM lacks standing because it cannot be injured until it actually loses eligibility for programs by converting a wetland. ECF 59 at 7–12. Intervenors argue that any injury is incurred by CTM's tenants. ECF 54-1 at 10. Both arguments are incorrect.

Where "the legality of government action or inaction" is being challenged "there is ordinarily little question" of standing for the "object of the action (or forgone action)." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992). Here, CTM is the object of Swampbuster and Defendants' regulations because Defendants' regulations apply to the land owned by CTM. 16 U.S.C. § 3822(a)(1) (certifications delineate "all wetlands located on subject land on a farm"); Plaintiff's Appendix in support of Summary Judgment (CTM App.) at 8–9. And a violation by a tenant on farmland can affect a landlord's eligibility for USDA programs with respect to that farm. *See* 7 C.F.R. § 12.9(a)(1)(i). Additionally, a tenant's violation can result in the reduction of the landlord's federal crop insurance. *id.* § 12.9(a)(1)(ii).

It is not speculative that Swampbuster's provisions injure CTM because Swampbuster prevents CTM from using portions of the property unless it gives up eligibility for USDA programs. 16 U.S.C. § 3821(d). Neither Defendants nor Intervenors cite 16 U.S.C. § 3821(d), which provides:

> any person who in any crop year beginning after November 28, 1990, converts a wetland by draining, dredging, filling, leveling, or any other means for the purpose, *or to have the effect*, of making the production of an agricultural commodity possible on such converted wetland shall be ineligible for those payments, loans, or programs specified in subsection (b) for that crop year and all

subsequent crop years.

Id. (emphasis added). In other words, if CTM converts a wetland on the property in a manner that makes agricultural production possible—even if it does not actually use it for agricultural production—it will lose eligibility for all benefits. *Id.*; *see also* Intervenors' Appendix in support of Summary Judgment (Int. App.) at 219. Thus, it is irrelevant what CTM's ultimate plans are for the property. If CTM converts the wetlands at issue in this case, then it will lose access to all future benefits.[1] This was reiterated by USDA officials to CTM. CTM App. at 8–9. As a result, CTM changed its behavior because of Swampbuster. *Id.*

The Supreme Court has recognized, in the unconstitutional conditions context, that the choice between foregoing a benefit or surrendering a constitutional right is an injury sufficient to show standing. A plaintiff suffers a "constitutionally cognizable injury" whenever the government succeeds in pressuring the plaintiff into forfeiting a constitutional right in exchange for a benefit or the government withholds a benefit based on the plaintiff's refusal to surrender a constitutional right. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606–07 (2013); *id.* at 607 (holding that the plaintiff suffered a "constitutionally cognizable injury" where he refused to waive his constitutional rights and was therefore denied a discretionary benefit); *cf. Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994) (reversing lower court's rejection of an unconstitutional-conditions claim where the government had "granted [the] petitioner's permit application subject to conditions" requiring the petitioner to waive her Fifth Amendment rights). That is, "regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the

[1] Regardless, a statement by CTM when acquiring the property does not necessarily reflect current or future plans.

Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz*, 570 U.S. at 606.[2] CTM has alleged unconstitutional condition claims and need not forego any USDA benefits to have standing to bring those claims.

Finally, CTM has suffered economic injury because of Swampbuster. Where a plaintiff demonstrates an economic injury there is ordinarily little question that a constitutionally sufficient injury in fact has been established. *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1029 (8th Cir. 2014) ("The consumers' alleged economic harm—even if only a few pennies each—is a concrete, non-speculative injury."); *see also Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) ("Economic harm to a business clearly constitutes an injury-in-fact."); Moreover, where economic injury is at issue "the amount is irrelevant," and "a dollar of economic harm" is still an injury in fact. *Id.*; *see Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017) ("a loss of even a small amount of money is ordinarily an 'injury.'");

This principle—that economic injury of any amount is constitutionally sufficient—is well recognized where the market value or salability of property is impacted. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 19 n.1 (2018) (holding that a "decrease in the market value of ... land" resulting from a critical habitat designation under the ESA was "sufficiently concrete injury for Article III purposes"); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (holding that a zoning ordinance that "of its own force ... greatly ... reduce[d] the value of appellee's lands" constituted a "present invasion of appellee's property rights").

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[2] Contrary to Defendants' argument, CTM does not need to request just compensation before alleging a violation of the Takings Clause. *Knick v. Twp. of Scott*, 588 U.S. 180, 190 (2019). Nor does CTM need to bring an unconstitutional conditions claim under the Tucker Act because it is seeking equitable relief from an unconstitutional condition rather than damages. *Id.* at 201–02 (while damages are the presumptive relief for a taking, it is not the only relief); *Koontz*, 570 U.S. at 609 (The Supreme Court has had "no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation ....").

Here, Swampbuster prevents CTM from leasing 9 acres of property to a farmer, affecting the value of the property and any lease it issues. CTM App. at 8–9; CTM App. 89–96; Int. App. 31–39. So even if Intervenors were correct that Swampbuster only affects how CTM's tenants farm, Swampbuster still injures CTM because the statute prevents CTM from leasing all its land. That loss of income—no matter how small—is sufficient injury to support CTM's standing.

B. There is final agency action this Court can review.

Defendants also incorrectly argue that there is no final agency action for this Court to review. In order for agency action to be final, first, "the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted). Courts take a "pragmatic" approach to determining whether there is final agency action. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599 (2016).

Defendants incorrectly argue that CTM never requested review of the 2010 certification. But CTM specifically requested a new certification because Swampbuster's Review Provision provides that Final certifications "remain valid and in effect … until such time as the person affected by the certification requests review of the certification by the Secretary" of the USDA. 16 U.S.C. § 3822(a)(4); CTM App. at 79. Defendants responded by quoting its Review Regulation, which allows for a review only if a natural event has altered the topography or hydrology of the land, or if the NRCS agrees that an error exists. CTM App. at 79. Thus, Defendants put its Review Regulation at issue by stating that CTM must comply with its Review Regulation to request review.

The NRCS also stated that a Certified Wetland Determination was completed in April

2010, that the 2010 Wetland Determination may be relied upon when making decisions involving current and future drainage projects, and that it did not offer CTM appeal rights because the appropriate time-period to request an appeal of the April determination had expired.

Here, "[t]here is no doubt [this] is agency action, which the APA defines as including even a 'failure to act.'" *Sackett v. EPA*, 566 U.S. 120, 126 (2012) (citing 5 U.S.C. §§ 551(13), 701(b)(2)). CTM requested a new certification, and the NRCS denied that request. The NRCS made its decision and has acted within the meaning of the APA. *See id.*

The NRCS's decision is also final. The NRCS's denial of the request is "the consummation of the Agency's decisionmaking process" because the decision is "not subject to further Agency review." *Sackett*, 566 U.S. at 127 (quotations omitted); *see* CTM App. at 79 ("You have not been offered appeal rights as the appropriate time-period to request an appeal of the 4/16/2010 determination has expired.). Defendants suggest that the NRCS might process CTM's request for review if they can provide different information, *id.*, but "[t]he mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal." *Sackett*, 566 U.S. at 127.

The NRCS has also "determined" "rights or obligations." *Bennett*, 520 U.S. at 178 (quotation omitted). Because of the NRCS's action, the 2010 Certification remains in place. CTM App. at 79. CTM is unable to use 9 acres of property without risking the loss of various benefits. In short, "legal consequences ... flow" as result of the NRCS's decision not to review the 2011 Certification. *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Thus, the agency's decision is final. *See Sackett*, 566 U.S. at 126.

This case is similar to other cases where the Supreme Court has held that there is final agency action. *See Hawkes*, 578 U.S. at 599–600 (citing *Frozen Food Express v. United States*, 351 U.S. 40 (1956)). In *Frozen Food Express*, at issue was the finality of an order specifying which commodities the Interstate Commerce Commission believed were exempt by statute from regulation, and which it believed were not. 351 U.S. at 41. "Although the order had no authority except to give notice of how the Commission interpreted the relevant statute," and "would have effect only if and when a particular action was brought against a particular carrier," the Court held "that the order was nonetheless immediately reviewable." *Hawkes*, 578 U.S. at 599–600 (cleaned up).

Similarly, the 2010 Certification, and the NRCS's refusal to issue a new certification, gives notice of how it will interpret Swampbuster as it applies to CTM's property. And "while no administrative ... proceeding can be brought for failure to conform" with the Certification itself, the certification "warns" that if CTM converts the wetlands it "do[es] so at the risk" of losing its benefits. *See Hawkes*, 578 U.S. at 600. Thus, as the U.S. District Court for the District of South Dakota held in a similar challenge to Swampbuster, a "denial of … requests for review" is "final agency action[]" because "[t]he refusals … ensure[] that the enforcement provisions of the Swampbuster Act remain in place[.]" *Foster v. U.S. Dep't of Agric.*, 609 F. Supp. 3d 769, 787 (D.S.D. 2022), *aff'd*, 68 F.4th 372 (8th Cir. 2023), *cert. granted, judgment vacated*, 144 S. Ct. 2707 (2024), *and vacated*, No. 22-2729, 2024 WL 4717247 (8th Cir. Nov. 7, 2024).

Finally, the promulgation of the implementing regulations is final agency action that CTM can challenge. *See Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 809 (2024). Although these regulations were promulgated decades ago "[a]n APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency

action, so the statute of limitations does not begin to run until she is injured." *Id.* CTM was not injured until it purchased the property in 2022. That is when its claims against the agency first accrued.

C. The APA provides the cause of action for all of CTM's claims.

Intervenors incorrectly argue that CTM has not stated a cause of action for its constitutional claims. ECF 54-1 at 11–14. CTM brings this claim under 5 U.S.C. § 702 and alleged that Defendants' actions in implementing Swampbuster are *ultra vires*—in part because the statute is unconstitutional. *See* Complaint ¶¶ 6, 55–83.

5 U.S.C. § 702 waives sovereign immunity for a person seeking injunctive relief who "suffer[ed] legal wrong because of agency action, or [was] adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Section 702's waiver of sovereign immunity "contains two separate requirements: 1) the person claiming a right to review must identify some agency action," and "2) the party seeking review must show that he has suffered a legal wrong or been adversely affected by that action within the meaning of a relevant statute." *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996). An "agency action" is defined "as the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (cleaned up). "A legal wrong is any invasion of a legally protected right." *Smith v. U.S. Dep't of Agric.*, 888 F. Supp. 2d 945, 954 (S.D. Iowa 2012) (citing *Preferred Risk Mut. Ins. Co.*, 86 F.3d at 793 n.5).

Here, CTM meets both requirements. First, as demonstrated above, CTM is affected or aggrieved by Defendants' actions. *See* Sections I-B, *supra*. Second, CTM alleges an invasion of legally protected rights under the Constitution. While these rights are not statutory rights, the

court in *Preferred Risk Mutual* looked to APA section 706 to hold that, in order to bring a claim under the APA, "the plaintiff must identify a substantive statute or regulation that the agency action had transgressed *and* establish that the statute or regulation applies to the United States." 86 F.3d at 792 ("Section 706 provides that the reviewing court shall set aside agency action found to be 'arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with law*.'" (quoting 5 U.S.C. § 706(2)(A))). Section 706 also provides that "the reviewing court shall" "hold unlawful and set aside agency action" "contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2)(B).

Thus, CTM has stated a cause of action for its constitutional claims. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (noting that equitable relief has long been recognized as the proper means for preventing agencies from acting unconstitutionally); *See also Collins v. Yellen*, 594 U.S. 220, 263 n.1 (2021) (Thomas, J., concurring) ("We have indicated that individuals may have an implied private right of action under the Constitution to seek equitable relief to 'preven[t] entities from acting unconstitutionally.'" (quoting *Free Enter. Fund*, 561 U.S. at 491 n.2)); 594 U.S. at 263 n.1(Thomas, J., concurring) (noting that plaintiffs in the case argued that their constitutional claim is cognizable under the APA); 594 U.S. at 276 (Gorsuch, J., concurring: "In response to such a showing [of unconstitutional action], a court would normally set aside the Director's *ultra vires* actions as 'contrary to constitutional right[.]'" (quoting 5 U.S.C. § 706(2)(b))).

II. Swampbuster imposes an unconstitutional condition on farmers.

Defendants and Intervenors argue that Swampbuster cannot be unconstitutional because Swampbuster awards benefits to farmers that they can choose to forego. ECF 59 at 13; ECF 54-1 at 16. But "[n]either Congress nor the states may condition the granting of government funds on

the forfeiture of constitutional rights." *Planned Parenthood of Mid-Missouri & E. Kansas, Inc. v. Dempsey*, 167 F.3d 458, 461 (8th Cir. 1999). And "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons … [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests[.]" *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

A. Swampbuster requires farmers to give up their interests protected by the Commerce Clause.

The purpose of the unconstitutional conditions doctrine is to prevent the government from producing "'a result which (it) could not command directly.'" *Perry*, 408 U.S. at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). Here, the federal government could not regulate the wetlands directly.

The 9 acres of wetlands do not contain any standing water, are not visibly wet, are not connected to any water body, and are not permanently or seasonally saturated or inundated by water at any time of the year. CTM App. 10, 122–130. The Property contains a small seasonal stream that runs through one portion of the upland portion of the Property, but the wetlands units on the Property are a significant distance away from the small seasonal stream and are not connected to any water body. CTM App. 122–130, 132.

Thus, Congress could not directly regulate these wetlands under the Commerce Clause. Congress's Commerce Clause power is limited to regulating the channels of interstate commerce, the instrumentalities of interstate commerce and goods in interstate commerce, and intrastate activity that has a substantial effect on interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). Swampbuster does not fall into any of the above categories. First, these wetlands are not channels of interstate commerce because they are solely intrastate and are not connected to any interstate waterways. CTM App. 9–10; s*ee, e.g.*, *United States v. Darby*, 312

U.S. 100, 114 (1941); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Second these wetlands are not instrumentalities of interstate commerce because they cannot transport the goods of interstate commerce. CTM App. at 9–10; *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914) (railcars); *Caminetti v. United States*, 242 U.S. 470, 491 (1917) (railcars). Wetlands like those regulatable under Swampbuster are not like railcars, and thus are not instrumentalities of interstate commerce. Finally, these wetlands do not "substantially effect" interstate commerce. CTM App. at 9–10; *Lopez*, 514 U.S. at 559; *Darby*, 312 U.S. at 119–20; *Wickard v. Filburn*, 317 U.S. 111, 125 (1942); *Katzenbach v. McClung*, 379 U.S. 294, 299–300 (1964).

Because Congress could not regulate the wetlands on CTM's property directly, it cannot produce the same regulatory effect by offering a benefit to farmers to "voluntarily" comply with the regulation.

B. Swampbuster requires farmers to give up their rights under the Takings Clause.

Nor could the federal government demand CTM place the wetlands in a conservation easement without paying just compensation. "When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021) (citation omitted). "The government commits a physical taking when it uses its power of eminent domain to formally condemn property[,]" "takes possession of property without acquiring title to it[,]" or "occupies property—say, by recurring flooding as a result of building a dam." *Id.* at 147–48 (citations omitted). "These sorts of physical appropriations constitute the clearest sort of taking, and we assess them using a simple, *per se* rule: The government must pay for what it takes." *Id.* at 148 (cleaned up).

Appropriation of an easement can effectuate a taking. *Id.* at 150–51 (citing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)). "[A] permanent physical occupation constitutes a *per se* taking regardless whether it results in only a trivial economic loss." *Id.* at 151 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423 (1982)). Compelled dedication of an easement for public use constitutes a taking. *Id.* at 151–52 (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)).

Swampbuster, in effect, requires farmers to transfer a conservation easement to the government that limits farmers' use of wetlands. In Iowa, a conservation easement is "an easement in, servitude upon, restriction upon the use of, or other interest in land owned by another, created for any of the purposes set forth in section 457A.1" Iowa Code Ann. § 457A.2. One of the purposes listed in section 457A.1 is "to preserve … riparian lands[and] wetlands[.]" *Id.* § 457A.1. And, under Iowa law, conservation easements can be temporary. *Id.* § 457A.2.

Thus, Swampbuster in effect requires farmers to place land in a conservation easement. That Swampbuster does not require farmers to record a literal conservation easement is irrelevant. A government cannot "absolve itself of takings liability by appropriating [a property right] in a form that is a slight mismatch from state easement law." *Cedar Point*, 594 U.S. at 155.

Defendants and Intervenors argue that Swampbuster does not effectuate a taking because the statute does not grant anyone access to farmland. ECF 59 at 17; ECF 54-1 at 17 (citing *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021)). But this is too narrow an understanding of what constitutes physical occupation. Fo example, the Court has held that a physical occupation occurs when the government causes recurring flooding on a property, even though flooding does not allow anyone to access the property but rather prevents the property owner from utilizing his or her land. *Cedar Point*, 594 U.S. at 148 (citing *United States v. Cress*, 243 U.S. 316, 327–28

(1917)).

Furthermore, while *Cedar Point* focused on the right to exclude, that right is not the only stick in the bundle of property rights. *See United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945) ("'[P]roperty' … denote[s] the group rights inhering in the citizen's relation to the physical thing[.]"); *cf. Nollan*, 483 U.S. at 833 n.2 ("[T]he right to build on one's own property … cannot remotely be described as a 'governmental benefit.'"). A negative easement is no less a property interest than any other interest. Indeed, the Eighth Circuit reviewed an Iowa city's proposed condemnation of a negative easement over farmland. *Milligan v. City of Red Oak*, 230 F.3d 355, 358 (8th Cir. 2000). In *Milligan*, no one argued that such a condemnation would not be a taking, but only whether the taking was for a public use. *Id.*

In *Nollan* and *Dolan*, the Court stated "'a special application' of [the unconstitutional conditions] doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Koontz*, 570 U.S. at 604 (citation omitted). Under *Nollan* and *Dolan*, the government can condition approval of a permit on the dedication of property to the public only if there is a "nexus" and "rough proportionality" between the property that the government demands and the social costs of the applicant's proposal. *Id.* at 605–06.

The nexus and rough proportionality standard is not applicable here because the federal government has no general police power to issue land-use permits. *Sackett v. EPA*, 598 U.S. 651, 679 (2023) ("Regulation of land and water use lies at the core of traditional state authority."). Instead, because the taking of an easement without is a *per se* taking of property, *Cedar Point*, 594 U.S. at 148, Swampbuster imposes an unconstitutional condition on farmers.

But even if *Nollan* and *Dolan* apply, Swampbuster imposes an unconstitutional condition

because under 16 U.S.C. § 3821(d) there is no proportionality between a farmer's impact on wetlands and what the farmer is required to give to the federal government. This disproportionality is demonstrated by the history of Swampbuster. "The initial version of this statute, 16 U.S.C. §§3821-24, enacted in 1985 and dubbed 'Swampbuster,' made the loss proportional to the amount of wetland converted." *Horn Farms, Inc. v. Johanns*, 397 F.3d 472, 474 (7th Cir. 2005). However, "[a]n amendment in 1990 provided that converting *any* wetland would cause the farmer to lose *all* agricultural use." *Id.* (emphasis in original).

C. Swampbuster is not a constitutional exercise of Congress's Spending Power.

Both Defendants and Intervenors rely on the Spending Clause to defend Swampbuster's constitutionality. ECF 59 at 13; ECF 54-1 at 15. But Congress's authority under the Spending Clause does not transform an unconstitutional condition into a constitutional condition.

Congress cannot, consistent with the spending power, use "financial inducements to exert a 'power akin to undue influence.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). In that instance, "pressure turns into compulsion." *Steward Machine Co.*, 301 U.S. at 590.

Legislation enacted under the Spending Power is unduly coercive when it leaves potential recipients of federal funds with no real alternative but to accept. *Sebelius*, 567 U.S. at 578; *New York v. United States*, 505 U.S. 144, 149 (1992). In *Sebelius*, twenty-six states challenged the requirement in the Affordable Care Act that they choose between Medicaid expansion or loss of all Medicaid funding. *Sebelius*, 567 U.S. at 542. The Court held that this portion of the Affordable Care Act violated the Spending Clause because the risk of losing all Medicaid funding meant that Congress had not provided the states with a meaningful choice. *Id.* at 581. Rather, the Court concluded, "the financial 'inducement' Congress has chosen is much more than

'relatively minor encouragement'—it is a gun to the head." *Id.*

Swampbuster is unduly coercive under the reasoning articulated in *Dole* and *Sebelius*. A person who is found to have violated Swampbuster is disqualified from several federally authorized agricultural benefit programs and could lose all their USDA benefits. 16 U.S.C. § 3821; *B & D Land & Livestock Co. v. Veneman*, 332 F. Supp. 2d 1200, 1204 (N.D. Iowa) (Plaintiffs faced with total loss of USDA benefits from the year of the alleged violation onward). And many of the programs covered by Swampbuster, *see* 16 U.S.C. § 3821(b), were around prior to the adoption of Swampbuster, *see* USDA, *History of RMA: History of the Crop Insurance Program*.[3] As a result, farmers are left with little alternative but to submit to Swampbuster's coercive regulatory scheme. By threatening eligibility for USDA programs, Swampbuster does not act like the "financial inducements," previously upheld by the Court as valid exercises of the spending power, but rather operates as "compulsion," *South Dakota v. Dole*, 483 U.S. 203, 211 (1987), and a "gun to the head." *Sebelius*, 567 U.S. at 581.

Defendants ignore the importance that coercion plays in any Spending Clause analysis, merely asserting that Swampbuster cannot be coercive. ECF 59 at 14. Instead, Defendants cite to *United States v. Dierckman*, 201 F.3d 915 (7th Cir. 2000), and *Horn Farms, Inc. v. Johanns*—which are not binding on this Court and were decided before *Sebelius*—for the proposition that Swampbuster is a valid exercise of the spending power. ECF 59 at 13–14.

In an attempt to distinguish *Sebelius*, Defendants argue that individuals have no sovereignty that is protected by the Commerce Clause. But "[t]he limitations that federalism entails are not … a matter of rights belonging only to the States." *Bond v. United States*, 564 U.S.

[3] https://www.rma.usda.gov/about-rma/history-rma#:~:text=History%20of%20the%20Crop%20Insurance,to%20carry%20out%20the%20program (discussing history of crop insurance) (last visited Feb. 13, 2025).

211, 222 (2011). "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.*

Finally, the Supreme Court has held that a nearly identical program to Swampbuster exceeds Congress's power under the Commerce Clause. *See United States v. Butler*, 297 U.S. 1, 71 (1936); *see also Koontz*, 570 U.S. at 608 (citing *Butler*). In *Butler*, the Court struck down the Agricultural Adjustment Act of 1933 which imposed a tax on processors of farm products, the proceeds of which to be paid to farmers who would reduce their area under cultivation and consequently their crops yields. *Butler*, 297 U.S. at 55–57.

The Court held that "the act invades the reserved rights of the states" because "[i]t is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government." *Butler*, 297 U.S. at 68. In reaching that holding, the Court rejected the government's argument that the statute was constitutional under the Spending Clause because "appropriations and expenditures under contracts for proper governmental purposes cannot justify contracts which are not within federal power" and "contracts for the reduction of acreage and the control of production are outside the range of that power." *Id.* at 72–73.

Similarly, Swampbuster is a statutory plan to regulate intrastate wetlands, a matter beyond the powers delegated to the federal government. And like the Agricultural Adjustment Act of 1933, Swampbuster pays farmers to reduce the acreage of land farmed. But, as the Court said in *Butler*, Defendants cannot defend their unconstitutional statutory plan by appealing to the Spending Clause.

III. Agencies may not issue regulations that contradict the plain text of the statute.

A. The Review Regulation is inconsistent with the text of the Swampbuster Statute.

Defendants' and Intervenors' argument that Congress empowered NRCS to issue the

Review Regulation cannot save their atextual interpretation of the statute. ECF 59 at 21; ECF 54-1 at 20. In support of their argument, Defendants and Intervenors point to a general rulemaking provision as proof that Congress delegated to NRCS the authority to fill in perceived gaps in 16 U.S.C. § 3822(a)(4). *Id.* This Court should reject that argument for two reasons.

First, the rulemaking provision in Swampbuster is nothing like the examples the Supreme Court recently cited as gap filling delegations. *See, e.g.*, *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 395 n.5 (2024). To be sure, the Court in *Loper Bright* recognized that there may be some instances where Congress provided the agency "a degree of discretion" to "give meaning to a particular statutory term." *Id.* at 394. As examples, the Court cited statutes where Congress expressly delegated to an agency the power to define specific terms. *Id.* at 395 n.5. By contrast, the Swampbuster provision at issue here contains no language indicating that the agency should have discretion to add any requirements for individuals who request review. *See* 16 U.S.C. § 3822(a)(4) ("A final certification ... shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary.").

Second, even assuming NRCS may regulate pursuant to the general rulemaking provision, it does not follow that the review regulation is permissible. This Court is still required to exercise its independent judgment and determine if the review regulation comports with the best reading of the statute. *See, e.g.*, *Loper Bright*, 603 U.S. at 395 (stating that courts must "independently interpret the statute and effectuate the will of Congress subject to constitutional limits"). And it is axiomatic that agencies may not rewrite statutory text. *See, e.g.*, *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014) (It is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should

operate."). Here, the text contains no limits on the right to request review of a wetland certification. 16 U.S.C. § 3822(a)(4). The Review Regulation, by contrast, creates several barriers to review. 7 C.F.R. § 12.30(c)(6). Despite Defendants' claim that the Review Regulation is "reasonable," ECF 59 at 21–22, it is never reasonable, much less permissible, to contradict the plain text of the statute. Ultimately, the problem with the Review Regulation is that "Congress did not write the statute that way, *United States v. Naftalin*, 441 U.S. 768, 773 (1979), and the extra-textual limitations cannot be harmonized with 16 U.S.C. § 3822(a)(4).

Despite Defendants' and Intervenors' arguments to the contrary, ECF 59 at 23; ECF 54-1 at 22, the 1996 amendments do not support the Review Regulation. The 1996 amendments effected an important change in the statute by stripping the agency of discretion to decide when review is warranted. *Compare* Pub. L. No. 99-198, 99 Stat. 1508, § 1222 (Dec. 23, 1985), *with* 16 U.S.C. § 3822(a)(4). Rather than giving effect to the 1996 amendments, the Review Regulation renders them a nullity by giving the agency discretion to decide when review is warranted. *See* 7 C.F.R. § 12.30(c)(6). If Congress intended the agency to have this discretion, it could have retained the original language of the statute—but it did not. And this congressional choice is entitled to respect, not modification. *See, e.g.*, *Intel Corp. Inv. v. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 189 (2020) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.") (quotations omitted).[4]

Defendants' and Intervenors' also incorrectly assert that Swampbuster's appeal provision

[4] Even less persuasive is Intervenors' suggestion that Congress has acquiesced to the Review Regulation. ECF 54-1 at 23. Courts have only "relied on congressional acquiescence when there is evidence that Congress considered and rejected the '*precise* issue' presented before the Court[.]" *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality opinion) (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) (emphasis added)). Intervenors have not made such a showing.

undermines CTM's argument. ECF 59 at 23–24; ECF 54-1 at 22. The fact that Swampbuster also contains an appeal provision for farmers to administratively appeal adverse findings, 16 U.S.C. § 3822(a)(3), does not mean that farmers are barred from future review unless the NRCS already agrees that a change is warranted. Indeed, that argument was rejected by this court in *B & D Land & Livestock Co.*, 332 F. Supp. 2d at 1213.[5] In *B & D Land & Livestock Co.*, the court explained that the § 3822(a)(3) appeal provision, "expressly provides for an administrative appeal process prior to final certification of a wetland." *Id.* at 1213. Moving to § 3822(a)(4), the court explained that this section: "expressly provides for a *second administrative challenge* to a wetland determination, *after* the final certification of the wetland has become final, when a person affected by the certification requests review of the certification by the Secretary." *Id.* Thus, the appeal provision is not inconsistent with CTM's interpretation that § 3822(a)(4) nullifies wetland determinations and initiates new review.

Equally unavailing is Defendants' and Intervenors' contention that CTM's interpretation of the statute is absurd. ECF 59 at 24; ECF 54-1 at 22. The absurdity canon is not a get-out-of consequences-free card and should only be applied "where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result ... and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring in judgment); *Nixon v. Missouri Mun. League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring in judgment) ("avoidance of unhappy consequences" is an adequate basis for

[5] Notably, neither Defendants nor Intervenors cite—much less address—*B & D Land and Livestock Co.* or *Branstad v. Veneman*, 212 F. Supp. 2d 976 (N.D. Iowa 2002). Both cases were decided by this Court and squarely support CTM's interpretation of the statute. *See* ECF 57-1 at 21–22.

interpreting a text). The fact that this Court adopted the view of the statute in *Branstad v. Veneman*, 212 F. Supp. 2d 976 (N.D. Iowa 2002), and *B & D Land and Livestock Co.* that CTM advances here undermines both Defendants' and Intervenors' absurdity arguments. *See* ECF 57-1 at 21–22 (explaining in detail both cases). Simply put, the absurdity canon cannot be stretched to prevent results that an agency simply dislikes.

The Review Regulation likewise cannot be justified by the various policy concerns advanced by Defendants or Intervenors. ECF 59 at 21, 24; ECF 54-1 at 22. Both suggest that the Review Regulation is necessary to the efficient operation of the statute. *Id.* But the duty of this Court is to "follow the statute as written," *Taylor v. Huerta*, 856 F.3d 1089, 1093 (D.C. Cir. 2017), not to speculate on how the agency's job could be easier or to second guess Congress's policy choices. *See, e.g.*, *Utility Air Regul. Grp.*, 573 U.S. at 325 ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."). To the extent that "policy considerations suggest that the current scheme should be altered, Congress must be the one to do it." *Intel Corp. Inv. Pol'y Comm.*, 589 U.S. at 188.

B. The converted wetlands rule contradicts the plain text of the statute.

The converted wetlands rule is also contrary to the plain text of the statute. ECF 57-1 at 22. Defendants and Intervenors attempt to downplay the effect of the rule by describing it as a clarification of the statute. ECF 59 at 24–25; ECF 54-1 at 23. The converted wetlands rule, however, is contrary to the definition provided by Congress. *Compare* 16 U.S.C. § 3801(a)(7)(A) (congressional definition of "converted wetland") *with* 7 C.F.R § 12.2(a) (agency definition of "converted wetland"). The statute makes clear that "otherwise manipulated" is restricted to activities that "result[] in impairing or reducing the flow, circulation, or reach of water[.]" 16 U.S.C. § 3801(a)(7)(A). The agency definition, however, goes farther by allowing "otherwise

manipulated" to include activities beyond those that result in "impairing or reducing the flow and circulation of water[.]" 7 C.F.R. § 12.2(a). This is clear by the use of the word "or" in the agency definition, which separates the "removal of woody vegetation" from the rest of the parenthetical and thus adds another activity to the definition that Congress did not include. Indeed, "the commonly used and understood definition of 'or' suggests an alternative between two or more choices." *Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 165 (3d Cir. 2011) (analyzing an insurance policy and consulting the dictionary definition of "or" as well as state law.). If additions to statutory text can be classified as mere "clarifications," then there is nothing preventing agencies from making an end run around statutory text and limitations.

To the extent that this Court looks to *Ballanger v. Johanns*, 495 F.3d 866 (8th Cir. 2007), for guidance on the woody vegetation question, that court's use of deference strongly counsels this Court to take a fresh look at the issue. Defendants' are correct that *Ballanger* analyzed the parenthetical in the statute and regulatory definition of "converted wetland." ECF 59 at 26. But the Court in *Ballanger* also upheld the regulation on deference grounds, stating that "[w]hether we, as a matter of first impression, would have interpreted the statute in the same manner as the agency is of no consequence." *Ballanger*, 495 F.3d at 872. That is not true after *Loper Bright*, 603 U.S. at 400 (stating that "[i]t [] makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best"). And here, the best interpretation of the statute does not allow for the addition of the woody vegetation regulation.

CONCLUSION

This Court should deny Defendants' and Intervenors' Motions for Summary Judgment.

Respectfully submitted this 18th day of February 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2025, that I submitted the foregoing Plaintiff's Combined Resistance to Defendants' and Intervenors' Motions for Summary Judgment to the Clerk of Court via the District Court's CM/ECF system.

Respectfully submitted this 18th day of February, 2025.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF IOWA, EASTERN DIVISION

CTM HOLDINGS, LLC, an Iowa limited liability company, *Plaintiff*, vs. THE UNITED STATES DEPARTMENT OF AGRICULTURE; THOMAS J. VILSACK, in his official capacity as the Secretary of the United States Department of Agriculture; THE NATURAL RESOURCES CONSERVATION SERVICE; TERRY COSBY, in his official capacity as Chief of the Natural Resources Conservation Service; and JON HUBBERT, in his official capacity as Iowa State Conservationist, *Defendants*, IOWA FARMERS UNION, IOWA ENVIRONMENTAL COUNCIL, FOOD & WATER WATCH, and DAKOTA RURAL ACTION, *Intervenors*.	CIVIL NO. 6:24-cv-02016-CJW-MAR **PLAINTIFF'S COMBINED RESPONSE TO DEFENDANTS' AND INTERVENORS' STATEMENTS OF MATERIAL FACTS IN SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT AND ADDITIONAL STATEMENT OF MATERIAL FACTS**

RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

1. James Conlan is the principal owner of Plaintiff CTM Holdings, LLC. (USDA App. 9, 57).

Response: Admit.

2. The property at issue in this case is identified by the U.S. Department of Agriculture Natural Resources Conservation Service ("NRCS") as Farm #4771, Tract # 360 (the "Subject Property"). (USDA App. 10 ¶ 3, 41).

Response: Admit.

3. On April 20, 2010, a wetland determination related to some portions of the Subject Property was made at the request of a former owner of the Subject Property (the "2010 Certified Wetland Determination"). (USDA App. 10 ¶ 4, 22).

Response: Admit.

4. On July 16, 2022, and again on August 3, 2022, James Conlan informed USDA that he planned to remove trees from the Subject Property. (USDA App. 10 ¶ 6, 55-56).

Response: Admit.

5. In response, a USDA employee informed James Conlan that tree removal may result in a wetland violation and that a wetland determination would be necessary. (USDA App. 10 ¶ 7, 54).

Response: Admit.

6. On August 10, 2022, a USDA employee further informed James Conlan that there was not an existing wetland determination related to some portions of the Subject Property. The USDA official encouraged James Conlan to request a determination for those areas where a certified wetland determination had not been performed. NRCS refers to these areas as "not

certified," but they are also sometimes referred to as "un-inventoried" or "not inventoried." (USDA App. 10 ¶ 8, 53).

Response: Admit.

7. On October 11, 2022, a USDA official again informed James Conlan that some areas of the Subject Property were not certified. The official encouraged James Conlan to submit a Form AD-1026 so that a new wetland determination could be performed for those areas. (USDA App. 11 ¶ 9, 51).

Response: Admit.

8. CTM submitted a Form AD-1026 related to the Subject Property in October 2022. (USDA App. 29-30).

Response: Admit.

9. Upon receipt of the Form AD-1026, NRCS evaluated whether, and to what extent, a new wetland determination would be required with respect to all or some portion of the Subject Property. (USDA App. 11 ¶ 11, 29).

Response: Admit.

10. With respect to the portions of the subject property that were not certified (for which no wetland determination had previously been performed) as of October 2022, NRCS performed a wetland determination and determined that the previously uncertified land did not contain any wetlands (the "2023 Certified Wetland Determination"). (USDA App. 11 ¶ 13, 32).

Response: Admit.

11. Concurrently with the 2023 Certified Wetland Determination, NRCS sent CTM a letter related to the portion of the Subject Property that was subject to the 2010 Wetland Determination. The letter informed CTM Holdings of the 2010 Wetland Determination and that a

new review would not be performed on the portion of the Subject Property subject to that determination unless CTM Holdings requested a review of the 2010 Certified Wetland Determination. (USDA App. 11-12 ¶ 14, 41).

Response: Admit.

12. This letter further informed CTM Holdings that a review request would need to be in writing and identify either a change in topography that occurred after the existing determination was made, or an error in the existing determination. (USDA App. 11-12 ¶ 14, 41).

Response: Admit.

13. After this letter was sent, CTM Holdings did not request a review of either the 2010 or 2023 Certified Wetland Determinations. (USDA App. 12, ¶ 15).

Response: Admit that CTM Holdings has not filed a Form AD-1026 after the letter was sent.

14. CTM Holdings has never requested a review of the 2010 Certified Wetland Determination. (USDA App. 12, ¶ 16).

Response: Deny. CTM holdings requested a review of the 2010 Certified Wetlands Determination by submitting Form AD-1026 in October 2022. Submitting Form AD-1026 is an established way for requesting a review of a certified wetlands determination. Plaintiff's appendix in Support of Plaintiff's Combined Resistance to Defendants' and Intervenors' Motions for Summary Judgment (CTM Resistance App.) at 3 (USDA Appeal Decision in Case No. 2011W000619)

15. The wetland conservation provisions of the Food Security Act of 1985, as amended (16 U.S.C. §§ 3801, 3821-3824), and their implementing regulations, are commonly referred to as "Swampbuster." (USDA App. 1-2, ¶ 3).

Response: Admit that the wetland conservation provisions of the Food Security Act of 1985 is commonly referred to as Swampbuster.

16. The highly erodible land conservation provisions of the Food Security Act of 1985, as amended (16 U.S.C. §§ 3801-3814), and their implementing regulations, are commonly referred to as "Sodbuster." (USDA App. 1-2, ¶ 3).

Response: Admit that the highly erodible land conservation provisions of the Food Security Act of 1985 is commonly referred to as Sodbuster.

17. Swampbuster is designed to remove certain economic incentives for USDA farm program participants to convert wetlands to cropland. It does so by rendering such participants ineligible for federal farm program benefits if they convert wetlands to make agricultural commodity production possible. (USDA App. 2, ¶ 4).

Response: Neither admit nor deny as the statement is a legal interpretation of the statute.

18. Both Sodbuster and Swampbuster apply only to individuals or entities who choose to participate in certain USDA farm benefit programs. Participation in these farm benefit programs is voluntary; participants choose to participate in USDA farm benefit programs and may, at any time, choose to withdraw from participating. (USDA App. 2, ¶ 5).

Response: Neither admit nor deny as the statement is a legal interpretation of the statute.

19. Subject to certain exemptions found in the Swampbuster and Sodbuster statutes and their implementing regulations, a person who chooses to participate and enrolls in such a program must comply with Swampbuster and Sodbuster provisions to maintain eligibility to receive program benefits. A person who chooses not to participate (or who chooses to stop participating) in the related farm benefit programs is not required to comply with Swampbuster or Sodbuster. (USDA App. 2, ¶ 6).

Response: Neither admit nor deny as the statement is a legal interpretation of the statute.

20. Again, subject to certain exemptions found in the regulations, a landowner who has chosen to participate in these farm benefit programs but subsequently violates the Swampbuster provisions becomes ineligible for certain farm program benefits until the participant returns to compliance. (USDA App. 2, ¶ 7).

Response: Neither admit nor deny as the statement is a legal interpretation of the statute.

21. Swampbuster contains certain exemptions that allow a landowner to retain program eligibility despite having failed to comply with Swampbuster provisions. 7 C.F.R. § 12.5(b)(1)(v), for example, allows a landowner to retain farm program eligibility despite having converted wetlands, if NRCS determines that the actions of the landowner with respect to the wetland conversion, "individually and in connection with all other similar actions authorized by NRCS in the area, would have only a minimal effect on the wetland functions and values of wetlands in the area." Similarly, a wetland conversion does not render a landowner ineligible for farm program benefits if the wetland conversion is adequately mitigated by, for example, the landowner's creation of a new wetland in accordance with 7 C.F.R. § 12.5(b)(4). Numerous similar exemptions exist. (USDA App. 3, ¶ 8).

Response: Neither admit nor deny as the statement is a legal interpretation of the statute.

22. Most of the farm benefit programs that USDA administers present prospective participants with a choice between, on one hand, participating in the programs and agreeing to comply with Swampbuster, or, on the other, not participating in the programs and thereby being entirely unaffected by Swampbuster. In this way, Swampbuster is just one of several statutory provisions affecting participation in the USDA-administered farm benefit programs. (USDA App. 3, ¶ 9).

Response: Neither admit nor deny as the statement is a legal interpretation of the statute.

23. A participant in a program subject to the highly erodible land conservation and wetland conservation provisions must submit Form AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification, to certify the participant's understanding of, and compliance with, the conservation requirements under USDA programs. Form AD-1026 also provides an opportunity for a participant to report completed or planned activities on land which may affect Swampbuster and Sodbuster compliance. (USDA App. 3-4, ¶ 10).

Response: Admit with qualifications. Form AD-1026 is also used to request a review of an existing wetlands certification. CTM Resistance App. 3 (USDA Appeal Decision in Case No. 2011W000619).

24. With regard to Swampbuster, USDA considers land as either "certified" or "not certified." "Certified" land is any specific tract of land for which NRCS has completed a certified wetland determination ("CWD"), identifying any wetland areas contained within the tract. "Not certified" land is any specific tract of land for which NRCS has not completed such a determination. Certified land is sometimes referred to as "inventoried," and land that is not certified is sometimes referred to as "un-inventoried" or "not inventoried." (USDA App. 4. ¶ 11).

Response. Admit.

25. When a participant submits a Form AD-1026 relating to a specific tract of land—and if the form indicates a need for a wetland determination—NRCS will complete a CWD only for the portions of that tract that are then "not certified". (USDA App. 4, ¶ 12).

Response: Deny. Form AD-1026 is also used to request a review of an existing wetlands certification. CTM Resistance App. 3 (USDA Appeal Decision in Case No. 2011W000619).

26. When a participant submits a Form AD-1026 relating exclusively to land that has already been subject to a CWD (i.e., relating exclusively to "certified" land), the form serves only as a certification of compliance with wetland and highly erodible land conservation requirements; submission of the form does not trigger a review of the existing CWD. (USDA App. 4, ¶ 13).

Response: Deny. Form AD-1026 is also used to request a review of an existing wetlands certification. CTM Resistance App. 3 (USDA Appeal Decision in Case No. 2011W000619).

27. A participant who disagrees with NRCS's CWD may appeal the determination within 30 days. A participant who disagrees with an existing CWD for which has all appeal rights have expired may also request review of the existing CWD at any time, by submitting a request in writing. (USDA App. 4, ¶ 14).

Response: Admit with qualifications. *Form AD-1026 is used to request a review of an existing wetlands certification.* CTM Resistance App. 3 (USDA Appeal Decision in Case No. 2011W000619).

28. Because wetland areas do not typically become non-wetland areas without a natural event that has altered the subject land, one avenue to request review of an existing CWD is to identify a natural event that has altered the subject land. The other avenue is to identify an error in the existing CWD. Without these conditions for seeking review, participants who disagree with an existing CWD would be able to endlessly request reviews of the determination without any basis or likelihood that a new determination would result in a different finding. Such a volume of review requests would overwhelm the limited resources of NRCS, preventing NRCS from having the ability to timely address both new requests for land which does not have an existing CWD, and legitimate requests in which previously certified wetland areas were no

longer wetlands due to a natural event or in cases where an error exists in an existing CWD. (USDA App. 5, ¶ 15).

Response: Deny. Farmers in the Northern District of Iowa have been able to request a review at any time since this Court's decisions in B & D Land & Livestock Co. v. Veneman, 332 F. Supp. 2d 1200, 1213 (N.D. Iowa 2004)*, and Branstad v. Veneman*, 212 F. Supp. 2d 976 (N.D. Iowa 2002)*, and have not endlessly requested review of certified wetlands determination. Additionally, there is a disincentive to request review of a certification because Swampbuster contains a safe harbor provision, but that provision only applies when a certification is in effect.* 16 U.S.C. §§ 3822(a)(4), 3822(a)(6).

29. Generally, a wetland conversion occurs when a wetland has been manipulated for the purpose or with the effect of making possible the production of an "agricultural commodity." An "agricultural commodity" is "any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters, or sugarcane." 7 C.F.R. § 12.2(a). Products not meeting this definition—like cranberries, trees, or fruits grown in a vineyard—are not "agricultural commodities." (USDA App. 5, ¶ 16).

Response: Admit.

30. Unless an exemption applies, a program participant who wishes to alter or manipulate wetlands may manipulate the wetlands to make agricultural commodity production possible and discontinue participation in the related program benefits. If, however, NRCS determines that a landowner has manipulated a wetland for a purpose other than making agricultural commodity production possible—such as to construct a building or road, to grow trees or a vineyard, or to plant cranberries—the participant will remain eligible for program benefits under the exemption set forth in 7 C.F.R. § 12.5(b)(1)(iv). (USDA App. 5-6, ¶ 17).

Response: Deny. CTM Resistance App. 17–18 ¶¶ 22–31.

31. Draining, dredging, filling, and leveling are common ways landowners may manipulate a wetland for the purpose of, or to have the effect of making the production of an agricultural commodity possible. 16 U.S.C. § 3801(a)(7)(A). Similarly, some landowners make possible the production of an agricultural commodity on wetlands by removing trees or other woody vegetation. When the land is converted to use for production of an agricultural commodity, it is likely to lose its wetland characteristics. (USDA App. 6, ¶ 18).

Response: Admit.

32. Woody vegetation, however, may be removed by cutting the tree but leaving the stumps in place. As long as the stumps remain in place, production of an agricultural commodity has not been made possible because the land cannot be accessed by normal farming equipment used for tilling. (USDA App. 6, ¶ 19).

Response: Admit.

33. To determine whether the removal of woody vegetation constitutes a conversion of wetlands, NRCS assesses the manner and extent of the removal to determine whether the manipulation is for the purpose or will have the effect of making possible the production of an agricultural commodity. Because removing tree stumps permits the property to be used for agricultural commodity production, NRCS advises landowners that doing so will cause a wetland conversion and (unless an exemption applies) be considered noncompliance with the Swampbuster provisions. (USDA App. 6-7, ¶ 20).

Response: Admit.

RESPONSE TO INTERVENORS' STATEMENT OF MATERIAL FACTS

1. Plaintiff CTM Holdings, LLC ("CTM Holdings") is a manager-managed limited liability company. Intervenors' Appendix ("Int. App.") 9.

Response: Admit.

2. There are two members of CTM Holdings: James F. Conlan, managing member, and Kelly B. Conlan. Int. App. 13–14.

Response: Admit.

3. James ("Jim") F. Conlan is not a farmer. He is a "self-employed" "business owner running several companies." Int. App. 1– 2.

Response: Deny. Intervenors do not define "farmer." Mr. Conlan owns several farms. CTM App. 16 ¶¶ 15–16.

4. On July 14, 2022, Plaintiff signed an agreement to purchase the Property at issue in this lawsuit, a 71.85-acre tract of land in Delaware County, Iowa ("the Property"). Int. App. 40–46; see also Int. App. 22.

Response: Admit.

5. Conlan purchased the Property for $700,000 and paid in cash. Int. App. 40.

Response: Admit.

6. CTM Holdings closed on the property and recorded a warranty deed on September 30, 2022 which indicated the Property was conveyed to CTM Holdings "for the consideration of Ten Dollar(s)." Int. App. 24–25.

Response: Admit.

7. Plaintiff does not farm the Property; Plaintiff leases it to a tenant named Cory Pfab. Int. App. 9–10.

Response: Admit with qualifications. Plaintiff leases the land to a tenant names Cory Pfab.

8. Plaintiff and Cory Pfab signed a lease agreement ("Current Lease") that governs Pfab's rental of the Property through March 1, 2025. Int. App. 63–69.

Response: Admit.

9. The Current Lease governs the entire Property (71.85 acres, described as "Tax Parcel Numbers: 480000403300, 480000403400, 4800000403410"). Int. App. 63; see generally Int. App. 63–69.

Response: Admit.

10. Pfab's rent is calculated based on 41 "tillable" acres at the rate of $500/acre, and 10.4 other acres at the rate of $250/acre, totaling $23,100 in "[t]otal annual cash rent." Int. App. 63.

Response: Admit.

11. Pfab signed a new lease ("New Lease") with Plaintiff which commences on March 1, 2025 and goes through March 1, 2030. Int. App. 15, 31; see generally Int. App. 31–39.

Response: Admit.

12. The New Lease governs the Property as well as other land, totaling 677 "FSA Crop Acres." Int. App. 31.

Response: Admit.

13. Pfab's rent is $350 per acre. Int. App. 31.

Response: Admit with qualifications. Rent is $500 per acre for the tillable acres and $250 per acre for the rest. CTM Resistance App. 20.

14. Landowners may ask U.S. Department of Agriculture ("USDA")'s Natural Resource Conservation Service ("NRCS") for a Certified Wetland Determination, which indicates areas

subject to wetland conservation provisions, and if present, identifies the location of each. See Int. App. 70–74; see also Int. App. 51.

Response: Admit.

15. To initiate the wetland determination process, a landowner must submit an AD 1026 form. See Int. App. 91; see generally, Int. App. 90–102.

Response: Admit with qualifications. A farmer can also submit a request to review an existing certified wetlands delineation by filing Form AD-1026. CTM Resistance App. 3 (USDA Appeal Decision in Case No. 2011W000619).

16. Form AD-1026 serves an additional function. Producers certify their compliance with Swampbuster and Sodbuster by signing a certification statement found on Form AD-1026. See Int. App. 71.

Response: Admit with qualifications. A farmer can also submit a request to review an existing certified wetlands delineation by filing Form AD-1026. CTM Resistance App. 3 (USDA Appeal Decision in Case No. 2011W000619).

17. On March 10, 2010, the prior owner of the Property asked the USDA for a Certified Wetland Determination for some, but not all, of the acreage on the Property, including a portion referred to as "Tract 360." Int. App. 86–89.

Response: Admit.

18. On April 16, 2010, NRCS determined that 53.3 acres (Fields 1, 3, 4, and 5) of Tract 360 were non-wetland, while 9 acres of Tract 360 (Units 1-5) were designated as wetlands ("the Wetland"). Int. App. 86–89.

Response: Admit.

19. Several months before closing on the property, Conlan contacted USDA employees about seeking a determination/redetermination of the wetland. Int. App. 23; see also Int. App. 94–102.

Response: Admit.

20. On October 14, 2022, Plaintiff submitted a Form AD-1026, seeking wetland determinations for Tract 360. Int. App. 70–71.

Response: Deny. CTM submitted a Form AD-1026 for the whole property. CTM Resistance App. 27–28 (CTM Form AD-1026).

21. This request encompassed land that had already been assessed as part of the 2010 Certified Wetland Designation Process (including the Wetland), as well as portions of Tract 360 which had not been previously assessed. Int. App. 114; see generally Int. App. 105–115.

Response: Admit.

22. In response to Plaintiff's AD-1026, USDA sent Plaintiff two letters on January 23, 2023. One letter ("First Letter") informed Plaintiff that 12.62 acres of Tract 360—acres which had not been previously assessed—were determined to be "non-wetland." Int. App. 75–83.

Response: Admit contents of the letter.

23. Plaintiff was "offered appeal rights" if it disagreed with the determination. Int. App.

Response: Admit contents of the letter.

24. The second January 23, 2023 letter ("Second Letter") informed Plaintiff that a Certified Wetland Determination had already been "previously completed" on Units 1 through 5 of Tract 360, which comprise the 9 acres of The Wetland. Int. App. 84–89. "Therefore, [CTM Holding's] current request for a wetland determination [would] not be completed by the NRCS." Int. App. 89.

Response: Admit contents of the letter.

25. USDA attached the prior wetland determination, dated April 16, 2010, to the Second Letter. Int. App. 86–89.

Response: Admit contents of the letter.

26. With respect to the Second Letter, Plaintiff was not "offered appeal rights" because "the appropriate time-period to request an appeal of the 4/16/2010 determination has expired."

Response: Admit contents of the letter.

27. However, NRCS informed CTM Holdings that if it believed the "decision to deny appeal rights [was] in error," CTM Holdings could, in writing and within 30 days, "request review of this decision from the Director of the National Appeals Division (NAD)." Int. App. 84–85.

Response: Admit contents of the letter.

28. CTM Holdings has not produced evidence indicating that it requested review of that decision.

Response: Admit that CTM did not appeal decision to deny appeal rights.

29. The USDA administers billions of dollars in loans, grants, crop insurance, conservation programs payouts, and other taxpayer subsidies to farmers ("Farm Benefits"). See Int. App. 172 (Megan Stubbs & Stephanie Rosch, U.S. Farm Programs: Eligibility and Payment Limits, CONGRESSIONAL RESEARCH SERVICE (Dec. 7, 2020) (R46248 Version 6), https://crsreports.congress.gov/product/pdf/R/R46248/6). See generally Int. App. 166–206.

Response: Admit.

30. "[D]irect federal outlays have averaged $14.1 billion per year from 1996 through 2019;" $18.1 billion when crop insurance premium subsidies are included. Int. App. 172.

Response: Admit.

31. The 1985 Farm Bill included two compliance provisions—one for "highly erodible land conservation (sodbuster)" and one for "wetland conservation (swampbuster)." Int. App. 208 (Megan Stubbs, Conservation Compliance and U.S. Farm Policy, Congressional Research Service (Oct. 6, 2016) (R42459 Version https://crsreports.congress.gov/product/pdf/R/R42459/27). See generally Int. App. 207–227.

Response: Neither admit nor deny as the statement is a legal interpretation.

32. "The two provisions, collectively referred to as conservation compliance, require that in exchange for certain [Farm Benefits], a producer agrees to maintain a minimum level of conservation on highly erodible land and not to convert wetlands to crop production." Int. App. 208.

Response: Neither admit nor deny as the statement is a legal interpretation.

33. USDA administers "over 20" conservation programs, including the Conservation Reserve Program (CRP). Int. App. 229 (Megan Stubbs, Agricultural Conservation: A Guide to Programs, Congressional Research Service, (Updated July 28, 2022) (R40763 Version 45), https://crsreports.congress.gov/product/pdf/R/R40763). See generally Int. App. 228–260.

Response: Admit.

34. CRP "provides annual rental payments, usually over 10 years, to producers to replace crops on highly erodible and environmentally sensitive land with long-term resource conserving planting." Int. App. 238.

Response: Admit.

35. CRP contracts incentivize farmers to replace crops with conservation practices on highly erodible lands, and/or on wetlands. See Int. App. 238–41.

Response: Admit.

36. Conservation programs like CRP are different from conservation compliance requirements (Swampbuster and Sodbuster). See generally, Int. App. 228– 260, 207–227.

Response: Admit.

37. Neither Swampbuster nor Sodbuster are mandatory; instead, conservation compliance is simply one of many eligibility requirements that must be met to qualify to receive many Farm Benefits. See Int. App. 169 (listing "Program Eligibility" requirements in the Table of Contents (pp. 4-14), and naming "Conservation Compliance," among others).

Response: Admit with qualifications. One must comply with Swampbuster and Sodbuster to maintain eligibility for USDA benefits.

38. Other eligibility requirements include being actively engaged in farming and meeting certain foreign person or legal entity requirements. Id.

Response: Neither admit nor deny as the statement is a legal interpretation.

39. Producers must certify their compliance with Swampbuster and Sodbuster by signing a certification statement on a form referred to as AD-1026. 7 C.F.R § 12.7; see also Int. App. 70–71.

Response: Admit.

40. There are numerous exemptions to Swampbuster, including using wetlands for non agricultural activities. See Int. App. 125 ("Swampbuster does not regulate non-agricultural activities, such as road or home site construction.").

Response: Neither admit nor deny as the statement is a legal interpretation of the statute.

41. CTM Holdings does not receive any Farming Benefits and has not since September 30, 2024. Int. App. 2, 4; 9–10.

Response: Deny, CTM Resistance App. 16, ¶ 16; CTM Resistance App. 29; Answer, ECF 17, at ¶ 50.

42. Plaintiff claims that it "received CRP payments for the highly erodible land on the Property after it purchased the Property in September 2022." Int. App. 16–17.

Response: Admit.

43. However, Conlan instructed USDA to make Cory Pfab the assignee of the CRP contract, "receiving the payment shares in lieu of CTM Holdings LLC," so it is unclear whether Plaintiff ever directly received any payments pursuant to the Property's CRP contract. Int. App. 92; see also Int. App. 103–04 (listing Pfab's share as 100% and CTM Holdings' share as 0%).

Response Admit with qualification. CTM Holdings assigns certain USDA benefits to its tenants. CTM Resistance App. 16 ¶ 16.

44. Either way, "[t]he Property's CRP contract expired on September 30, 2024." Int. App. 2; see also Int. App. 103–04; Int. App. 4 ("CTM Holdings, LLC, B&C, LLC, James F. Conlan, and Kelly B. Conlan do not receive any USDA benefits directly.").

Response: Admit.

45. On August 25, 2024, Plaintiff informed USDA that "CTM is not going to re-enroll any part of the Delaware farm in the CRP. Everything that was in CRP comes out in October, 2024 I believe. My intention is to row crop everything that was CRP." Int. App. 29; see generally Int. App. 26–30.

Response: Admit.

46. On September 16, 2024, USDA responded: "Upon expiration of CRP, normal farming activities may occur beginning October 1, 2024. As a reminder, conservation compliance provisions must be followed in order to receive USDA benefits." Int. App. 26.

Response: Admit.

47. On September 30, 2024, Plaintiff's CRP contract expired. Int. App. 2–3; see also Int. App. 103–04.

Response: Admit.

48. CTM Holdings asserts "on information and belief," that its tenant Cory Pfab receives a USDA crop insurance subsidy. Int. App. 2–3.

Response: Admit with qualifications. CTM Holdings and B&C, LLC maintain USDA program eligibility for their tenants to receive all benefits and subsidies. CTM Resistance App. 16 ¶ 16.

49. CTM Holdings should know if its tenant receives USDA benefits because it has lease provisions requiring consent before tenant's participation in USDA programs: "Participation of this farm in any offered program by the U.S. Department of Agriculture or any state for crop production control or soil conservation, the observance of the terms and conditions of these programs, and the division of farm program payments, requires Landlord's consent." Int. App. 31, 63.

Response: Admit with qualifications. CTM Holdings and B&C, LLC maintain USDA program eligibility for their tenants to receive all benefits and subsidies. CTM Resistance App. 16 ¶ 16.

50. Additionally, the New Lease also provides that CTM Holdings has a "contractual lien" in "all contract rights and U.S. government and/or state agricultural farm program payments" belonging to Pfab. Int. App. 31–32.

Response: Admit.

51. Plaintiff concedes that, beyond Pfab, any other "parties, properties and tenants" are not relevant to this litigation and "are not parties to this litigation." Int. App. 14–15.

Response: Admit with qualification. CTM's other tenants are not parties to this litigation.

52. Cory Pfab is not an "affiliated entity" of Plaintiff CTM Holdings, LLC for purposes of conservation compliance. See Int. App. 14; 3–4 ("B&C, LLC is the only affiliated entity referenced in the Complaint [and] B&C, LLC is a sole-member LLC, [and] James F. Conlan is the sole member.").

Response: Admit.

53. When filling out its Form AD-1026 on October 12, 2022, Plaintiff listed "none" under "names of affiliated persons with farming interests" section. Int. App. 70.

Response: Admit.

54. The Appendix to Form AD-1026 explains that only "first level members of the entity" are considered "affiliated persons" for purposes of conservation compliance, if the producer is a "limited liability company." Int. App. 118.

Response: Admit contents of document.

55. CTM Holdings is a limited liability company. Int. App. 13–14, and Pfab is not a "first level member" of CTM Holdings. Int. App. 13–14; Int. App. 3–4.

Response: Admit.

56. There is no term in CTM Holdings' lease with Cory Pfab that provides any redress if an action by CTM Holdings results in a loss of benefits for Pfab. Int. App. 63–69; Int. App.31 39.

Response: Admit.

57. Plaintiff has already earned income from the Wetland, and CTM disclosed that "[i]n accordance with Swampbuster, in 2022-2023 [it] sold select timber from the Property for a total of $26,500." Int. App. 4–5; see also Int. App. 47– 48.

Response: Admit.

58. Int. App. 47. 59. Plaintiff produced a "Timber Sale Contract" for $26,500 dated November 4, 2022. As early as August 3, 2022, Conlan informed USDA "I intend to have the trees logged off the farm." Int. App. 47.

Response: Admit.

59. As early as August 3, 2022, Conlan informed USDA "I intend to have the trees logged off the farm." Int. App. 59; *see generally* Int. App. 58–61.

Response: Admit that Mr. Conlan made statement.

60. That same day—before USDA knew who Plaintiff's tenant was or whether the tenant was "affiliated with" Plaintiff—USDA employee Katherine Rahe informed Conlan that although she was "[n]ot sure the extent of what you are referencing," he should know that "[a]t this time, any logging or widespread tree removal could potentially create a wetland violation situation," which could "jeopardize all benefits associated to the farm, including those of any tenants associated to the farm." Int. App. 58.

Response: Admit.

61. As noted above, Pfab is not "affiliated with" CTM Holdings. See Int. App. 14; 3 4. When filling out its Form AD-1026 on October 12, 2022, Plaintiff listed "none" under "names of affiliated persons with farming interests" section. Int. App. 70–71.

Response: Admit.

62. On November 7, 2022, Conlan informed USDA that the timber sale would involve trees removed from the Wetland, but that "[t]he stumps will not be removed." See Int. App. 50; see also Int. App. 52 ("My intention is to [] remove the tree (but not the stumps) from existing determined wetland (ie no dirt disturbance).").

Response: Admit.

63. Plaintiff completed this timber sale in compliance with Swampbuster. Int. App. 4 5. ("the logging company removed just the logs and left the stumps and roots in accordance with Swampbuster and Defendants approval").

Response: Admit.

64. Plaintiff continued receiving CRP payments until the contract's expiration on September 30, 2024. Int. App. 4–5; see also Int. App. 50–51.

Response: Admit.

65. Conlan informed USDA that his plans for farming the Property were only temporary, and that his "ultimate plan" was to develop the Property for commercial use. Int. App. 120; see also Int. App. 121.

Response: Admit with qualification that Conlan made that statement in 2022.

66. USDA employee Dylan Salow typed up notes of a July 20, 2022 meeting with Conlan, noting that Conlan "talked about taking the farm out of USDA participating [sic] so he could do anything with it he wanted," and said his "ultimate plan [for the Property] is to clear cut everything and develop the area." Int. App. 120.

Response: Admit contents of notes.

67. USDA employee David Mack also took notes of the July 20, 2022 meeting, stating: "Met with Jim Conlan who is purchasing this farm. Jim[']s long term plan is to develop to

commercial site. Reviewed USDA Wetland Rules with Jim." Int. App. 122; see generally Int. App. 122–23.

Response: Admit contents of notes.

68. Along with Mack's notes, Defendants produced a photocopied version of USDA's "Wetlands and Conservation Compliance: What every Iowa Farmer Needs to Know." Int. App. 124–25.

Response: Admit.

69. That document explains under the sub-heading "Non-Agricultural Activities" that "Swampbuster does not regulate non-agricultural activities such as road or home site construction." Int. App. 125.

Response: Admit contents of document. Whether the statement is accurate is a question of law. Furthermore, the statement contradicts other statements from the USDA. CTM Resistance App. 17–18, ¶¶ 22–31; *see also* Intervenors' Appendix in support of Summary Judgment at 219.

70. The New Lease between CTM Holdings and Pfab allows CTM Holdings to terminate its agreement with Pfab "immediately and automatically" if Plaintiff decides to engage in commercial development. Int. App. 36.

Response: Admit.

71. Specifically, "Tenant agrees that Landlord has the ability to sell, develop, or lease for a purpose other than agricultural production, all or any part of the Real Estate at any time and in the event Landlord does so Tenant agrees that Tenant's lease of such portion of the Real Estate shall immediately and automatically be terminated without regard to Tenant's rights under Iowa Code Chapter 562." Int. App. 36.

Response: Admit.

72. Pfab's "sole remedy" for such a termination will be the "direct cost of any destroyed current year crop (fertilizer, seed, spray, fuel, but not labor or machinery use)." Int. App. 36.

Response: Admit.

73. As recently as January 2, 2025, Conlan confirmed to a Chicago Tribune reporter that commercial development is his ultimate goal for the Property. The Chicago Tribune reported: "In 2022, [Conlan] bought 71 acres in Delaware County intending to rent it to farmers and eventually sell it to a developer." Int. App. 161.

Response: Admit that Mr. Conlan made that statement.

74. In that same article, Conlan confirmed that he "knew about the wetland designations before buying the land but believed he could get them overturned . . . ." Id.

Response: Admit that Mr. Conlan made that statement.

ADDITIONAL STATEMENT OF MATERIAL FACTS IN RESPONSE TO DEFENDANTS' AND INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

1. A farmer can request a review of an existing certified wetlands delineation by filing Form AD 1026. CTM Resistance App. 3 (USDA Appeal Decision in Case No. 2011W000619).

Respectfully submitted this 18th day of February 2025.

/s/ Jeffrey W. McCoy

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* *Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2025, that I submitted the foregoing Plaintiff's Combined Response to Defendants' and Intervenors' Statements of Material Facts in Support of Their Motions for Summary Judgment and Additional Statement of Material Facts to the Clerk of Court via the District Court's CM/ECF system.

Respectfully submitted this 18th day of February, 2025.

/s/ Jeffrey W. McCoy

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF IOWA, EASTERN DIVISION

CTM HOLDINGS, LLC, an Iowa limited liability company, *Plaintiff*, vs. THE UNITED STATES DEPARTMENT OF AGRICULTURE; THOMAS J. VILSACK, in his official capacity as the Secretary of the United States Department of Agriculture; THE NATURAL RESOURCES CONSERVATION SERVICE; TERRY COSBY, in his official capacity as Chief of the Natural Resources Conservation Service; and JON HUBBERT, in his official capacity as Iowa State Conservationist, *Defendants*, IOWA FARMERS UNION, IOWA ENVIRONMENTAL COUNCIL, FOOD & WATER WATCH, and DAKOTA RURAL ACTION, *Intervenors*.	CIVIL NO. 6:24-cv-02016-CJW-MAR **PLAINTIFF'S APPENDIX IN SUPPORT OF COMBINED RESISTANCE TO DEFENDANTS' AND INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT**

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Respectfully submitted this 18th day of February 2025.

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UNITED STATE DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
NATIONAL APPEALS DIVISION

In the matter of	)	
	)	
XXXXX	)	
	)	
And	)	Case No. 2011W000619
	)	
NATURAL RESOURCES CONSERVATION SERVICE	)	

APPEAL DETERMINATION

XXXXX and XXXXX (Appellant) filed an appeal challenging a Natural Resources Conservation Service (NRCS or Agency) adverse decision dated June 23, 2011. Agency issued a final wetland determination finding .8 acres of Tract 400 (Site 1) is wetland farmed under natural conditions.

Appellant argues the determination is not proper, in that it is not in accordance with required procedures and regulations. Specifically they challenge the Agency's comparison site used to determine the hydrology of the vegetation. They claim the site is too far away, receives more moisture, and is not similar enough to Site 1. They also argue there are at least two alternative sites proposed by Appellant that would be better. Next, they argue the Agency's use of aerial photographs to determine saturation and inundation was improper. Appellant contends their use was improper because XXXXX has not adopted an offsite methods manual. Additionally, Appellant's observations and monitoring of two holes indicate Site 1 does not have sufficient water levels to be a wetland. Finally, Appellant suggests the snowmelt from the 4-10 feet of snow in the shelterbelt is the cause of any wetland characteristics found at Site 1. Appellant argues Site 1 is an artificial wetland and not a wetland farmed under natural conditions.

At Appellant' request, I held an in person hearing on October 18, 2011. I held the record open for Appellant to submit their closing argument in writing. After Appellant submitted their closing argument, Agency requested an opportunity to respond to several arguments raised for the first time. I held the record open to allow the Agency to respond. I received all documents from the parties by November 23, 2011, and I closed the record on November 25, 2011. The Western Regional Assistant Director granted an extension until January 10, 2012 to issue the determination. Based on the evidence and the arguments submitted by the parties, and the program regulations that apply to this situation, I conclude the Agency decision was not in error. The rationale for my decision follows.

BACKGROUND

The highly erodible land and wetland conservation rules set out in the Food Security Act of 1985 encourage participants in United States Department of Agriculture (USDA) programs to adopt land management measures to protect wetland functions and values. The law does this by linking eligibility for USDA program benefits to farming practices on wetlands. *See* Title 16 of the United States Code (16 U.S.C.) Sections (§§) 3801 *et seq*. Specifically, after November 28, 1990, a program participant is ineligible for USDA program benefits if there is a conversion of a wetland that makes possible the production of an agricultural commodity. The purpose of this provision is to remove incentives to produce agricultural commodities on such lands. The purpose of limiting production is to (1) reduce soil loss because of wind and water erosion; (2) protect the nation's long-term capacity to produce food and fiber; (3) reduce sedimentation (4) improve water quality; and (5) aid in preserving the nation's wetlands. *See* Title Seven Code of Federal Regulations (7 C.F.R.) § 12.1(b)(1-4). In order to determine compliance with the wetlands provisions, NRCS determines if a producer's land has wetlands that are subject to the provisions of the Food Security Act and provides other technical assistance. *See* 7 C.F.R. § 12.30(a)(1-8).

In order for NRCS to classify a site as a wetland, it must meet three criteria. There must be a predominance of hydric soils, sufficient water to support hydrophytic vegetation (hydrology) and a prevalence of hydrophytic vegetation. *See* 7 C.F.R. § 12.2 Definitions, Wetland. NRCS, along with other federal agencies, developed scientific procedures used to test for and determine whether a site meets the wetland criteria.

STATEMENT OF THE ISSUES

I had to determine whether Agency correctly applied its regulations when it determined Site 1 to be a wetland. To make this determination, I had to resolve the following questions:

1. **Did NRCS properly determine Site 1 meets the wetland criteria of hydric soils, hydrophytic vegetation, and wetland hydrology?**

2. **Was NRCS' onsite visit in November sufficient to make a proper wetland determination?**

3. **Did NRCS properly determine Site 1 is not an artificial wetland?**

FINDINGS OF FACT (FOF)

PROCEDURAL HISTORY

1. Appellant operates land identified as southeast quarter of Section 28, Township 105 North, Range 58 West, in XXXXX County XXXXX. (Agency Record (AR) pages 31 & 39, Agency Testimony, Hearing Audio(HA) Track 1, 00:23:33 – 00:23:45)

2. The National Wetland Inventory (NWI) completed in 1983 and 1984 identified Site 1 as a temporary wetland. (AR page 41, Agency Testimony, HA Track 1, 00:27:40 – 00:28:01 & 00:30:41 – 00:31:04)

3. In May 2003, NRCS made a field visit to Site 1. (Appellant's Brief page 20) In 2004, NRCS made an initial wetland technical determination that Site 1 (then referred to as Site 18) was a wetland. Appellant contested the determination and requested a review. (AR page 22, Appellant Testimony, HA Track 3, 00:38:34 – 00:39:00)

4. In July 2008, Appellant requested a new determination via form AD-1026. In May 2009, NRCS made a second field visit to Site 1. (Appellant's Brief page 20) In 2009, NRCS issued a second determination finding Site 1 to be a wetland. NRCS rescinded the 2009 determination. On November 23, 2010, NRCS completed a third visit to Site 1. NRCS issued a final determination on June 23, 2011 finding Site 1 to be a wetland. (AR page 22, Appellant Testimony, HA Track 3, 00:38:34 – 00:39:00)

5. The June 2011 determination was independent and did not rely on any data gathered from the determinations in 2003 and 2009. (Agency Testimony, HA Track 2, 01:01:34 – 01:01:59)

PRELIMINARY FINDINGS

6. Site 1 is located in the XXXXX Region as identified by the Army Corp of Engineers. (AR page 330, Agency Testimony, HA Track 1, 00:25:15 – 00:25:23) The soil type is Tetonka on the soil survey. Tetonka soil types are on the county's hydric soils list. (AR page 49 & Agency Testimony, HA Track 1, 00:27:08 – 00:27:34) Site 1 receives between 21 and 23 inches of precipitation a year. (AR page 100)

7. NRCS found no manipulations prior to 1985. (Agency Testimony, HA Track 1, 00:28:20 – 00:28:26)

8. Normal circumstances were present as Site 1 is in row crop production as it has been since at least 1981. (Agency Testimony, HA Track 1, 00:29:00 – 00:29:23)

9. There are no hydrolic manipulations such as a ditch or tile. (Agency Testimony, HA Track 1, 00:29:23 – 00:29:28)

10. There is a shelterbelt located on the south edge of the field. It exists in all available aerial photography. Appellant's relatives originally planted the shelterbelt in 1936. (AR page 72, Agency Testimony, HA Track 1, 00:29:28 – 00:29:53). Snow drifts in the shelterbelt range from 4 to 10 feet high. (Appellant Testimony, HA Track 3, 00:21:47 – 00:22:17) Snow in the shelterbelt takes about 30 days longer to melt than snow in the fields. (Appellant Testimony, HA Track 3, 00:22:17 – 00:24:07) The snowmelt drains into Site 1. (Appellant Testimony, HA Track 3, 00:24:07 – 00:24:24)

11. According to the NWI, Site 1 is located in a pothole region with many small depressions. (Agency Testimony, HA Track 1, 00:30:29 – 00:30:40)

12. The NWI identifies Site 1 as a temporary seasonal wetland indicating the site periodically lacks hydrology and could have a wetland plant community. (Agency Testimony, HA Track 1, 00:30:50 – 00:31:00 & 00:31:40)

13. NRCS determined Site 1 is a concave area and naturally ponds water. (Agency Testimony, HA Track 1, 00:49:08 – 00:49:20)

WETLAND TECHNICAL DETERMINATION

Hydrology

14. XXXXX is an Agricultural Engineer for NRCS. She has a B.S. degree in Agricultural Engineering and is a licensed agricultural engineer in the state of XXXXX. She works for NRCS and has 21 years of experience. She has 18 years experience making wetland determinations and has appropriate wetland determination authority from NRCS. (Agency Testimony, HA Track 1, 00:20:49 – 00:21:20)

15. The Agricultural Engineer completed an onsite determination on November 23, 2010. She identified Site 1 as a pothole with a depth of ponding of approximately .7 feet. At that depth, the site normally overflows towards the north. (AR pages 94 – 98, Agency Testimony, HA Track 1, 01:03:29 – 01:04:07) She identified this geomorphic condition as a secondary indicator of hydrology. (Agency Testimony, HA Track 1, 01:14:53 – 01:15:02)

16. The field visit was outside the period of normal environmental conditions. Normal precipitation measurements for May and June for Site 1 are between 6 and 8 inches. (AR pages 73 & 74, Agency Testimony, HA Track 1, 01:10:10 – 01:11:13). Normal precipitation for November is between 3/4 and 1½ inches. (AR pages 75 & 76, Agency Testimony, HA Track 1 00:12:15 – 01:13:32)

17. Because NRCS visited the site outside of the normal environmental conditions, NRCS relied on remote sensing to make a hydrology determination. NRCS compared annual aerial photography (also called slides) of Site 1 from 1991 through 2010 taking into account the amount of rainfall received in the three months prior to the photo. NRCS determined a wetland signature indicated by a change in color tone in 7 of the 10 years when there was normal rainfall. (AR pages 87 & 88, Agency Testimony, HA Track 1 01:22:26 – 01:28:00)

18. In 2003, NRCS also used remote sensing to determine hydrology for Site 1. NRCS determined there was a wetland signature in 5 of 9 years with normal precipitation. (Agency Testimony, HA Track 2, 01:02:00 – 01:03:07)

Hydric Soils

19. XXXXX (Soil Scientist) is a soil scientist employed by NRCS for 24 years. He has 15 years experience making wetland determinations. He also has appropriate job approval authority. (Agency Testimony, HA Track 2, 00:18:10 – 00:18:31)

20. Soil Scientist made an onsite visit on November 23, 2010 to determine whether there was a prevalence of hydric soils on Site 1. (AR page 468)

21. Soil Scientist took six soil samples from within the boundary of Site 1 and two outside the boundary. (AR page 52, Agency Testimony, HA Track 2, 00:27:43 – 00:28:54)

22. The six samples taken within the boundary of Site 1 contained a predominance of hydric soils with soil indicators of F6, F8, and A11 with redox concentrations. The redox features and the soil indicators of F6, F8, and A11 are primary indicators of hydric soils. (AR pages 53 – 62, Agency Testimony, HA Track 2, 00:29:40 – 00:32:28 & 00:33:50 – 00:34:26 & 00:43:38 – 00:44:08)

23. Redox features occur in wet conditions. They form when iron accumulates due to the natural chemical and biological reactions to the lack of oxygen. Redox features are an indicator of hydric soils. (Agency Testimony, HA Track 2, 00:39:15 – 00:40:21)

24. The hydric soil samples within the boundary of Site 1 contained an argillic horizon, which is consistent with Tetonka soils in wetland areas. (AR pages 53 -62, Agency Testimony, HA Track 2, 00:47:23 – 00:51:01)

25. An argillic horizon takes a very long time to form and indicates the natural characteristics and hydrologic features needed to create it were in place long before the shelterbelt existed. (Agency Testimony, HA Track 2, 01:38:48 – 01:39:49)

26. The predominant soil type at Site 1 was consistent with the official series description of Tetonka soils. (Agency Testimony, HA Track 2, 00:33:30 – 00:33:50)

27. The two soil samples outside the wetland boundary did not contain a prevalence of hydric soils. (AR pages 56 & 60, Agency Testimony, HA Track 2, 00:44:06 – 00:45:32)

28. The Soil Scientist took a ninth soil sample outside the boundary of Site 1 and next to the shelterbelt. The soil sample between the Site 1 and the shelterbelt is an upland soil and not a hydric soil. (AR page 61, Agency Testimony, HA Track 2, 00:51:01 – 00:54:38)

Hydrophytic Vegetation

29. XXXXX is a South Dakota NRCS state biologist and has two years of experience with NRCS. Prior to 2009, he conducted wetland delineations for the Corp of Engineers for nine years. He has appropriate wetland job approval authority from NRCS. (Agency Testimony, HA Track 2, 01:12:17 – 01:12:51)

30. Because Site 1 is under agricultural management, there is insufficient or unreliable vegetation to make a hydrophytic vegetation determination. (Agency Testimony, HA Track 2, 01:13:08 – 01:13:37)

31. To determine if Site 1 met the hydrophytic vegetation requirement, NRCS used a comparison site. (Agency Testimony, HA Track 2, 01:17:00 - 01:17:42) The comparison site selected was a Tetonka comparison site located in XXXXX County, the northwest quarter of section 27, township 110, range 56 west from an approved list of sites previously established. (Agency Testimony, HA Track 2, 01:21:19 – 01:21:30)

32. The comparison site has a Tetonka soil type (Agency Testimony, HA Track 2, 01:26:46 – 01:26:58), is identified as a pothole (Agency Testimony, HA Track 2, 01:28:42 – 01:28:47), and receives between 23 -25 inches of precipitation annually. (AR pages 43 & 100, Agency Testimony, HA Track 2, 01:32:44 – 01:33:04)

33. The NWI identified the comparison site as a seasonal wetland. Seasonal and temporary wetlands are similar as both have the same ephemeral characteristics, meaning they periodically lack hydrology. (Agency Testimony, HA Track 2, 01:27:00 – 01:27:43)

34. The comparison site and Site 1 are both located in the major land resource area titled 55C. (Agency Testimony, HA Track 2, 01:30:38 – 01:31:01)

35. In July 2000, NRCS conducted the hydrophytic vegetation analysis on the comparison site. (AR pages 84, 660 – 665, Agency Testimony, HA Track 2, 01:23:38 – 01:24:17)

36. The comparison site had a prevalence index of 2.05. Any prevalence index of three or less indicates hydrophytic vegetation is prevalent on the site. (Agency Testimony, HA Track 2, 01:23:14 – 01:23:29)

DISCUSSION

Seven C.F.R. § 11 governs the appeal. Seven C.F.R. § 12 governs the issues on appeal. I also consulted the 2002 Natural Resources Conservation Service XXXXX Mapping Conventions for Determining Wetlands (XXXXX Mapping Conventions), the December 2010 National Food Security Act Manual (NFSAM), the Food Security Act Wetland Identification Procedures, and the January 1987 Corp of Engineers Wetlands Delineation Manual.

1. **Did NRCS properly determine Site 1 meets the wetland criteria of hydric soils, hydrophytic vegetation, and wetland hydrology?**

Yes. NRCS properly determined Site 1 meets the wetland criteria of hydric soils, wetland hydrology, and hydrophytic vegetation. Wetland means land that: 1) has predominance of hydric soils, 2) is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions, and 3) under normal circumstances supports a prevalence of such vegetation. *See* 7 C.F.R. § 12.2. Appellant contends there is insufficient water for the site to meet the hydrology requirement of a wetland and they disagree with the Agency's method in their hydrophytic vegetation determination. To address Appellant's arguments, I must consider whether NRCS properly considered all three factors: hydric soils, hydrology, and hydrophytic vegetation. All three factors must exist for a wetland determination. Therefore, I address each factor as follows.

Hydric Soils

Site 1 has a predominance of hydric soils. The rules define hydric soils as soils that, in an undrained condition, are saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic

vegetation. *See* 7 C.F.R. § 12.2, definitions. NRCS identifies hydric soils by using published soil maps, which reflect soil surveys completed by NRCS or by using on-site reviews. *See* 7 C.F.R. § 12.31(a)(1). NRCS identifies hydric soils using the National List of Hydric Soils in conjunction with NRCS soil surveys to predict the location and properties of hydric soils in a given county or similar area. NRCS maintains an official list of local hydric soils in the Soil Data Mart. The National List of Hydric Soils is an aggregation of the local hydric soils lists produced from Soil Data Mart data. NRCS will also apply the publication "Field Indicators of Hydric Soils in the United States" to identify and delineate soils that would meet the definition of hydric soils in the field. *See* NFSAM, Part 514.4 (B)(1) - (2) and (C)(2).

NRCS followed proper procedures in determining that Site 1 has a predominance of hydric soils. NRCS used two methods in the hydric soil determination. NRCS reviewed the soil map of Site 1, which identified the soil type as Clarno-Stickeny-Tetonka. The county soil list identifies Tetonka as a hydric. (FOF 6) NRCS also studied six soil samples taken from Site 1 and three from the surrounding area. (FOF 21 & 28) NRCS found F6, F8, and A11 soil profiles with redox concentrations within the boundary of Site 1. (FOF 22 & 23) NRCS used the Field Indicators of Hydric Soils to identify the F6, F8 and A11 profiles with redox concentrations as hydric soils. (FOF 22) NRCS also identified an agrillic horizon from the soil samples taken within the boundary of Site 1. (FOF 24 & 25) An agrillic horizon is a characteristic found in Tetonka hydric soils. (FOF 24) Both the soil map and the soil samples provide current applicable data and indicate Site 1 has a predominance of hydric soils. Therefore, the rules support NRCS's determination that Site 1 has hydric soils.

Hydrology

Site 1 has wetland hydrology. The rules require NRCS to use wetland hydrology indicators in combination with indicators of hydric soils and hydrophytic vegetation to determine whether an area is a wetland. The function of wetland hydrology indicators is to provide evidence that the site has a continuing wetland hydrologic regime and that hydric soils and hydrophytic vegetation are not relics of a past hydrologic regime. *See* NFSAM, Part 514.6 (B). To meet the hydrology requirement of a wetland a site must have one primary or two secondary hydrologic indicators. When the hydrologic indicators are lacking, NRCS uses remote sensing to look for indicators of a wetland signature. *See* XXXXX Mapping Conventions XXXXX - LTR-31 Steps 1 & 2. (AR page 147)

In this case, NRCS' preliminary findings and onsite visit only identified one secondary indicator of hydrology, a concave topography subject to ponding. (FOF 15) Because there were insufficient primary and secondary indicators, NRCS used remote sensing to make their hydrology determination. *See* XXXXX Mapping Conventions XXXXX -LTR-31 Step 3. (AR page 148) Remote sensing requires NRCS to review aerial photography (also called slides) from a 20-year period ending with the current year. NRCS reviews the photographs for indicators of a wetland signature. Indicators of a wetland signature include the following:

- hydrophytic vegetation
- surface water
- saturated conditions
- flooded or drowned-out crops
- stressed crops due to wetness

- differences in vegetation due to different planting dates
- inclusion of wet areas as set aside or idled
- circular or irregular areas of unharvested crops within a harvested field
- isolated areas that are not farmed with the rest of the field
- areas of greener vegetation (especially during dry years).

See XXXXX Mapping Conventions XXXXX -LTR-33. (AR page 149) If there is a wetland signature in more than 50% of years with normal rainfall then a site meets the hydrology requirement of a wetland. *See* XXXXX Mapping Conventions XXXXX -LTR-33 Step 2. (AR page 149) NRCS reviewed aerial photography from 1991 through 2010 and identified a wetland signature in 7 of the 10 years with normal rainfall. (FOF 17)

NRCS followed proper procedures in determining wetland hydrology on Site 1. Their preliminary findings and onsite visit identified one secondary indicator of hydrology, a concave topography subject to ponding. Because there were insufficient primary and secondary indicators, NRCS proceeded to remote sensing as outlined in step 3 of the XXXXX Mapping Conventions, XXXXX -LTR-31. (AR page 148) They reviewed available aerial photographs taken during the growing season from 1991 to 2010. NRCS identified a wetland signature in 7 of the 10 years with normal rainfall. Because the review of the aerial photography showed a wetland signature in more than 50% of the years with normal rainfall, NRCS properly determined Site 1 has the required hydrology to be a wetland.

Remote Sensing and XXXXX Mapping Conventions

Appellant argues the National Engineering Handbook, Chapter 19, Part 650 paragraph 5-3(2)(i) only permits the use of Chapter 19 tools, remote sensing in this case, if they are contained in a state offsite methods manual. (AR page 159) Appellant argues NRCS improperly used remote sensing because XXXXX has never adopted an offsite methods manual. Appellant concludes NRCS did not follow the wetland delineation procedures when they used remote sensing, and therefore, their hydrology determination is erroneous.

However, paragraph 5-3(2)(i) of the National Engineering Handbook does not restrict the use of Chapter 19 tools only when they are contained in state offsite methods manual. Paragraph 5-3(2)(i) states that in all circumstances NRCS may use Chapter 19 tools if objective criteria are contained in the state offsite methods manual. This manual section does not limit the use of Chapter 19 tools to only those states with an offsite methods manual. There is nothing in the paragraph prohibiting authorization of Chapter 19 tools by another authority. This interpretation is consistent with paragraph 5-17 of the Food Security Act Wetland Identification Procedures. (AR page 162) "States are provided an option of developing and approving additional guidance to a Level-1 determination, as well as using any additional guidance currently in place. This Level-1 additional guidance is referred to as State Offsite Methods or State Mapping Conventions."

Furthermore, 7 C.F.R. § 12.30(c) requires the Army Corps of Engineers, the Environmental Protection Agency, the U.S. Fish and Wildlife Service and NRCS to approve wetland delineation procedures. In XXXXX, the required agencies have approved the XXXXX Mapping Conventions. (AR page 135) Therefore, the procedures contained in the XXXXX Mapping Conventions are appropriate for wetland determinations. XXXXX Mapping

Conventions properly authorize the use of the Chapter 19 tool remote sensing when primary and secondary indicators are lacking. Because NRCS could only identify one secondary indicator, they properly used remote sensing, in the hydrology determination. Because NRCS found a wetland signature in 7 of 10 years with normal rainfall, NRCS properly concluded that Site 1 meets the hydrology requirement for a wetland. (AR page 149)

Wetland Signature and Color Tone(CT)

Appellant argues that NRCS did not properly identify a wetland signature in 7 of the last 10 years of normal rainfall. Appellant points out there are inconsistencies with the shading and the color tone between the different years and different photos. (Appellant's Brief pages 22 – 25) I note Appellant did not offer expert testimony at the hearing, nor did they take the opportunity to question the NRCS expert on any discrepancies they observed. The testimony of the NRCS expert was undisputed at the evidentiary hearing. NRCS also used remote sensing in their 2003 determination. (FOF 18) NRCS made the 2003 and 2010 determinations independently. (FOF 5) The fact that they both reached the same conclusion gives additional credibility to the NRCS determination. I find the expert testimony of both NRCS witnesses more credible than Appellant's observations and analysis.

Appellant also argues that NRCS improperly used the abbreviation of color tone (CT) as an indicator of a wetland signature. Appellant contends a finding of CT is insufficient for a finding of inundation. (Appellant's Brief pages 18 – 19) Appellant cites the indicators of a wetland signature in XXXXX Mapping Conventions, XXXXX -LTR-33, which are listed on the previous page, and correctly notes that CT is not on the list of wetland signature indicators. Appellant concludes the hydrology determination is erroneous because NRCS used CT as a wetland signature indicator, and CT is not an indicator.

However, a change in color tone is indicative of several of the wetland signature characteristics in XXXXX -LTR-33. NRCS would notice a change in color tone to identify wetland signature characteristics like saturated conditions, different planting dates for crops, and areas of greener vegetation. NRCS' use of CT as short hand for a wetland signature indicator does not invalidate the hydrology determination.

Appellant's water flow Analysis

Appellant argues the NRCS hydrology determination is erroneous because it is impossible for Site 1 to have the required duration of saturation or inundation of a Farmed Wetland pothole. Seven C.F.R. § 12.2 Wetland Determination (4)(ii) specifies the saturation/inundation requirement for a Farmed Wetland pothole. It requires ponding for "7 or more consecutive days" or saturated for "14 or more consecutive days" during the growing season in most years. Appellant contends that the pothole on Site 1 is not big enough to remain inundated or saturated for more than six days. Appellant calculated the rate at which the depression would drain when filled. Appellant determined even at the slowest rate water drains in Tetonka soil there would be less than six days of saturation or inundation. (Appellant's Brief page 27) Appellant argues that six days of saturation or inundation is not sufficient to support a finding of a farmed wetland pothole.

Appellant calculations are correct regarding how quickly the pothole drains. However, Appellant's analysis assumes the depression only fills up and drains once. If there were multiple periods of rainfall prior to the depression draining, it fills up again and requires an additional six days to drain. In other words, if it rains 2 times in 6 days causing the depression to refill, by Appellant's calculations it would take as many as 12 days to drain. If it rained 3 times in a 12-day period, it could take as long as 18 days to drain. Given Site 1 receives 21 - 23 inches of annual precipitation, and receives more than an inch of rain on average during May and June, it reasonable to conclude that during the growing season the pothole will fill and drain several consecutive times. (FOF 6 & 16) Therefore, Appellant's water flow analysis fails to negate the hydrology determination.

Appellant's Data

To further Appellant's assertion that there is insufficient water at Site 1 to meet the hydrology requirement, Appellant dug two holes about two feet deep and monitored the water levels in the holes during the 2010 growing season. One hole was within the boundary of Site 1 and one hole was outside the boundary. (AR 99 – 111) Based on their observations and analysis they conclude that the water levels were not high enough for a sufficient length of time to meet the hydrology requirement. Appellant made no claim of having any expertise in determining water saturation or inundation, or in making wetland determinations. Appellant sited no regulation or authority for this procedure. Appellant stated that there were no measuring devices, like a piezometer, used to measure the water entering or leaving the holes. Appellant stated that there was no tubing or structure of any kind inside the holes and that it was "just dirt." (Appellant Testimony, HA Track 3, 00:33:08 – 00:33:52) While I appreciate Appellant's efforts to gather and collect additional data, the procedures used are not prescribed or authorized by any wetland delineation procedure. Therefore, this data is unreliable and not suitable for drawing conclusions about whether Site 1 is a wetland or not. The conclusions of the NRCS expert, based on procedures authorized by the XXXXX Mapping Conventions are consistent with wetland delineation policy. Therefore, NRCS's conclusion that Site 1 meets the hydrology requirement is proper.

Hydrophytic Vegetation

Site 1 has a prevalence of hydrophytic vegetation. The rules provide that hydrophytic vegetation consist of plants growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season because of excessive water content. A plant is hydrophytic if the National List of Plant Species that Occur in Wetland or a regional plant list approved by NRCS lists it. *See* 7 C.F.R. § 12.31 (b)(1) and NFSAM, Part 514.5 (C). If vegetation has been altered or removed, NRCS will determine if a prevalence of hydrophytic vegetation typically exists on this area by the use of a comparison site.

An appropriate comparison site must meet several requirements. Seven C.F.R. §12.31(b)(2)(ii) states that a comparison site must be "in the local area on the same hydric soil map unit under non-altered hydrologic conditions." In addition the 2010 Food Security Act Wetland Identification Procedures paragraph 5-70, states that when using the "comparison sites approach the comparison site should support hydrologic conditions that are similar to what existed on the altered site prior to the alteration." (AR page 170) Therefore, an appropriate

comparison site will support similar hydrologic conditions, be in the local area, have the same hydric soil map unit and be unaltered.

The comparison site in this case meets these requirements. Appellant does not dispute that both sites have the same soil type (Tetonka) and the comparison site is unaltered. (FOF 32) Seven C.F.R. §12.31(b)(2)(ii) does not define the term "local area." NRCS testified it interprets "local area" to mean the same major land resource area, or MLRA. (Agency Testimony, HA Track 2, 01:30:38 – 01:32:01) Here, both sites are located in the same MLRA. (FOF 34) Finally, both sites have similar hydrology as identified by the NWI. One is seasonal and one is temporary. Seasonal and temporary wetlands have similar hydrologic conditions, as both lack water for part of the growing season. (FOF 33) Therefore, the comparison site meets the specified requirements and its use was appropriate.

In this case, NRCS properly determined a comparison site was appropriate because Site 1 was in agricultural production. NRCS chose a comparison site established in July 2000. In addition to meeting the specified requirements of a comparison site as discussed above, the comparison site shares other similarities with Site 1. The comparison site is a pothole and receives a similar amount of rainfall. (FOF 32 - 34) Based on the July 2000 analysis, the comparison site had a prevalence index of 2.05. Any prevalence index of three or less indicates hydrophytic vegetation is prevalent on the site. Therefore, NRCS properly determined Site 1 met the hydrophytic vegetation requirement of a wetland.

Alternate Comparison Site

Appellant argues the comparison site is not an appropriate site for a number of reasons. First, they question NRCS' practice of using pre-established comparison sites. They also point out a number of differences between Site 1 and the comparison site. Finally, they argue a more appropriate site would be one located on their property.

Appellant argues wetland delineation procedures do not specifically authorize the use of predetermined comparison sites. However, Appellant cited no policy or provision that prohibits this practice. It seems a reasonable and cost effective way of making determinations when the comparison site meets the requirements in 7 C.F.R. § 12.2(b)(2)(ii). Because the comparison site meets theses requirements, its use was appropriate.

Appellant correctly points out there are differences between Site 1 and the comparison site. Specifically, Appellant notes that the Site 1 receives 21 – 23 inches of precipitation a year while the comparison site receives 23 – 25 inches of annual precipitation. (FOF 6 & 32) The comparison site is located more than 30 miles from Site 1, and has more primary and secondary indicators of hydrology. However, these differences do not prohibit the use of the comparison site in the vegetation determination. No two sites are identical and there will always be differences. Appellant has to show that the comparison site does not meet the requirements in 7 C.F.R. § 12.31(b)(2)(ii). Since there is no evidence to suggest that the comparison site does not meet the requirements, it use was appropriate.

Appellant felt a more appropriate comparison site would have been one on their property. They argue their proposed site is closer and therefore more representative of the types of local vegetation. When NRCS was making their determination in 2009, Appellant suggested two

different locations in their pastureland. (Appellant Testimony, HA Track 3, 00:18:00 – 00:18:50) However, there was no evidence that the proposed sites had the same soil map unit or that they supported similar hydrologic conditions. Therefore, Appellant has not shown their proposed sites are more appropriate or the comparison site to be inappropriate.

Summary

In summary, I find that NRCS properly considered all three factors (hydric soils, hydrophytic vegetation and hydrology) in determining that Site 1 is a wetland.

2. **Was NRCS' onsite visit in November sufficient to make a proper wetland determination?**

Appellant argues that the November site visit was not appropriate because it was not during the growing season. Appellant reasons that given the 30 plus months the determination request was pending, there was adequate opportunity to visit the site when conditions would be optimal. Appellant cites 7 C.F.R § 12.6(c)(7) in arguing that the onsite visit must be made when "conditions are favorable for making an evaluation of soils, hydrology or vegetation." (Appellant' Brief page 19)

NRCS interprets 7 C.F.R. § 12.6 (c)(7) differently. It argues this directive does not mandate the time of year required for a site visit. Because NRCS uses an indicator-based approach to wetland determinations, a site visit during the growing season is not required. Part IV of the Food Security Act Wetland Identification Procedures states that the indicator-based approach allows the Agency to make sound decisions, regardless of the timing of the field visit. (AR pages 158 -160) Paragraphs 4-2, 4-3 and 5-4 recognizes NRCS may not always make the onsite visit in optimum conditions, and onsite visits are not always related to collecting wetland indicator data. There are many reasons an onsite visit is required after an appeal or before the withholding of benefits. *See* 16 U.S.C. § 3822(a)(5) & (c). The onsite visit requirement does not require NRCS to base all indicators on data collected directly from the site. It is a requirement that NRCS make a trip to the site. In some cases, NRCS may visit a site to get additional information about present or future manipulation plans. It may have nothing to do with the wetland indicators or the data used to make the determination. *See* paragraph 5-4 of the FSA Wetland Identification Procedures AR page 160. Because the onsite visit requirement is not required to be during the growing season, NRCS' November 2010 onsite visit was appropriate.

Finally, Appellant argues that because NRCS made previous site visits May, it should use the data collected from the previous determinations in 2003 and 2009. Appellant indicates that it was an error to exclude these determinations from the record. (Appellant's brief page 25 & 26) NRCS conducted the 2010 determination independent from the previous determinations. (FOF 4 & 5) Both the 2009 and 2003 determinations indicated Site 1 was a wetland. NRCS' independent determination in 2010 is consistent with these results, but does not rely on the data in its conclusion. The findings of all the previous determinations corroborate the results in 2010.

3. **Did NRCS properly determine Site 1 is not an artificial wetland?**

Appellant suggests the best explanation for any of the wetland characteristics found at Site 1 is the snowmelt from the shelterbelt and that Site 1 is an artificial wetland. Seven C.F.R. § 12.2 Wetland Determination (1) defines artificial wetland as an area that was formerly non-wetland, but now meets wetland criteria due to human activities. The shelterbelt was planted in 1936 as a windbreak. (FOF 10) Each winter anywhere from 4 – 10 feet of snow accumulates in the shelterbelt. (FOF 10) This snow takes about 30 days longer to melt than snow in the field and the snowmelt drains into Site 1. (FOF 10) Appellant argues the human activity of planting the shelterbelt resulted in the snow accumulating at the edge of the field and additional water draining into Site 1. Therefore, they conclude the proper classification of Site 1 is an artificial wetland.

However, Appellant's analysis is inconsistent with the soil data collected. The soil outside of Site 1 is not hydric. (FOF 20 & 21) If the draining snowmelt was the cause of the hydric soils at Site 1, then the soil between the shelterbelt and Site 1 should also be hydric. However, even the soil next to the shelterbelt is an upland soil and not hydric. (FOF 28) Additionally, the presence of the argillic horizon found only in the hydric soils of Site 1 indicates the necessary hydrologic conditions were present long before the shelterbelt existed. (FOF 24 & 25) Furthermore, Appellant documented ponding at Site 1 in September 2010, long after the snow melted, and before any significant snow could accumulate in the shelterbelt. (AR pages 110 – 111) This demonstrates the snowmelt is not the only source of water draining into Site 1. Because snowmelt is not the only source of water draining into Site 1, hydric soils only exist within the boundary of Site 1, and the argillic horizon began forming long before the shelterbelt existed, NRCS properly determined that Site 1 is not an artificial wetland.

DETERMINATION

Seven C.F.R. § 11.8(e) provides that an appellant bears the burden of proving that an agency's adverse decision is erroneous by a preponderance of the evidence. In this case, Appellant did not meet this burden. The Agency decision is not erroneous.

This is a final determination of the Department of Agriculture unless a party a timely requests a review.

Dated and mailed this 10th day of January 2012.

/s/

Chris Barley
Hearing Officer
National Appeals Division

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF IOWA, EASTERN DIVISION

CTM HOLDINGS, LLC, an Iowa limited liability company, *Plaintiff*, vs. THE UNITED STATES DEPARTMENT OF AGRICULTURE; THOMAS J. VILSACK, in his official capacity as the Secretary of the United States Department of Agriculture; THE NATURAL RESOURCES CONSERVATION SERVICE; TERRY COSBY, in his official capacity as Chief of the Natural Resources Conservation Service; and JON HUBBERT, in his official capacity as Iowa State Conservationist, *Defendants*.	CIVIL NO. 6:24-cv-02016 **DECLARATION OF JAMES F. CONLAN**

DECLARATION OF JAMES F. CONLAN

Pursuant to 28 U.S.C. § 1746, I, James F. Conlan, declare the following:

1. I am over the age of eighteen and competent to make this declaration. I make this declaration based on personal knowledge. If called as a witness I could competently testify about what is written in this declaration.
2. I am the founder and managing member of CTM Holdings, LLC ("CTM Holdings"), the Plaintiff in this matter.

The Property

3. On September 30, 2022, CTM Holdings closed on the purchase of three contiguous parcels (Nos. 480-403300, 480-403400, and 480-403410) consisting of 71.85 acres of farmland located at Corner of 217th Street and 1st Street in Delaware County, Iowa ("Property").
4. Identified as Exhibit "1", produced to the other parties with the bate-stamp CTM Holdings 0003-4, and provided in Plaintiff's Appendix in Support of Plaintiff's Motion for Summary Judgment is a true and correct copy of the recorded Deed from my purchase of the Property.
5. When I purchased the Property, of the 71.85 acres, approximately 39.83 acres were tilled and being used for agriculture; 10.4 acres were designated as erodible land and in the Conservation Reserve Program ("CRP") by the prior owner; and 21.62 acres were forested, of which the USDA had previously designated 9 acres as "wetland".
6. Identified as Exhibit "3", produced to the other parties with the bate-stamp CTM Holdings 0016-19, and provided in Plaintiff's Appendix in Support of Plaintiff's Motion for Summary Judgment is a true and correct copy of the 2010 Wetlands Determination that I received from Defendants on, or after, January 23, 2023.

2023 Wetlands Determination

7. I submitted the AD-1026 form on October 14, 2022 for the Property.
8. The purpose of submitting the AD-1026 form was to put the Property in the FSA program, make it eligible for USDA benefits, and to request a wetlands redetermination.
9. I later received a letter dated January 23, 2023, from the Natural Resources Conservation Service ("NRCS") field office providing a "Wetland Preliminary Technical Determination" for the Property. Included with that letter was another letter from NRCS

denying my request for a new certified wetlands determination, and instead informed me that because the "Certified Wetland Determination" was completed on April 16, 2010 that I could not appeal the 2010 determination. These letters also confirmed that 9 acres of the Property are designated as wetlands.

10. Identified as Exhibit "8", produced to the other parties with the bate-stamp CTM Holdings 0005-23, and provided in Plaintiff's Appendix in Support of Plaintiff's Motion for Summary Judgment is a true and correct copy of the January 23, 2023 Wetland Determination Letters.

The Plaintiff

11. CTM Holdings, LLC is an Iowa limited liability company that I founded.
12. CTM Holdings, LLC is a manager managed LLC, of which there are only two members.
13. The managing member of CTM Holdings is me, James F. Conlan.
14. The affiliated entity referenced in the complaint is B&C, LLC of which I, James F. Conlan, is the sole-member.
15. Between CTM Holdings and B&C, LLC my two entities own over 1,000 acres of Iowa farmland that is all under the USDA program and are leased to tenants who farm the land.
16. CTM Holdings and B&C, LLC maintain USDA program eligibility for their tenants to receive all benefits and subsidies.

CRP Program Participation

17. CTM Holdings leases the Property to its Tenants Cory Pfab.
18. Identified as Exhibit "9", produced to the other parties with the bate-stamp CTM Holdings 0096-102, and provided in Plaintiff's Appendix in Support of Plaintiff's Motion

for Summary Judgment is a true and correct copy of the current Lease with Operator/Tenant Cory Pfab effective until March 1, 2025.

19. When I purchased the Property it was under a Conservation Reserve Program ("CRP") Contract by the prior owner with the USDA from May 1, 2010 to September 10, 2024.

20. As the purchaser of the Property, CTM Holdings took over the remainder of the existing CRP contract.

21. I assigned CTM Holding's rights to the CRP payments to its Tenant, Cory Pfab.

Loss of Uses

22. It is my understanding, from both a reading of the law and conversations with USDA/NRCS representatives, that I cannot use the 9 acres of wetland in an economically beneficial or productive manner without violating Swampbuster.

23. It is my understanding, from both a reading of the law and conversations with USDA/NRCS representatives, that I cannot build any structure on the wetlands because in order to build I would have to remove tree stumps, grade and level the land to prepare for construction, which would be a wetland violation because that is considered having the effect of making the production of agriculture possible, and it goes against the purpose of Swampbuster, which is to leave the land in its natural state.

24. It is my understanding, from both a reading of the law and conversations with USDA/NRCS representatives, that nothing can be built on the 9 acres without violating Swampbuster

25. The 9 acres cannot be leased as farmland because they cannot be farmed. Because the 9 acres cannot be farmed and cannot be used for any other purpose but to remain in its

natural state, the 9 acres greatly decrease the value of the Property for both farm leases and sales price.

26. The marketability and sales price for the Property are diminished by the existence of the wetlands determination.

27. It is my understanding, from both a reading of the law and conversations with USDA/NRCS representatives, that removal of the stumps from the wetlands would result in a wetland violation.

28. It is my understanding, from both a reading of the law and conversations with USDA/NRCS representatives, that if CTM Holdings uses the 9 acres then it could lose its USDA benefits, including the benefits for land owned by B&C, LLC and all the tenants on those properties.

29. USDA informed me that "A wetland violation would jeopardize all financial benefits associated to the farm, including those of any tenants associated to the farm, and possibly their other farming interests."

30. Identified as Exhibit "12", produced to the other parties with the bate-stamp CTM Holdings 0082-95, and provided in Plaintiff's Appendix in Support of Plaintiff's Motion for Summary Judgment is a true and correct copy of an email chain between me and the USDA/NRCS.

31. I do not receive compensation for the 9 acres of wetland from the USDA for my compliance with wetland conservation.

The "Wetlands"

32. The 9 acres of "wetland" are indistinguishable from the rest of the 12.62 acres of forested nonwetlands.

33. The 9 acres of "wetland" do not contain any standing water, are not visibly wet, are not connected to any water body, and are not permanently or seasonally saturated or inundated by water at any time of the year.

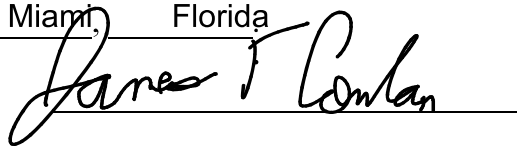
34. Identified as Exhibit "13", produced to the other parties with the bate-stamp CTM Holdings 0024-32, and provided in Plaintiff's Appendix in Support of Plaintiff's Motion for Summary Judgment are true and correct copies, and are an accurate depiction, of the Property.

35. The Property contains a small seasonal stream that runs through one portion of the nonwetlands, and the stream is not designated as "wetlands".

36. All the "wetlands" units on the Property are a significant distance away from the small seasonal stream and none of the "wetlands" are connected to any water body.

37. The soil rating of the 9 acres of wetland is indistinguishable from the rest of the Property, which is a crop high quality suitability rating of 84/85.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 27, 2025, in Miami, Florida.



James F. Conlan

FARM LEASE - CASH OR CROP SHARES

THIS LEASE ("Lease") is made between CTM Holdings, LLC ("Landlord"), whose address for the purpose of this Lease is [redacted] and Cory Pfab and Susan Pfab ("Tenant"), whose address for the purpose of this Lease is [redacted].

THE PARTIES AGREE AS FOLLOWS:

1. **PREMISES AND TERM.** Landlord leases to Tenant the following real estate situated in Delaware County, Iowa (the "Real Estate"):

   Tax Parcel Numbers: 480000403300, 480000403400 and 4800000403410 legally described as:
   Southeast Quarter (SE ¼) of Southeast Quarter (SE ¼) and the East one Fourth (E ¼) of Southwest Quarter (SW ¼) of Southeast Quarter (SE ¼) of Section Thirty-Two (32); the Southwest Quarter (SW ¼) of Southwest Quarter (SW ¼) of Section Thirty Three (33); all in Township Eighty Nine (89), North, Range Four (4), West of the Fifth P.M., all subject to easements and existing roadways of record;

   The exact legal description is subject to verification by review of the abstract of title,

   and currently containing 41 tillable acres per county FSA records (41 crop acres and 10.4 acres of CRP land), more or less, with possession by Tenant for a term of two (2) years to commence on March 1, 2023, and end on March 1, 2025. The Tenant has had or been offered an opportunity to make an independent investigation as to the acres and boundaries of the premises. In the event that possession cannot be delivered within fifteen (15) days after commencement of this Lease, Tenant may terminate this Lease by giving the Landlord notice in writing.
2. **RENT.** Tenant shall pay to Landlord as rent for the Real Estate (the "Rent"):
   Total annual cash rent of $23,100.00 (41 acres x $500 = $20,500 + 10.4 acres x $250 = $2,600) payable, unless otherwise agreed, as follows: $11,550.00 on March 1, 2023, $11,550.00 on September 1, 2023, $11,550.00 on March 1, 2024 and $11,550.00 on September 1, 2024.

   All Rent is to be paid to Landlord at the address above or at such other place as Landlord may direct in writing. Rent must be in Landlord's possession on or before the due date. Participation of this farm in any offered program by the U.S. Department of Agriculture or any state for crop production control or soil conservation, the observance of the terms and conditions of this program, and the division of farm program payments, requires Landlord's consent. Payments from participation in these programs shall be divided 0% Landlord 100% Tenant. Governmental cost-sharing payments for permanent soil conservation structures shall be divided 100% Landlord 0% Tenant. Crop disaster

payments shall be divided 0% Landlord 100% Tenant.

3. **LANDLORD'S LIEN AND SECURITY INTEREST.** As security for all sums due or which will become due from Tenant to Landlord, Tenant hereby grants to Landlord, in addition to any statutory liens, a security interest as provided in the Iowa Uniform Commercial Code and a contractual lien in all crops produced on the premises and the proceeds and products thereof, all contract rights concerning such crops, proceeds and/or products, all proceeds of insurance collected on account of destruction of such crops, all contract rights and U.S. government and/or state agricultural farm program payments in connection with the above described premises whether such contract rights be payable in cash or in kind, including the proceeds from such rights, and any and all other personal property kept or used on the real estate that is not exempt from execution. Tenant shall also sign any additional forms required to validate the security interest in government program payments.

   Tenant shall not sell such crops unless Landlord agrees otherwise. Tenant shall notify Landlord of Tenant's intention to sell crop at least three (3) business days prior to sale of the crop (with business days being described as Monday through Friday, except any Iowa or federal holidays). Tenant shall pay the full rent for the crop year in which the crop is produced, whether due or not, at the time of sale pursuant to Landlord's consent to release Landlord's security interests. Upon payment in full Landlord shall release Landlord's lien on the crop produced in that crop year on the premises. The parties agree that by the Landlord releasing the lien as to the crop in one year, the Landlord in no way releases the lien or agrees to release the lien in any prior or subsequent year.

   Tenant shall sign and deliver to Landlord a list of potential buyers of the crops upon which Landlord has been granted a security interest in this lease. Unless Landlord otherwise consents, Tenant will not sell these crops to a buyer who is not on the potential list of buyers unless Tenant pays the full rent due for the crop year to the Landlord at or prior to the date of sale. Landlord may give notice to the potential buyers of the existence of this security interest.

   Landlord is further granted the power, coupled with an interest, to sign on behalf of Tenant as attorney-in-fact and to file one or more financing statements under the Iowa Uniform Commercial Code naming Tenant as Debtor and Landlord as Secured Party and describing the collateral herein specified. Tenant consents to the financing statement being filed immediately after execution of this Lease.

4. **INPUT COSTS AND EXPENSES.** Tenant shall prepare the Real Estate and plant such crops in a timely fashion as may be directed by Tenant. Tenant shall only be entitled to pasture or till those portions of the Real Estate designated by Landlord. All necessary machinery and equipment, as well as labor, necessary to carry out the terms of this lease shall be furnished by and at the expense of the Tenant. The following materials, in the amounts required by good husbandry, shall be acquired by Tenant and paid for by the parties as follows:

	% Landlord	% Tenant
(1) Fertilizer	0%	100%
(2) Lime and Trace Minerals	0%	100%

(3) Herbicide	0%	100%
(4) Insecticides	0%	100%
(5) Seeds	0%	100%
(6) Seed Cleaning	0%	100%
(7) Harvesting and/or Shelling Expense	0%	100%
(8) Grain Drying	0%	100%
(9) Grain Storage	0%	100%
(10) Other Expenses	0%	100%

5. **PROPER HUSBANDRY; HARVESTING OF CROPS; CARE OF SOIL, TREES, SHRUBS AND GRASS.** Tenant shall farm the Real Estate in a manner consistent with good husbandry, seek to obtain the best crop production that the soil and crop season will permit, properly care for all growing crops in a manner consistent with good husbandry, and harvest all crops on a timely basis. In the event Tenant fails to do so, Landlord reserves the right, personally or by designated agents, to enter upon the Real Estate and properly care for and harvest all growing crops, charging the cost of the care and harvest to the Tenant, as part of the Rent. Tenant shall timely control all weeds, including noxious weeds, weeds in the fence rows, along driveways and around buildings throughout the premises. Tenant shall comply with all terms of the conservation plan and any other required environmental plans for the leased premises. Tenant shall do what is reasonably necessary to control soil erosion including, but not limited to, the maintenance of existing watercourses, waterways, ditches, drainage areas, terraces and tile drains, and abstain from any practice which will cause damage to the Real Estate.

   Upon request from the Landlord, Tenant shall by August 15 of each lease year provide to the Landlord a written listing showing all crops planted, including the acres of each crop planted, fertilizers, herbicides and insecticides applied showing the place of application, the name and address of the applicator, the type of application and the quantity of such items applied on the lease premises during such year.

   Tenant shall distribute upon the poorest tillable soil on the Real Estate, unless directed otherwise by Landlord, all of the manure and compost from the farming operation suitable to be used. Tenant shall not remove from the Real Estate, nor burn, any straw, stalks, stubble, or similar plant materials, all of which are recognized as the property of Landlord. Tenant may use these materials, however, upon the Real Estate for the farming operations. Tenant shall protect all trees, vines and shrubbery upon the Real Estate from injury by Tenant's cropping operation or livestock.

   Tenant shall maintain accurate yield records for the real estate, and upon request, during or after lease term, shall disclose to Landlord, all yield base information required for participation in government program
6. **DELIVERY OF GRAIN.** Intentionally omitted.
7. **LANDLORD'S STORAGE SPACE.** Intentionally omitted.

8. **ENVIRONMENTAL.**

a. Landlord. To the best of Landlord's knowledge to date:

i. Neither Landlord nor, Landlord's former or present tenants, are subject to any investigation concerning the premises by any governmental authority under any applicable federal, state, or local codes, rules, and regulations pertaining to air and water quality, the handling, transportation, storage, treatment, usage, or disposal of toxic or hazardous substances, air emissions, other environmental matters, and all zoning and other land use matters.

ii. Any handling, transportation, storage, treatment, or use of toxic or hazardous substances that has occurred on the premises has been in compliance with all applicable federal, state, and local codes, rules, and regulations.

iii. No leak, spill release, discharge, emission, or disposal of toxic or hazardous substances has occurred on the premises.

iv. The soil, groundwater, and soil vapor on or under the premises is free of toxic or hazardous substances except for chemicals (including without limitation fertilizer, herbicides, insecticides) applied in conformance with good farming methods, applicable rules and regulations and the label directions of each chemical.

Landlord shall hold Tenant harmless against liability for removing solid waste disposal sites existing at the execution of this Lease, with the exception that Tenant shall be liable for removal of solid waste disposal sites to the extent that the Tenant created or contributed to the solid waste disposal site at any time.

Landlord shall assume liability and shall indemnify and hold Tenant harmless against any liability or expense arising from any condition which existed, whether known or unknown, at the time of execution of the lease which is not a result of actions of the Tenant or which arises after date of execution but which is not a result of actions of the Tenant.

Landlord shall disclose in writing to Tenant the existence of any known wells, underground storage tanks, hazardous waste sites, and solid waste disposal sites. Disclosure may be provided by a properly completed groundwater hazard statement to be supplemented if changes occur.

b. Tenant. Tenant shall comply with all applicable environmental laws concerning application, storage and handling of chemicals (including, without limitation, herbicides and insecticides) and fertilizers. Tenant shall apply any chemicals used for weed or insect control at levels not to exceed the manufacturer's recommendation for the soil types involved. Farm chemicals may (not) be stored on the premises for more than one year. Farm chemicals for use on other properties may (not) be stored on this property. Chemicals stored on the premises shall be stored in clearly marked, tightly closed containers. No chemicals or chemical containers will be disposed of on the premises. Application of chemicals for agricultural purposes per manufacturer's recommendation shall not be construed to constitute disposal.

Tenant shall employ all means appropriate to insure that well or ground water contamination does not occur, and shall be responsible to follow all applicator's licensing requirements. Tenant shall install and maintain safety check valves for injection of any chemicals and/or fertilizers into an irrigation system (injection valve only, not main well check valve). Tenant shall properly post all fields (when posting is required) whenever chemicals are applied by ground or air. Tenant shall haul and

spread all manure on appropriate fields at times and in quantities consistent with environmental protection requirements. Tenant shall not dispose of waste oil, tires, batteries, paint, other chemicals or containers anywhere on the premises. Solid waste may (not) be disposed of on the premises. Dead livestock may (not) be buried on the premises. If disposal of solid waste or burial of dead animals is permitted as stated in the previous two sentences, the disposal or burial shall be in compliance with all applicable environmental laws. Tenant shall not use waste oil as a means to suppress dust on any roads on or near the premises. No underground storage tanks, except human waste septic systems that meet current codes, rules, and regulations, shall be maintained on the premises.

Tenant shall immediately notify Landlord of any chemical discharge, leak, or spill which occurs on premises. Tenant shall assume liability and shall indemnify and hold Landlord harmless for any claim or violation of standards which results from Tenant's use of the premises. Tenant shall assume defense of all claims, except claims resulting from Landlord's negligence, in which case each party shall be responsible for that party's defense of any claim. After termination, Tenant shall remain liable for violations which occurred during the term of this Lease.

In the absence of selection of an alternative where choices are provided in this paragraph 8b, the choice of the word "may" shall be presumed unless that presumption is contrary to applicable environmental laws and regulations.

9. **TERMINATION OF LEASE.** This Lease shall automatically renew upon expiration from year-to-year, upon the same terms and conditions unless either party gives due and timely written notice to the other of an election not to renew this Lease. If renewed, the tenancy shall terminate on March 1 of the year following, provided that the tenancy shall not continue because of an absence of notice in the event there is a default in the performance of this Lease. All notices of termination of this Lease shall be as provided by law.
10. **POSSESSION AND CONDITION AT END OF TERM.** At the termination of this Lease, Tenant will relinquish possession of the Real Estate to the Landlord. If Tenant fails to do so Tenant agrees to pay Landlord $500.00 per day, as liquidated damages until possession is delivered to Landlord. At the time of delivery of the Real Estate to Landlord, Tenant shall assure that the Real Estate is in good order and condition, and substantially the same as it was when received by Tenant at the commencement of this Lease, excusable or insurable loss by fire, unavoidable accidents and ordinary wear, excepted.
11. **LANDLORD'S RIGHT OF ENTRY AND INSPECTION.** In the event notice of termination of this Lease has been properly served, Landlord may enter upon the Real Estate or authorize someone else to enter upon the Real Estate to conduct any normal tillage or fertilizer operation after Tenant has completed the harvesting of crops even if this is prior to the date of termination of the lease. Landlord may enter upon the Real Estate at any reasonable time for the purpose of viewing or seeding or making repairs, or for other reasonable purposes.
12. **VIOLATION OF TERMS OF LEASE.** If Tenant or Landlord violates the terms of this Lease, the other may pursue the legal and equitable remedies to which each is entitled. Tenant's failure to pay any Rent when due shall cause all unpaid Rent to become immediately due and payable, without any notice to or demand upon Tenant.

13. **REPAIRS.** Tenant shall maintain the fences on the leased premises in good and proper repair. Landlord shall furnish necessary materials for repairs that Landlord deems necessary within a reasonable time after being notified of the need for repairs. Tenant shall haul the materials to the repair site without charge to Landlord.
14. **NEW IMPROVEMENTS.** All buildings, fences and improvements of every kind and nature that may be erected or established upon the Real Estate during the term of the Lease by the Tenant shall constitute additional rent and shall inure to the Real Estate, becoming the property of Landlord unless the Landlord has agreed in writing prior to the erection that the Tenant may remove the improvement at the end of the lease.
15. **WELL, WINDMILL, WATER AND SEPTIC SYSTEMS.** Intentionally omitted.
16. **EXPENSES INCURRED WITHOUT CONSENT OF LANDLORD.** No expense shall be incurred for or on account of the Landlord without first obtaining Landlord's written authorization. Tenant shall take no actions that might cause a mechanic's lien to be imposed upon the Real Estate.
17. **NO AGENCY.** Tenant is not an agent of the Landlord.
18. **TELEVISION AND RADIO.** Intentionally omitted.
19. **ACCOUNTING.** Intentionally omitted.
20. **ATTORNEY FEES AND COURT COSTS.** If either party files suit to enforce any of the terms of this Lease, the prevailing party shall be entitled to recover court costs and reasonable attorneys' fees.
21. **CHANGE IN LEASE TERMS.** The conduct of either party, by act or omission, shall not be construed as a material alteration of this Lease until such provision is reduced to writing and executed by both parties as addendum to this Lease.
22. **CONSTRUCTION.** Words and phrases herein, including the acknowledgment, are construed as in the singular or plural and as the appropriate gender, according to the context.
23. **NOTICES.** The notices contemplated in this Lease shall be made in writing and shall either be delivered in person, or be mailed in the U.S. mail, certified mail to the recipient's last known mailing address, except for the notice of termination set forth in Section 9, which shall be governed by the Code of Iowa.
24. **ASSIGNMENT.** Tenant shall not assign this Lease or sublet the Real Estate or any portion thereof without prior written authorization of Landlord.
25. **CERTIFICATION**. Tenant certifies that it is not acting, directly or indirectly, for or on behalf of any person, group, entity or nation named by any Executive Order or the United States Treasury Department as a terrorist, "Specially Designated National and Blocked Person" or any other banned or blocked person, entity, nation or transaction pursuant to any law, order, rule or regulation that is enforced or administered by the Office of Foreign Assets Control; and it is not engaged in this transaction, directly or indirectly on behalf of, or instigating or facilitating this transaction, directly or indirectly on behalf of, any such person, group, entity or nation. Tenant hereby agrees to defend, indemnify and hold harmless Landlord from and against any and all claims, damages, losses, risks, liabilities and expenses (including attorney's fees and costs) arising from or related to any breach of the foregoing certification.
26. **ADDITIONAL PROVISIONS.**
    A. Tenant agrees that no animals or manure will be placed on the property.

B. Tenant agrees that the existing waterways will not be tilled and that cornstalks or bean stubble will not be removed from the fields.

C. TENANT'S RENT OPTION. Tenant shall have the option to lease the Real Estate for one (1) additional one (1) year term beginning March 1, 2025, and ending February 28, 2026, for rental rate of $25,700.00, on the same terms and conditions set forth in this Lease. The additional one (1) year term will be for 51.4 tillable acres at a rate of $500.00 per acre. Tenant shall give Landlord written notice of his intent to exercise this option no later than August 1, 2024. In the event that Tenant fails to give Landlord written notice to exercise Tenant's option to rent the Real Estate for the 2025 crop year, then Landlord may terminate Tenant's tenancy in accordance with Iowa Code Chapter 562. If the lease is terminated, possession ends after crops are removed from the fields.

D. Tenant agrees that Landlord has the ability to sell or develop all or any part of the Real Estate at any time, and in the event that Landlord sells or develops all or part of the Real Estate, Tenant agrees that Tenant's lease on the sold or developed portion of the Real Estate is immediately and automatically terminated without regard to Tenant's rights under Iowa Code Chapter 562. However, if Landlord sells or develops any portion of the Real Estate during the term of this lease (including any renewal terms), the Landlord shall credit Tenant for the direct cost of any destroyed current year crop (fertilizer, seed, spray, fuel, but not labor or machinery use) and that this shall be Tenant's sole remedy for damages.

E. CRP Payment. There are an additional 10.4 acres (as of 2022) in CRP. Landlord shall assign the CRP contract and the accompanying CRP payment to Tenant. The Tenant will also lease these 10.4 acres of CRP at a rate of $250.00 per acre (total $2,600.00) Tenant will maintain the CRP acres. The 10.4 acres in CRP will no longer be in CRP as of October 2024.

F. COUNTERPARTS. This agreement may be executed in counterparts, each of which when executed and delivered shall constitute an original of this agreement. No counterpart shall be effective until each party has executed at least one counterpart. In addition, a facsimile, photocopy, scanned copy or digital signature shall have the same force and effect as an original signature.

DATED: 9-22, 2022.

TENANTS:

Cory Pfab

Susan Pfab

LANDLORD:
CTM HOLDINGS, LLC

By: James F. Conlan, Member

This form is available electronically.

AD-1026
(10-30-14)

(See Page 2 for Privacy and Paperwork Reduction Act Statements)

RECEIVED
OCT 1? 2022
Delaware Co. FSA

U.S. DEPARTMENT OF AGRICULTURE
FarmServiceAgency

HIGHLY ERODIBLE LAND CONSERVATION (HELC) AND WETLAND CONSERVATION (WC) CERTIFICATION

Read attached AD-1026 Appendix before completing form.

PART A – BASIC INFORMATION

1. Name of Producer	2. Tax Identification Number *(Last 4 digits)*	3. Crop Year
CTM Holdings LLC	1026	2023

4. Names of affiliated persons with farming interests. *Enter "None," if applicable.*

None

RECEIVED
OCT 14 2022
NRCS

Affiliated persons with farming interests must also file an AD-1026. See Item 7 in the Appendix for a definition of an affiliated person.

5. Check one of these boxes if the statement applies; otherwise continue to Part B.

A. ☐ The producer in Part A does not have interest in land devoted to agriculture. Examples include bee keepers who place their hives on another person's land, producers of crops grown in greenhouses, and producers of aquaculture AND these producers do not own/lease any agricultural land themselves. **Note:** Do not check this box if the producer shares in a crop.

B. ☐ The producer in Part A meets all three of the following:
- does not participate in any USDA program that is subject to HELC and WC compliance except Federal Crop Insurance.
- only has interest in land devoted to agriculture which is exclusively used for perennial crops, except sugarcane, and
- has not converted a wetland after February 7, 2014.

Perennial crops include, but are not limited to, tree fruit, tree nuts, grapes, olives, native pasture and perennial forage. A producer that produces alfalfa should contact the Natural Resources Conservation Service at the nearest USDA Service Center to determine whether such production qualifies as production of a perennial crop.

Note: *If either box is checked, and the producer in Part A does not participate in Farm Service Agency (FSA) or Natural Resources Conservation Service (NRCS) programs, the full tax identification number of the producer must be provided, but establishment of detailed farm records with FSA is not required. Go to Part D and sign and date.*

PART B - HELC/WC COMPLIANCE QUESTIONS

Indicate YES or NO to each question. *If you are unsure of whether a HEL determination, wetland determination, or NRCS evaluation has been completed, contact your local USDA Service Center.*	YES	NO
6. During the crop year entered in Part A or the term of a requested USDA loan, did or will the producer in Part A plant or produce an agricultural commodity (including sugarcane) on land for which an HEL determination has not been made?	✓	
7. Has anyone performed (since December 23, 1985), or will anyone perform any activities to:		
A. Create new drainage systems, conduct land leveling, filling, dredging, land clearing, or excavation that has **NOT** been evaluated by NRCS? ***If "YES", indicate the year(s):*** Fall '22	✓	
B. Improve or modify an existing drainage system that has **NOT** been evaluated by NRCS? ***If "YES", indicate the year(s):*** _____		✓
C. Maintain an existing drainage system that has **NOT** been evaluated by NRCS? ***If "YES", indicate the year(s):*** _____ **Note:** *Maintenance is the repair, rehabilitation, or replacement of the capacity of existing drainage systems to allow for the continued use of wetlands currently in agricultural production and the continued management of other areas as they were used before December 23, 1985. This allows a person to reconstruct or maintain the capacity of the original system or install a replacement system that is more durable or will realize lower maintenance or costs.*		✓

Note: *If "YES" is checked for Item 7A or 7B, then Part C must be completed to authorize NRCS to make an HELC/WC and/or certified wetland determination on the identified land. If "YES" is checked for Item 7C, NRCS does not have to conduct a certified wetland determination.*

8. Check one or both boxes, if applicable; otherwise, continue to Part C or D.

A. ☐ Check this box only if the producer in Part A has FCIC reinsured crop insurance and filing this form represents the first time the producer in Part A, including any affiliated person, has been subject to HELC and WC provisions.

B. ☐ Check this box if either of the following applies to the producer and crop year entered in Part A:
- Is a tenant on a farm that is/will not be in compliance with HELC and WC provisions because the landlord refuses to allow compliance, but all other farms not associated with that landlord are in compliance. (AD-1026B, Tenant Exemption Request, must be completed).
- Is a landlord of a farm that is/will not be in compliance with HELC and WC provisions because of a violation by the tenant on that farm, but all other farms not associated with that tenant are in compliance. (AD-1026C, Landlord or Landowner Exemption Request, must be completed).

PART C – ADDITIONAL INFORMATION

9. If "YES" was checked in Item 6 or 7, provide the following information for the land to which the answer applies:

A. Farm and/or tract/field number: Farm #4771 Tract #360
If unknown, contact the Farm Service Agency at the nearest USDA Service Center.

B. Activity: New land into production, Land clearing

C. Current land use *(specify crops)*: Trees/Grass

D. County: Delaware

PART D – CERTIFICATION OF COMPLIANCE

I have received and read the AD-1026 Appendix and understand and agree to the terms and conditions therein on all land in which I (or the producer in Part A if different) and any affiliated person have or will have an interest. I understand that eligibility for certain USDA program benefits is contingent upon this certification of compliance with HELC and WC provisions and I am responsible for any non-compliance. I understand and agree that this certification of compliance is considered continuous and will remain in effect unless revoked or a violation is determined. I further understand and agree that:

- all applicable payments must be refunded if a determination of ineligibility is made for a violation of HELC or WC provisions.
- NRCS may verify whether a HELC violation or WC has occurred.
- a revised Form AD-1026 must be filed if there are any operation changes or activities that may affect compliance with the HELC and WC provisions. I understand that failure to revise Form AD-1026 for such changes may result in ineligibility for certain USDA program benefits or other consequences.
- affiliated persons are also subject to compliance with HELC and WC provisions and their failure to comply or file Form AD-1026 will result in loss of eligibility for applicable benefits to any individuals or entities with whom they are considered affiliated.

Producer's Certification:

I hereby certify that the information on this form is true and correct to the best of my knowledge.

10A. Producer's Signature *(By)*	10B. Title/Relationship *(If Signing in Representative Capacity)*	10C. Date *(MM-DD-YYYY)*
e-Signed by James Conlan For, if applicable On 10-12-22	Manager	10-12-22
FOR FSA USE ONLY *(for referral to NRCS)* Sign and date if NRCS determination is needed.	11A. Signature of FSA Representative	11B. Date *(MM-DD-YYYY)* 10-13-22

IMPORTANT: If you are unsure about the applicability of HELC and WC provisions to your land, contact your local USDA Service Center for details concerning the location of any highly erodible land or wetland and any restrictions applying to your land according to NRCS determinations before planting an agricultural commodity or performing any drainage or manipulation. Failure to certify and properly revise your compliance certification when applicable may: (1) affect your eligibility for USDA program benefits, including whether you qualify for reinstatement of benefits through the Good Faith process, and (2) result in other consequences.

NOTE: *The following statement is made in accordance with the Privacy Act of 1974 (5 USC 552a - as amended). The authority for requesting the information identified on this form is 7 CFR Part 12, the Food Security Act of 1985 (Pub. L. 99-198), and the Agricultural Act of 2014 (Pub. L. 113-79). The information will be used to certify compliance with HELC and WC provisions and to determine producer eligibility to participate in and receive benefits under programs administered by USDA agencies. The information collected on this form may be disclosed to other Federal, State, Local government agencies, Tribal agencies, and nongovernmental entities that have been authorized access to the information by statute or regulation and/or as described in applicable Routine Uses identified in the System of Records Notice for USDA/FSA-2, Farm Records File (Automated) and USDA/FSA-14, Applicant/Borrower. Providing the requested information is voluntary. However, failure to furnish the requested information will result in a determination of producer ineligibility to participate in and receive benefits under programs administered by USDA agencies.*

This information collection is exempted from the Paperwork Reduction Act as specified in the Agricultural Act of 2014 (Pub. L. 113-79, Title II, Subtitle G, Funding and Administration). The provisions of appropriate criminal and civil fraud, privacy, and other statutes may be applicable to the information provided. ***RETURN THIS COMPLETED FORM AD-1026 TO YOUR COUNTY FARM SERVICE AGENCY (FSA) OFFICE.***

Producer Farm Data Report
Crop Year: 2023

Date: 10/13/22 11:16 AM
Page: 1

DISCLAIMER: This is data extracted from the web farm database. Because of potential messaging failures in MIDAS, this data is not guaranteed to be an accurate and complete representation of data contained the MIDAS system, which is the system of record for Farm Records.

Producer Name and Address

PFAB, CORY JON
6333 OLDE DAVENPORT RD
LA MOTTE IA 52054-9523

Telephone: (563) 599-3110

Recording County Office Name

Dubuque, Iowa

Number of Farms	Number of Tracts	Farmland	Cropland	DCP Cropland	CRP Cropland	Eff DCP Cropland
18	23	2195.95	1855.49	1860.86	28.08	1832.78

State & County	Farm	Tract	Relationship to Farm Tract	Producer	Farmland	Cropland	DCP Cropland	CRP Cropland	Eff DCP Cropland	HEL Code	Wetland Code
Delaware, IA	4771		Operator	KINTZLE, MARK DAVID							
		360	Owner	CTM HOLDINGS LLC	72.47	51.21	51.21	10.55	40.66	N	DNC
			Other Tenant	PFAB, CORY JON							
Delaware, IA	5755	6176	Operator	PFAB, CORY JON	130.27	129.69	129.69	0.0	129.69	SA	DNC
			Owner	CTM HOLDINGS LLC							
Dubuque, IA	1023	1075	Operator	PFAB, CORY JON	87.13	35.9	35.9	17.53	18.37	SA	N
			Owner	KEMP, KATHY J							
			Owner	KEMP, JAMES PETER							
Dubuque, IA	1038	1076	Operator	PFAB, CORY JON	73.81	52.89	52.89	0.0	52.89	SA	DNC
			Owner	SOUTHERN HILLS TWO INC							
ubuque, IA	1470	909	Owner/Operator	PFAB, CORY JON	141.81	139.03	139.03	0.0	139.03	SA	DNC
Dubuque, IA	3991	973	Operator	PFAB, CORY JON	203.57	195.39	195.39	0.0	195.39	SA	DNC
			Owner	KOOS, DONALD							
Dubuque, IA	5841	152	Operator	PFAB, CORY JON	126.77	117.08	117.08	0.0	117.08	SA	DNC
			Owner	DECKER, LYNN MARIE							
		153	Operator	PFAB, CORY JON	194.45	109.26	114.63	0.0	114.63	SA	DNC
			Owner	DECKER, LYNN MARIE							
Dubuque, IA	5890	11566	Operator	PFAB, CORY JON	18.73	18.04	18.04	0.0	18.04	SA	DNC
			Owner	AZBELL, KERRY B							
			Owner	AZBELL, MARCIA							
Dubuque, IA	6559	977	Operator	PFAB, CORY JON	161.33	156.27	156.27	0.0	156.27	DNC	DNC
			Owner	PFABCO LLC							

HEL Codes				Wetland Codes		
	SA = HEL: Sys Applied	SNR = HEL: Sys Not Required	DNC = Determination Not Complete		WL = Wetland	DNC = Determination Not Complete
	SNA = HEL: Sys Not Applied	2YR = HEL: 2-yr Implement	N = Not HEL		N = No Wetland	

Producer Farm Data Report **Date:** 10/13/22 11:16 AM

Crop Year: 2023 **Page:** 2

DISCLAIMER: This is data extracted from the web farm database. Because of potential messaging failures in MIDAS, this data is not guaranteed to be an accurate and complete representation of data contained the MIDAS system, which is the system of record for Farm Records.

State & County	Farm	Tract	Relationship to Farm Tract	Producer	Farmland	Cropland	DCP Cropland	CRP Cropland	Eff DCP Cropland	HEL Code	Wetland Code
Dubuque, IA	6559	13030	Operator	PFAB, CORY JON	37.14	16.6	16.6	0.0	16.6	DNC	DNC
			Owner	MUEHLENKAMP, JUSTIN D							
			Owner	MUEHLENKAMP, MARISSA R							
		13031	Operator	PFAB, CORY JON	117.86	94.57	94.57	0.0	94.57	DNC	DNC
			Owner	PFABCO LLC							
Dubuque, IA	6955	877	Operator	PFAB, CORY JON	71.94	70.28	70.28	0.0	70.28	SA	DNC
			Owner	CALLAHAN CONSTRUCTION INC							
		12596	Operator	PFAB, CORY JON	40.68	34.76	34.76	0.0	34.76	SA	DNC
			Owner	B & C LLC							
Dubuque, IA	7501	13200	Operator	PFAB, CORY JON	4.83	4.83	4.83	0.0	4.83	SA	DNC
			Owner	PFABCO LLC							
Dubuque, IA	7558	13236	Operator	PFAB, CORY JON	72.51	63.38	63.38	0.0	63.38	SA	DNC
			Owner	PFABCO LLC							
Jackson, IA	194	615	Operator	PFAB, CORY JON	111.73	95.17	95.17	0.0	95.17	SA	DNC
			Owner	B & C LLC							
Jackson, IA	198		Operator	ENGLISH FAMILY FARM, INC.							
		569	Owner	ENGLISH FAMILY FARM, INC.	189.52	177.51	177.51	0.0	177.51	SA	DNC
			Other Tenant	PFAB, CORY JON							
Jackson, IA	909	665	Operator	PFAB, CORY JON	137.86	92.09	92.09	0.0	92.09	SA	DNC
			Owner	BECHEN, DENNIS J							
Jackson, IA	6248	4836	Operator	PFAB, CORY JON	25.88	25.88	25.88	0.0	25.88	SA	DNC
			Owner	PFABCO LLC							
		7116	Operator	PFAB, CORY JON	31.01	31.01	31.01	0.0	31.01	SA	DNC
			Owner	PFABCO LLC							
Jackson, IA	6371	6552	Operator	PFAB, CORY JON	108.49	108.49	108.49	0.0	108.49	N	DNC
			Owner	REISS, ANTHONY J							
			Owner	REISS, KATHLEEN R							
Linn, IA	2364	442	Operator	PFAB, CORY JON	36.16	36.16	36.16	0.0	36.16	N	DNC
			Owner	B & C LLC							

HEL Codes	SA = HEL: Sys Applied SNA = HEL: Sys Not Applied	SNR = HEL: Sys Not Required 2YR = HEL: 2-yr Implement	DNC = Determination Not Complete N = Not HEL	**Wetland Codes**	WL = Wetland N = No Wetland	DNC = Determination Not Complete

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2025, that I submitted the foregoing Plaintiff's Appendix in Support of Combined Resistance to Defendants' and Intervenors' Motions for Summary Judgment to the Clerk of Court via the District Court's CM/ECF system.

Respectfully submitted this 18th day of February, 2025.

/s/ Jeffrey W. McCoy
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